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**Rural Utilities Service**

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**[Docket Numbers: RUS–20–TELECOM–0022]**

**RIN 0572–AC50**

## Special Authority To Enable Funding of Broadband and Smart Utility Facilities Across Select Rural Development Programs

**AGENCY:** Rural Utilities Service, Rural Housing Service, Rural Business-Cooperative Service, USDA.

**ACTION:** Final rule; request for comments.

**SUMMARY:** The Rural Utilities Service, Rural Business-Cooperative Service, and Rural Housing Service, agencies that comprise the Rural Development Mission Area within the United States Department of Agriculture, are issuing this final rule to establish the authority authorized by Section 6210 of the Agriculture Improvement Act of 2018, which will assist rural families and small businesses in gaining access to broadband service by permitting recipients of a loan, grant, or loan guarantee from RD to use up to 10 percent of the amount provided to construct broadband infrastructure in areas not served by minimum acceptable level of broadband service. This rule describes the procedures by which these agencies will consider projects eligible for special broadband authority.

**DATES:** *Effective date:* September 15, 2020.

*Comment date:* This rule is being issued to allow for immediate implementation of this program. Although this final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the rule. These comments must be submitted electronically and received on or before November 16, 2020. Rural Development will consider these comments and the need for making any revisions as a result of these comments.

**ADDRESSES:** Comments may be submitted on this rule using the following method:

- *Electronically using the Federal eRulemaking Portal: Go to https://www.regulations.gov* and, in the ''Search Documents'' box, enter the RUS–20–TELECOM–0022 or the RIN No. 0572–AC50, and click the ''Search'' button. To submit a comment, choose the ''Comment Now!'' button. Information on using *Regulations.gov,* including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available under the ''Help'' tab at the top of the Home page. In the Docket ID column, select RUS–20–TELECOM–0022 to submit or view public comments and to view supporting and related materials available electronically. Information on using *Regulations.gov,* including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link.
- *Other Information:* Additional information about Rural Development and its programs is available on the internet at *http://www.rd.usda.gov.*

**FOR FURTHER INFORMATION CONTACT:** For inquiries directly related to this rulemaking, contact Michele Brooks, Director, Regulations Management Division, Innovation Center, Rural Development, United States Department of Agriculture, 400 Independence Avenue SW, Washington, DC 20250; Telephone: (202) 690.1078; Email: *Michele.Brooks@usda.gov.*

**SUPPLEMENTARY INFORMATION:**

### Executive Summary

*Background*

Rural Development (RD) is a mission area within the United States Department of Agriculture (USDA) comprised of the Rural Utilities Service (RUS), Rural Housing Service (RHS) and Rural Business-Cooperative Service (RBCS). RD's mission is to increase economic opportunity and improve the quality of life for all rural Americans. RD meets its mission by providing loans, loan guarantees, grants, and technical assistance through more than 40 programs aimed at creating and improving housing, businesses, and infrastructure throughout rural America. Part of rebuilding America's infrastructure is investing in rural broadband. Access to broadband has become essential for the social and economic benefits it provides to American residents, businesses, governments and communities. Broadband is crucial for increased health, educational and economic opportunities, as well as for job and business creation and growth. Broadband can help close the digital divide between rural and urban communities. RD provides a variety of loans and grants to build broadband networks and deliver service to rural households and businesses, provide capital for rural telecommunications companies and broadband providers.

On December 20, 2018, Congress passed The Agricultural Improvement Act of 2018 (2018 Farm Bill) (Pub. L. 115–334). In addition to sweeping changes in broadband program authorities, Congress provided for special use of funding from other RD programs for broadband deployment in Section 6210, ''Smart Utility Authority for Broadband.'' The provision granted the Secretary of Agriculture the discretion to allow recipients of grants, loans, or loan guarantees under RD programs to use not more than 10 percent of such funding to finance broadband infrastructure in areas not served by the minimum acceptable level of broadband service, as defined in this part, and which will not result in

competitive harm to a current RD loan, grant, or loan guarantee. While Section 6210 only imposes the competitive harm restriction with respect to RUS loan, grant, and loan guarantee recipients, RD has determined to apply the restriction RD-wide, consistent with the statutory guidance on conflicts and duplications of awards provided in 7 U.S.C. 2204b(d)(2).

Rural community leaders, businesses and utilities must consider broadband availability and uses as they plan for, and implement, new and improved facilities and services to support community and economic development. While integration of communications technology into a planned investment can be used for internal purposes, it can also serve as a catalyst to rural broadband deployment efforts. For example, investment in health care, public safety and businesses can be enhanced or leveraged to expand the availability and utilization of advanced broadband in rural areas. Smart highways can facilitate vehicle to infrastructure communications to enhance driver safety; smart water systems can remotely detect contaminants before they pose a health risk; smart pipelines can report leaks and structural weaknesses before they become dangerous; and smart grid systems deliver enhanced security and energy efficiency, as well as speed recovery after an electric outage. Through this regulation, RD enables limited integration of broadband deployment with other rural investments funded through its broad suite of programs. It does so without adding the burden of seeking funding through separate program areas.

Note however that this regulation is not intended to affect existing authority available under Rural Development programs that can fund smart utility and broadband infrastructure. Notwithstanding such authority, such funding will be subject to this regulation with respect to the public notice and reporting requirements contained in this part when retail broadband service is provided.

*Purpose of the Regulatory Action*

The purpose of this regulation is to implement Section 6210 of the 2018 Farm Bill designed to leverage the federal resources available for the deployment of broadband services in rural areas. Under Section 6210, the Secretary has discretion to allow recipients of RD grants, loan, or loan guarantees to a limited amount of funds for broadband purposes.

*Rural Development Program Cross-References*

This rulemaking includes modifying each of the individual program regulations to include a cross-reference to the new 7 CFR part 1980, subpart M. These cross-references allow the Agencies to establish the necessary requirements in each of the included programs so that the Agencies can successfully carry out the purposes of sec. 6210 of the 2018 Farm Bill. The following paragraphs provide a brief description of the included programs.

*7 CFR Part 1710—General and Pre-Loan Policies and Procedures Common To Electric Loans and Guarantees.* The Electric Program makes loans and loan guarantees to finance the construction of electric distribution, transmission, and generation facilities, including system improvements to improve electric service in rural areas, as well as demand side management, smart grid, energy efficiency and conservation programs, and on-grid and off-grid renewable energy systems.

*7 CFR Part 1779—Water and Waste Disposal Programs Guaranteed Loans.* This program provides guaranteed loans to assist private lenders to provide affordable financing to qualified borrowers to improve access to clean, reliable water and waste disposal systems for households and businesses in rural areas.

*7 CFR Part 1780—Water and Waste Loans And Grants.* This program provides direct loans and grants to fund clean and reliable drinking water systems, sanitary sewage disposal, sanitary solid waste disposal, and storm water drainage to households and businesses in eligible rural areas.

*7 CFR Part 1783—Revolving Funds for Financing Water And Wastewater Projects (Revolving Fund Program*). This program helps qualified nonprofits create revolving loan funds that can provide financing to extend and improve water and waste disposal systems in rural areas.

*7 CFR Part 1942, Subpart A—Community Facility Loans.* This program provides affordable funding to develop essential community facilities in rural areas. An essential community facility is defined as a facility that provides an essential service to the local community for the orderly development of the community in a primarily rural area, and does not include private, commercial, or business undertakings.

*7 CFR Part 3570, Subpart B—Community Facilities Grant Program.* The purpose of this program is to assist in the development of essential community facilities in rural areas. The Agency will authorize grant funds on a graduated basis. Eligible applicants located in smaller communities with lower populations and lower median household incomes may receive a higher percentage of grant funds.

*7 CFR Part 3575, Subpart A—Community Programs Guaranteed Loans.* This program provides loan guarantees to eligible private lenders to help build essential community facilities in rural areas.

*7 CFR Part 4274, Subpart D—Intermediary Relending Program (IRP).* This program provides 1 percent low-interest loans to local lenders or ''intermediaries'' that re-lend to businesses to improve economic conditions and create jobs in rural communities.

*7 CFR Part 4279, Subpart B—Business and Industry Loans.* The Business and Industry Guaranteed Loan Program bolsters the availability of private credit by guaranteeing loans for rural businesses.

*7 CFR Part 4279, Subpart C—Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Loans.* This program, also known as the Section 9003 Program, provides loan guarantees to assist in the development of advanced biofuels, renewable chemicals, and biobased products manufacturing facilities.

*7 CFR, PART 4280, Subpart A—Rural Economic Development Loan And Grant.* This program, also known as REDLG, provides funding for rural projects through local utility organizations. USDA provides zero-interest loans to local utilities which they, in turn, pass through to local businesses (ultimate recipients) for projects that will create and retain employment in rural areas. The ultimate recipients repay the lending utility directly. The utility is then responsible for repayment to USDA.

*7 CFR Part 4280, Subpart B—Rural Energy For America Program.* This program, also known as REAP, provides guaranteed loan financing and grant funding to agricultural producers and rural small businesses to purchase or install renewable energy systems or make energy efficiency improvements.

*7 CFR Part 4280, Subpart E—Rural Business Development Grants.* This program, also known as RBDG, is designed to provide technical assistance and training and other activities leading to the development or expansion of small and emerging private businesses that have fewer than 50 new workers and less than $1 million in gross revenue, in rural areas.

*Request for Comments*

To enhance program delivery, RD seeks input from the public on this rule and will consider these comments and the need for making any revisions as a result of them. A final rule, if necessary, will be published in the **Federal Register**. Please refer to the **ADDRESSESS** section on how to submit comments on this rule.

**Executive Orders and Other Certifications**

*Executive Order 12372, Intergovernmental Review*

This rule is excluded from the scope of Executive Order 12372 (Intergovernmental Consultation), which may require a consultation with State and local officials. See the final rule related notice entitled, ''Department Programs and Activities Excluded from Executive Order 12372'' (50 FR 47034).

*Executive Order 12866, Regulatory Planning and E.O. 13563, Improving Regulation and Regulatory Review*

This rule has been determined to be not significant for purposes of Executive Order 12866 and E.O. 13563 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

*Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Management and Budget designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

*Regulatory Flexibility Act Certification*

RD has determined that the Regulatory Flexibility Act is not applicable to this rule because the Agency is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

*Executive Order 12988, Civil Justice Reform*

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. RD has determined that this rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all state and local laws and regulations that conflict with this rule will be preempted. No retroactive effect will be given to this rule and, in accordance with section 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912(e)), administrative appeal procedures must be exhausted before an action against the Department or its agencies may be initiated.

*Executive Order 13132, Federalism*

The policies contained in this rule do not have any substantial direct effect on 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. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

*Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

This rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes. RD has assessed the impact of this rule on Indian tribes and determined that it does not, to our knowledge, have tribal implications that require tribal consultation under E.O. 13175. If a tribe would like to engage in consultation with RD on this rule, please contact RD's Native American Coordinator at (720) 544–2911 or *AIAN@wdc.usda.gov*.

Additionally, Rural Development recognizes the challenges of deploying broadband in tribal communities. Therefore, Rural Development will coordinate with USDA's Office of Tribal Relations to conduct at least one listening session to collect recommendations from tribes on how this program can help tribes address current broadband challenges, and gain additional insight into the unique economic, geographical and political realities that continue to impair access to affordable broadband infrastructure in many tribal communities.

*Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs*

Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule is not subject to the requirements of Executive Order 13771 (82 FR 9339, February 3, 2017) because it is not significant under Executive Order 12886.

*Information Collection and Recordkeeping Requirements*

The Information Collection and Recordkeeping requirements contained in this rule have been approved by an emergency clearance under OMB Control Number 0572–0156. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), Rural Development invites comments on any aspect of this collection of information including suggestions for reducing the burden, for which the Agency intends to request approval from the Office of Management and Budget (OMB). Comments may be submitted regarding this information collection by the following method:

Comments may be submitted on this interim final rule using the following method:

• *Electronically using the Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and in the ''Search Documents'' box, enter the Docket Number RUS–20–TELECOM–0022 or the RIN No. 0572–AC50, and click the ''Search'' button. To submit a comment, choose the ''Comment Now!'' button. Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available under the ''Help'' tab at the top of the Home page. In the Docket ID column, select RUS–20–TELECOM–0022 to submit or view public comments and to view supporting and related materials available electronically. Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link.

*Other Information:* Additional information about Rural Development and its programs is available on the internet at *http://www.rd.usda.gov*.

*Comments are invited on:* (a) The accuracy of the agency's estimate of burden including the validity of the methodology and assumption used; (b) ways to enhance the quality, utility, and clarity of the information to be collected; and (c) ways to minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques on other forms and information technology.

*Title:* Special Authority to Enable Funding of Broadband and Smart Utility Facilities Across Select Rural Development Programs.

*OMB Control Number:* 0572–0156.

*Type of Request:* New.

*Abstract:* The Rural Utilities Service, Rural Business-Cooperative Service, and Rural Housing Service, agencies that comprise the Rural Development Mission Area within the United States Department of Agriculture, are issuing this final rule to establish the authority authorized by Section 6210 of the Agriculture Improvement Act of 2018. This rule describes the procedures by which these agencies will consider projects eligible for special broadband authority and Smart Utility facilities.

The collection of information is necessary for RD to determine an applicant's ability to borrow under the terms of the 2018 Farm Bill and included programs and that the applicant complies with statutory, regulatory, and administrative eligibility requirements for loan assistance. As part of that submission, applicants are required to provide a service area map, where applicable, of their entire service territory.

Applicants seeking funding to finance the provision of retail broadband under the special broadband authority of this part are generally expected to comply with the rules related to broadband funding under Title VI of the Rural Electrification Act. To be considered for funding under special broadband authority, applicants must provide:

(1) A description of the proposed retail broadband project;

(2) a map, where applicable, of the proposed service area to be funded under smart utility authority of the applicant;

(3) the amount and type of support requested by the applicant;

(4) any other information required of similar applicants under Title VI of the Rural Electrification Act.

Fully Searchable Data Base—The applicant information provided will be made part of a fully searchable database which could disclose to the public the information above.

Public Notice Survey—The agency will post a public notice filing on the agency's website. Incumbent service providers in the area may respond to the public notice filing by providing a public notice response.

*Estimated Number of Respondents:* 53.

*Estimated Number of Responses per Respondent:* 3.

*Estimated Total Annual Responses:* 159.

*Estimate of Hours (Burden) per Response:* 1.5 hours.

*Estimated Total Annual Burden on Respondents:* 239 hours.

Copies of this information collection can be obtained from MaryPat Daskal, Branch 2 Regulations Management Division, Innovation Center, Rural Development, U.S. Department of Agriculture, 1400 Independence Ave. SW, Stop 1522, Washington, DC 20250. Phone: 202–720–7853.

All responses to this information collection and recordkeeping notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

*E-Government Act Compliance*

RD is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

*National Environmental Policy Act Certification*

This rule has been examined under RD environmental regulations at 7 CFR part 1970. RD has determined that this is not a major Federal action significantly affecting the environment. Therefore, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an Environmental Impact Statement is not required.

*Catalog of Federal Domestic Assistance*

The programs eligible for special broadband authority under this rule are as follows:

- Business and Industry Loan Program—10.768
- Biorefinery Assistance—10.865
- Community Facilities Loans and Grants—10.766
- Grant Program to Establish a Fund for Financing Water and Wastewater Projects—10.864
- Intermediary Relending Program—10.767
- Rural Business Development Grant—10.351
- Rural Economic Development Loans and Grants—10.854
- Rural Electrification Loans and Loan Guarantees—10.850
- Rural Energy for America Program—10.868
- Rural Rental Housing Loans—10.415
- Sec. 538 Rural Rental Housing Guaranteed Loans—10.438
- Water & Waste Disposal Systems for Rural Communities—10.760

The Catalog of Federal Domestic Assistance Programs is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402–9325, telephone number (202) 512–1800 or online at *https://beta.sam.gov/*.

*Unfunded Mandates*

This rule contains no Federal mandates (under the regulatory provision of title II of the Unfunded Mandates Reform Act of 1995) for State, local, and Tribal governments or the private sector. Therefore, this rule is not subject to the requirements of section 202 and 205 of the Unfunded Mandates Reform Act.

*Civil Rights Impact Analysis*

RD has reviewed this rule in accordance with USDA Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex or disability. After review and analysis of the rule and available data, it has been determined that the program purpose, application submission and eligibility criteria, and the issuance of this rule will neither adversely nor disproportionately impact very low, low and moderate-income populations, minority populations, women, Indian tribes or persons with a disability, by virtue of their race, color, national origin, sex, age, disability, marital, or familial status.

*USDA Non-Discrimination Policy*

In accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339.

Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *http://www.ascr.usda.gov/complaint_filing_cust.html* and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by: (1) Mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *program.intake@usda.gov*.

USDA is an equal opportunity provider, employer, and lender.

**List of Subjects**

*7 CFR Part 1710*

Electric power, Grant programs—energy, Loan programs—energy, Reporting and recordkeeping requirements, Rural areas.

*7 CFR Part 1779*

Loan programs, Waste treatment and disposal, Water supply.

*7 CFR Part 1780*

Community development, Community facilities, Grant programs—housing and community development, Loan programs—housing and community development, Reporting and recordkeeping requirements, Rural areas, Waste treatment and disposal, Water supply, Watersheds.

*7 CFR Part 1783*

Business and industry, Community development, Community facilities, Grant programs—housing and community development, Reporting and recordkeeping requirements, Rural areas Waste treatment and disposal, Water supply, Watersheds.

*7 CFR Part 1942*

Business and industry, Community facilities, Fire prevention, Grant programs—business, Grant programs—housing and community development, Grant programs—Indians, Indians, Loan programs—agriculture, Loan programs—housing and community development, Loan programs—Indians, Loan programs—natural resources, Reporting and recordkeeping requirements, Rural areas, Soil conservation, Waste treatment and disposal, Water supply, Watersheds.

*7 CFR Part 1980*

Agriculture, Business and industry, Community facilities, Credit, Disaster assistance, Livestock, Loan programs—agriculture, Loan programs—business, Loan programs—housing and community development, Low- and moderate-income housing, Reporting and recordkeeping requirements, Rural areas.

*7 CFR Part 3570*

Administrative practice and procedure, Fair housing, Grant programs—housing and community development, Housing, Low- and moderate-income housing, Reporting and recordkeeping requirements, Rural areas.

*7 CFR Part 4274*

Community development, Loan programs—business, Reporting and recordkeeping requirements, Rural areas.

*7 CFR Part 4279*

Loan programs—business, Reporting and recordkeeping requirements, Rural areas.

*7 CFR Part 4280*

Business and industry, Energy, Grant programs—business, Loan programs—business, Rural areas.

Accordingly, for reasons set forth in the preamble, chapters XVII, XVIII, XXXV, and XLII of title 7 of the Code of Federal Regulations (CFR) are amended as follows:

## Chapter XVII—RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE

## PART 1710—GENERAL AND PRE-LOAN POLICIES AND PROCEDURES COMMON TO ELECTRIC LOANS AND GUARANTEES

■ 1. The authority citation for part 1710 continues to read as follows:

**Authority:** 7 U.S.C. 901 *et seq.,* 1921 *et seq.,* 6941 *et seq.*

### Subpart C—Loan Purposes and Basic Policies

■ 2. Amend § 1710.106 by adding paragraph (g) to read as follows:

**§ 1710.106 Uses of loan funds.**

* * * * *

(g) A borrower is permitted to use up to 10 percent of the amount provided under this part to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

## PART 1779—WATER AND WASTE DISPOSAL PROGRAMS GUARANTEED LOANS

■ 3. The authority citation for part 1779 continues to read as follows:

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1989; 16 U.S.C. 1005.

■ 4. Amend § 1779.24 by adding paragraph (f) to read as follows:

**§ 1779.24 Eligible loan purposes.**

* * * * *

(f) A borrower is permitted to use up to 10 percent of the amount provided under this part to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

## PART 1780—WATER AND WASTE LOANS AND GRANTS

■ 5. The authority citation for part 1780 continues to read as follows:

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1989; 16 U.S.C. 1005.

### Subpart A—General Policies and Requirements

■ 6. Amend § 1780.9 by adding paragraph (h) to read as follows:

**§ 1780.9 Eligible loan and grant purposes.**

* * * * *

(h) A borrower is permitted to use up to 10 percent of the amount provided under this part to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

## PART 1783—REVOLVING FUNDS FOR FINANCING WATER AND WASTEWATER PROJECTS (REVOLVING FUND PROGRAM)

■ 7. The authority citation for part 1783 continues to read as follows:

**Authority:** 7 U.S.C. 1926(a)(2)(B).

### Subpart A—General

■ 8. Revise § 1783 to read as follows:

**§ 1783.1 What is the purpose of the Revolving Fund Program?**

This part sets forth the policies and procedures for making grants to qualified private, non-profit entities to capitalize revolving funds for the purpose of providing financing to eligible entities for pre-development costs associated with proposed water and wastewater projects or with existing water and wastewater systems, and short-term costs incurred for

replacement equipment, small-scale extension of services, or other small capital projects that are not part of the regular operations and maintenance activities of existing water and wastewater systems. An eligible entity is permitted to use up to 10 percent of the amount provided under this part to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

**CHAPTER XVIII—RURAL HOUSING SERVICE, RURAL BUSINESS-COOPERATIVE SERVICE, RURAL UTILITIES SERVICE, AND FARM SERVICE AGENCY, DEPARTMENT OF AGRICULTURE**

## PART 1942—ASSOCIATIONS

■ 9. The authority citation for part 1942 continues to read as follows

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1989.

### Subpart A—Community Facility Loans

■ 10. Amend § 1942.17 by revising paragraph (d)(1)(i)(B)(*5*) to read as follows:

**§ 1942.17 Community facilities.**

* * * * *

(d) * * *

(1) * * *

(i) * * *

(B) * * *

(*5*) Supplemental and supporting structures for other rural electrification or telephone systems (including facilities such as headquarters and office buildings, storage facilities, and maintenance shops) when not eligible for Rural Electrification Administration financing. Additionally, a borrower is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

* * * * *

## PART 1980—GENERAL

■ 11. Add subpart M, consisting of §§ 1980.1201 through 1980.1210 to read as follows:

### Subpart M—Special Authority To Enable Funding of Broadband and Smart Utility Facilities Across Select Rural Development Programs

Sec.
1980.1201 Purpose.
1980.1202 Special broadband and smart utility facility funding.
1980.1203 Definitions.
1980.1204 Eligibility.
1980.1205 Eligible purposes.
1980.1206 Application process and public notice requirement.
1980.1207 Approval to provide retail broadband service.
1980.1208 Award procedures and compliance.
1980.1209 Reporting.
1980.1210 OMB Control Number.

**Authority:** 7 U.S.C. 1981(e) and 7 U.S.C. 908.

**§ 1980.1201 Purpose.**

This subpart establishes policies and procedures for the review, approval and servicing of projects authorized to use funding for broadband and smart utility facilities (Special Broadband Authority) in select Rural Development programs. This special broadband authority will leverage the federal resources available for the deployment broadband services in rural areas. The Secretary has discretion to allow recipients of RD grants, loans, or loan guarantees to use a limited amount of funds for broadband purposes.

**§ 1980.1202 Special broadband and smart utility facility funding.**

(a) The Secretary, acting directly or through authority delegated to the RD agency heads, may allow a recipient of an RD grant, loan, or loan guarantee to use up to 10 percent of project funds for any purpose outlined in § 1980.1205 and in compliance with this part.

(b) Prior to exercising authority under this part, the Agency with a request for special broadband authority (the Awarding Agency) shall consult with the Administrator of the affected RD Agency to determine:

(1) If the provision of broadband service by the recipient (or another party under a wholesale broadband service agreement) would cause competitive harm to a current Rural Development borrower, grantee, or guaranteed lender with respect to an active project for broadband deployment and provision of services With respect to a current RD awardee in the project service area that has significantly defaulted on, or not material complied with its award requirements, the affected RD agency may make a finding of no competitive harm unless it is necessary to protect the government's interest;

(2) If the recipient intends to use the funds for the provision of retail broadband service and, if so, assist the agency in providing public notice and receiving responses from existing service providers, as provided in this rule, so that a determination can be made as to whether the minimum acceptable level of broadband service exists in the service area at the time of the request; and

(3) If the recipient does not intend to provide broadband service, and the funded facilities will only be used for internal use, such as smart utility, there shall be no finding of competitive harm and the recipient shall be relieved of the public notice provision requirement of § 1980.1207 and reporting requirements of § 1980.1209. Note that recipients funding broadband facilities for internal use under an RD program's existing authority would not be subject to this part with respect to the 10 percent funding limitation; however, if such facilities are contemplated to provide retail broadband service in the future, the public notice requirements of § 1980.1206(b) and (c) will apply.

**§ 1980.1203 Definitions.**

*Agency.* One of the three Rural Development agencies, the Rural Housing Service, the Rural Business-Cooperative Service or the Rural Utilities Service.

*Agency head.* The Administrator of the applicable RD agency.

*Awarding Agency.* An agency which has received an application for special broadband authority or has approved an application for such authority.

*Broadband service.* Any technology identified by the Secretary as having the capacity to provide transmission facilities that enable a subscriber to originate and receive voice, data, graphics, and video.

*Con Act.* The Consolidated Farm and Rural Development Act of 1972, as codified and amended at 7 U.S.C. 1921 *et seq.*

*Minimum acceptable level of broadband service.* The minimum transmission capacity with respect to terrestrial service that will qualify as broadband service, as published by the RUS in the **Federal Register** pursuant to 7 CFR part 1738. If a new minimum transmission capacity is published in the **Federal Register** while a request for smart utility authority is pending, broadband service for the purpose of reviewing the request will be defined by the minimum transmission capacity that was in effect at the time the request was received by the Agency.

*Rural Development (RD).* A mission area of the United States Department of Agriculture (USDA) made up of the Rural Housing Service (RHS), Rural Business-Cooperative Service (RBCS) and the Rural Utilities Service (RUS).

*Retail broadband service.* For the purposes of this subpart, retail broadband service means any broadband service that is provided to the public at a charge. Broadband

Service which is used exclusively by the recipient for its own purposes and is not sold to the public is not retail broadband. Broadband service which is sold to other service providers through wholesale agreements shall also not be considered retail broadband service.

*RE Act.* The Rural Electrification Act of 1936, as codified and amended at 7 U.S.C. 901 *et seq.*

*Secretary.* The Secretary of Agriculture.

*Special broadband authority.* Approval by an RD program to use up to 10 percent of the proceeds of an RD loan, grant, or loan guarantee for the purposes of constructing, improving, or acquiring broadband facilities and equipment in rural areas, whether or not retail or wholesale broadband service will be provided.

*Smart utility.* The use of broadband facilities and equipment that is only available internally by a recipient during the economic life of the assets financed by an RD loan, grant, or loan guarantee.

**§ 1980.1204 Eligibility.**

Programs eligible to be considered for smart utility and broadband service authority include RD programs under the Rural Electrification Act and the Consolidated Farm and Rural Development Act. Programs included, but not limited to, are as follows:

(a) 7 CFR part 1710—General and Pre-Loan Policies and Procedures Common to Electric Loans and Guarantees;

(b) 7 CFR part 1779—Water and Waste Disposal Programs Guaranteed Loans;

(c) 7 CFR part 1780—Water and Waste Loans and Grants;

(d) 7 CFR part 1783—Revolving Funds for Financing Water and Wastewater Projects (Revolving Fund Program);

(e) 7 CFR part 1942, subpart A—Community Facility Loans;

(f) 7 CFR part 3575, subpart A—Community Programs Guaranteed Loans;

(g) 7 CFR part 3560—Direct Multi-Family Housing Loans and Grants;

(h) 7 CFR part 3565—Guaranteed Rural Rental Housing Program;

(i) 7 CFR part 3570, subpart B—Community Facilities Grant Program;

(j) 7 CFR part 4274, subpart D—Intermediary Relending Program (IRP);

(k) 7 CFR part 4279, subpart B—Business and Industry Loans;

(l) 7 CFR part 4279, subpart C—Biorefinery, Renewable Chemical and Biobased Product Manufacturing Assistance Loans;

(m) 7 CFR, part 4280, subpart A—Rural Economic Development Loan and Grant Programs;

(n) 7 CFR part 4280, subpart B—Rural Energy for American Program; and

(o) 7 CFR part 4280, subpart E—Rural Business Development Grants.

**§ 1980.1205 Eligible purposes.**

Recipients may use funds for the costs of the construction, improvement, and acquisition of broadband facilities and equipment in rural areas, as set forth in this part. Rural area shall be defined by the applicable program regulations.

**§ 1980.1206 Application process and public notice requirement.**

(a) *Initial notification to agency for all programs.* Applicants seeking to use program funds for eligible purposes under § 1980.1205 must inform the RD agency at the time of application, except for Smart Grid loans authorized under the RE Act and 7 CFR part 1710. This is to determine that sufficient funding is available in the applicable program to consider funding this special broadband authority in addition to the underlying RD project.

(b) *Notice for retail broadband.* All applicants that use special broadband authority to provide retail broadband service must provide the following information, which will be posted publicly on RUS' fully searchable website, in addition to the identity of the applicant and the status of the application:

(1) A description of the proposed retail broadband project;

(2) A map of the proposed service area to be funded under smart utility authority of the applicant;

(3) The amount and type of support requested by the applicant;

(4) The estimated number and proportion of service points in the proposed service territory without fixed broadband service, whether terrestrial or wireless; and

(5) Any other information required of the applicant in a funding notice.

(c) *Information available to the public for approved applications.* For applications that are approved for the provision of retail broadband service under the special broadband authority, the following information will be made available to the public:

(1) The information provided in paragraph (a) of this section;

(2) Each annual report required under § 1980.1209, which will be redacted to protect any proprietary information; and

(3) Such other information as the Administrator of the RUS deems sufficient to allow the public to understand the assistance provided.

(d) *Alternative methods of public notice.* The Administrator of the RUS will provide instructions on the RUS website for alternative methods of public notice and responses by existing service providers related to projects seeking funding under the special broadband authority where the Administrator determines that existing procedures and systems used by applicants to RUS' broadband programs would be impracticable, costly, or impose excessive delay.

(e) *Additional requirements for guarantees, intermediaries and revolving loan programs.* In addition to paragraphs (a) through (d) of this section, participants and recipients of funds from eligible RD guarantee, intermediary, and revolving loan programs set forth in § 1980.1204 shall be subject to the following requirements:

(1) No funds may be issued by program participants to recipients for special broadband authority without written approval from the Awarding Agency.

(2) Recipients must apply for special broadband authority on a project-by-project basis through program participants. Program participants shall serve as the applicant to the Awarding Agency and shall be responsible for ensuring that the public notice, reporting and other requirements of this part are contained in applicable agreements between the participant and the recipient.

**§ 1980.1207 Approval to provide retail broadband service.**

(a) *Service area assessment.* For applicants requesting to provide retail broadband service under the special broadband authority, applications must be posted publicly for 45 days.

(1) During the public notice period, service providers may voluntarily submit information required by the RUS Administrator onto the agency's mapping tool, or alternate methods if determined by the RUS Administrator under § 1980.1206(d). Information submitted by service providers shall be exempt from disclosure pursuant to 5 U.S.C. 552(b)(2)(B).552.

(2) If no broadband service provider submits information under paragraph (a)(1) of this section, the agency shall consider the number of providers in the proposed service area to be established by using any other data regarding the availability of broadband service that the RUS may collect or obtain through reasonable efforts.

(b) *Use of funds.* After review of information submitted from service providers, if any, and all available data on broadband availability, if the RUS determines that the minimum acceptable level of broadband service is

available in the proposed retail service area, the Awarding Agency shall not approve the use of funds for such purpose. The Awarding Agency, however, may approve the use of funds for retail broadband service if:

(1) Areas with the minimum acceptable level of broadband service are eliminated from the proposed service area; and

(2) The applicant covenants that it will not provide service in these areas with funds from the Awarding Agency.

(c) *Use of Funds for wholesale broadband service.* For applicants requesting that funds be used for wholesale broadband service, the applicant must agree:

(1) To publicly advertise in the service area that broadband service is available at wholesale to any service provider; and

(2) That the same wholesale contract will be used for all service providers requesting wholesale service and offered at the same per unit price.

**§ 1980.1208 Award procedures and compliance.**

(a) The Awarding Agency will inform applicants seeking consideration of funding under this part of the agency's disposition of the applicant's request;

(b) Except as provided in § 1980.1206(e), awards made under this part shall be managed and serviced by the Awarding Agency;

(c) Except as provided in § 1980.1206(e), the Agency shall be responsible for oversight and compliance of projects utilizing authority under this part;

(d) Requirements for providing retail broadband service or wholesale broadband service under §§ 1980.1206, 1980.1207, and this section shall be made part of the applicable loan or grant agreement between the recipient and the Awarding Agency, or, with respect to guarantees and intermediaries, between the program participants and the recipients;

(e) The applicable agreement must provide that non-compliance with this part or use of funds for retail broadband service or wholesale broadband service without having received agency authority to do so as required in this part, shall:

(1) Be an automatic event of default under the applicable agreement; and

(2) Require that the associated loan or grant funds used in violation of this part be disallowed or returned immediately to the awarding agency or to the program participant for eligible relending.

**§ 1980.1209 Reporting.**

For three years starting the first January 31st after completion of the broadband project, recipients of funds used for retail broadband service under this part must submit the following information each year utilizing RUS' online reporting system:

(a) Existing network service improvements and facility upgrades, as well as new equipment and capacity enhancements that support high-speed broadband access for educational institutions, health care providers, and public safety service providers;

(b) The estimated number of end users who are currently using or forecast to use the new or upgraded infrastructure;

(c) The progress towards fulfilling the objectives for which the assistance was granted;

(d) The number and geospatial location of residences and businesses that will receive new broadband service;

(e) The speed and price of the Recipient's broadband service offerings; and

(f) The average price of broadband service in the project's service area.

**§ 1980.1211 OMB Control Number.**

The information collection requirements in this part are approved by the Office of Management and Budget and assigned OMB control number 0572–0156.

**CHAPTER XXXV—RURAL HOUSING SERVICE, DEPARTMENT OF AGRICULTURE**

## PART 3570—COMMUNITY PROGRAMS

■ 12. The authority citation for part 3570 continues to read as follows:

**Authority:** 64 FR 32388, June 17, 1999, unless otherwise noted.

### Subpart B—Community Facilities Grant Program

■ 13. Amend § 3570.62 by adding paragraph (a)(2)(iii) to read as follows:

**§ 3570.62 Use of grant funds.**

* * * * *

(a) * * *

(2) * * *

(iii) A borrower is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

* * * * *

## PART 3575—GENERAL

■ 14. The authority citation for part 3575 continues to read as follows:

**Authority:** 5 U.S.C. 301, 7 U.S.C. 1989.

### Subpart A—Community Programs Guaranteed Loans

■ 15. Amend § 3575.24 by adding paragraph (b)(5) to read as follows:

**§ 3575.24 Eligible loan purposes.**

* * * * *

(b) * * *

(5) A borrower is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

**CHAPTER XLII—RURAL BUSINESS-COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE**

## PART 4274—DIRECT AND INSURED LOANMAKING

■ 16. The authority citation for part 4274 continues to read as follows:

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1932 note; 7 U.S.C. 1989.

### Subpart D—Intermediary Relending Program (IRP)

■ 17. Amend § 4274.314 by adding paragraph (b)(16) to read as follows:

**§ 4274.314 Loan purposes.**

* * * * *

(b) * * *

(16) A borrower is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

## PART 4279—GUARANTEED LOANMAKING

■ 18. The authority citation for part 4279 is revised to read as follows:

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1989; 7 U.S.C. 310B(a)(2); and 7 U.S.C 8103.

### Subpart B—Business and Industry Loans

■ 19. Amend § 4279.113 by adding paragraph (z) to read as follows:

**§ 4279.113 Eligible uses of funds.**

* * * * *

(z) A borrower is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

### Subpart C—Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Loans

■ 20. Amend § 4279.210 by adding paragraph (d)(10) to read as follows:

**§ 4279.210 Project eligibility requirements.**

* * * * *

(d) * * *

(10) A borrower is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

* * * * *

## PART 4280—LOANS AND GRANTS

■ 21. The authority citation for part 4280 continues to read as follows:

**Authority:** 5 U.S.C. 301; 7 U.S.C. 940c; 7 U.S.C. 1932(c).

### Subpart A—Rural Economic Development Loan and Grant Programs

■ 22. Amend § 4280.15 by adding paragraph (i) to read as follows:

**§ 4280.15 Ultimate recipient projects eligible for rural economic development loan funding.**

* * * * *

(i) A borrower is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

### Subpart B—Rural Energy for America Program

■ 23. Amend § 4280.101 by adding paragraph (c) to read as follows:

**§ 4280.101 Purpose.**

* * * * *

(c) Grants or guaranteed loans, or a combination grant and guaranteed loan to a borrower is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

### Subpart E—Rural Business Development Grants

■ 24. Amend § 4280.417 by adding paragraph (e) to read as follows:

**§ 4280.417 Project eligibility.**

* * * * *

(e) An applicant is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

**Bette B. Brand,**

*Deputy Under Secretary, Rural Development.*

[FR Doc. 2020–19033 Filed 9–14–20; 8:45 am]

BILLING CODE 3410–15–P

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2017–0346; Airspace Docket No. 17–AAL–2]**

**RIN 2120–AA66**

## Amendment of Class E Airspace; Cordova, AK

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

**ACTION:** Final rule.

**SUMMARY:** This action modifies the Class E surface area airspace and the Class E airspace extending upward from 700 feet and 1,200 feet above the surface of the earth at Merle K (Mudhole) Smith Airport, Cordova, AK, eliminates references to the Glacier River Non-Directional Beacon (NDB) and updates the Airport's geographic coordinates to match the FAA's current aeronautical database. This action supports Instrument Flight Rules (IFR) operations under standard instrument approach and departure procedures in the National Airspace System.

**DATES:** Effective 0901 UTC, December 31, 2020. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations Part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

**ADDRESSES:** FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA).

For information on the availability of FAA Order 7400.11E at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

**FOR FURTHER INFORMATION CONTACT:** Richard Roberts, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S. 216th Street, Des Moines, WA 98198; telephone (206) 231–2245.

**SUPPLEMENTARY INFORMATION:**

### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies Class E surface area airspace and Class E airspace extending upward from 700 feet and 1,200 feet above the surface of the earth at Merle K (Mudhole) Smith Airport, Cordova, AK, in support of IFR operations.

### History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 35229; June 9, 2020) for Docket No. FAA–2017–0346 to modify Class E airspace at Merle K (Mudhole) Smith Airport, Cordova, AK, in support of IFR operations at the airport. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

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

This document amends FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas,

air traffic service routes, and reporting points.

**The Rule**

The FAA is amending 14 CFR part 71 by modifying the Class E surface area and Class E airspace extending upward from 700 and 1,200 feet AGL at Merle K (Mudhole) Smith Airport, Cordova, AK. The FAA completed an airspace review after the airport was identified as having Class E airspace established, in error, beyond 12 nautical miles from the shoreline. This action modifies the Class E airspace extending upward from the surface by removing that airspace 3.2 miles northwest and 2.1 miles southeast of the 222° bearing from the Glacier River NDB extending 10 miles southwest of the airport. This action also removes the airspace 2 miles each side of the 124° bearing from the Glacier River NDB extending 10.4 miles southeast of the airport. This airspace is no longer needed because of the implementation of Area Navigation (RNAV) approaches to Runways 27 and 09. In addition, this action modifies that airspace 2 miles each side of the 115° bearing to 1 mile each side of the 113° bearing from the airport extending 5.5 miles southeast of the airport. This modification provides protection for aircraft descending to 1,000 feet on the Instrument Landing System (ILS) approach to Runway 27.

The Class E airspace extending upward from 700 feet above the surface is modified to that airspace within 6.6 miles of the airport from the point that the 82° bearing intersects the 6.6-mile radius clockwise to the point that the 309° bearing intersects the 6.6-mile radius, and includes that airspace 2 miles each side of the 113° bearing extending 16 miles southeast of the airport. This area protects aircraft on departure until reaching 1,200 feet AGL and aircraft as they descend through 1,500 feet on the ILS approach to Runway 27.

The airspace extending upward from 1,200 feet above the surface is reduced to within 20 miles of the airport to provide protection for aircraft above 1,500 feet AGL while transitioning to the enroute environment.

The reference in the legal description to the Glacier River NDB is removed as the airspace is being redesigned without the use of this reference. In addition, this action updates the geographic coordinates of the airport to match the FAA's current aeronautical database. This action supports IFR operations under standard instrument approach and departure procedures in the National Airspace System.

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

**Regulatory Notices and Analyses**

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

**Environmental Review**

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

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

Airspace, Incorporation by reference, Navigation (air).

**Adoption of the Amendment**

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

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

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

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

### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

*Paragraph 6002 Class E Airspace Areas Designated as Surface Areas.*

* * * * *

**AAL AK E2 Cordova, AK [Modified]**

Merle K (Mudhole) Smith, AK
(Lat. 60°29′30″ N, long. 145°28′39″ W)

That airspace within a 4.1-mile radius of the Merle K (Mudhole) Smith Airport beginning at a point where the 69° bearing from the Airport intersects the 4.1-mile radius clockwise to a point where the 322° bearing from the Airport intersects the 4.1-mile radius, thence to the point of beginning and within 1 mile each side of the 113° bearing from the Airport extending from the 4.1-mile radius to 5.5 miles southeast of the Airport.

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

* * * * *

**AAL AK E5 Cordova, AK [Modified]**

Merle K (Mudhole) Smith, AK
(Lat. 60°29′30″ N, long. 145°28′39″ W)

That airspace within a 6.6-mile radius of the Merle K (Mudhole) Smith Airport, beginning where the 82° bearing from the Airport intersects the 6.6-mile radius clockwise to the point where the 309° bearing intersects the 6.6-mile radius, thence to the point of beginning and that airspace 2 miles each side of the 113° bearing from the Airport extending from the 6.6-mile radius to 16 miles southeast from the airport, and that airspace extending upward from 1,200 feet above the surface within a 20-mile radius of the airport, excluding that airspace more than 12 miles from the shoreline.

Issued in Seattle, Washington, on September 8, 2020.

**Byron Chew,**

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

[FR Doc. 2020–20229 Filed 9–14–20; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2020–0384; Airspace Docket No. 19–AAL–15]**

**RIN 2120–AA66**

## Proposed Amendment of Class D and Class E Airspace; Bethel, AK

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

**ACTION:** Final rule.

**SUMMARY:** This action modifies the Class D and Class E surface area at Bethel Airport, Bethel AK, by redefining the

Hangar Lake exclusion area and eliminating the use of the VORTAC in the descriptions. This action removes Class E airspace as an extension to the Class D and Class E surface area and modifies the Class E airspace extending upward from 700 feet above the surface at the Airport. After a biennial review of the airspace, the FAA found it necessary to amend the existing airspace for the safety and management of Instrument Flight Rules (IFR) operations at this airport. This action also updates the geographical coordinates and replaces the outdated term Airport/Facility Directory with the term Chart Supplement.

**DATES:** Effective 0901 UTC, December 31, 2020. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

**ADDRESSES:** FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA).

For information on the availability of FAA Order 7400.11E at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

**FOR FURTHER INFORMATION CONTACT:** Richard Roberts, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–2245.

**SUPPLEMENTARY INFORMATION:**

## Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the Class D, Class E surface airspace and Class E airspace extending upward from 700 feet AGL at Bethel Airport, Bethel AK in support of IFR operations.

## History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 35231; June 9, 2020) for Docket No. FAA–2020–0384 to modify the Class D airspace, the Class E surface airspace, and the Class E airspace extending upward from 700 feet above the earth at Bethel Airport, Bethel AK in support of IFR operations. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class D and Class E airspace designations are published in paragraph 5000, 6002, 6004, 6005 of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class D and Class E airspace designations listed in this document will be published subsequently in the Order.

## Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

## The Rule

The FAA is amending 14 CFR part 71 by modifying the description of the Class D and Class E surface areas, removing the Class E as an extension to the Class D and Class E and modifying the Class E airspace extending upward from 700 feet AGL at Bethel Airport, Bethel AK.

The Class D and Class E surface areas are modified so that the Hangar Lake exclusion area is described as that area within .7 miles of the Hangar Lake ARP and eliminate the use of the VORTAC in the definition. This will ensure that a change in the status of the nav-aid, in the future, would have no effect on the description and not require additional rulemaking.

The FAA is eliminating the Class E airspace extension to the Class D and Class E surface area, as it is no longer required for approaches.

In addition, the FAA is modifying the Class E airspace extending upward from 700 feet above the surface to within 6.6 miles of the Airport (reduced from 16.8 miles) and removing the procedure turn maneuvering area from the Bethel Airport to 22.8 miles north, as it is no longer required for the approaches. The use of the term Airport Facility/Directory is replaced with Chart Supplement and the geographical coordinates are updated to match the FAA database.

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

## Regulatory Notices and Analyses

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

## Environmental Review

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

## Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

## Adoption of the Amendment

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

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

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

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

### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

*Paragraph 5000 Class D Airspace.*

* * * * *

**AAL AK D Bethel, AK [Amended]**

Bethel Airport, AK
(Lat. 60°46′43″ N, long. 161°50′14″ W)
Hangar Lake
(Lat. 60°48′17″ N, long. 161°43′15″ W)

That airspace extending upward from the surface to and including 2,600 feet MSL within a 4.1-mile radius of the Bethel Airport, AK, excluding that portion below 1,100 feet MSL within .7-mile radius of Hangar Lake SPB. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

*Paragraph 6002 Class E Airspace Designated as Surface Areas.*

* * * * *

**AAL AK E2 Bethel, AK [Amended]**

Bethel Airport, AK
(Lat. 60°46′43″ N, long. 161°50′14″ W)
Hangar Lake
(Lat. 60°48′17″ N, long. 161°43′15″ W)

That airspace extending upward from the surface within a 4.1-mile radius of the Bethel Airport, AK, excluding that portion below 1,100 feet MSL within .7-mile radius of Hangar Lake SPB. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

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

* * * * *

**AAL AK E4 Bethel, AK [Removed]**

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

* * * * *

**AAL AK E5 Bethel, AK [Amended]**

Bethel Airport, AK
(Lat. 60°46′43″ N, long. 161°50′14″ W)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of the Bethel Airport, AK, and that airspace 8 miles east and 4 miles west of the 211° radial from the airport extending from the 6.6-mile radius to 22 miles south of the Airport.

Issued in Seattle, Washington, on September 8, 2020.

**Byron Chew,**

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

[FR Doc. 2020–20231 Filed 9–14–20; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2019–0852; Airspace Docket No. 19–ANM–26]**

**RIN 2120–AA66**

## Establishment of Class E Airspace, Torrington, WY

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

**ACTION:** Final rule.

**SUMMARY:** This action establishes Class E airspace extending upward from 700 feet above the surface at Torrington Municipal Airport, Torrington, WY, to accommodate new area navigation (RNAV) procedures. This action ensures the safety and management of instrument flight rules (IFR) operations within the National Airspace System.

**DATES:** Effective 0901 UTC, December 31, 2020. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

**ADDRESSES:** FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA).

For information on the availability of FAA Order 7400.11E at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

**FOR FURTHER INFORMATION CONTACT:** Richard Roberts, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–2245.

**SUPPLEMENTARY INFORMATION:**

### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes new Class E airspace extending upward from 700 feet above the surface of the earth at Torrington Municipal Airport, Torrington, WY, in support of IFR operations.

### History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 38342; June 26, 2020) for Docket No. FAA–2020–0852 to establish Class E airspace at Torrington Municipal Airport, Torrington, WY, in support of IFR operations at the airport. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

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

This document amends FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

### The Rule

The FAA is amending 14 CFR part 71 by modifying the Class E airspace

extending upward from 700 feet above the surface at Torrington Municipal Airport, Torrington, WY. In addition to the airspace within 7.7 miles of the airport, additional airspace accommodates two new RNAV approaches. A rectangular segment east of the airport 7 miles each side of the 109° bearing extending 27 miles from the airport, and an area northwest of the airport 2 miles each side of the 295° bearing extending from the 7.7-mile radius to 11 miles northwest of the airport.

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

**Regulatory Notices and Analyses**

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

**Environmental Review**

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

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

Airspace, Incorporation by reference, Navigation (air).

**Adoption of the Amendment**

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

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

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

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

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

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

* * * * *

**ANM WY E5 Torrington, WY [Amend]**

Torrington Municipal Airport, WY
(Lat. 42°03′52″ N, long. 104°09′10″ W)

That airspace extending upward from 700 feet above the surface within a 7.7-mile radius of the Torrington Municipal Airport, and that airspace 2 miles each side of the 295° bearing extending from the 7.7-mile radius to 11 miles northwest of the airport, and that airspace 7 miles each side of the 109° bearing extending from the 7.7-mile radius to 27 miles east from the airport.

Issued in Seattle, Washington, on September 8, 2020.

**Byron Chew,**

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

[FR Doc. 2020–20233 Filed 9–14–20; 8:45 am]

BILLING CODE 4910–13–P

## SECURITIES AND EXCHANGE COMMISSION

## 17 CFR Parts 200, 202 and 270

**[Release No. IC–33921; File No. S7–19–19]**

**RIN 3235–AM51**

## Amendments to Procedures With Respect to Applications Under the Investment Company Act of 1940

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (the ''Commission'') is adopting amendments to its rules under the Investment Company Act of 1940 to establish an expedited review procedure for applications that are substantially identical to recent precedent as well as a rule to establish an internal timeframe for review of applications outside of such expedited procedure. In addition, the Commission is adopting an amendment to its rules under the Investment Company Act of 1940 to deem an application outside of expedited review withdrawn when the applicant does not respond in writing to comments within 120 days.

**DATES:** *Effective date:* June 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Steven Amchan and Hae-Sung Lee, Senior Counsels; Daniele Marchesani, Assistant Chief Counsel; Chief Counsel's Office, at (202) 551–6825; or Keith Carpenter, Senior Special Counsel; Disclosure Review and Accounting Office, at (202) 551–6921, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

**SUPPLEMENTARY INFORMATION:** The Securities and Exchange Commission (''Commission'') is adopting an amendment to 17 CFR 270.05 (rule 0–5) under the Investment Company Act of 1940 [15 U.S.C. 80a *et seq.*], an amendment to 17 CFR 200.30–5 (rule 30–5) and 17 CFR 202.13. The Commission is also adopting related amendments to rule 30–5 of its Rules of Organization and Program Management governing delegation of authority to the Director of Division of Investment Management.

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## I. Introduction and Background

The applications process under the Investment Company Act of 1940 (''Act'') has been a significant and valuable tool in the evolution of the investment management industry, and the rules we are adopting are intended to increase its efficiency and transparency. The Commission is adopting amendments to rule 0–5 under the Act to establish an expedited review procedure for applications that are substantially identical to recent precedent as well as a rule to establish an internal timeframe for review of applications outside of such expedited procedure. The Commission is also adopting amendments to rule 0–5 to deem an application outside of expedited review withdrawn when the applicant does not respond in writing to comments within 120 days.[1]

On October 18, 2019, we proposed these rule amendments and new rule.[2] We also announced our intention to begin disseminating publicly staff of the Division of Investment Management (''Staff'' or ''Division'') comments on applications as well as responses to those comments. As discussed in greater detail below, commenters [3] generally supported the rules to make the applications process more efficient and transparent.[4] Some commenters were supportive of our proposal without suggesting modifications.[5] Other commenters recommended modifications and clarifications to certain aspects of it. For example, several commenters suggested broadening the eligibility requirements to use the expedited review process.[6] Additionally, a number of commenters recommended making the proposed internal timeframe for standard applications shorter.[7] Finally, while a few commenters supported our proposal to begin publicly releasing Staff comments and applicants' responses,[8] several did not and expressed concerns.[9]

After consideration of the comments we received, we are adopting the rule amendments and rule largely as proposed, with modifications to address comments.[10] Additionally, at the present time Staff comments and applicants' responses will not be publicly disseminated.

### *A. Overview of Applications for Relief Under the Act*

In 1940, Congress passed the Act in response to numerous abuses that existed in the investment company industry prior to that time.[11] As a result, the Act imposes significant substantive restrictions on the operation of investment companies that it regulates (''funds''). Congress, however, also recognized the need for flexibility to address unforeseen or changed circumstances, consistent with the protection of investors, in the administration of the Act.[12]

The Act, therefore, contains provisions that empower the Commission to issue orders granting exemptions from provisions of the Act, authorizing transactions, or providing other relief.[13] Most significantly, section 6(c) gives the Commission the broad power to exempt conditionally or unconditionally any person, security, or transaction from any provisions of the Act or any rule thereunder, provided that the 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].'' [14] The Commission regularly receives applications seeking orders for exemptions or other relief under the Act.[15] If the request meets the applicable standards, the Commission publishes a notice of the application in the **Federal Register** and on its public website, stating its intent to grant the requested relief.[16] The notice gives interested persons an opportunity to request a hearing on the application. If the Commission does not receive a hearing request during the notice

[1] Unless otherwise specified, references to days herein are to calendar days.

[2] *See* Amendments to Procedures With Respect to Applications under the Investment Company Act of 1940, Investment Company Act Release No. 33658 (Oct. 18, 2019) [84 FR 58075 (Oct. 30, 2019)] (''Proposing Release'').

[3] The comment letters on the Proposing Release (File No. S7–19–19) are available at *https://www.sec.gov/comments/s7-19-19/s71919.htm.*

[4] *See* Comment Letter of the Investment Company Institute (Nov. 29, 2019) (''ICI Comment Letter''); Comment Letter of the Investment Adviser Association (Nov. 27, 2019) (the Investment Adviser Association stated that it supports the comments and recommendations put forth in the ICI Comment Letter); Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (Nov. 27, 2019) (''SIFMA AMG Comment Letter''); Comment Letter of Fidelity Investments (Nov. 29, 2019) (''Fidelity Comment Letter''); Comment Letter of Stradley Ronon Stevens & Young, LLP (Dec. 4, 2019) (''Stradley Comment Letter''); Comment Letter of the Small Business Investor Alliance (Nov. 29, 2019) (''SBIA Comment Letter''); Comment Letter of Kathleen Crowley (Nov. 6, 2019) (''Kathleen Crowley Comment Letter''). One commenter questioned why the changes we are adopting require a rule. *See* Comment Letter of Diane Smith (Oct. 20, 2019) (''Diane Smith Comment Letter''). The commenter asked why the Staff cannot just quickly notice applications that are substantially identical to precedent. *Id.* We are enacting these procedures as rules because we believe that applicants will benefit from the certainty and transparency of these rules.

[5] *See* SBIA Comment Letter; Kathleen Crowley Comment Letter.

[6] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Fidelity Comment Letter; Comment Letter of the American Investment Council (Nov. 26, 2019) (''AIC Comment Letter''); Stradley Comment Letter.

[7] *See id.*

[8] *See* Diane Smith Comment Letter; Comment Letter of the Capital Group Companies (Nov. 26, 2019) (''Capital Group Comment Letter''); Comment Letter of Abigail Najera (Nov. 14, 2019) (''Abigail Najera Comment Letter''); Comment Letter of Ed Snoke (Dec. 21, 2019) (''Ed Snoke Comment Letter'').

[9] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Fidelity Comment Letter; Stradley Comment Letter.

[10] A few commenters had suggestions for improving the applications notice process. *See* Diane Smith Comment Letter; Ed Snoke Comment Letter. While changing the application notice process is beyond the scope of this rulemaking, the Staff will consider the suggestions as they continue to consider process improvements and any additional recommendations to the Commission.

[11] *See generally* Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, pt. 3, ch. 7, H.R. Doc. No. 136, 77th Cong., 1st Sess. (1941); 15 U.S.C. 80a–1.

[12] *See e.g.,* Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. 872 (1940) (hereinafter 1940 Senate Hearings) (Commissioner Healy stated that ''it seemed possible and even quite probable that there might be companies—which none of us have been able to think of—that ought to be exempted.''); *id.* at 197 (David Schenker, Chief Counsel of the Investment Trust Study, stated that ''the difficulty of making provision for regulating an industry which has so many variants and so many different types of activities . . . is precisely [the reason that section 6(c)] is inserted.'').

[13] As the orders are subject to the terms and conditions set forth in the applications requesting relief, references in this release to ''relief'' or ''orders'' include the terms and conditions described in the related application.

[14] 15 U.S.C. 80a–6(c). Other sections of the Act provide the Commission with additional or specific exemptive authority. *See, e.g.,* section 3(b)(2) (Commission may find that an issuer is ''primarily engaged'' in a non-investment company business even though the issuer may technically meet the definition of investment company); section 12(d)(1)(J) (Commission may exempt any person, security, or transaction, or any class or classes of transactions, from section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors); and section 17(b) (Commission may exempt proposed transactions from the Act's affiliated transaction prohibitions) (codified at 15 U.S.C. 80a–3(b)(2), 15 U.S.C. 80a–(12)(d)(1)(J), and 15 U.S.C. 80a–17(b)).

[15] In fiscal year 2019, approximately 112 initial applications were filed under the Act on EDGAR Form Type 40–APP.

[16] Notices of the Commission's intent to deny the requested relief, and the related orders, are rare because applicants typically withdraw or abandon their application in anticipation of such actions.

period, and does not otherwise order a hearing on an application, subsequent to the expiration of the notice period, the Commission generally issues an order granting the requested relief.[17]

The Staff reviews the applications that the Commission receives under the Act.[18] During the review process, the Division may issue comments to the applicant, asking for clarification of, or modification to, an application to determine whether, or ensure that, the relief meets the Act's standards.[19] In addition, the Commission has granted the Director of the Division of Investment Management (''Director'') delegated authority to issue notices of applications and orders generally where the matter does not appear to the Director to present significant issues that have not been previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors warrants that the Commission consider the matter.[20] The vast majority of notices of applications and orders are issued by the Commission via the Staff under delegated authority. For those applications for which the Director does not have delegated authority, after the Division's review is completed, the Division presents them to the Commission. The Director does not have delegated authority to deny applications.

The applications process under the Act has been a significant and valuable tool in the evolution of the investment management industry, and sometimes is the origin of new rules under the Act.[21] Some applications, for example, have requested relief from provisions of the Act to permit funds to operate in a more efficient and less costly manner.[22] Applicants have also sought relief to implement innovative features or create new types of funds that do not fit within the regulatory confines of the Act.[23] For example, over the course of 27 years, exchange-traded funds (''ETFs'') originated and developed through the applications process.[24] Because the drafters of the Act in 1940 did not contemplate the ETF structure, ETFs need exemptions from certain provisions of the Act to operate.[25] ETFs registered under the Act now have approximately $3.32 trillion in total net assets and account for approximately 16 percent of total net assets of registered investment companies.[26]

*B. Efforts To Improve the Application Process*

As discussed in the previous section, granting appropriate exemptions from the Act can provide important economic benefits to funds and their shareholders, foster financial innovation, and increase the diversity of opportunities for investors. We thus recognize the importance of considering and, where appropriate, granting relief as efficiently and quickly as possible. However, in light of our statutory mission of investor protection and the substantive concerns underlying the Act, we also recognize the critical importance of analyzing applications carefully to determine whether the relief requested, together with any terms and conditions of the relief, meets the relevant statutory standards.[27]

Over time, some applicants have expressed concern regarding the length of time required to obtain an order on both routine and novel applications. In 1990, the Commission requested comments on, among other things, whether it should adopt different procedures for applications.[28] In response, commenters argued that lengthy review procedures delay the commencement of transactions, prevent applicants from responding quickly to changing market conditions, and slow the entry of new products to the market, all to the detriment of investors.[29] As a result, in 1993, the Commission proposed amendments to rule 0–5 under the Act to establish an expedited review procedure for certain routine applications.[30] The Commission, however, did not adopt these proposed amendments.

In subsequent years, initiatives aimed at improving the application process

[17] 15 U.S.C. 80a–39; 17 CFR 270.0–5. In fiscal year 2019, the Commission issued 97 orders for applications under the Act.

[18] Applications under the Act are filed on EDGAR. *See* Mandatory Electronic Submission of Applications for Orders under the Investment Company Act and Filings Made Pursuant to Regulation E, Investment Company Act Release No. 28476 (Oct. 29, 2008). The Commission has stated that the Staff will not, except in the most extraordinary situations, review draft applications. *See* Commission Policy and Guidelines for Filing of Applications for Exemption, Investment Company Act Release No. 14492 (Apr. 30, 1985) (specifying certain procedures that applicants should follow in order to facilitate the review of applications) (''1985 Release''). Consistent with the Commission's statement, the Staff currently only reviews draft applications in very limited circumstances. One commenter stated that the Staff has not provided a clear explanation of how it evaluates whether an application meets this high standard, and requested that we more clearly define it, and establish a formal process for applicants to seek review of draft applications. *See* AIC Comment Letter. The Commission's longstanding policies regarding draft applications from the 1985 Release are well established and we do not believe they require further elaboration. Applicants seeking clarifications as to their particular facts and circumstances are encouraged to reach out to the Staff.

[19] In the past, the Staff placed applications on inactive status when applicants did not respond to comments within 60 days. Such inactive status was for internal tracking purposes only and had no effects on the application process. In the expedited review process we are adopting, 17 CFR 270.0–5(f)(2)(iii) (rule 0–5(f)(2)(iii)) deems expedited applications withdrawn without prejudice if the applicant has not filed an amendment responsive to a Staff request for modification within 30 days. For non-expedited applications, new 17 CFR 270.0–5(g) (rule 0–5(g)) provides that if an applicant has not responded in writing to a request for clarification or modification of an application within 120 days, such application will be deemed withdrawn without prejudice.

[20] Title 17 CFR 200.30–5(a)(1) generally delegates the power to issue notices with respect to applications under the Act where the matter does not appear to the Director to present significant issues that have not been previously settled by the Commission or to raise questions of fact or policy indicating that the public interest or the interest of investors warrants that the Commission consider the matter. Title 17 CFR 200.30–5(a)(2) generally delegates the power to authorize the issuance of orders where (1) a notice has been issued and no request for a hearing has been received from any interested person within the period specified in the notice, (2) the Director believes that the matter presents no significant issues that have not been previously settled by the Commission, and (3) it does not appear to the Director to be necessary in the public interest or the interest of investors that the Commission consider the matter.

[21] *See infra* footnote 35.

[22] *See, e.g.,* Franklin Alternative Strategies Funds, et al., Investment Company Act Release Nos. 33095 (May 10, 2018) (Notice of Application) and 33117 (June 5, 2018) (Order) (permitting applicants to operate a joint lending and borrowing facility).

[23] For example, money market funds need exemptive relief from section 2(a)(41) (which requires registered investment companies to value their securities based on market values, if available, or if not, as determined in good faith by the board of directors) in order to operate. In a series of orders beginning in the 1970s, the Commission permitted money market funds to use alternative valuation methods, such as amortized cost or penny rounding. The Commission later adopted 17 CFR 270.2a–7 (rule 2a–7 under the Act) to allow money market funds to operate without individual exemptive orders.

[24] *See* Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sept. 25, 2019).

[25] In 2019, the Commission adopted 17 CFR 270.6c–11 (rule 6c–11) providing relief to most ETFs under the Act. *See id.*

[26] *See id.* at 5.

[27] *See* 15 U.S.C. 80a–6(c).

[28] Request for Comments on Reform of the Regulation of Investment Companies, Investment Company Act Release No. 17534 (June 15, 1990), 55 FR 25322 (the ''Study Release'').

[29] *See, e.g.,* Letter from the Subcomm. on Investment Companies and Investment Advisers of the Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association, to Jonathan G. Katz, Secretary, SEC, 7–9 (Oct. 18, 1990), File No. S7–11–90.

[30] *See* Expedited Procedure for Exemptive Orders and Expanded Delegated Authority, Investment Company Act Release No. 19362 (Mar. 26, 1993). The proposal sought to implement the Staff's recommendations from the *Protecting Investors* report by proposing to amend rule 0–5 under the Act to establish an expedited review procedure for certain routine applications. *See* Division of Investment Management, SEC, Protecting Investors: A Half Century of Investment Company Regulation, Procedures for Exemptive Orders, 503–522 (1992) (considering comments received in response to the Study Release).

have continued. For example, in 2008, the Staff implemented an internal performance target of providing initial comments on at least 80 percent of applications within 120 days after their receipt.[31] We believe this performance measure has helped make the application process more efficient. In 2008, the first year with this performance target, the Division provided initial comments within 120 days on 81 percent of applications.[32] By 2010, the Division met this target on 100 percent of applications, and has not dropped below 99 percent any year since.[33] For filings made on or after June 1, 2019, the Division implemented a new internal target of providing comments on both initial applications and amendments within 90 days.[34] Notwithstanding the recent improvements, we have continued to consider ways to improve the applications process as we recognize the importance of completing the review of an application in an appropriate and timely manner. The rule changes we are adopting are intended to improve the efficiency and speed of the application process while preserving the ability to assess the appropriateness of the requested relief. In addition, the Commission has made it a priority to propose and adopt rules to replace lines of routine applications.[35] These rules benefit the application process by making the corresponding applications no longer necessary, which, in turn, allows the Staff to devote additional resources to other, more novel types of applications that can promote further industry innovation and expand investment choices for investors.

*C. Factors Affecting the Application Process*

The amount of time necessary for the Staff to review an application depends in large part on the nature of the application. The Staff generally characterizes applications as falling into one of two general categories: (1) Applications that seek novel, largely unprecedented relief or relief for which some Commission precedent exists but that raises additional questions of fact, law, or policy; and (2) applications that seek relief substantively identical to relief that the Commission has recently granted (''routine applications'').

Applications in the first category may involve financial innovations or transactions on the forefront of the investment management industry. In those instances, substantial time and resources are needed to analyze thoroughly the legal and policy issues raised, and the recommendations the Staff must make to the Commission often include significant policy considerations. As part of this process, the Staff generally works with the applicant to refine the proposal and to develop appropriate terms and conditions for the relief that address the applicable standards under the Act. This process can be time consuming.

The Staff generally should be able to review routine applications much more quickly than applications in the first category because the Staff has already performed the overall legal and policy analysis underlying the requested relief. Sometimes, however, routine applications for which there is clear precedent nonetheless contain significantly different versions of the terms or representations compared to the relevant precedent. These applications require extra time to review because the Staff must analyze the changes to determine whether they alter the scope or nature of the requested relief. On more rare occasions, the Staff may re-evaluate the appropriateness of relief previously granted or the terms and conditions associated with the relief, or consider whether the relief can appropriately be granted to a specific applicant.[36]

For all applications, the Commission must consider the applicants' desire to obtain prompt relief while ensuring it has sufficient time to meet its overarching responsibility to consider whether an application meets the standard for the requested relief.

## II. Discussion of Commission Action

The rule amendments and rule we are adopting are intended to make the application process more efficient and effective in furthering the purposes of the Act.[37] They are also intended to provide additional certainty and transparency in the application process. Specifically, we are adopting an expedited review process for routine applications, an informal internal procedure for applications that would not qualify for the expedited process, and a rule to deem an application withdrawn when an applicant does not respond in writing to Staff comments within 120 days.

*A. Expedited Review Procedure*

In order to expedite the review of routine applications, the Commission is adopting amendments to rule 0–5 under the Act, which sets forth the procedure for applications under the Act. These amendments establish an expedited review procedure for applications that are substantially identical to recent precedent. We believe that the approach we are adopting balances applicants' desire for a prompt decision on their application with the Commission's need

[31] Unlike the 1993 proposal to amend rule 0–5 under the Act, this performance target was an internal measure and did not involve the amendment of any rule. *See* U.S. Securities and Exchange Commission, 2008 Performance and Accountability Report, at 40, *available at https://www.sec.gov/about/secpar/secpar2008.pdf. See also* Remarks Before the ICI 2007 Securities Law Developments Conference by Andrew J. Donohue, Director, Division of Investment Management (Dec. 6, 2007), *available at https://www.sec.gov/news/speech/2007/spch120607ajd.htm.* In 2006, the Commission's Inspector General found that the application process was not always timely and provided recommendations for improving the process. *See* SEC Inspector General Report, IM Exemptive Application Processing (Audit No. 408), Sept. 29, 2006.

[32] *See* U.S. Securities and Exchange Commission 2008 Performance and Accountability Report, at 40.

[33] *See* Fiscal Year 2019, Congressional Budget Justification Annual Performance Plan, Fiscal Year 2017, Annual Performance Report, at 99 *available at https://www.sec.gov/files/secfy19congbudgjust.pdf.* In addition to the Division's performance target for comments on initial filings, the Staff also began tracking and seeking the same target for comments on amendments.

[34] In fiscal year 2019, after the implementation of the new internal target, the Division provided comments within 90 days on 100% of applications.

[35] *See, e.g.,* Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sept. 25, 2019); Fund of Funds Arrangements, Investment Company Act Release No. 33329 (Dec. 19, 2018) (proposed rule). Earlier examples of rules replacing lines of routine applications include, among others, 17 CFR 270.3a–7 (rule 3a–7) excluding certain structured financings from the definition of ''investment company'' (Exclusion from the Definition of Investment Company for Structured Financings, Investment Company Act Release No. 19105 (Nov. 19, 1992) [57 FR 56248 (Nov. 27, 1992)]); amending 17 CFR 270.15a–4 (rule 15a–4) to address changes in control and acquisitions of investment advisers (Temporary Exemption for Certain Investment Advisers, Investment Company Act Release No. 24177 (Nov. 29, 1999) [64 FR 68019 (Dec. 6, 1999)]); and 17 CFR 270.17a–8 (rule 17a–8) addressing mergers of affiliated investment companies (Investment Company Mergers, Investment Company Act Release No. 25666 (July 18, 2002) [67 FR 48511 (July 24, 2002)]). *See also supra* footnote 23 and SEC Inspector General Report IM Exemptive Application Processing (Audit No. 408), Sept. 29, 2006, at 4.

[36] Several additional factors may affect the timing of the review including, for example, applicants' responsiveness to Staff comments, the number of pending applications, and market or other developments that affect the applicants' business plans.

[37] Our actions do not concern applications under the Investment Advisers Act of 1940 (''Advisers Act''). The Commission receives only a few applications under the Advisers Act each year, and these applications are filed on paper rather than electronically via the EDGAR system. *See www.sec.gov/rules/iareleases.shtml.* These applications are generally fact intensive, so they are less likely to qualify for an expedited review process like the one we are adopting here. *See, e.g.,* The Jeffrey Company, Investment Advisers Act Release Nos. 4659 (Mar. 7, 2017) (Notice of Application) and 4681 (Apr. 4, 2017) (Order) (family office application). *Cf. infra* footnote 67 and accompanying text.

for adequate time to consider requests for relief.

We believe that the new procedure will encourage applicants for expedited review to submit applications substantially identical to precedent, which will help facilitate Staff review. Accordingly, we should be able to grant relief that meets the applicable standards more quickly, and, in turn, devote additional resources to the review of more novel requests.[38] A more efficient application process will allow applicants to realize the benefits of relief more quickly than otherwise would be the case.[39] Further, we believe that the expedited review procedure will make the applications process less expensive for applicants, because we anticipate that it will reduce the number of Staff comments that would require a response and enable applicants to have more certainty regarding the timing of application processing. Generally, we believe fund shareholders will share in these benefits.

1. Eligibility for Expedited Review

Title 17 CFR 270.0–5(d)(1) (rule 0–5(d)(1)) provides that an applicant may request expedited review if the application is substantially identical to two other applications for which an order granting the requested relief has been issued within three years of the date of the application's initial filing.

''Substantially Identical'' Standard

Like the proposal, 17 CFR 270.0–5(d)(2) (rule 0–5(d)(2)) defines ''substantially identical'' applications as those requesting relief from the same sections of the Act and 17 CFR part 270, containing identical terms and conditions, and differing only with respect to factual differences that are not material to the relief requested.[40] We intend for applicants only to use the expedited procedure for routine applications that are substantially identical to precedent and seek the same relief that others have already received, so that additional consideration generally is unnecessary. The ''substantially identical'' requirement will help to ensure that applicants use the procedure only when they do not need to modify the terms and conditions of the precedent applications and are not raising new issues for the Commission to consider.[41] In addition, the requirement will help to ensure that applicants submit applications that include language that is substantially identical to the language of the precedent applications, which will facilitate Staff review.

Two commenters generally supported the proposed ''substantially identical'' standard to qualify for expedited review.[42] A number of other commenters, instead, suggested broadening this standard, as well as clarifying certain aspects of it.[43]

Commenters suggested several different modifications to our proposed ''substantially identical'' standard. A few commenters suggested that the standard be changed so that applications would need to be ''substantially identical in all applicable respects'' to precedent.[44] One of these commenters suggested that the Commission could require each applicant to explain in its expedited application why particular conditions in precedent are irrelevant.[45] Another commenter recommended that the expedited application's terms and conditions be substantially identical and differ only with respect to factual differences that are not material to the relief requested.[46] An additional commenter suggested that ''substantially identical'' be replaced with objective criteria, but did not provide specific suggestions, or that ''substantially identical'' be defined as differences ''not relevant in any material respects.''[47]

We are adopting the ''substantially identical'' standard largely as proposed. With the expedited process, we are seeking to create a new process that is both faster and more certain in its timing than the current process while maintaining sufficient time for the Staff to evaluate applications that may raise novel issues. The ''substantially identical standard'' accomplishes that because it makes the expedited procedure only available for applications that closely track precedent. In most cases under this standard, the Staff should be able to issue a notice within 45 days without issuing any comments to the applicant first.[48] Modifying the standard to permit more extensive differences from precedent applications would require the Staff to inquire about and consider the nature of these differences, which would frustrate the objective of creating a quick review process with increased certainty. Additionally, permitting more extensive differences from precedent would likely lead the Staff to issue more comments in the expedited process and/or transfer applications to the standard process, which could significantly impair our ability to achieve the objectives of the expedited process.

For the same reason, we are not, as some commenters suggested, modifying the rule to allow for ''mix and match'' precedent applications, *i.e.,* applications that combine portions or sections of different prior applications.[49] Applications that mix and match multiple precedents will not meet the ''substantially identical'' standard in the rule.[50] Different lines of applications often have sections that are interconnected with each other in particular ways. In the Staff's experience, the reviews of applications combining different lines of precedent require analysis of whether all the relevant terms and conditions have been carried forward appropriately and work together in a manner consistent with each of the relevant precedents. Such reviews have resulted in a significant number of comments, rendering such applications inconsistent with the approach to, and purpose underlying, the expedited process.

Several commenters requested clarifications relating to the ''substantially identical'' standard. One commenter asked the Commission to clarify the use of the word ''terms'' in the requirement that an expedited application must contain ''identical terms and conditions'' compared to precedent.[51] Reference to the ''terms'' of an application in rule 0–5(d)(2) means the representations in an application that are material to the requested relief. Terms are separate and apart from any

[38] The Staff will issue notices under delegated authority for applications reviewed under the expedited procedure.

[39] *See infra,* discussion in Section III.C.1.

[40] Factual differences not material to the relief requested might include the applicants' identities, the state of legal organization of a fund, and the constitution of the fund's board of directors.

[41] Even small changes to the terms and conditions of an application, compared to a precedent application, may either raise a novel issue or require a significant amount of time for the Staff to consider whether a novel issue is raised. *See supra* Section I.C.

[42] *See* Capital Group Comment Letter; Abigail Najera Comment Letter.

[43] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Fidelity Comment Letter; AIC Comment Letter.

[44] *See* ICI Comment Letter (''We also request that the Commission clarify that an application for expedited review may contain conditions that are substantially identical in all applicable respects with those set forth in prior precedent.''); Fidelity Comment Letter (suggesting that ''in place of the 'substantially identical' standard, an application for expedited review must contain terms and conditions that are substantially identical to prior precedent 'in all applicable respects' '').

[45] *See* ICI Comment Letter.

[46] *See* AIC Comment Letter.

[47] *See* SIFMA AMG Comment Letter.

[48] *See supra,* discussion in Section II.A about reducing the number of Staff comments.

[49] *See* ICI Comment Letter; Fidelity Comment Letter.

[50] *See* Proposing Release, *supra* footnote 2, at n. 29.

[51] *See* ICI Comment Letter.

express conditions included in the application.

The same commenter also asked the Commission to identify in detail any information in an application other than the requested relief and the registrant-provided conditions that must be substantially identical to prior precedent to meet the ''substantially identical'' requirement.[52] Based on the Staff's experience, applications that involve the same types of entities, request the same relief, and are subject to the same terms and conditions as precedent, would usually be ''substantially identical'' notwithstanding minor differences, such as different names and places of legal organization.[53] The reference to ''identical'' terms and conditions requires that not only the substance of the terms and conditions be the same, but also that their wording be the same. Applications that are ''substantially identical'' may also have other factual differences not relating to the terms and conditions of the application.

In a similar vein, this commenter suggested that alternatively we issue standard template conditions for routine or frequently requested applications for exemptive relief.[54] Recent precedent would normally reflect the latest approved terms and conditions, so we do not believe creating a template would increase the effectiveness of the rule. We believe that when a line of applications becomes so routine that standard terms and conditions could be articulated, a better approach would be to consider codifying such relief in a new rule under the Act that would make applications unnecessary.[55] Further, as noted above, minor modifications would generally not disqualify an application from the expedited review process. Applicants may also use the standard review process to make more extensive modifications to develop new lines of relief.

Finally, another commenter requested that the Commission provide guidance regarding the objective criteria used to determine that an application is ''substantially identical'' to a precedent application (and therefore eligible for expedited review).[56] Under the rule amendments we are adopting, ''substantially identical'' applications are applications containing identical terms and conditions, and differing only with respect to factual differences that are not material to the relief requested. While it is impossible to identify what all those factual differences may be for any future line of expedited applications, we believe that filed applications that have been approved, including any amendments thereto, will provide additional useful guidance to applicants in this respect.

Number of Precedents

Under the rule as adopted, an application may be filed under expedited review if it is substantially identical to two precedent applications for which an order granting the requested relief has been issued within three years of the date of the application's initial filing.[57] Some commenters suggested that we only require one precedent application to qualify for expedited review.[58] One of these commenters opined that where the Commission is comfortable enough to provide relief to one applicant, subsequent applicants that meet the requirements should receive the same treatment.[59] Other commenters, instead, agreed with our proposal that two precedents is an appropriate number to qualify for an expedited review process.[60]

After considering these comments, we continue to believe that requiring a minimum of two precedents is appropriate. As one of the commenters supporting our proposal noted, two prior precedents demonstrate that a line of relief is established so that a faster review is appropriate, while minimizing burdens on applicants.[61]

Lookback Period

We proposed to require that the precedents used for expedited review have been issued within the last two years prior to the filing of the application in question.[62] The proposed two-year requirement was designed to help ensure that the precedents are relatively recent, so that in most cases, it is less likely that there would be questions as to whether the terms and conditions of the precedent applications are still appropriate. We requested comment on whether the two year standard was appropriate. After consideration of the comments we received, discussed further below, we are extending the lookback period to three years.

One commenter believed our proposed two-year lookback period was too long given the rate of change in the investment management industry, and said it should be 18 months.[63] Most commenters, however, thought it was too short. They argued that it should be five years to make the expedited procedure more widely available considering that there may be lines of applications that continue to be routine even if the Commission has not approved two applications in that line within the last two years.[64] Several of these commenters also proposed alternative options. One commenter proposed an alternative of one application within three years, and two within five years.[65] Another commenter proposed an alternative of one application within two years, and two within five years.[66]

In choosing the proposed lookback period, we sought to make the expedited procedure available only when more limited review is needed to ensure that an application include terms and conditions that justify granting the requested relief. Accordingly, we sought to exclude from expedited review applications that used older precedent, which the Staff would need to reevaluate in light of industry and regulatory developments.

We believe that extending the lookback period to five years would frustrate our goal of creating a quicker and more efficient review process for appropriate applications. In particular, the Staff needs to review all applications that were approved after the precedent that applicant is relying on to ensure that the precedent includes up to date terms and conditions, and is otherwise consistent with the Commission's current policies. As a

[52] *See id.*

[53] Some commenters expressed concern about whether applicants with different affiliate structures from precedent applications would be able to satisfy the ''substantially identical'' standard. *See* ICI Comment Letter; Fidelity Comment Letter. To the extent that an applicant's affiliate structure is material to the relief requested, the applicant would not be able to meet the ''substantially identical'' standard.

[54] *See* ICI Comment Letter.

[55] Several commenters encouraged the Commission periodically to codify exemptive relief in rules. *See* Diane Smith Comment Letter; ICI Comment Letter.

[56] *See* SIFMA AMG Comment Letter.

[57] *See* rule 0–5(d)(1). An application may be filed under expedited review if it is substantially identical to more than two qualifying precedent applications as well. However, such an application would include exhibits with marked copies showing changes from only two qualifying precedent applications and an accompanying cover letter explaining why those two precedents were chosen. *See* 17 CFR270.0–5(e)(2) (rule 0–5(e)(2)) and (e)(3) (rule 0–5(e)(3)).

[58] *See* SIFMA AMG Comment Letter; Stradley Comment Letter.

[59] *See* SIFMA AMG Comment Letter.

[60] *See* ICI Comment Letter; Fidelity Comment Letter.

[61] *See* ICI Comment Letter.

[62] *See* Proposing Release, *supra* footnote 2, at 13.

[63] *See* Abigail Najera Comment Letter (18 months would ''ensure immediate relevance'' of the precedents selected).

[64] *See* AIC Comment Letter; Fidelity Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter; Stradley Comment Letter.

[65] *See* AIC Comment Letter.

[66] *See* SIFMA AMG Comment Letter.

result, the longer the lookback period is, the longer the review process needs to be. Based on Staff review of application filings, we believe that most lines of applications appropriate for the expedited review process will have at least two precedents in the two-year time period we proposed. We also believe extending the lookback period to three years in response to commenters' views will provide applicants with additional flexibility, without frustrating our goals described above. Accordingly, we are modifying the lookback period to three years.

Because we are extending the lookback period in response to the comments we received, to facilitate Staff review, we have revised the rule to require applicants to explain in their cover letter why they chose the particular precedents they are using. If more recent precedents were available, the applicant must explain why the precedents used, rather than the more recent precedents, are appropriate. This new provision will help ensure that applicants will only use older precedent when there is a good reason for doing so and will support the efficiency of the process by aiding the Staff's review of whether the precedent is appropriate.

Lines of Applications That Might Not Qualify for Expedited Review

Our proposal stated that certain kinds of applications appeared highly unlikely to be suitable for expedited review. These included, for example, applications filed under sections 2(a)(9), 3(b)(2), 6(b), 9(c), and 26(c) of the Act.[67] We explained that these types of applications are generally too fact-specific for applicants to be able to meet the substantially identical standard. Our proposal also said that other lines of applications would also usually not meet the standard for expedited review.[68]

In our proposal, we requested comment on whether these types of applications are unlikely to be suitable for expedited review and whether the proposed rule should explicitly exclude them from expedited review.

Some commenters argued that the rule should explicitly exclude certain types of applications, with one commenter recommending that we should exclude all of the applications discussed, as the Commission did in its 1993 expedited review proposal,[69] to avoid creating uncertainty about such applications.[70] Other commenters suggested excluding applications under section 26(c) of the Act,[71] or applications that ''change the deal'' on investors, saying that such applications should only be granted sparingly after appropriate and due consideration.[72]

Another commenter disagreed with our statement in the Proposing Release that co-investment applications would usually not meet the standard for expedited review.[73] This commenter stated that co-investment applications could satisfy the ''substantially identical'' standard, and that they should be eligible for expedited review.[74]

After considering these comments, we are not explicitly excluding any particular types of applications from expedited review. We continue to believe, based on Staff experience, that certain lines of applications will generally not satisfy such standard because they are too fact specific to meet the substantially identical standard, as discussed above.[75] That is, while the terms and conditions may be substantially identical, the Staff looks at particular facts and circumstances outlined in the application to evaluate whether the requested relief meets the applicable standard.[76] Were circumstances to arise, however, in which an application in those lines can satisfy the ''substantially identical'' standard, the Staff may be able to proceed under expedited review.[77] If rule 0–5 explicitly excluded those applications from expedited review, the Staff would not have such option regardless of whether the application in substance is suited for expedited review. We believe that maintaining this flexibility is important so as not to frustrate the purpose of the rule.

2. Additional Information Required for Expedited Review

Applicants seeking expedited review will need to include certain information with the application under 17 CFR 270.0–5(e) (rule 0–5(e)), as we had proposed. Title 17 CFR 270.0–5(e)(1) (rule 0–5(e)(1)) requires that the cover page of the application include a notation prominently stating ''EXPEDITED REVIEW REQUESTED UNDER 17 CFR 270.0–5(d).'' This requirement will assist the Staff in quickly identifying and effectively processing the request for expedited review. Rule 0–5(e)(2) requires applicants to submit exhibits with marked copies of the application showing changes from the final versions of the two precedent applications. These exhibits will help the Staff to readily discern any variations between the application seeking expedited review and the precedent applications. Rule 0–5(e)(3) requires an accompanying cover letter, signed, on behalf of the applicant, by the person executing the application, (i) identifying the two substantially identical applications that serve as precedent, explaining why the applicant chose those particular precedents, and, if more recent applications of the same type have been approved, why the precedents chosen, rather than the more recent applications, are appropriate; and (ii) certifying that the applicant believes the application meets the requirements of 17 CFR 270.0–5(d) (rule 0–5(d)) and that the marked copies required by rule

[67] *See e.g.,* Bridgeway Capital Management, Inc., Investment Company Act Release Nos. 28685 (Apr. 1, 2009) (Notice of Application) and 28716 (Apr. 28, 2009) (Order) (declaration regarding control, section 2(a)(9) application); Exact Sciences Corporation, Investment Company Act Release Nos. 33228 (Sept. 14, 2018) (Notice of Application) and 33267 (Oct. 11, 2018) (Order) (inadvertent investment companies, section 3(b)(2) application); Hudson Advisors L.P., et al. Investment Company Act Release Nos. 32804 (Aug. 31, 2017) (Notice of Application) and 32834 (Sept. 26, 2017) (Order) (employees securities company, section 6(b) application); Charles Schwab & Co. Inc. and Charles Schwab Investment Management, Inc., Investment Company Act Release Nos. 33157 (July 10, 2018) (Notice of Application) and 33195 (Aug. 7, 2018) (Order) (ineligible—disqualified firm, section 9(c) application); AXA Equitable Life Insurance Company, et al., Investment Company Act Release Nos. 33201 (Aug. 15, 2018) (Notice of Application) and 33224 (Sept. 11, 2018) (Order) (fund substitution, section 26(c) application).

[68] *See* Proposing Release, *supra* footnote 2, at n.32. *See infra* footnote 75.

[69] *See supra* footnote 30.

[70] *See* Comment Letter of John Smith (Nov. 29, 2019) (''John Smith Comment Letter'') (noting that when the Commission proposed expedited review procedures in 1993, it explicitly excluded certain types of applications, and that in the Proposing Release we did not explain why we are reversing that position).

[71] *See* Capital Group Comment Letter (stating that the Commission's and Staff's role in evaluating these applications is critical because they present conflicts of interest in which investors' judgment is being replaced).

[72] *See* Ed Snoke Comment Letter (pointing, as examples, to substitution and multi-class applications).

[73] *See* AIC Comment Letter.

[74] *See id.*

[75] In addition to the lines of applications discussed in our proposal, investment company deregistration applications filed under section 8(f) are also unlikely to be suitable for expedited review.

[76] For example, when considering applications seeking an order under section 3(b)(2) of the Act declaring an applicant to be engaged in a business other than that of investing, reinvesting, owning, holding, or trading securities, we examine, among other things, the applicant's historical development, public representations of policy, directors' and officers' activities, as well as the nature of the applicant's assets and the sources of its income. *See e.g.,* Lyft, Inc., Investment Company Act Release Nos. 33399 (Mar. 14, 2019) (Notice of Application) and 33442 (Apr. 8, 2019) (Order).

[77] Co-investment applications that meet the substantially identical standard will also be eligible for expedited review. *See supra* footnote 68, Proposing Release at footnote 32.

0–5(e)(2) are complete and accurate.[78] These requirements are largely the same as proposed, with one modification to include the requirement, discussed in Section II.A.1 above, to explain why the applicant chose particular precedents.

We requested comment on whether the proposed requirements were appropriate. One commenter supported our proposed requirement for this additional information, saying that it did not believe the requirements would be unduly burdensome.[79] Another commenter suggested that even if we require two precedents, marked copies against both precedents would be redundant and of limited value, and we should only require one marked copy.[80] The commenter further stated that the cover letter and certification are also unnecessary because the marked copy will indicate the precedent used, and the notation on the cover page indicates that the applicant believes that the application qualifies for expedited review. The commenter suggested that we could instead require applicants seeking expedited treatment to expand the verification required by 17 CFR 270.0–2(d) (rule 0–2(d) under the Act) to verify that the marked copies submitted to qualify for expedited treatment are complete and accurate to the best of the signer's knowledge.[81]

After considering these comments, we continue to believe that the additional information we are requesting will help ensure the expedited procedure works as intended without being unduly burdensome to applicants. First, we believe it is necessary for the Staff to review marked copies of the application against both precedents submitted in order to allow the Staff to verify whether the new application is substantially identical to both such precedents. Second, while we understand that the fact that an application is filed for expedited review, as indicated by its cover page notation, may implicitly convey that the applicant believes it qualifies for expedited review, the requirement for a certification in the cover letter should work to ensure that applicants have confirmed that the application meets all the requirements for the expedited review.[82] Expanding the verification required by rule 0–2(d), as suggested by one commenter, would not serve the same function as this requirement because rule 0–2(d) does not address the qualification requirements of the new expedited review process. Additionally, because the applicants make, review, and submit to the Commission the marked copies, we believe they can certify that such marked copies are complete and accurate. Accordingly, we are adopting 17 CFR 270.0–5(e) (rule 0–5(e)) substantially as proposed.

3. Expedited Review Timeframe

Under 17 CFR 270.0–5(f), a notice for an application submitted for expedited review will be issued no later than 45 days from the date of filing[83] unless the applicant is notified that the application is not eligible for expedited review because (i) it does not meet the criteria in rule 0–5(d) or rule 0–5(e), or (ii) additional time is necessary for appropriate consideration of the application. We have changed the timeline for the Staff's review of unsolicited amendments, as discussed below. We are also modifying this portion of the rule to clarify that an application will not be eligible for the expedited review procedure if it does not comply with the requirements of rule 0–5(e).

We proposed 45 days as the timeframe for expedited review, based on the Division's experience considering and acting on routine applications. Commenters were generally supportive of the 45-day timeframe.[84]

While we anticipate that the notice for an application meeting rule 0–5(d)'s criteria will typically be issued within the 45-day timeline, there may be situations where further consideration is necessary for appropriate consideration of the application.[85] These may include, for example, cases where the Commission is considering a change in policy that would make the requested relief, or its terms and conditions, no longer appropriate. There also may be cases where the Staff is investigating potential violations of Federal securities laws that may be relevant to the request for relief.[86] In such cases, the Staff might not be in a position to make a determination on the application at the end of the 45-day period.

If the Staff notifies the applicant under rule 0–5(f)(1)(ii) that an application is not eligible for expedited review, it will give the applicant the option to either withdraw the application or amend it to make changes so that the application could proceed outside of the expedited review process. In connection with the amendments to rule 0–5, we are also amending 17 CFR 200.30–5 to delegate to the Division Director the authority to notify an applicant under rule 0–5(f)(1)(ii) that an application pursuant to the Act is not eligible for expedited review under rule 0–5.

Certain conditions will govern the operation of the 45-day time period. We proposed that the 45-day period would restart upon the filing of any amendment that the Commission or Staff did not solicit because the Staff would need additional time to review the change or changes made in such an amendment.

Several commenters had suggestions for modifying the timeframe for unsolicited amendments in expedited review.[87] One commenter stated that applicants sometimes amend applications to correct or update factual information that is immaterial to the legal analysis or request for relief.[88] This commenter and others recommended that we instead establish a 14-day pause for immaterial unsolicited amendments, and a 45-day period only for material unsolicited amendments.[89] Another commenter suggested that the review period for unsolicited amendments be limited to 14 days when the applicant provides the Staff with a representation

[78] Section 34(b) of the Act makes it unlawful for any person to make any untrue or misleading statement of material fact in any registration statement, application, report, account, record, or other document filed or transmitted under the Act, or to omit from any such document any fact necessary in order to prevent the statements made therein from being materially misleading. We recognize that in certain cases an applicant and its counsel may view an application to be ''substantially identical'' under rule 0–5(d)(2), even if the application is ultimately found not to meet such requirement under 17 CFR 270.0–5(f)(1)(ii) (rule 0–5(f)(1)(ii)). Complete and accurate marked copies must, among other things, show the changes in the application from the final versions of the two precedents that were filed on EDGAR (as opposed to earlier drafts).

[79] *See* ICI Comment Letter.

[80] *See* Stradley Comment Letter.

[81] *See id.*

[82] To the extent applicants' confirmation helps prevent the submission of applications that are not suitable for expedited review, Staff time and resources will not be spent unnecessarily, and our overall objective of efficiency will be furthered.

[83] Notice of the application, followed by an order concluding the matter, will be issued under current rule 0–5(a) and (b), respectively.

[84] *See, e.g.,* ICI Comment Letter; Fidelity Comment Letter; SIFMA AMG Comment Letter; SBIA Comment Letter.

[85] One commenter, noting that our proposed new rule for applications outside of expedited procedure states that it does not create enforceable rights, suggested that we clarify whether the new expedited review process creates an enforceable right for applicants, and if so, what possible damages would be. *See* John Smith Comment Letter. The creation of a new expedited process under rule 0–5 does not create any enforceable rights (in judicial proceedings or otherwise).

[86] To the extent such circumstances are nonpublic and are not known to the applicant, the Staff may not be able to inform the applicant of the reason for the delay.

[87] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Fidelity Comment Letter.

[88] *See* ICI Comment Letter.

[89] *See* ICI Comment Letter; Fidelity Comment Letter.

that the amendment does not contain material changes and the applicant supplies a marked copy of the amendment highlighting the changes from the previous filing.[90]

We understand that these modifications would provide applicants more flexibility to make changes to their application without triggering another 45-day review period. We believe, however, that it is important for the benefits created by such flexibility to justify the resulting burden on the review process. Accordingly, we are changing the timeline for Staff review of unsolicited amendments to 30 days. The expedited process rule that we are adopting pauses the 45-day review period upon the filing of an unsolicited amendment, and the 45-day review period resumes running on the 30th day after such amendment is filed.[91] Notwithstanding this provision, however, the Staff may act before the end of such pause, if the unsolicited amendment only encompasses minor changes. We believe that this modification will increase applicants' flexibility to revise their applications by shortening the resulting potential extension of the timeline, while still providing the Staff with sufficient time to review such unsolicited changes.

In addition, as proposed, any comment by the Staff requesting a modification of the application will pause the 45-day period. Although the Commission anticipates that the Staff will issue few such comments on an application that qualifies for expedited review, there may be times when a comment is necessary, for example, to either reflect an event that occurred after the application was filed or to resolve technical matters.[92] There may also be times when a revised term or condition is being added in a line of routine applications and the Staff may ask applicants to make corresponding changes to their application.

The amended rule provides that the 45-day period will pause upon such a request by the Staff and will resume 14 days after the filing of an amended application that is responsive to such request. The Staff will need the additional time to review the amended application and determine whether a notice can be issued under 17 CFR 270.0–5(f)(1)(i). Based on the Division's experience regarding amendments to routine applications, we are adopting 14 days as the appropriate amount of time for the Staff to make this determination. Commenters were supportive of this aspect of the rule.[93]

Additionally, the rule provides that the 45-day period will pause upon any irregular closure of the Commission's Washington, DC office to the public for normal business, including, but not limited to, closure due to a lapse in Federal appropriations, national emergency, inclement weather, or ad hoc Federal holiday. The 45-day period will resume upon the reopening of the Commission's Washington, DC office to the public for normal business.[94]

The rule further provides that, if applicants do not file an amendment responsive to the Staff's requests for modification within 30 days of receiving such requests, including a marked copy showing any changes made and a certification that such marked copy is complete and accurate, the application will be deemed withdrawn.[95] This withdrawal will be without prejudice, but if the applicant were to resubmit the application, a new timeframe would begin. In adopting this rule, we are committing to processing routine applications promptly. We believe that applicants seeking to benefit from the expedited processing should act expeditiously.[96]

### *B. Timeframe for ''Standard Review'' of Applications*

In addition to an expedited review process, the Commission is also adopting a rule to provide a timeframe for all other applications filed under rule 0–5. We believe that rule 17 CFR 202.13 will provide applicants with added transparency regarding the timing of the review of applications. Currently, the Division uses an internal performance timeline to govern the timing of Staff responses to applications and amendments. While the Staff in recent years has been successful in meeting the applicable timeline, and has recently moved to the same 90-day timeline set forth by the proposed rule,[97] the rule should result in a more transparent timeline, including the time at which the Staff would forward an application to the Commission. We are modifying the rule from the proposal to shorten the timeline for Staff action in some instances.

Under the rule we are adopting, the Staff should take action on the application within 90 days of the initial filing and each of the first three amendments thereto, and within 60 days of any subsequent amendment.[98] In addition, the Staff may grant 60-day extensions, and applicants should be notified of any such extension.[99]

For the purposes of the rule, and as proposed, action on an application or amendment consists of (i) issuing a notice of application; (ii) providing the applicants with comments; or (iii) informing the applicants that the application will be forwarded to the Commission, in which case the application is no longer subject to paragraph (a) of the rule.[100] If the Staff does not support the requested relief, the Staff typically notifies applicants that it would recommend that the Commission deny the application and gives applicants the opportunity to withdraw the application before such recommendation is made.[101]

We requested comment on this timeframe for ''standard review'' of applications.[102] There was broad support generally for our proposed 90-day timeframe for initial applications.[103] Several commenters recommended limiting the Staff's ability to extend the review period or reducing the Staff's time to review amendments. One commenter suggested that the Commission enumerate the circumstances upon which the Staff can grant itself 90-day extensions, and/or provide only the Division Director the ability to grant extensions on matters not enumerated but substantially similar to those described in the rule.[104]

[90] *See* SIFMA AMG Comment Letter.

[91] *See* 17 CFR 270.0–5(f)(2)(i)(B).

[92] In cases where an application is not substantially identical to precedent, the Staff will notify the applicant under rule 0–5(f)(1)(ii) that the application is not eligible for expedited review. Using the comment process to ensure that an application is substantially identical to precedent would require Staff time and defeat the purpose of the expedited review process. *See supra* Section II.A.1. We believe that, as applicants gain familiarity with the ''substantially identical'' standard in practice, the application process will run smoothly.

[93] *See* Fidelity Comment Letter; ICI Comment Letter.

[94] *See* 17 CFR 270.0–5(f)(2)(i)(C).

[95] *See infra* footnote 119.

[96] If an applicant takes longer than 30 days to respond to Staff comments, the application may not be appropriate for expedited review.

[97] *See supra* Section II.B.

[98] As with the expedited review process, the standard review period will also pause upon any irregular closure of the Commission's Washington, DC office to the public for normal business. *See* 17 CFR 202.13(a).

[99] The provisions of this rule, including the timeframes provided for, are not intended to create enforceable rights by any interested parties and shall not be deemed to do so. Rather, this rule provides informal non-binding guidelines for the Division and procedures that the Commission anticipates the Division following. *See* 17 CFR 202.13(c).

[100] *See* 17 CFR 202.13(b).

[101] *See supra* footnote 16.

[102] *See* Proposing Release, *supra* footnote 2, at 22.

[103] *See, e.g.,* ICI Comment Letter; Fidelity Comment Letter; SIFMA AMG Comment Letter.

[104] *See* ICI Comment Letter. The commenter further recommended that the Commission require the Division Director to review and/or approve additional extensions beyond the first 90-day extension. While it might not be practicable for the

Continued

Two commenters suggested ways of constraining the Staff's ability to grant multiple 90-day extensions.[105] One of those commenters recommended that the Commission consider a deadline for final action on standard review applications.[106] The other commenter stated that the ability to issue unlimited 90-day extensions would undermine the efficacy of the proposed standard review timeframe, and suggested an approach similar to expedited review in which the 90-day period would pause, as opposed to restart, for the comment process, and only restart upon applicants filing an unsolicited amendment.[107]

Three commenters suggested shortening the length of the extensions and reducing the review time for amendments.[108] One commenter suggested extensions should be for 30 days, so that the maximum internal deadline would be 120 days, absent an amendment.[109] Another commenter stated that a 90-day extension period is excessive and that it should be shortened to 45 days.[110] That commenter said that because Staff reviews of subsequent amendments are not *de novo,* they should not take as long as the review of the initial application filing.[111] Another commenter recommended that for applications under standard review, the Staff have 14 business days to review solicited amendments and immaterial unsolicited amendments, and 90 business days to review material unsolicited amendments.[112]

In addition to comments regarding the timeframe, we received a few comments that addressed whether Staff action should be required. One commenter stated that the proposed rule would undermine the Commission's policy goals because it only states that the Staff ''should take action'' without actually requiring Staff action within 90 days. The commenter suggested that we require Staff action or communication to the applicant to occur within 90 days.[113] That commenter further suggested that any such required actions or communications include providing applicants with substantive status updates, such as whether the Division has shared the applications with another Commission division.[114] Another commenter recommended that we require the Staff to provide applicants with an update regarding the status of their application at approximately the mid-point of the review period.[115]

We are adopting the rule with modifications to address some concerns raised by commenters. Our intention is to provide applicants with more transparency and certainty regarding the timing of the review of applications. At the same time, it is essential that the Staff retain the ability to appropriately consider the relevant legal and policy issues. By filing an application, applicants are seeking exemptions or other relief under the Act. The Division may grant such relief under delegated authority only if the applicable standard is satisfied. Accordingly, the rule must preserve some flexibility for situations where more time is needed for appropriate consideration of an application. If the rule were to limit the number of extensions, and the Staff were not in the position to approve an application under delegated authority, the Staff might be unable to recommend that the Commission approve the application. Such a result would make the application process less efficient than the alternative of a further extension.

In response to the concerns raised about the possibility of the comment process extending too long, however, the final rule provides for shorter timelines than those we proposed in order to provide shorter timeframes for Staff review of certain subsequent amendments. In particular, the rule provides that after the third amendment to an application, the Staff should take action on any subsequent amendments within 60 days of their filing.[116] We also are decreasing the length of any extensions to the timelines by the Staff from 90 days to 60 days.[117] We believe these changes will help move the review process towards its conclusion, while at the same time preserving the flexibility that the Staff needs to make sure that the requested relief satisfies the relevant statutory standard.

Applicants' responsiveness to Staff comments is an essential component of a successful and timely application process. We have previously stated that the Staff should not have to spend an inordinate amount of time processing clearly deficient applications at the expense of delaying action on other applications.[118] Consistent with this longstanding policy, if the Staff issues comments on an application and the next amendment filed is not responsive to those comments, the Staff will repeat such comments, direct the applicant to explain why the comments were not addressed, or potentially recommend that the Commission deny the application.

Finally, we do not support imposing specific requirements for communication between the Staff and applicants. At the outset of each review, the Staff provides applicants with the contact information for the Staff. Our Staff is always available to applicants and, in fact, applicants frequently contact the Staff to inquire about their application's current status. We also do not believe the Staff should be required to notify applicants if the Division shares their application with another Commission division, because such communications may involve nonpublic internal deliberations. Accordingly, we do not believe that communication schedules fixed by rule are needed to foster more effective communication.

### *C. Applications Deemed Withdrawn Under the Standard Review Process*

The Commission is also amending rule 0–5 to deem an application withdrawn if the applicant does not respond in writing to Staff comments. Deeming inactive applications withdrawn will both assist us in maintaining a clear record of pending applications, as well as provide the public, including potential new applicants, with a better sense of the applications that the Commission is actively considering at any given time.

Rule 0–5(g) provides that, if an applicant has not responded in writing to a request for clarification or modification of an application filed under this section within 120 days after

Director only to be able to review and approve extensions, we expect that the Division will review and approve such extensions in situations where necessary for the appropriate consideration of an application.

[105] *See* Stradley Comment Letter; Fidelity Comment Letter.

[106] *See* Stradley Comment Letter.

[107] *See* Fidelity Comment Letter.

[108] *See* Stradley Comment Letter; SIFMA AMG Comment Letter; ICI Comment Letter.

[109] *See* Stradley Comment Letter.

[110] *See* SIFMA AMG Comment Letter.

[111] *See id.*

[112] *See* ICI Comment Letter.

[113] *See id.*

[114] *See id.*

[115] *See* SIFMA AMG Comment Letter.

[116] *See* 17 CFR 202.13(a). We do not believe that the review process for amendments to applications should always be shorter than the initial review. With many novel applications, or other applications departing from precedent, the Staff's initial comments typically identify threshold issues, which the Staff then considers more in depth in subsequent reviews of the application, on the basis of the applicants' responses. The Staff's review of those responses, as well as discussions on how to address those issues in the applications, often take more time than the review of the initial filing. Accordingly, we do not believe that a shorter review period for the first few amendments is appropriate.

[117] *See* 17 CFR 202.13(a).

[118] *See* Commission Policy and Guidelines for Filing of Applications for Exemption, Investment Company Act Release No. 14492 (Apr. 30, 1985).

the request, the application will be deemed withdrawn.[119] The withdrawal will be without prejudice and the applicant would be free to refile, however the timeline would restart with the new application.[120]

One commenter said that it did not have any recommendations regarding this aspect of our proposal, but requested clarification of how the Staff would treat an application that the Staff requests to be withdrawn and an applicant declines to withdraw.[121] Withdrawals under rule 0–5(g) will happen by operation of law. Applicants will not need to take any affirmative action to cause the withdrawal.

Another commenter suggested that applicants be able to request extensions to the response period before withdrawal occurs to ensure that Staff comments and applicant responses are not made public prematurely.[122] We believe this concern is now moot given we are not moving forward at this time with publicly disseminating Staff comments on applications, and responses to those comments, as discussed below.[123]

*D. Release of Comments on Applications and Responses*

Finally, in our proposal we announced our intention to begin to disseminate publicly Staff comments on applications, and responses to those comments and stated that we believed it would improve the transparency of the application process.

Most commenters recommended against public dissemination of Staff comments and responses, expressing a number of concerns.[124] First, they argued that public dissemination would discourage innovation in the fund industry and thwart open dialogue between applicants and the Staff.[125] The commenters noted that applications may present novel ideas and explained that initial applicants would become reluctant to share proprietary information with the Staff regarding these ideas, given that dissemination of such information could provide competitive advantages to third parties.[126] Second, commenters believe that public dissemination may also lead to increased confidential treatment requests for materials filed in connection with applications, thus substantially increasing the administrative burden on applicants and the Staff.[127] Further, to avoid the dissemination of information, applicants may choose to communicate with the Staff orally rather than in writing, which would make communications with the Staff less effective in sharing relevant information.[128] Consequently, the commenters believe that public dissemination of comments and responses to those comments would generally increase burdens on applicants and the Staff and make the application process less efficient.[129]

Third, commenters opposing public dissemination noted that information disclosed would be of little utility to investors, given it is not the type of information relevant to investment decisions.[130] The commenters were also concerned that the information may be confusing to the public given that written correspondence from various stages in the review of an application may present an incomplete picture of the review process and the resolution of the relevant issues.[131]

Some commenters also distinguished the applications process from the review of disclosure filings, for which the Staff currently publicly disseminates comments.[132] In particular, the commenters noted that certain registration statement amendments can become effective automatically, and thus there may be benefit to publishing comments because there would be no other public record.[133] Conversely, applications do not have automatic effectiveness; applicants file and amend an application publicly, and such amended application, together with the Commission notice of an application, provide a fulsome record of the issues considered during the application's review.[134]

However, some commenters supported public dissemination of comments and responses to comments. Those commenters believed that it would be beneficial for future applicants to be able to review the Staff's comments and applicants' responses, enhancing transparency.[135]

While the Commission plans to continue to consider publicly disseminating Staff comments and response to those comments, the comment letters discussed above raised issues with respect to this proposal that merit further consideration. Accordingly, comments and responses will not be disseminated at this time.

*E. Other Matters*

Pursuant to the Congressional Review Act,[136] the Office of Information and Regulatory Affairs has designated these amendments as not ''a major rule,'' as defined by 5 U.S.C. 804(2). If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

## III. Economic Analysis

*A. Introduction*

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 2(c) of the Act states that when the Commission is engaging in rulemaking under the Act and is required to consider or determine whether the action is necessary or

[119] An application requesting expedited review will not be subject to this withdrawal provision because under rule 0–5(f)(2)(iii), it will be deemed withdrawn if the applicant has not filed an amendment responsive to a Staff request for modifications within 30 days.

An applicant can request to withdraw an application with a letter filed as form APP–WD on EDGAR, with the corresponding permission being filed as form APP–WDG on EDGAR. The Staff will reflect that an application is deemed withdrawn under rule 0–5(g) by uploading a form APP–WDG on EDGAR, without need for any action by the applicant. The Staff intends to reflect the withdrawal by uploading the form APP–WDG generally within 30 days after the end of the 30-day period for expedited applications and the 120-day period for other applications.

[120] Under rule 17 CFR 203.13, the 90-day timeline for Staff comments applies to all new applications even if a predecessor withdrawn application was subject to the 60-day timeline applicable to certain amendments.

[121] *See* ICI Comment Letter.

[122] *See* SIFMA AMG Comment Letter.

[123] *See infra,* discussion in Section II.D.

[124] *See* ICI Comment Letter; IAA Comment Letter; Fidelity Comment Letter; SIFMA AMG Comment Letter; Stradley Comment Letter.

[125] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Stradley Comment Letter.

[126] *See* ICI Comment Letter.

[127] *See* ICI Comment Letter; IAA Comment Letter; Fidelity Comment Letter; SIFMA AMG Comment Letter; Stradley Comment Letter.

[128] *See* ICI Comment Letter; SIFMA AMG Comment Letter.

[129] *See* ICI Comment Letter; Fidelity Comment Letter; Stradley Comment Letter.

[130] *See* ICI comment letter; Fidelity Comment Letter; SIFMA AMG Comment Letter.

[131] *See* Stradley Comment Letter. *See also* Fidelity Comment Letter.

[132] In our proposal, we noted that dissemination of comments on applications and responses to those comments would follow a process similar to the process that the Division of Investment Management's Disclosure Review and Accounting Office uses to publicly disseminate comment letters and responses on disclosure filings.

[133] *See* ICI Comment Letter.

[134] *See* ICI Comment Letter; Stradley Comment Letter.

[135] *See* Capital Group Comment Letter. *See also* Ed Snoke Comment Letter and Diane Smith Comment Letter (suggesting release of comments at the time of the notice to help for the basis for any hearing request on the application). We note that the publicly available application as well as the Commission notice of the application provide the public with the relevant information on which to base a hearing request.

[136] 5 U.S.C. 801 *et seq.*

appropriate in (or, with respect to the Act, consistent with) the public interest, the Commission shall consider whether the action will promote efficiency, competition, and capital formation, in addition to the protection of investors. The following analysis considers the potential economic effects that may result from amended rule 0–5, including the benefits and costs to applicants and other market participants as well as the broader implications of the rule for efficiency, competition, and capital formation.

Amended rule 0–5 creates an expedited review process for applicants whose application is substantially identical to two previously approved precedential applications. The rule further provides that an application for relief will be deemed withdrawn if the applicant does not respond in writing within 120 days of a request for clarification or modification of the application.[137] Overall, we anticipate that these amendments will benefit both applicants and investors by allowing eligible applicants to realize the benefits of relief more quickly than under the current process, which generally will be shared with fund shareholders. Additionally, we expect the amendments to result in cost savings associated with the application process, which could be passed on to investors. As discussed below, we anticipate that we will receive approximately 50 applications per year seeking expedited review under the Act.

The scope of the benefits and costs of amended rule 0–5 depends on the expected volume of applications generally as well as the expected volume of applications for expedited review in particular. Those benefits and costs also depend on the extent to which applicant experience under amended rule 0–5 is expected to differ from current experience. Below, we describe the number of applications as well as the time the Commission takes in responding to such applications.

*B. Economic Baseline*

1. Applications for Relief

The table below reports the number of initial applications by category and calendar year for 2017, 2018, and 2019.[138]

| Exemption type [1] | 2017 | 2018 | 2019 | Total |
|---|---|---|---|---|
| 12(d)(3) | 0 | 1 | 0 | 1 |
| Affiliated Sales | 2 | 2 | 0 | 4 |
| Business Development Companies | 1 | 2 | 1 | 4 |
| Co-Investment | 21 | 15 | 14 | 50 |
| Deregistration | 0 | 0 | 1 | 1 |
| Distributions | 1 | 4 | 1 | 6 |
| Employees Securities Company | 4 | 1 | 2 | 7 |
| Exchange-Traded Funds | 39 | 33 | 22 | 94 |
| Family Office | 0 | 1 | 0 | 1 |
| Fund of Funds—Multi-Group | 9 | 3 | 2 | 14 |
| Inadvertent Investment Companies | 1 | 0 | 0 | 1 |
| Ineligible—Disqualified Firm | 1 | 1 | 0 | 2 |
| Insurance Products | 4 | 2 | 1 | 7 |
| Inter-fund Lending | 5 | 1 | 3 | 9 |
| Interval Funds | 2 | 0 | 0 | 2 |
| Joint Transaction | 0 | 3 | 0 | 3 |
| Multi-Class | 11 | 9 | 5 | 25 |
| Multi-Manager | 14 | 9 | 6 | 29 |
| Other | 8 | 10 | 11 | 29 |
| Unit Investment Trusts—Other | 1 | 0 | 1 | 2 |
| Total | 124 | 97 | 70 | 291 |

[1] *See* U.S. Securities and Exchange Commission, Investment Company Act Notices and Orders: Category Listing, available at *https://www.sec.gov/rules/icreleases.shtml.*

Among the 291 applications shown in the above table, the largest broad categories of applications are applications related to exchange-traded funds (94, or 32 percent of applications) and applications related to co-investment (50, or 17 percent of applications).[139] Together, these two categories of applications make up 144, or 49 percent of applications from 2017 to 2019.

The table below reports the number of amended filings associated with the 291 initial applications from 2017 to 2019, for those initial applications that resulted in notices from 2017 to 2019.[140]

NUMBER OF AMENDED FILINGS

| 0 | 1 | 2 | 3 | 4 | >4 | Total |
|---|---|---|---|---|---|---|
| 42 | 90 | 39 | 17 | 9 | 5 | 202 |

[137] *See supra* footnote 119.

[138] We use a combination of EDGAR and internal data for this baseline analysis. The table includes initial applications that were initially filed from 2017 to 2019.

[139] The Commission's recent adoption of rule 6c-11 will permit exchange-traded funds that satisfy certain conditions to operate without obtaining an exemptive order. *See supra* footnote 24. Also, the Commission recently proposed new 17 CFR 270.12d1–4 (rule 12d1–4 under the Investment Company Act) that would, under specified circumstances, permit a fund to acquire shares of another fund in excess of the limits of section 12(d)(1) of the Act without obtaining an exemptive order from the Commission. *See* Funds of Funds Arrangements, Investment Company Act Release No. 33329 (Dec. 19, 2018) (84 FR 1286, Feb. 1, 2019).

[140] Eighty-nine initial filings did not result in a notice before December 31, 2019. Because the table provides information on the number of amended filings associated with applications that resulted in notices, those 89 initial filings are excluded from the sample.

Of the 202 applications from 2017 to 2019, 42 (21 percent) initial applications resulted in a notice without any amendment. Ninety (45 percent) applications resulted in a notice after one amendment to the initial application. Overall, 70 (35 percent) initial applications required two or more amended applications prior to receiving a notice.

2. Review Process

The current rules governing applications for exemption serve as a baseline against which we assess the economic impacts of amended rule 0–5. At present, there are no rules under the Act or other rules governing timeframes for Commission consideration of applications for exemption. While rules governing timeframes for the consideration of applications for exemption have not been formalized, in 2008 the Staff adopted the performance target of providing comments on at least 80 percent of initial applications within 120 days after their receipt.[141] For filings made on or after June 1, 2019, the Division has now implemented a new internal target of providing comments on both initial applications and amendments within 90 days.

The table below summarizes the number of days between an applicant's initial filing and a response from the Commission from 2017 to 2019.

| Year | Mean | % ≤45 days | % ≤90 days | % ≤120 days |
|---|---|---|---|---|
| 2017 | 85 | 16% | 46% | 98% |
| 2018 | 95 | 10 | 37 | 91 |
| 2019 | 66 | 30 | 84 | 100 |
| Overall | 84 | 18 | 52 | 96 |

We note that the prolonged Government shutdown from December 22, 2018 to January 25, 2019 (35 days) affected turnaround times for those applications initially submitted in the latter portion of 2018, as the Staff was not able to review and process applications during that time. Overall, from 2017 through 2019, 18 percent of applicants experienced times between initial filing and a response from the Commission of 45 days or less. Fifty-two percent of applicants experienced times of 90 days or less, and 96 percent of applicants experienced times of 120 days or less.

*C. Benefits and Costs of Amended Rule 0–5*

We are adopting an expedited review process for routine applications and a new rule to deem an application for expedited exemptive relief withdrawn when an applicant fails to respond to Staff comments. These actions could have both direct as well as indirect effects. Because the actions affect the application process, the actions could affect both applicants and the Commission. Further, to the extent the actions have a direct effect on the Commission, there could arise an indirect effect on applicants as well as investors. These potential direct and indirect effects are discussed in the context of benefits and costs of the rule described below.

The magnitude of these estimated expected effects will depend, at least in part, on the extent to which anticipated outcomes differ from the baseline. For example, as noted above, we calculate that in recent years 18 percent of initial applications have received Commission response within 45 days.[142] The expected benefits and costs will depend on the extent to which the actions result in outcomes that differ from recent experience.[143]

1. Benefits

We expect that the adopted expedited review process will have the direct effect of allowing the benefits of relief to be realized by applicants more quickly than otherwise would be the case. Further, we expect that the adopted expedited review procedure will make the application process less expensive. For example, we believe that for applications that seek relief substantively identical to relief that the Commission has recently granted the new procedure will encourage applicants to submit applications that are substantially identical to precedent. Submitting applications that are substantially identical to precedent should reduce the cost of drafting applications as well as reduce costs associated with needing to file multiple amendments.

We estimate that the expedited review process will significantly reduce costs for applicants compared to applicants receiving orders under standard review. We believe the estimated total cost burden per application for applicants to receive an order for an average application under standard review utilizing outside counsel is approximately $74,550 [144] and the estimated hour or cost burden per application for applicants utilizing in-house counsel will be approximately 150 hours or $58,800.[145] The Staff estimates that the total cost burden per application for applicants to receive an order for an application under the adopted expedited review utilizing outside counsel is approximately $14,910 [146] and the estimated hour or cost burden per application for applicants utilizing in-house counsel will be approximately 30 hours or $11,760.[147] Therefore, the estimated costs for an application under the expedited review process equate to an 80 percent savings compared to the estimated costs for an average application under the standard review process.

The estimated savings for an application under expedited review compared to an average application under the standard review process would be approximately $59,640 [148] per application utilizing outside counsel or

[141] *See supra* footnote 31.

[142] As discussed above, 52% of initial filings have received Commission action within 90 days.

[143] The expected benefits and costs will also depend on the amount of application activity. Recent Commission rulemaking and proposed rules, if adopted, could result in a reduction in the number of future applications. *See supra* footnote 35.

[144] This estimate is based on the following calculations: $497 (hourly rate for outside counsel) × 150 (estimated hours to receive an order for an application under standard review) = $74,550.

[145] This estimate is based on the following calculations: $392 (hourly rate for in-house counsel) × 150 (estimated hours to receive an order for an application under standard review) = $58,800.

[146] This estimate is based on the following calculations: $497 (hourly rate for outside counsel) × 30 (estimated hours to receive an order for an application under expedited review) = $14,910.

[147] This estimate is based on the following calculations: $392 (hourly rate for in-house counsel) × 30 (estimated hours to receive an order for an application under expedited review) = $11,760.

[148] This estimate is based on the following calculations: $74,550 (estimated total cost under standard review utilizing outside counsel) − $14,910 (estimated total cost under expedited review utilizing outside counsel) = $59,640.

120 hours [149] or $47,040 [150] per application utilizing in-house counsel. Accordingly, the expedited review process would decrease the total estimated annual cost burden by approximately $2,385,600 utilizing outside counsel and total estimated annual hour burden by approximately 1,200 hours utilizing in-house counsel.[151] The total estimated annual savings for the expedited review process for both outside and in-house counsel would be $2,856,000.[152] We expect that investors in entities utilizing the expedited review process will benefit to the extent those cost savings are passed along.

We expect that the adopted actions will also have a direct effect on the Commission. As discussed in Section I.C above, a significant factor affecting the time to review an application is often how the application has been drafted. Applications for which there is clear precedent often omit standard terms or conditions, or contain significantly different versions of the standard terms or representations, from the relevant precedent. These variances increase the time required for the Staff's review because the Staff must analyze the changes to determine whether they alter the scope or nature or appropriateness of the requested relief. To the extent the new procedure would encourage applicants for expedited review to submit applications that are substantially identical to precedent, we expect the new procedure to reduce the amount of Staff resources required to review such applications.

The anticipated reduction in Staff resources required to review applications could result in indirect effects associated with the adopted actions. In particular, to the extent Staff is able to devote greater resources to more novel applications, the benefits realized by applicants with more novel applications may be realized more quickly than otherwise would be the case. To the extent those benefits are passed along to investors, investors would experience indirect benefits as well. Additionally, to the extent these indirect benefits accrue to applicants with more novel applications, the adopted actions could foster the submission of a greater number of novel applications which could lead to greater innovation in investment products. Further, the adopted actions could benefit investors by enhancing competition among market participants, which we discuss in more detail below.

2. Costs

Adopted rule 0–5(d) creates the opportunity for applicants whose applications meet certain requirements to request expedited review subject to the requirements of adopted rules 0–5(d) and 0–5(e). The adopted amendment to rule 0–5 does not require potential applicants to request expedited review. Potential applicants for expedited review, then, would only bear the costs of requesting expedited review in those circumstances where the applicant believes the benefits justify the costs.

With respect to applications for expedited review, amended rule 0–5(e)(2) requires applicants to submit exhibits with marked copies of the application showing changes from the final versions of the two precedent applications. Based on interactions with applicants and Staff experience, for those applicants relying on outside counsel to prepare two marked copies against two recent precedents, the estimated cost is $2,485 per application.[153] Applicants utilizing in-house counsel to provide two marked copies against two recent precedents would spend 5 hours or $1,960 per application.[154]

Amended rule 0–5(e)(1) requires that the cover page of the application include a notation prominently stating ''EXPEDITED REVIEW REQUESTED UNDER 17 CFR 270.0–5(d).'' Amended rule 0–5(e)(3) further requires the accompanying cover letter to certify on behalf of the applicant that the applicant believes the application meets the requirements of rule 0–5(d), and that the marked copies required by rule 0–5(e)(2) are complete and accurate with an explanation on why the particular precedents were chosen. The written certification is similar to the representation required from counsel under 17 CFR 280.485 (rule 485) for post-effective amendments filed by certain registered investment companies.[155] Such a representation would be subject to section 34(b) of the Act.[156] Based on conversations with applicants and Staff experience, we expect the cost of these cover letter requirements to be $994 per application utilizing outside counsel [157] and 2 hours or $784 per application utilizing in-house counsel.[158]

We estimate we will receive approximately 50 applications [159] per year seeking expedited review under the Act. Therefore, we estimate that the new requirements will impose a total annual cost burden of approximately $139,160 utilizing outside counsel [160] and total annual hour burden of approximately 70 hours utilizing in-house counsel [161] for a cost burden of $27,440.[162] The total estimated annual cost burden for all applicants expected to seek expedited review, reflecting the use of both outside and in-house counsel, would be $166,600.[163]

Amended rule 0–5 also provides that, with respect to expedited reviews, if applicants do not file an amendment responsive to Staff's requests for modification within 30 days of receiving such requests, including a marked PDF copy showing any changes made and a certification that such marked copy is accurate and complete, the application will be deemed withdrawn. We believe the cost of complying with the 30-day requirement would be the same as complying with the current 60-day requirement.[164] We assume that those applicants requesting expedited review would likely bear an opportunity cost the longer the application process is delayed. Applicants for expedited review, then, will benefit from responding to Staff requests for modification in a more timely manner than they would under the current requirement.

[149] This estimate is based on the following calculations: 150 (estimated total hours under standard review utilizing in-house counsel) − 30 (estimated total hours under expedited review utilizing in-house counsel) = 120.

[150] This estimate is based on the following calculations: $58,800 (estimated total cost under standard review utilizing in-house counsel) − $11,760 (estimated total cost under expedited review utilizing in-house counsel) = $47,040.

[151] This estimate is based on the following calculations:

$59,640 (estimated savings per application under expedited review) × 50 (estimated number of applications under expedited review, *see infra* footnote 182) × 0.80 (approximate percentage of applications prepared by outside counsel) = $2,385,600.

120 (estimated hours saved per application under expedited review) × 50 (estimated number of applications under expedited review, *see infra* footnote 182) × 0.20 (approximate percentage of applications prepared by in-house counsel) = 1,200.

[152] This estimate is based on the following calculations: $2,385,600 (estimated total cost savings utilizing outside counsel) + [1,200 (estimated total hours saved utilizing in-house counsel) × $392 (hourly rate for in-house counsel)] = $2,856,000. This estimate takes into account the incremental costs of the expedited review requirements.

[153] *See infra* footnote 186.

[154] *See infra* footnote 179.

[155] *See* rule 485(b)(4).

[156] *See supra* footnote 78.

[157] *See infra* footnote 186.

[158] *See infra* footnote 183.

[159] *See infra* footnote 176.

[160] *See infra* footnote 187.

[161] *See infra* footnote 180.

[162] *See infra* footnote 181.

[163] $166,600 = $139,160 (cost of utilizing outside counsel) + $27,440 (cost of utilizing in-house counsel).

[164] In the past, Staff placed an application on inactive status when an applicant did not respond to comments within 60 days. *See supra* footnote 19.

Adopted rule 0–5(g) additionally provides that, if an applicant has not responded in writing to a request for clarification or modification of an application filed under standard review within 120 days after the request, the application will be deemed withdrawn. As an oral response will not stop an application from being deemed withdrawn, the ''in writing'' requirement will create an additional cost. We believe the ''in writing'' requirement will increase the burden by $994 per application for applicants relying on outside counsel.[165] Applicants utilizing in-house counsel would spend 2 hours or $784 per application.[166] We estimate we will receive approximately 90 applications [167] seeking standard review under the Act annually and of those 90 applications, we estimate that approximately 10 percent will result in applicants responding ''in writing'' to avoid the application's deemed withdrawal pursuant to rule 0–5(g). Therefore, the ''in writing'' requirement under rule 0–5(g) would increase the total estimated annual cost burden by approximately $7,157 utilizing outside counsel [168] and total estimated annual hour burden by approximately 3.6 hours utilizing in-house counsel [169] for an estimated cost burden of $1,411.[170] The total estimated annual cost burden for both outside and in-house counsel would be $8,568.[171]

*D. Effects on Efficiency, Competition, and Capital Formation*

This section evaluates the impact of adopted amendments to rule 0–5 on efficiency, competition, and capital formation.

*Efficiency.* We expect the expedited review process to benefit potential applicants directly by providing them an opportunity, subject to certain conditions, for expedited exemptive relief. Further, to the extent the adopted rule encourages applications that are substantially identical to precedent, we expect the adopted rule should reduce the likelihood of applicants needing to file amendments. To the extent the expedited review process allows applicants to realize the benefits of relief more quickly and with fewer filings, we would expect the operating efficiency of applicants to increase more quickly and to do so with a greater net benefit than under the existing application process.

As discussed above, applications for which there is clear precedent often omit standard terms or conditions, or contain significantly different versions of the standard terms or representations, from the relevant precedent. As a result, the Staff requires increased time and resources to review the changes to determine whether they alter the scope or nature of the requested relief. To the extent the new procedures would encourage applicants for expedited review to submit applications that are substantially identical to precedent, we expect the new procedures to reduce the amount of Staff resources required to review such applications and increase Staff resources available to review more novel applications. As a result, the benefits of any innovative features and new product types associated with novel applications could be realized by investors more quickly, thereby increasing investment efficiency (that is, the ability of investors to find and invest in funds that meet their particular needs or strategies) more quickly than under the current process.

*Competition.* The adopted rule would likely increase competition in those situations where applicants would meet the requirements for expedited review. The effect on competition is expected to operate through two channels. The first channel would be the speed with which potential competitors could realize the benefits of relief. The expedited review process would allow applicants to compete more quickly with prior applicants who already realized those benefits.[172] Second, to the extent the adopted expedited review process reduces the cost of applying for exemptive relief, the cost reduction would lower barriers to competing with those applicants who have already been granted relief.

*Capital Formation.* The adopted rule may lead to increased capital formation. As discussed above, to the extent the expedited review process allows applicants to realize the benefits of relief both more quickly and at a lower cost, we would expect the efficiency of the application process to increase, allowing more investor money to be used productively. The increased efficiency could also lead to more applications, including more novel applications. To the extent this results in a broader range of investment products, some investors may find new investment opportunities that more closely match their investment goals. This could induce these investors to invest additional money, increasing demand for intermediated assets as a whole and, as a result, facilitating capital formation.

Also, to the extent the new procedures would encourage applicants for expedited review to submit applications that are substantially identical to precedent, we expect the new procedures to reduce the amount of Staff resources required to review such applications and increase Staff resources available to review more novel applications. An increase in Staff resources available to review more novel applications could, in turn, lead to more applicants who would implement innovative features or create new types of products. To the extent investors do not substitute one type of product or feature for another and find new products and features valuable, an increase in the number of applications involving innovative features or new types of products, could increase the overall amount of resources investors are willing to invest and, as a result, facilitate capital formation.

*E. Reasonable Alternatives*

Rule 0–5(d)(1) provides that an applicant may request expedited review if the application is substantially identical to two other applications for which an order granting the requested relief was issued. As alternatives, the rule could require a single precedent or more than two precedents. Our decision to require two precedent applications reflects a balancing of the accessibility to the expedited review process and the likely need for additional consideration by the Staff. Increasing the number of required precedents would decrease the likelihood of additional Staff consideration, but it would likely reduce the number of potential applicants qualifying for expedited review. For example, if we were to require three precedent applications rather than two, the third application, which would qualify for expedited review under the adopted amendment to rule 0–5, would no longer be eligible for expedited review. Increasing the number of required precedents would also likely lengthen the amount of time before applicants could request expedited exemptive relief. For example, if we were to require three precedent applications rather than two,

[165] *See infra* footnote 188.

[166] *See infra* footnote 183.

[167] *See infra* footnote 182.

[168] *See infra* footnote 189.

[169] *See infra* footnote 184.

[170] *See infra* Section IV, PRA Table 1.

[171] $8,568 = $7,157 (cost of utilizing outside counsel) + $1,411 (cost of utilizing in-house counsel).

[172] To the extent the adopted expedited review process will allow subsequent applicants to compete more quickly, benefits to ''first-movers'' (*i.e.,* prior applicants, including the two relied on as precedent) may be reduced. We would expect any resulting effect on innovation to be minimal. In general, we anticipate that the expected gains from innovation will justify the expected loss in benefits associated with quicker competition.

to the extent precedent applications do not occur at the same time, applicants would have to wait for a third precedent application rather than being able to apply for expedited review after the second substantially identical application. Conversely, decreasing the number of required precedents would likely increase the number of potential applicants qualifying for expedited review, but it would increase the likelihood for additional Staff consideration. We believe the requirement of two precedent applications strikes an appropriate balance between those two competing considerations.

Further, the adopted rule requires the two precedent applications to have been filed within the past three years. Our decision to require precedents that have been filed over the past three years reflects a balancing of the accessibility to the expedited review process and the Staff resources required to review whether the terms and conditions of an application are still appropriate. Increasing the timeframe to greater than three years could increase the number of applicants qualifying for expedited review, but also increase Staff resources required to review whether the terms and conditions of an application are still appropriate. Conversely, shortening the timeframe to less than three years would reduce the amount of Staff resources required to review whether the terms and conditions of an application are still appropriate, but likely reduce the number of potential applicants who could qualify for expedited review. We believe the three year requirement strikes an appropriate balance between those two competing considerations.

Also, the adopted rule could require a broader standard than the ''substantially identical'' standard. The adopted rule creates a new process that we expect will be both faster and more certain in its timing than the current process, while increasing the Staff resources available to evaluate applications that may raise novel issues. Modifying the standard to permit more extensive differences from precedent applications would increase the number of potential applicants qualifying for expedited review, but would increase the proportion of Staff resources required to inquire about and consider the nature of these differences. Additionally, permitting more extensive differences from precedent would likely lead the Staff to issue more comments in the expedited process and/or transfer a greater number of applications to the standard process compared to the adopted standard, which could significantly impair our ability to achieve the objectives of the expedited process. We believe the substantially identical standard strikes an appropriate balance between those two competing considerations.

## IV. Paperwork Reduction Act

The new rule amendments under the Act contain ''collections of information'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[173] The title for the new collection of information is ''Rule 0–5 under the Investment Company Act, Procedure with Respect to Applications and Other Matters.'' [174] The Commission is submitting these collections of information to the OMB for review in accordance with 44 U.S.C. 3507 (d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The new rules are designed to expedite the review process of routine applications. We discuss below the mandatory collection of information burdens associated with the amendments to rules 0–5(e) and 0–5(g).[175]

### *A. Burden of Information Collection*

Rule 0–5(e) requires applicants seeking expedited review to include certain information with the application. Rule 0–5(e)(1) requires that the cover page of the application include a notation prominently stating ''EXPEDITED REVIEW REQUESTED UNDER 17 CFR 270.0–5(d).'' Rule 0–5(e)(2) requires applicants to submit exhibits with marked copies of the application showing changes from the final versions of two precedent applications identified as substantially identical. Rule 0–5(e)(3) requires an accompanying cover letter, signed, on behalf of the applicant, by the person executing the application (i) identifying two substantially identical applications and explaining why the applicant chose those particular applications, and if more recent applications of the same type have been approved, why the applications chosen, rather than the more recent applications, are appropriate; and (ii) certifying that the applicant believes the application meets the requirements of rule 0–5(d) and that the marked copies required by rule 0–5(e)(2) are complete and accurate.

Applicants for orders under the Act can include investment companies and affiliated persons of investment companies. Applicants file applications as they deem necessary. The Commission receives approximately 140 applications per year under the Act, and of the 140 applications, we estimate that we will receive approximately 50 applications [176] seeking expedited review under the Act.[177] Although each application is typically submitted on behalf of multiple entities, the entities in the vast majority of cases are related companies and are treated as a single applicant for purposes of this analysis. Each application subject to rules 0–5(e) and 0–5(g) does not impose any ongoing obligations or burdens on the applicant.

Much of the work of preparing an application is performed by outside counsel. Based on conversations with applicants and Staff experience, only approximately 20 percent of applications are prepared by in-house counsel.

The new mandatory requirements under rule 0–5(e) would increase the estimated hour or cost burden for applicants utilizing in-house counsel by 7 hours [178] or $2,744 [179] per application. Therefore, the new mandatory requirements under rule 0–5(e) would increase the total estimated annual hour burden by approximately 70 hours utilizing in-house counsel.[180] The total estimated annual cost burden for

[173] 44 U.S.C. 3501 through 3521.

[174] The collection of information burden within the meaning of the PRA for the general requirements of applications is under rule 0–2.

[175] Responses to this collection of information will not be kept confidential.

[176] This estimate takes into account the recent codification of certain ETF Exemptive Orders. *See supra* footnote 24.

[177] Like section III above, this section only relates to applications seeking expedited review.

[178] This estimate is based on the following calculation: 5 hours (estimated hours per application to prepare the marked copies) + 2 hours (estimated hours per application to explain, notate, and certify) = 7 hours.

[179] This estimate is based on the following calculation:

5 (estimated hours per application to prepare the marked copies) × $392 (hourly rate for an in-house counsel) = $1,960.

2 (estimated hours per application to explain, notate, and certify) × $392 (hourly rate for an in-house counsel) = $784.

$1,960 (estimated cost per application to prepare the marked copies) + $784 (estimated cost per application to explain, notate, and certify) = $2,744.

The hourly wages data is from the Securities Industry Financial Markets Association's Management & Professional Earnings in the Securities Industry 2013, modified by Commission Staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 (professionals) to account for bonuses, firm size, employee benefits, and overhead, suggests that the cost for in-house counsel is $392 per hour.

[180] This estimate is based on the following calculations:

[5 (estimated hours per application to prepare the marked copies) + 2 (estimated hour per application to explain, notate, and certify)] × 50 (estimated number of applications under expedited review) × 0.20 (approximate percentage of applications prepared by in-house counsel) = 70.

utilizing in-house counsel would be $27,440.[181]

Rule 0–5(g) would provide that, if an applicant has not responded in writing to a request for clarification or modification of an application filed under standard review within 120 days after the request, the application will be deemed withdrawn. As an oral response would not stop an application from being deemed withdrawn, rule 0–5(g), would require applicants to respond ''in writing'' and therefore create an additional cost within the meaning of the PRA.

We estimate that we will receive approximately 90 applications[182] per year seeking standard review under the Act and of the 90 applications, we estimate that approximately 10 percent will result in applicants responding ''in writing'' to avoid the application's deemed withdrawal pursuant to rule 0–5(g). We believe the ''in writing'' requirement under rule 0–5(g) would increase the burden for applicants utilizing in-house counsel by 2 hours or $784 per application.[183] Therefore, the ''in writing'' requirement under rule 0–5(g) would increase the total estimated annual hour burden by approximately 3.6 hours utilizing in-house counsel.[184] The total estimated annual cost burden utilizing in-house counsel would be $1,411.20.[185]

*B. Cost to Respondents*

As discussed above, much of the work of preparing an application is performed by outside counsel. Based on conversations with applicants and Staff experience, approximately 80 percent of applications are prepared by outside counsel.

Therefore, the new mandatory requirements under rule 0–5(e) would increase the estimated cost and administrative burdens for applicants utilizing outside counsel by $3,479[186] per application and the total estimated annual cost burden by approximately $139,160 utilizing outside counsel.[187]

We believe the ''in writing'' requirement would increase the burden by $994 per application for applicants relying on outside counsel.[188] Therefore, the ''in writing'' requirement under rule 0–5(g) would increase the total estimated annual cost burden by approximately $7,157 utilizing outside counsel.[189]

The estimate of annual cost burden is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms.

The following table summarizes the estimated effects and external costs of the paperwork burden associated with the amendments to rules 0–5(e) and 0–5(g).

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN INCREASE AND TOTAL COSTS OF THE AMENDMENTS

| | Number of annual responses | Burden hours per response | Annual burden costs |
|---|---|---|---|
| Rule 0–5(e) | 50[1] | 7 | [2] $166,660 |
| Rule 0–5(g) | 9[3] | 2 | [4] 8,568 |
| Totals | 59 | 9 | 175,168 |

[1] This estimate is based on the following calculations: [50 (estimated number of applications under expedited review) × 0.80 (approximate percentage of applications prepared by outside counsel)] + [50 (estimated number of applications under expedited review) × 0.20 (approximate percentage of applications prepared by in-house counsel)] = 50.

[2] $166,600 = $139,160 (estimated cost of utilizing outside counsel) + $27,440 (estimated cost of utilizing in-house counsel).

[3] This estimate is based on the following calculations: [90 (estimated number of applications under standard review) × 0.10 (approximate percentage of applications required to respond ''in writing'') × 0.80 (approximate percentage of applications prepared by outside counsel)] + [90 (estimated number of applications under standard review) × 0.10 (approximate percentage of applications required to respond ''in writing'') × 0.20 (approximate percentage of applications prepared by in-house counsel)] = 9.

[4] $8,568 = $7,157 (estimated cost of utilizing outside counsel) + $1,411 (estimated cost of utilizing in-house counsel).

## V. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis (''FRFA'') in accordance with section 3 of the Regulatory Flexibility Act (''RFA'')[190] regarding our amendments to rule 0–5 and new rule 17 CFR 202.13.

*A. Reasons for and Objectives of the Actions*

The application process under the Act has become more important as the

[181] This estimate is based on the following calculation: 70 (estimated total hours utilizing in-house counsel) × $392 (hourly rate for an in-house counsel) = $27,440.

[182] This estimate is based on the following calculation: 140 (estimated number of all applications) − 50 (estimated number of applications under expedited review) = 90.

[183] This estimate is based on the following calculation: 2 (estimated hours to prepare ''in writing'' response) × $392 (hourly rate for an in-house counsel) = $784.

[184] This estimate is based on the following calculations:

2 (estimated hours to prepare ''in writing'' response) × 90 (estimated number of applications under standard review) × 0.10 (approximate percentage of applications required to respond ''in writing'') × 0.20 (approximate percentage of applications prepared by in-house counsel) = 3.6.

[185] This estimate is based on the following calculation: 3.6 (estimated total hours utilizing in-house counsel) × $392 (hourly rate for an in-house counsel) = $1,411.20.

[186] This estimate is based on the following calculation:

5 (estimated hours to prepare the marked copies) × $497 (hourly rate for an attorney) = $2,485.

2 (estimated hours per application to explain, notate, and certify) × $497 (hourly rate for an attorney) = $994.

$2,485 (estimated cost per application to prepare the marked copies) + $994 (estimated cost per application to explain, notate, and certify) = $3,479.

The hourly wages data is from the Securities Industry Financial Markets Association's Management & Professional Earnings in the Securities Industry 2013, modified by Commission Staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 (professionals) to account for bonuses, firm size, employee benefits, and overhead, suggests that the cost for outside counsel is $497 per hour.

[187] This estimate is based on the following calculations:

[$2,485 (estimated cost per application to prepare the marked copies) + $994 (estimated cost per application to explain, notate, and certify] × 50 (estimated number of applications under expedited review) × 0.80 (approximate percentage of applications prepared by outside counsel) = $139,160.

[188] This estimate is based on the following calculation: 2 (estimated hours to prepare ''in writing'' response) × $497 (hourly rate for outside counsel) = $994.

[189] This estimate is based on the following calculations:

$994 (estimated cost per application to prepare ''in writing'' response) × 90 (estimated number of applications under standard review) × 0.10 (approximate percentage of applications required to respond ''in writing'') × 0.80 (approximate percentage of applications prepared by outside counsel) = $7,157.

[190] *See* 5 U.S.C. 603.

industry has grown and diversified. Granting appropriate exemptions from the Act can provide important economic benefits to funds and their shareholders, and foster financial innovation. Thus, we have continued to consider ways to improve the applications process as we recognize the importance of obtaining an order in a timely manner. The new amendments and new rule reflect our efforts to improve the process and establish an expedited review procedure for applications that are substantially identical to recent precedent. We believe that the new approach balances applicants' desire for a prompt decision on their application with the Commission's need for adequate time to consider requests for relief.

We believe that the new procedure would encourage applicants for expedited review to submit applications that are substantially identical to precedent, which we expect would facilitate Staff review. Accordingly, we should be able to grant relief that meets the applicable standards more quickly, and, in turn, devote additional resources to the review of more novel requests. A faster application process would allow the benefits of relief to be realized by applicants, and ultimately by fund shareholders, more quickly than otherwise would be the case. Further, we expect that the new expedited review procedure will make the applications process less expensive for applicants, because we believe that it will reduce the numbers of Staff comments.

*B. Legal Basis*

The Commission is adopting the rules contained in this document under the authority set forth in sections 6(c) and 38(a) of the Act [15 U.S.C. 80a–6(c) and 80a–37(a)].

*C. Small Entities Subject to the Amendment*

Any registered investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of $50 million or less as of the end of its most recent fiscal year.[191] Staff estimates that, as of June 2019, there were 50 open-end funds (including 8 ETFs), 33 closed-end funds, and 16 business development companies (BDCs) that would be considered small entities that may be subject to amendments to rule 0–5.[192]

*D. Projected Reporting, Recordkeeping, and Other Compliance Requirements*

Rule 0–5(e) will require applicants seeking expedited review of an application to file with the Commission: (1) A cover page of the application that states prominently, ''EXPEDITED REVIEW REQUESTED UNDER 17 CFR 270.0–5(d)''; (2) exhibits with marked copies of the application showing changes from the final versions of two precedent applications identified as substantially identical; and (3) requires an accompanying cover letter, signed, on behalf of the applicant, by the person executing the application (i) identifying two substantially identical applications and explaining why the applicant chose those particular applications, and if more recent applications of the same type have been approved, why the applications chosen, rather than the more recent applications, are appropriate; and (ii) certifying that the applicant believes the application meets the requirements of rule 0–5(d) and that the marked copies required by rule 0–5(e)(2) are complete and accurate.[193] As discussed in section IV, the estimated cost and administrative burdens for small entities associated with these activities for applicants utilizing outside counsel would be $3,479[194] per application and the estimated hour or cost burden for applicants utilizing in-house counsel would be 7 hours[195] or $2,744[196] per application.

As discussed in section III, we believe the additional costs and administrative burdens of providing the required statements and certifications on the included cover page and submitting two marked copies against two precedents would not have a substantial impact on the total cost for applications that qualify for the expedited review procedure. Small entities will benefit considerably from the expedited review procedure as the total estimated savings significantly justify the estimated added burden under rule 0–5(e). The estimated savings for an application under expedited review compared to an average application under the standard review process would be approximately $59,640[197] per application utilizing outside counsel or 120 hours[198] or $47,040[199] per application utilizing in-house counsel.

Rule 0–5(g) will require applicants to respond ''in writing'' to a request for clarification or modification of an application filed under standard review within 120 days after the request from the Staff or the application will be deemed withdrawn. As discussed in section IV, the estimated cost and administrative burdens for small entities associated with these activities for applicants utilizing outside counsel would be $994[200] per application and the estimated hour or cost burden for applicants utilizing in-house counsel would be 2 hours or $784[201] per application. Rule 0–5(g) imposes additional costs and administrative burdens on small entities for standard review applications, but the estimated savings from the expedited review process justify the added burden of rule 0–5(g).

In addition, compliance with the new amendments may require the use of professional legal skills necessary for research and preparation of required documents. We discuss the economic impact, including the estimated costs and burdens, of the new amendments to all registrants, including small entities, in sections III and IV above.

We believe there are no reporting, recordkeeping, or other compliance requirements for small entities with respect to rule 17 CFR 202.13. The new rule is an internal set of deadlines with no costs and administrative burdens incurred by the applicants.

*E. Duplicative, Overlapping or Conflicting Federal Rules*

The Commission believes that there are no duplicative, overlapping or conflicting Federal rules to the amendments to rule 0–5 and rule 17 CFR 202.13.

*F. Significant Alternatives*

The RFA directs the Commission to consider significant alternatives that

[191] *See* 17 CFR 240.0–10 (rule 0–10(a)). Recognizing the growth in investment company assets under management since rule 0–10 was adopted, the Commission plans to revisit the definition of a small investment company for purposes of rule 0–10.

[192] This estimate is derived from an analysis of data obtained from Morningstar Direct as well as data reported on Form N–SAR filed with the Commission for the period ending June 2019.

[193] The amendments are discussed in detail in section II.A above. We discuss the economic impact, including the estimated compliance costs and burdens, of the amendments in section III and section IV.

[194] This estimate is based on the following calculation: $2,485 (estimated cost per application to prepare the marked copies) + $994 (estimated cost per application to explain, notate, and certify) = $3,479.

[195] This estimate is based on the following calculation: 5 hours (estimated hours per application to prepare the marked copies) + 2 hours (estimated hours per application to explain, notate, and certify) = 7 hours.

[196] This estimate is based on the following calculation: $1,960 (estimated cost per application to prepare the marked copies) + $784 (estimated cost per application to explain, notate, and certify) = $2,744.

[197] *See supra* footnote 148.

[198] *See supra* footnote 149.

[199] *See supra* footnote 150.

[200] *See supra* footnote 188.

[201] *See supra* footnote 183.

would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the adoption, we considered the following alternatives: (i) Establishing differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rule, or any part thereof, for such small entities.

We do not believe that establishing different compliance or reporting requirements for small entities would permit us to achieve our stated goals. We believe that the new approach is expected to reduce costs by shortening the time it takes for applicants to obtain orders on certain routine applications. Further clarification, consolidation, or simplification of the compliance and reporting requirements is not necessary to achieve the goals of the rule and would not be appropriate in the public interest and consistent with the protection of investors. The use of performance rather than design standards is not appropriate, as the new approach is intended to expedite the applications process and the use of a single design standard would make the procedure more efficient. Exemption from coverage of the rule would not be necessary, as the new expedited process would further benefit small entities by making the applications process more cost efficient.

## VI. Statutory Authority

The Commission is adopting the rules contained in this document under the authority set forth in sections 6(c) and 38(a) of the Act [15 U.S.C. 80a–6(c) and 80a–37(a)].

## List of Subjects

*17 CFR Part 200*

Administrative practice and procedure, Authority delegations (Government agencies).

*17 CFR Part 202*

Administrative practice and procedure, Securities.

*17 CFR Part 270*

Investment Companies, Reporting and recordkeeping requirements, Securities.

## Text of the Amendments

For the reasons set forth in the preamble, title 17, chapter II of the Code of Federal regulations is amended as follows:

## PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

### Subpart A—Organization and Program Management

■ 1. The general authority citation for part 200, subpart A, continues to read as follows:

**Authority:** 15 U.S.C. 77c, 77o, 77s, 77z–3, 77sss, 78d, 78d–1, 78d–2, 78o–4, 78w, 78*ll*(d), 78mm, 80a–37, 80b–11, 7202, and 7211 *et seq.,* unless otherwise noted.

* * * * *

■ 2. Amend § 200.30–5 by adding paragraph (a)(9) to read as follows:

**§ 200.30–5 Delegation of authority to Director of Division of Investment Management.**

* * * * *

(a) * * *

(9) To notify an applicant under 17 CFR 270.0–5(f)(1)(ii) that an application pursuant to the Act (15 U.S.C. 80a–1 *et seq.*) is not eligible for expedited review under 17 CFR 270.0–5.

* * * * *

## PART 202—INFORMAL AND OTHER PROCEDURES

■ 3. The general authority citation for part 202 continues to read as follows:

**Authority:** 15 U.S.C. 77s, 77t, 77sss, 77uuu, 78d–1, 78u, 78w, 78*ll*(d), 80a–37, 80a–41, 80b–9, 80b–11, 7201 *et seq.,* unless otherwise noted.

* * * * *

■ 4. Add § 202.13 to read as follows:

**§ 202.13 Informal procedure with respect to applications under the Investment Company Act of 1940.**

(a) On any application subject to 17 CFR 270.0–5, other than an application eligible for and proceeding under expedited review as provided for by 17 CFR 270.0–5(d), (e), and (f), the Division should take action within 90 days of the initial filing and each of the first three amendments thereto, and within 60 days of any subsequent amendment. Such 90- or 60-day period will stop running upon any irregular closure of the Commission's Washington, DC office to the public for normal business, including, but not limited to, closure due to a lapse in Federal appropriations, national emergency, inclement weather, or ad hoc Federal holiday, and will resume upon the reopening of the Commission's Washington, DC office to the public for normal business. The Division may grant 60-day extensions and the applicant should be notified of any such extension.

(b) Action on the application or any amendment thereto shall consist of:

(1) Issuing a notice;

(2) Providing the applicant with requests for clarification or modification of the application; or

(3) Informing applicant that the application will be forwarded to the Commission, in which case the application is no longer subject to the provisions set forth in paragraph (a) of this section.

(c) The provisions of this section, including the timeframes provided for in this section, are not intended to create enforceable rights by any interested parties and shall not be deemed to do so. Rather, this section provides informal non-binding guidelines and procedures that the Commission anticipates the Division following.

## PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 5. The general authority citation for part 270 continues to read as follows:

**Authority:** 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, 80a–39, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 6. Amend § 270.0–5 by adding paragraphs (d) through (g) to read as follows:

**§ 270.0–5 Procedure with respect to applications and other matters.**

* * * * *

(d)(1) An applicant may request expedited review of an application if such application is substantially identical to two other applications for which an order granting the requested relief has been issued within three years of the date of the application's initial filing.

(2) For purposes of this section, ''substantially identical'' applications are applications requesting relief from the same sections of the Act and this part, containing identical terms and conditions, and differing only with respect to factual differences that are not material to the relief requested.

(e) An application submitted for expedited review must include:

(1) A notation on the cover page of the application that states prominently, ''EXPEDITED REVIEW REQUESTED UNDER 17 CFR 270.0–5(d)'';

(2) Exhibits with marked copies of the application showing changes from the final versions of the two applications identified as substantially identical

under paragraph (e)(3) of this section; and

(3) An accompanying cover letter, signed, on behalf of the applicant, by the person executing the application:

(i) Identifying two substantially identical applications and explaining why the applicant chose those particular applications, and if more recent applications of the same type have been approved, why the applications chosen, rather than the more recent applications, are appropriate; and

(ii) Certifying that the applicant believes the application meets the requirements of paragraph (d) of this section and that the marked copies required by paragraph (e)(2) of this section are complete and accurate.

(f)(1) No later than 45 days from the date of filing of an application for which expedited review is requested:

(i) Notice of an application will be issued in accordance with paragraph (a) of this section; or

(ii) The applicant will be notified that the application is not eligible for expedited review because it does not meet the criteria set forth in paragraph (d) or (e) of this section or because additional time is necessary for appropriate consideration of the application.

(2) For purposes of paragraph (f)(1) of this section:

(i) The 45-day period will stop running upon:

(A) Any request for modification of an application and will resume running on the 14th day after the applicant has filed an amended application responsive to such request, including a marked copy showing any changes made and a certification signed by the person executing the application that such marked copy is complete and accurate;

(B) Any unsolicited amendment of the application and will resume running on the 30th day after such an amendment, provided that the amendment includes a marked copy showing changes made and a certification signed by the person executing the application that such marked copy is complete and accurate; and

(C) Any irregular closure of the Commission's Washington, DC office to the public for normal business, including, but not limited to, closure due to a lapse in Federal appropriations, national emergency, inclement weather, or ad hoc Federal holiday, and will resume upon the reopening of the Commission's Washington, DC office to the public for normal business.

(ii) If the applicant does not file an amendment responsive to any request for modification within 30 days of receiving such request, including a marked copy showing any changes made and a certification signed by the person executing the application that such marked copy is complete and accurate, the application will be deemed withdrawn.

(g) If an applicant has not responded in writing to any request for clarification or modification of an application filed under this section, other than an application that is under expedited review under paragraphs (d) and (e) of this section, within 120 days after the request, the application will be deemed withdrawn.

By the Commission.

Dated: July 6, 2020.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2020–14884 Filed 9–14–20; 8:45 am]

BILLING CODE 8011–01–P

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## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### 19 CFR Chapter I

### Transportation Security Administration

### 49 CFR Chapter XII

## Notification of Termination of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within Certain Countries

**AGENCY:** U.S. Customs and Border Protection and U.S. Transportation Security Administration, Department of Homeland Security.

**ACTION:** Notification of termination of arrival restrictions.

**SUMMARY:** This document announces the decision of the Secretary of the Department of Homeland Security (DHS) to terminate arrival restrictions applicable to certain flights. Specifically, this document terminates arrival restrictions that are applicable to flights carrying persons who had recently traveled from, or were otherwise present within, the People's Republic of China (excluding the Special Administrative Regions of Hong Kong and Macau); the Islamic Republic of Iran; the countries of the Schengen Area; the United Kingdom, excluding overseas territories outside of Europe; the Republic of Ireland; or the Federative Republic of Brazil. These arrival restrictions direct such flights to only land at a limited set of U.S. airports where the U.S. Government (USG) had focused public health resources conducting enhanced entry screening. Other measures to protect public health will remain in place.

**DATES:** The arrival restrictions described in this document are terminated as of 12:01 a.m. Eastern Daylight Time (EDT) on September 14, 2020.

**FOR FURTHER INFORMATION CONTACT:** Matthew S. Davies, Office of Field Operations, U.S. Customs and Border Protection (CBP) at 202–325–2073.

**SUPPLEMENTARY INFORMATION:**

### Background

In recent months, in response to the Coronavirus Disease 2019 (COVID–19) outbreak, DHS announced a series of arrival restrictions, as follows:

- Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the People's Republic of China, 85 FR 6044 (Feb. 4, 2020);
- Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the People's Republic of China, 85 FR 7214 (Feb. 7, 2020);
- Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the People's Republic of China or the Islamic Republic of Iran, 85 FR 12731 (Mar. 4, 2020);
- Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Countries of the Schengen Area, 85 FR 15059 (Mar. 17, 2020);
- Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the United Kingdom or the Republic of Ireland, 85 FR 15714 (Mar. 19, 2020);
- Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Federative Republic of Brazil, 85 FR 31957 (May 28, 2020).

The Secretary announced such arrival restrictions consistent with 19 U.S.C. 1433(c), 19 CFR 122.32, 49 U.S.C. 114, and 49 CFR 1544.305 and 1546.105.

The Secretary has decided to terminate these arrival restrictions. These restrictions funnel eligible arriving air passengers to one of 15 designated airports of entry where the USG has focused public health resources in order to conduct enhanced entry screening. Terminating this effort

will allow public health resources to be more effectively reprioritized for other containment and mitigation efforts and will stimulate air travel. Continuing activities will include an illness reporting system and a passenger education process carried out in tandem with other enhanced public health measures implemented within the passenger air transportation system in collaboration with industry. This notice does not affect those other public health measures, which will remain in place as long as appropriate. Appropriate traveler health education materials will continue to be made available to passengers arriving from foreign countries. Health education information will continue to be displayed at ports of entry.

**Notification of Termination of Arrival Restrictions**

Pursuant to 19 U.S.C. 1433(c), 19 CFR 122.32, 49 U.S.C. 114, and 49 CFR 1544.305 and 1546.105, and effective as of 12:01 a.m. Eastern Daylight Time (EDT) on September 14, 2020 for all affected flights arriving at a U.S. airport, the Secretary hereby terminates the arrival restrictions announced at 85 FR 6044 (Feb. 4, 2020); 85 FR 7214 (Feb. 7, 2020); 85 FR 12731 (Mar. 4, 2020); 85 FR 15059 (Mar. 17, 2020); 85 FR 15714 (Mar. 19, 2020); and 85 FR 31957 (May 28, 2020).

**Signature**

The Acting Secretary of DHS, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Ian J. Brekke, Deputy General Counsel, DHS Office of the General Counsel, for purposes of publication in the **Federal Register**.

**Ian J. Brekke,**

*Deputy General Counsel, U.S. Department of Homeland Security.*

[FR Doc. 2020–20371 Filed 9–11–20; 9:00 am]

BILLING CODE 9111–14– 9110–05–P

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

### 29 CFR Part 1926

**[Docket ID OSHA–2015–0012]**

**RIN 1218–AD07**

## Cranes and Derricks in Construction: Railroad Roadway Work

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Final rule.

**SUMMARY:** OSHA is revising the standard for cranes and derricks in construction to provide specific exemptions and clarifications with regard to the application of the standard to cranes and derricks used for railroad roadway work. These exemptions and clarifications recognize the unique equipment and circumstances in railroad roadway work and reflect the preemption of some OSHA requirements by regulations promulgated by the Federal Railroad Administration (FRA). The revised standard provides a clearer understanding of which regulatory requirements are applicable, resulting in a more effective regulatory program and ultimately improved safety.

**DATES:** *Effective date:* This final rule is effective on November 16, 2020.

**ADDRESSES:** In accordance with 28 U.S.C. 2112(a)(2), the agency designates Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor, Room S–4004, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, to receive petitions for review of the final rule.

*Docket:* To read or download material in the electronic docket for this rulemaking, go to *http://www.regulations.gov* or to the OSHA Docket, Room N–3653, OSHA, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–2350, TTY number (877) 889–5627. Some information submitted (*e.g.,* copyrighted material) is not available publicly to read or download through this website. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

**FOR FURTHER INFORMATION CONTACT:**

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*Copies of this* **Federal Register** *document and news releases:* Electronic copies of these documents are available at OSHA's web page at *http://www.osha.gov*.

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### I. Background

OSHA published the Cranes and Derricks in Construction standard on August 9, 2010 (29 CFR part 1926, subpart CC, 75 FR 47906). The crane standard resulted from years of work by a negotiated rulemaking committee that drew from a wide range of stakeholders to include industry and labor best practices to draft regulatory requirements to prevent crane tip overs, electrocution from crane contact with power lines, workers being struck by the equipment or loads, crane collapse because of improper assembly, and other hazards associated with the operation of cranes in construction work. The crane standard added many new provisions, addressing topics such as requirements to ensure safe ground conditions underneath equipment, mandatory safety devices, distance from power lines, inspection procedures, workplace area controls to prevent workers from entering hazardous areas, and new operator certification requirements.

On October 7, 2010, the Association of American Railroads and a number of individual railroads (hereafter collectively referred to as AAR) filed a petition challenging the rule. That petition remains before the United States Court of Appeals for the District of Columbia Circuit (Case No. 10–1386), but after AAR provided more background and additional information about existing practices in the railroad industry, the parties reached a settlement in which OSHA agreed to issue an interpretation of the standard as it relates to railroads and to propose revisions to the regulatory text of the crane standard. The settlement followed extensive discussions with AAR and officials from FRA and the principal labor organization representing affected employees, the Brotherhood of Maintenance of Way Employes Division (Teamsters) (BMWED). OSHA also reviewed the settlement with the Brotherhood of Railroad Signalmen (BRS). In deciding to enter into the settlement, OSHA acknowledged the lack of a record of significant injuries or fatalities resulting from the use of cranes or derricks for railroad track construction and maintenance and the

consensus between labor and management groups that the proposed exemptions and alternatives would continue practices generally accepted as safe in the railroad industry. The settlement was narrowly tailored to address the aspects of the railroad industry that differ significantly from the more typical construction work covered by the crane standard. In 2018, OSHA published a notice of proposed rulemaking (NPRM) seeking public comment on the proposed regulatory changes for the railroad industry that had been included in the settlement agreement (83 FR 34076 (July 19, 2018)).

Subsequent to the settlement agreement executed between AAR and OSHA in September 2014, FRA issued a final regulation involving, among other issues, safety-related training requirements for the use of railroad cranes and railroad roadway maintenance machines (hereafter, RMMs will mean [railroad] roadway maintenance machines) equipped with a hoisting device.[1] This regulation also included other revisions to FRA regulations addressing the use of RMMs (79 FR 66460, November 7, 2014).

As dictated by Section 4(b)(1) of the Occupational Safety and Health (OSH) Act (29 U.S.C. 653), to the extent FRA regulations exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health, OSHA is preempted from applying regulatory requirements of its own to the corresponding working conditions addressed. On March 19, 2019, following the publication of OSHA's NPRM, FRA provided OSHA further information clarifying that FRA intends to preempt the potential applicability of most of the OSHA requirements addressed in OSHA's NPRM (see Docket ID: OSHA–2015–0012–0015) through FRA regulations. Thus, OSHA concludes that those affected parts of the OSHA crane standard do not apply with regard to the operation of RMMs.

Although any exemption from OSHA requirements resulting from the preemption of OSHA statutory authority by FRA would apply whether or not the OSHA regulations include any specific exemptions, OSHA believes it is still appropriate to amend the Code of Federal Regulations (CFR) to include the explicit exemptions for RMMs in the OSHA crane standard. Having the exemptions specified in the OSHA crane standard will provide additional clarity for employers in the railroad industry, including contractors, who may be unfamiliar with the legal implications of FRA's action. A clearer understanding of which regulatory requirements are applicable will ultimately result in a more effective regulatory program and improved safety.

Thus, as explained in this preamble, OSHA is adding certain exemptions and clarifications to the crane standard. Some of these exemptions recognize the unique equipment and circumstances in railroad roadway work, while others reflect the preemption of some OSHA requirements by FRA.

This rule is an E.O. 13771 deregulatory action. Details on the estimated costs and cost savings for this rule can be found in the final rule's economic analysis in section III of this preamble.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule not a ''major rule'' as defined by 5 U.S.C. 804(2).

## II. Summary and Explanation of the Final Rule

The following discussion summarizes and explains each new or revised provision in this final rule and the substantive differences between the revised and previous version of OSHA's crane operator requirements in subpart CC of 29 CFR part 1926.

### *A. Exemption for Flash-Butt Welding Trucks and Equipment With Similar Attachments*

This final rule adds paragraph (c)(18) to § 1926.1400 of the crane standard, as proposed, in order to exclude flash-butt welding trucks and equipment with similar attachments from the requirements of part 1926, subpart CC.

Flash-butt welding trucks are RMMs with low-hanging workhead attachments. These machines are equipped with an attachment designed to suspend and move a welding workhead low and close to the rails in order to precisely weld two sections of rail together. Other machines that fall within this exemption are similarly designed to suspend and move specific operation workheads low to the rails. This class of machines does not have any other hoisting device. AAR provided examples of these machines to OSHA prior to publication of the proposed rule (see Docket ID: OSHA–2015–0012–0008).

Because these machines are not capable of raising and suspending the workhead more than a few feet above the ground or roadbed, and the weight and structure of the workhead does not appear to present any danger of equipment tipover at any point during the workhead's full range of motion, OSHA believes that equipment in this class does not present the types of safety hazards OSHA intended to address in the crane standard.

In response to the proposed rule, OSHA received two public comments that addressed this issue directly. One comment was submitted jointly by BRS and BMWED (see Docket ID: OSHA–2015–0012–00014). The labor organizations stated that they generally support the proposal to revise § 1926.1400(c) to expressly exempt flash-butt welding trucks and other RMMs equipped only with hoisting devices used to suspend and move their workhead assemblies low and close to the rails. The labor organizations also noted that the adoption of the proposed exemption ''does not appear to compromise worker safety.''

Another comment was received from the AAR (see Docket ID: OSHA–2015–0012–00011, p. 7). The AAR stated that ''flash-butt welding trucks and other roadway maintenance machines with low-hanging workhead attachments should be exempted from the requirements of the OSHA Crane Standard and so should be added to the equipment specifically exempted under [§ 1926.1400(c)].''

OSHA is revising § 1926.1400(c) to expressly exempt flash-butt welding trucks and other RMMs equipped only with hoisting devices used to suspend and move their workhead assemblies low and close to the rails, as proposed.

### *B. New 29 CFR 1926.1442 To Address Railroad Equipment*

Title 29 CFR 1926.1442, which addresses severability, is currently the last section of the crane standard. OSHA

[1] The railroad industry relies on a number of different pieces of equipment to deliver and position the ballast rock that supports the railroad ties, the ties that support the rail, and the rail itself. Railroads also use the equipment to install railroad signal posts and to keep the tracks and the areas immediately alongside the track free from debris and other impediments to trains. The railroad industry classifies this equipment collectively as ''roadway maintenance machines,'' which are defined in FRA regulations as devices ''powered by any means of energy other than hand power . . . being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary'' (49 CFR 214.7). The ''roadway'' referenced in this definition does not refer to a road over which cars or trucks would travel; within the railroad industry it refers to the area encompassing the tracks, track support, and nearby items that could foul the track (see, *e.g.,* the definition of ''roadway worker'' in 49 CFR 214.7). Most of this equipment falls within the scope of OSHA's Cranes and Derricks Standard in subpart CC because it is ''power operated equipment'' and includes some form of hoisting device that allows the equipment to be used to ''hoist and lower and horizontally move a suspended load'' (see 29 CFR 1926.1400(a)).

is redesignating the severability provision currently in 29 CFR 1926.1442 as § 1926.1443 to enable the addition of a new § 1926.1442 dedicated to the RMMs addressed in this rulemaking.

Rather than insert the various new RMM exceptions throughout subpart CC, this final rule consolidates them into a single section for the convenience of the affected parties and to maintain the organizational integrity of subpart CC. Aside from the § 1926.1400(c)(18) exclusion for flash-butt welding trucks and similar equipment, § 1926.1442 will contain all of the new provisions addressed through the settlement.

OSHA received one comment directly addressing this change. The BRS, in a joint comment with the BMWED, supported the consolidation indicating it would be convenient for all affected parties. (See Docket ID: OSHA–2015–0012–0014, p. 2.)

Thus, OSHA is finalizing the redesignation of this section as proposed.

*C. Scope of New § 1926.1442*

New § 1926.1442(a) sets out the scope of the new exemptions. The limited exemptions for railroads in the new § 1926.1442 apply to work on the construction of railroad tracks and supporting structures, including the railroad ties supporting the tracks, the ballast and the road bed that support the track and ties, and the poles and other structures on which railroad signal devices and signage are mounted.

The exemptions do not apply to other types of construction activities that may be related to railroads, such as the construction of buildings, retaining walls, fences, or platforms controlled by railroads. When the exemptions do not apply, the crane standard continues to apply to construction activities conducted by employers in the railroad industry as it does to employers in other industries.[2]

In the proposed rule, OSHA had proposed to limit the scope of the exemptions in § 1926.1442 only to construction of railroad tracks and supporting structures other than bridge construction (83 FR at 34079). In this final rule, OSHA is applying these exemptions to equipment covered by subpart CC that meets the definition of ''Roadway Maintenance Machine'' as defined in 49 CFR 214.7, regardless of whether the equipment is used for railroad bridge construction work or for other construction work involving railroad tracks and supporting structures. In its comments in response to the proposed rule, AAR noted that ''FRA regulations also cover bridge construction work'' and that accordingly ''the distinction found in proposed § 1926.1442(a) for bridge construction work is no longer appropriate and not legally accurate (see Docket ID: OSHA–2015–0012–00011, p. 5).

The scope of these exemptions in the final rule reflects the extent to which FRA has acted to preempt OSHA regulatory authority in accordance with section 4(b)(1) of the OSH Act, as discussed earlier. See 79 FR 66460 and FRA's communication to OSHA in Docket ID: OSHA–2015–0012–0015. FRA made clear in its 2019 communication to OSHA that it intended to preempt the relevant provisions of OSHA's standard without regard to whether they applied to bridge construction or not (see, *e.g.,* FRA's response to OSHA's first question: ''. . . [FRA regulations] oust OSHA's similar construction standards, including standards relating to bridge construction . . .''). The distinction for bridge construction work in proposed § 1926.1442(a) is no longer appropriate and therefore was not included in this final rule. To prevent the removal of the proposed distinction for bridge work from inadvertently expanding the exemptions beyond activities regulated by FRA, however, the final rule specifies that the exemptions apply only to the extent that the RMM activities remain subject to the authority of FRA. For example, OSHA's exemptions would apply to railroad bridge construction subject to subpart B of 49 CFR part 214 (Bridge Worker Safety Standards), but the use of cranes to construct a highway bridge over railroad track would not be exempt to the extent that FRA lacks authority to regulate that activity to ensure the safe operation of that equipment. OSHA's crane standard, including its requirements for operator training, certification, and evaluation, would apply in full to the latter class of construction activity.

*D. Section 1926.1442(b)(1) Operator Certification, Training, and Evaluation*

This final rule paragraph provides exemptions in accordance with section 4(b)(1) of the OSH Act, which exempts from the Act the working conditions of certain employees with respect to which other Federal agencies exercise statutory authority to prescribe and enforce occupational safety and health standards.

Following OSHA's promulgation of the crane standard in subpart CC, FRA promulgated training requirements for operators of RMMs equipped with hoisting devices. FRA's rule included a clear statement in the preamble that after the effective date of the new rule, ''FRA regulations would apply to operators of roadway maintenance machines equipped with a crane, rather than OSHA's regulation related to crane operator qualification and certification found at 29 CFR 1926.1427'' (79 FR 66460, 66475 (November 7, 2014)). FRA had previously issued its proposed rule with a similar statement prior to OSHA's settlement agreement with AAR, so the draft regulatory language in OSHA's settlement agreement included a proposed exemption from the operator certification requirements of § 1926.1427. In the NPRM for this rulemaking, OSHA went further and stated that it read FRA's final-rule statement as preempting all OSHA requirements that would apply to the training, certification, and assessment of operators of RMMs (83 FR at 34079). OSHA therefore proposed to exempt all of the operator ''qualification and certification'' requirements in § 1926.1427, as well as the operator training requirements in § 1926.1430, and sought comment on whether any additional provisions should be cited in the exemption (83 FR at 34080).

OSHA received two comments, both agreeing that FRA's statement should be read as broadly preempting all of OSHA's operator training, evaluation, and certification requirements with respect to operators of RMMs. A joint comment from the labor organizations BRS and BMWED affirmed that the hazards OSHA had identified when promulgating the operator certification requirements do exist in the railroad industry but did not object to OSHA's exemption for certification and training so long as ''this exemption does not relieve the FRA from its responsibility to assure that these hazards are addressed.'' (See Docket ID: OSHA–2015–0012–0014.)

AAR, whose comment was endorsed by several other commenters, asserted that FRA regulation prohibits OSHA from enforcing requirements regarding ''all aspects of operator training,'' including ''the evaluation and assessment of roadway maintenance machine operators.'' (See Docket ID: OSHA–2015–0012–0011, pp. 4–5.) AAR also noted that OSHA, in a separate rulemaking, had proposed new training and evaluation requirements for

[2] The crane standard already incorporates additional provisions addressing railroad activities. (See, *e.g.,* § 1926.1420(b)(2) (communications near railroads).) Some of those provisions already exempt railroad employers from certain requirements, and those exemptions would continue to apply. New § 1926.1442(a) states that all other ''requirements'' would continue to apply, but exemptions for railroad activities already in the crane standard would continue to exempt such activities.

operators of three specific categories of cranes for which operator certification was not required: §§ 1926.1436(q) (Qualification and training for derricks), 1926.1440(a) (Sideboom cranes), and 1926.1441(a) (Equipment with a rated hoisting/lifting capacity of 2,000 pounds or less) (see Cranes and Derricks in Construction: Operator Qualification, 83 FR 23534, 23568–23569 (May 21, 2018)). AAR recommended that OSHA expressly exempt operators of RMMs from the training and evaluation provisions proposed in those sections.

OSHA agrees with AAR and is therefore expanding the exemptions in final rule § 1926.1442(b)(1). Like the proposed rule, the final rule includes an explicit exemption from the training, certification, and evaluation requirements for these operators in §§ 1926.1427 and 1926.1430, to provide clear notice to employers in the railroad industry that might not otherwise be aware of the effect of FRA's rule on OSHA's standard. The final rule goes further. Although OSHA did not ultimately include any operator evaluation requirements in § 1926.1436(q), § 1926.1440(a), or § 1926.1441(a),[3] the exemption in this final rule also applies to operator qualification requirements in §§ 1926.1436(q), 1926.1440(a), and 1926.1441(a), as AAR requested, based on FRA's statement of intent to exercise jurisdiction over all aspects of operator training.

The exemption in § 1926.1442(b)(1) also extends to the requirements for the assessment and evaluation of crane operators. Under § 1926.1427, as amended in 2018, employers are required to evaluate their operators to ensure competency to operate specific cranes. Although FRA's final rule predated the promulgation of OSHA's assessment and evaluation requirements, OSHA reads FRA's statements about replacing OSHA's regulation related to crane operator qualification and certification found at 29 CFR 1926.1427 as intended to preempt all OSHA requirements that would apply to the training, certification, assessment, and evaluation of operators of RMMs.

*E. Section 1926.1442(b)(2) Rail Clamps, Rail Stops, and Work-Area Controls*

This final rule paragraph provides exemptions in accordance with section 4(b)(1) of the OSH Act.

Final rule § 1926.1442(b)(2) exempts employers from three requirements. Section 1926.1442(b)(2)(i) and (ii) provides exemptions from subpart CC requirements for using rail stops and rail clamps on equipment covered by subpart CC. Under § 1926.1442(b)(2)(iii), OSHA provides an exemption from work area controls specified by § 1926.1424(a)(2) when employers are subject to the on-track safety program requirements of 49 CFR 214.307(b).

FRA's interpretation of its regulations in its communication to OSHA stated clearly that it intended the regulations at 49 CFR part 214 (specifically, §§ 214.307, 214.341(b), and 214.357(b)) to preempt all three categories of OSHA's requirements when operating RMMs: ''FRA regulations ensure employers put in place sufficient protections to prevent the types of hazards that OSHA intended to prevent through its work-area control, rail clamp and rail stop requirements.'' (See Docket ID: OSHA–2015–0012–0015.)

Comments received in response to the proposal were supportive of the proposed exemptions for rail stops, rail clamps, and work area controls. (See Docket IDs: OSHA–2015–0012–0011, p. 7–8; OSHA–2015–0012–0014, p. 2.) In light of FRA's stated intention to preempt OSHA's provisions in these areas without the limitations OSHA had included in the proposed rule, the exemptions in this final § 1926.1442(b)(2) are expanded from the proposal. In the proposed rule, OSHA had included caveats to these exemptions; in the final rule, the proposed caveats have been removed, consistent with the extent of FRA's regulatory requirements.

*F. Section 1926.1442(b)(3) Out-of-Level Work*

This paragraph provides exemptions in accordance with section 4(b)(1) of the OSH Act.

Section 1926.1442(b)(3) exempts RMMs from restrictions on out-of-level work. These OSHA restrictions, including the requirements to comply with out-of-level manufacturer procedures in § 1926.1402(b), the inspection requirements in § 1926.1412(d)(l)(xi), and the requirement that machines have out-of-level indicators in § 1926.1415(a)(l), address the risk of equipment tipover and loss of control of the load.

The record in this rulemaking indicates that out-of-level operation is a longstanding and necessary practice in the railroad industry. Industry practices already account for load-chart adjustments and other standard practices to address out-of-level work. In 2010, OSHA responded to the unique nature of railroad work conditions with an exception to the out-of-level work prohibition for railroad equipment but limited the exception to include only equipment traveling on the tracks (see § 1926.1402(f)). Following the rulemaking, AAR explained that many RMMs, like a swing loader crane, often travel next to the track (as opposed to on it) but frequently must work out-of-level because the ballast and road bed are sloped. OSHA therefore proposed an expanded exemption that would have applied to RMMs even when operated off the track but would have required a registered professional engineer (RPE) or another qualified person to make adjustments to the manufacturer-provided load charts that typically anticipate operation on level ground (83 FR at 34080).

All of the comments addressing this provision supported the exemption. One commenter supported OSHA and agreed that ''these proposals, if promulgated, would maintain safety and health protections while reducing employers' compliance burdens.'' (See Docket ID: OSHA–2015–0012–0010.) Another commenter also expressed support for the exemption and stated that it is ''helpful.'' (See Docket ID: OSHA–2015–0012–0011, p. 8.)

A third commenter suggested that the ''approvals must be in writing and be included in the 'Instructions Document' required under 214.341(b).'' This commenter also suggested that the option of allowing a qualified person to make additional adjustments should be removed because ''the equipment manufacturer and an RPE are the only professionals qualified with the knowledge and expertise necessary to adjust load charts for railroad operations.'' (See Docket ID: OSHA–2015–0012–0014, p. 3.)

FRA subsequently communicated to OSHA that it intends its regulations at 49 CFR part 214, subparts C and D, including §§ 214.341 and 214.357, to ''govern the safe operation of roadway maintenance machines (including those with cranes) such that they oust OSHA's similar construction standards . . . that would otherwise require operators of this equipment to comply with crane manufacturer's procedures.'' (See Docket ID: OSHA–2015–0012–0015.) FRA also stated that its regulations ''do not directly limit out-of-level work, but that issue may be indirectly addressed in a manufacturer's instructions or the instructions established by an employer that replace the manufacturer's instructions.'' (Id.) OSHA interprets this response as indicating that OSHA is foreclosed from imposing conditions on out-of-level work.

[3] See explanation in OSHA's final rule for Cranes and Derricks in Construction: Operator Qualifications, 83 FR 56198, 56209 (November 9, 2018).

Therefore, OSHA is issuing this exemption in this final rule as a broad exemption from the prohibition on out-of-level work without any of the conditions required in the proposal.

*G. Section 1926.1442(b)(4) Dragging a Load Sideways*

The exemption in § 1926.1442(b)(4) in this final rule provides relief from the prohibition in § 1926.1417(q) against using cranes or derricks to drag a load sideways. It has been an existing practice during many track construction projects for RMMs to drag rail or ties sideways. The practice of dragging long pieces of rail sideways off the ties or to position them on top of the ties is routine and critical to the process of track construction. This practice does not have a ready alternative, does not involve lifts more than a few feet off the ground, and the movement of the load is predictable because the procedure is repeated over and over with the same materials.

None of the commenters opposed this exemption. One comment in response to the proposed rule expressed general support for ''the exemptions in the Proposed Rule and the changes made pursuant to the settlement agreement between OSHA and AAR.'' (See Docket ID: OSHA–2015–0012–0011, p. 9.) Another comment supported this exemption, stating that ''the long existing practice of dragging a load sideways in the rail industry is absolutely crucial for the rail industry to perform.'' (See Docket ID: OSHA–2015–0012–0014, p. 3.)

Therefore, OSHA is including this exemption in the final rule as proposed.

*H. Section 1926.1442(b)(5) Boom-Hoist Limiting Device*

Section 1926.1442(b)(5) of this final rule clarifies existing § 1926.1416(d)(1), which requires equipment manufactured after December 16, 1969, to have a boom-hoist limiting device. Traditionally, boom hoists wind wire rope around a revolving drum. At the other end of the wire rope is a ball, to which a hook or other device can be attached, that can be pulled up toward the tip of the boom. The boom hoists continue to wind until stopped by the operator, a limiting device, or by damaging the machine. The process is somewhat analogous to a fisherman winding line on a rod and reel: If too much winding occurs, the lure is pulled into the rod tip; more winding bends and breaks the rod or detaches the lure. The limiting device prevents similar results on boom-hoist equipped cranes and derricks by automatically stopping winding when the ball is pulled too close to the tip of the boom. On hydraulic cylinder/piston equipped booms, the § 1926.1416(d)(1) requirement for a limiting device is redundant because the stroke or piston travel is an inherent limit in each cylinder/piston. Thus, OSHA proposed to exempt RMMs using a hydraulic piston for raising and lowering the boom from the requirement for a boom-hoist limiting device in § 1926.1416(d)(1) (83 FR at 34081).

Both commenters addressing this provision supported the exemption. (See Docket ID: OSHA–2015–0012–0011, p. 9 and OSHA–2015–0012–0014, p. 3.) One of the commenters noted that ''the Sec. 1926.1416(d)(1) requirement for a limiting device is redundant because the stroke or piston travel is an inherent limit in each cylinder/piston. . . . We support this proposed section and the clarification it brings'' (see Docket ID: OSHA–2015–0012–0014, p. 3).

Therefore, OSHA is including this provision in the final rule as proposed.

*I. Section 1926.1442(b)(6) Manufacturer Guidance for Modifications Covered by § 1926.1434*

Section 1926.1442(b)(6) in this final rule provides an exemption for certain railroad machines from the requirements of § 1926.1434, which requires employers to obtain and follow the equipment manufacturer's guidance for equipment modifications. OSHA's proposed exemption was conditioned on procedural prerequisites such as the employer obtaining approval from an RPE for equipment modifications not permitted by the manufacturer (83 FR at 34081). The AAR and the two labor organizations (BRS and BMWED) addressed the issue and supported the exemptions, while the latter comment requested that engineer approval be in writing. (See Docket ID: OSHA–2015–0012–0011, p. 7; OSHA–2015–0012–0014, p. 3.)

As discussed earlier with respect to out-of-level work, however, in 49 CFR 214.341 and 214.357 FRA has chosen to address the issue of manufacturer's guidance and how it will allow departure from that guidance. FRA communicated to OSHA that FRA views its regulations as preempting OSHA's jurisdiction to require compliance with manufacturer instructions and guidance. (See Docket ID: OSHA–2015–0012–0015.) Therefore, to reflect the extent of FRA's preemption, OSHA has included this exemption in the final rule without the associated procedural prerequisites proposed in the corresponding paragraph.

*J. Section 1926.1442(b)(7) Other Manufacturer Guidance*

Section 1926.1442(b)(7) in this final rule provides an exemption for certain RMMs from the requirements of several other sections of subpart CC that require employers to follow the manufacturer's guidance, instructions, procedures, prohibitions, limitations, or specifications. The requirements are found in §§ 1926.1404(j), (m), and (q); 1926.1417(a), (r), (u), and (aa); 1926.1433(d)(1)(i); and 1926.1441. Under the final rule, these requirements do not apply if the employer is subject to the requirements of 49 CFR part 214.

As with the exemptions from manufacturer requirements in § 1926.1442(b)(6), OSHA's proposed exemption had also been conditioned on procedural prerequisites such as obtaining the approval of an RPE (83 FR at 34082). Again, the AAR and the two labor organizations (BRS and BMWED) provided the only comments specifically addressing the issue and the comments supported the exemptions while the latter comment requested that engineer approval be in writing. (See Docket ID: OSHA–2015–0012–0011, p. 7; OSHA–2015–0012–0014, p. 3.)

FRA's statement that it views the regulations at 49 CFR 214.341 and 214.357 as preempting OSHA requirements to comply with manufacturer requirements is also applicable to the exemption in § 1926.1442(b)(7). (See Docket ID: OSHA–2015–0012–0015.)

Therefore, to reflect the extent of FRA's preemption, OSHA has included this exemption in the final rule without the associated procedural prerequisites proposed in the corresponding paragraph.

## III. Final Economic Analysis and Regulatory Flexibility Analysis

Executive Orders 12866 and 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1532(a)) require OSHA to estimate the costs, assess the benefits, and analyze the impacts of certain rules that the agency promulgates. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The estimated cost savings for employers for this final rule are the difference between the full cost of the 2010 rule and the residual costs left after the exemptions of this final rule are in place, which is a savings of $17.1 million per year at a discount rate of 3

percent.[4] This final rule is not economically significant within the meaning of Executive Order 12866, nor is it a major rule under the Unfunded Mandates Reform Act or Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). In addition, this rule complies with Executive Order 13563.

When it issued the final crane standard in 2010, OSHA prepared a final economic analysis to ensure compliance with the OSH Act and Executive Order 12866 (58 FR 51735) (September 30, 1993). OSHA also published a Final Regulatory Flexibility Analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). On September 26, 2014, the agency included additional economic analysis when it published a final rule extending the employer duty to ensure operator competency and the deadline for all crane operators to become certified (79 FR 57785). Because OSHA did not have sufficient data at the time, OSHA did not include in either rulemaking a complete assessment of the economic impact on the railroad industry.

This final economic analysis (FEA) not only addresses the economic impact on the railroad industry of the revisions to the crane standard, but also completes the analysis of the impact of the entire crane standard on the railroad industry. This analysis relies on the data used for the proposed rule in the preliminary economic analysis (PEA) for this rulemaking (83 FR at 34082–87). OSHA requested public comment on the PEA but did not receive any comments challenging the validity of the economic estimates provided in the PEA.

The PEA used the same methodology applied to other industries in the 2010 economic analysis of the crane standard. In conducting the preliminary analysis, the agency relied mainly on the best available economic data provided by AAR to the agency as part of the settlement agreement. The agency provided a list of questions to AAR. To help answer the questions, AAR decided to send out a survey to its Class I freight railroad members. It then returned the results, along with other general responsive information, to OSHA. Those responses (referenced as AAR 2015), as well as some estimates from the economic analysis supporting the September 26, 2014, operator certification deadline extension final rule (79 FR 57785), form the basis of the original PEA, and hence this FEA. The major changes between this FEA and the PEA are wages and prices updated to 2018 dollars as well as decreased costs due to expansion of several of the exemptions.

As noted earlier in this document, in spring 2019 (following the publication of OSHA's NPRM), FRA provided OSHA additional information clarifying that FRA intends that its regulations preempt the potential applicability of a number of the OSHA requirements addressed in OSHA's NPRM. (See Docket ID: OSHA–2015–0012–0015.) In this final rule, OSHA is amending the CFR to include these corresponding exemptions. This step of codifying exemptions was requested by AAR to remove any ambiguity regarding the application of these provisions of the crane standard to the railroad industry. In the discussion that follows, OSHA has identified the reduction in costs that result from employers not being required to comply with these provisions. For consistency with the analysis provided in the PEA, OSHA has continued to rely on the same baseline costs identified in the PEA, which makes it easier to quantify the cost reductions that result from compliance with fewer provisions of the crane standard.

One of the major impacts of the expanded exemptions is that whereas the settlement agreement had limited the exemptions to activities other than bridgework (meaning that the equipment or activities for bridgework would be subject to the general requirements in OSHA's crane standard), FRA stated that it was preempting the applicable provisions in OSHA's proposed rule without regard to whether they related to bridgework. Thus, PEA costs associated with bridgework are no longer counted as costs of this final rule.

FRA's preemption interpretation and OSHA's corresponding exemptions in this final rule relieve the railroad industry of many cost burdens related to the crane standard. OSHA estimates that the 2010 rule would have cost the railroad industry $24.7 million annually in 2018 dollars. The residual total of the 2010 crane rule after the exemptions of this final rule is $7.6 million in costs for the railroad industry. Thus, railroad employers will save $17.1 million per year at a discount rate of 3 percent. At a discount rate of 7 percent, the 2010 rule would have cost the railroad industry $26.2 million annually, has a residual total of costs of $7.6 million, and hence has cost savings of $18.6 million. When the agency uses a perpetual time horizon to allow for cost comparisons under E.O. 13771, the annualized cost savings are $4.1 million per year in 2016 dollars with 7 percent discounting.[5] These cost savings are conservative in that several exemptions, described below, are not estimated quantitatively (the associated costs were not estimated in the 2010 rule) but those exemptions could appreciably increase total cost savings if they could be calculated.

*A. Scope of the Exemptions*

The railroad industry is typically divided into three ''classes'' of railroads according to a revenue-based classification scheme developed by the Surface Transportation Board (STB).[6] Class I railroads are the largest railroads with the greatest amount of revenue and primarily comprise seven large freight railroads and the Amtrak passenger rail service. They operate over the vast majority of track across the country. Class II and III railroads are smaller freight railroad companies, various commuter lines, and other specialty lines that operate over much smaller sections of track or operate on track owned by the Class I railroads.

OSHA has imperfect information about the three classes of railroads. The AAR survey covered only the Class I freight railroads. AAR was also able to provide additional information it obtained from Amtrak, but due to incomplete national statistics for the railroad industry, OSHA has not been able to obtain corresponding data for Class II and Class III railroads.

Therefore, for this final rule, the agency has followed the same procedure as it did in the PEA and used indirect estimates to scale up partial data to create estimates for the industry as a whole. The U.S. Department of Transportation states that Class I freight railroads operated 94,400 miles (68%) of the 139,400 total miles in the U.S. system.[7] Amtrak stated that it maintains 852 miles of track (Amtrak, 2017). In combination with Class I freight track, the total Class I track estimate is therefore 95,252 (94,400 miles operated

[4] At a discount rate of 7 percent, the cost savings are $18.6 million per year. Due to rounding as shown in the text versus the underlying exact spreadsheet calculations, some text calculations may vary from the exact presented totals. All dollar amounts in the text are brought forward to 2018 dollars.

[5] This perpetual cost calculation is in 2016 dollars for a horizon starting in 2020.

[6] See 49 CFR part 1201, General Instructions 1–1. Class I railroads are those with annual carrier operating revenues of more than $250 million, Class II railroads are those with operating revenues between $20 million and $250 million, and Class III railroads have annual operating revenues of less than $20 million.

[7] ''The United States had almost 140,000 railroad route-miles in 2014, including about 94,400 miles owned and operated by the seven Class I freight railroads. Amtrak, local, and regional railroads operated the remaining 45,000 miles.'' (DOT/BTS, 2016, p. 16 (internal citation omitted)).

by Class I freight + 852 miles operated by Amtrak) out of the total U.S. track of 139,400. AAR also stated that its members operate 6,935 RMMs that might fall within the scope of OSHA's crane standard (AAR, 2015), and Amtrak stated that it operates 303 RMMs that might fall within that standard (Amtrak, 2017). Assuming that non Class-I railroads use RMMs in the same way as Class I railroads, OSHA is able to estimate the total number of potentially covered RMMs by scaling up the total number of Class I RMMs by the ratio of total track to Class I track, or 1.46 (139,400/(94,400 + 852)).[8] With the total number of Class I RMMs at 7,238 (6,935 freight + 303 Amtrak), the final estimate of all RMMs is 10,593 (7,238 × 1.46). To the extent that Class I railroads perform track work for other segments of the railroad industry, this markup will be an overestimate. The agency solicited comment but received none on this issue and so used the same methodology for this FEA.

Based on information provided by FRA's Office of Safety Analysis, OSHA estimates that there are a total of 775 railroads (OSHA discussion with FRA staff, September 9, 2014). AAR reported that in 2012 the total number of freight railroads, including the 7 Class I freight railroads, was 574 (AAR, 2014). The remainder of the railroads are passenger and commuter railroads, plant railroads (that do not operate on the general railroad system of transportation [9]), freight car manufacturers, freight car repair facilities or companies that provide specialized rail services and switching and terminal railroads. The agency assumes 2012 data continue to approximate industry conditions today.

To account for the cost savings from the final rule exemptions, the number of RMMs must be broken out into two subcategories. There is a small group of RMMs that would fit into the full exemption for flash-butt welding trucks and similar equipment under § 1926.1400(c)(18). AAR reported that its members had 22 RMMs that would fall within the exemption (AAR, 2015), while Amtrak indicated that none of its RMMs would do so (Amtrak, 2017).[10] Using the same ratio to account for these exempt RMMs in Class II and III railroads, OSHA estimates that there is a total of 32 pieces of such exempt RMMs across the entire railroad industry (1.46 × 22). Therefore, OSHA estimates that 7,216 (7,238 − 22) Class I RMMs, and an industry total of 10,561 (10,593 − 32) RMMs, would fall under at least some provisions of the crane rule. Again, OSHA did not receive any comment on these estimates, which are unchanged from the PEA.

*B. Non-Operator Base Costs of 2010 Crane Standard for Railroads*

When OSHA promulgated the crane standard in 2010, the agency did not include an economic analysis of the costs imposed by that standard on the railroad industry. In order to estimate cost savings of this final rule, the agency must now estimate the costs the railroad industry would have been subject to if it had been required to comply with all requirements of the 2010 crane standard. OSHA has now estimated those costs, first in the PEA and now updated for this FEA. Table B–9 of the 2010 final rule (75 FR at 48104) shows that railroads are in the ''Own but Do Not Rent'' sector of the industry profile. The agency estimated the costs of the 2010 final rule by using the costs for the ''Own but Do Not Rent'' sector as a proxy for railroad costs, scaling these aggregate costs by the size of the railroad industry. In the PEA the agency recognized this proxy may be imperfect and solicited comment on these estimates but received none, and so has continued to use them for this FEA (83 FR at 34083).

In the PEA, OSHA noted that costs other than operator certification would have been incurred by railroad employers using equipment covered by OSHA's crane standard (*id.*). Most 2010 rule provisions other than operator certification and training are not operator specific, so the agency, as it did in the PEA, estimated the cost of the 2010 requirements by identifying the per-crane non-operator cost of the 2010 final rule and applying that cost (inflated to 2018 dollars using the GDP deflator) to the number of affected RMMs in the railroad sector.

The ''Own but Do Not Rent'' sector in Table B–9 (75 FR at 48104) has total operator certification costs of $30,606,452 and overall total costs of $62,651,984, leaving $32,045,531 in non-certification costs ($62,651,984 − $30,606,452).[11] The ''Own but Do Not Rent'' sector was listed as having 50,807 cranes and other covered equipment (Table B–11, 75 FR at 48107). Thus, excluding operator certification costs, OSHA's 2010 cost estimates for the ''Own but Do Not Rent'' sector amounted to $631 per machine ($32,045,531/50,807). Using the 1.15 GDP deflator factor for 2010–2018, this cost brought forward to 2018 dollars is $724 (Bureau of Economic Analysis (BEA), 2018).

Based on this per-machine cost of the 2010 rule and the estimate of 10,593 total pieces of railroad equipment covered by the 2010 rule, the total annual base non-operator cost of the 2010 rule to the entire railroad industry would be $7,673,147 (10,593 × $724.38; 2018 dollars). The exception for flash-butt welding trucks and similar equipment removes 32 RMMs and lowers the cost in 2018 dollars to $7,649,824 (10,561 × $724.38), which is a savings of $23,323.

These are the base non-operator costs only. There are two pieces of equipment specific to cranes on rails that would have a special impact on railroads absent the exemptions: Rail clamps and rail stops. These were not included in the 2010 rule base costs and are addressed next.

*C. Rail Clamps and Rail Stops*

Rail clamps are one type of equipment that would no longer be required in the railroad industry under the exemption in § 1926.1442(b)(2)(i) in this final rule. AAR told OSHA that the railroad industry does not typically use rail clamps for most operations and indicated that 5,663 additional rail clamps beyond what the Class I railroad industry has in stock would need to be purchased to comply with the existing crane rule (AAR, 2015). Further communication from AAR stated that Amtrak would need 157 additional clamps (Amtrak, 2017). These rail clamps would have imposed new up-

[8] From this point forward, this FEA refers to the ratio of total track to Class I track (1.46) as ''the standard markup.''

[9] The general railroad system of transportation refers to ''the network of standard gage track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas.'' 49 CFR part 209, appendix A.

[10] For the purposes of this analysis, OSHA has treated all flash-butt welding trucks and similar equipment as covered by the standard absent the proposed exemption.

[11] In the 2010 rulemaking, OSHA did not include any additional costs for operator training, other than certification exam preparation, because operator training was already required under the previous standard. Therefore, this analysis relies exclusively on operator certification costs as the costs avoided by the exemption for railroads from OSHA's operator training and certification requirements. OSHA promulgated a revision to the crane standard in 2018 that included some additional costs for evaluating operators and some additional savings from removing the requirement for multiple operator certifications for different crane capacities (see 83 FR 56198, 56236–56239 (Nov. 9, 2018)). The new exemption in § 1926.1442(b)(1) applies to all crane operator training, certification, and evaluation requirements. Thus, the exemption in this railroad rulemaking ensures that there is no economic impact on the railroad industry from the 2018 final rule.

Costs for operator certification are annualized over 5 years, reflecting the 5 year length for which a certificate is valid. All other costs are the same each year and so do not need to be annualized.

front, maintenance, and replacement costs on the industry.

In the PEA, OSHA estimated a total initial cost for rail clamps of $51,104,943, plus an additional $4,897,557 annual cost for maintenance.[12] OSHA requested comment but received none and is therefore incorporating the same costs into this final economic analysis. OSHA derived these costs first by applying the standard markup of 1.46 to estimate the total railroad industry-use clamps as 8,517 (1.46 × (5,663 + 157)). OSHA then estimated the up-front cost for each unit. AAR's survey reported as follows: ''The majority of the railroads indicated that the unit cost for a rail clamp is $5,000–$6,000. However, one of the railroads contacted a manufacturer and obtained a unit cost of $10,000.'' (AAR, 2015 p. 5). OSHA's costs are estimated to reflect the average costs for most firms, so the agency selected the higher-end of the typical cost of $6,000 from the AAR survey. Therefore, the total initial cost for rail clamps would have been $51,104,943 (8,517 × $6,000). Annualized over 10 years at a discount rate of 3 percent, the annualized cost would have been $5,991,058. Annual maintenance costs per clamp are estimated at $575 for a total annual maintenance cost of $4,897,557 (8,517 × $575).[13]

Railroads would have also incurred replacement costs as clamps reach the end of their useful lifespan. From the AAR 2015 survey, the number of replacement clamps needed over 10 years for Class I freight railroads would have been 4,223. OSHA did not receive an estimate for the number of replacement clamps that Amtrak or the Class II and III railroads would use, so the agency developed an estimate for additional replacement clamps based on the ratio of Class I freight railroad track to all other track. The resulting markup factor for purely Class I freight track as compared to the entire U.S. railroad industry track is 1.48 (139,400 miles of total U.S. track/94,400 miles of Class I freight track). Applying this freight markup to the total number of replacement clamps produces an estimate of 6,236 for the entire industry (4,223 × 1.48). If 10 percent of these clamps were replaced each year, then with the unit cost equal to the purchase price of $6,000, annual replacement costs would have totaled $3,741,650 (6,236 × 10% × $6,000).[14] Added together, the railroad industry will save $14,630,265 annually by avoiding the costs for rail clamps ($5,991,058 initial annualized cost + $4,897,557 maintenance + $3,741,650 replacement clamps).

Rail stops are the second type of equipment exempted by § 1926.1442(b)(2)(ii) in this final rule. In order to comply with the 2010 crane standard, AAR indicated that 11,326 additional rail stops beyond what the Class I freight railroads have in stock would need to be purchased (AAR, 2015). Amtrak indicated it would need an additional 314 stops (Amtrak, 2017). The standard (track-based) markup derived earlier in this FEA and applied to the sum of Class I rail stops and Amtrak rail stops produces an estimated 17,035 additional rail stops for the entire industry (1.46 × (11,326 + 314)). The unit cost of a rail stop is $300 each (AAR, 2015); therefore, the total initial cost of rail stops would have been $5,110,494 (17,035 × $300). Annualized over 10 years at a discount rate of 3%, the annual cost would have been $599,106. Annual maintenance costs per stop are $30 (AAR, 2015); therefore, total maintenance cost would have been $511,049 (17,035 × $30).

OSHA also estimated annual replacement costs for these additional rail stops. The number of additional replacement stops for the Class I freight railroads needed over 10 years is 10,436 (AAR, 2015). OSHA did not receive information regarding the number of additional replacement stops required for Amtrak or the Class II and III railroads. OSHA again uses the markup of the ratio of all U.S. railroad track to Class I freight railroad track, which is 1.48. The number of additional replacement stops needed for the whole industry would have been 15,410 (1.48 × 10,436). If 10 percent of the replacement stops will be introduced each year then 1,541 replacement railroad stops will be required each year (15,410 × 0.10). The estimate of the annual unit cost for these replacement stops is the unit cost for buying a new rail stop of $300.[15] Hence the total annual cost for additional replacement rail stops is $462,324 (1,541 × $300). Added together, annual cost savings to the railroad industry of this exemption from the 2010 crane standard for railroad stops are $1,572,479 ($599,106 initial annualized cost + $511,049 maintenance + $462,324 replacement stops).

The total annual costs savings of both railroad stops and clamps in 2015 dollars is $16,202,744 ($14,630,265 + $1,572,479). In 2018 dollars, the annual cost savings for both railroad stops and clamps is $17,067,100.[16]

*D. Work Area Controls*

OSHA estimates no economic impact from the exemption in § 1926.1442(b)(2)(iii) from compliance with the crane standard's work-area controls requirements. FRA already requires a number of work area controls to prevent injury to those working on or around railroad equipment, and FRA has stated its intent that the railroad industry is now fully exempted from this provision of OSHA's crane standard. OSHA noted in the PEA that even absent the preemption, OSHA believes that the railroads could comply with OSHA's requirements without incurring significant new costs. Therefore, OSHA did not identify a new cost for this requirement nor treat the final rule as resulting in any cost saving. OSHA requested comment on this approach but received none. Therefore, OSHA has maintained the same approach in this FEA.

*E. Out-of-Level Work*

The 2010 crane rule economic analysis did not estimate any cost increase due to the prohibition on out-of-level work applicable to RMMs traveling off of railroad tracks, and in the PEA for this rulemaking, OSHA did not estimate any cost savings attributable to the corresponding exemption from this requirement. OSHA requested comment but received none and therefore does not estimate

[12] While most costs here are the same each year, both rail clamps and stops have an initial upfront cost. The agency annualizes all initial costs over 10 years, its standard procedure. For replacement costs it also uses a 10 year horizon. All final costs presented use this 10 year horizon for annualization when needed.

[13] The estimate of $575 is the midpoint of the range in the AAR survey of $450 to $700 ($575 = ($450 + $700)/2).

[14] If the total pool of working clamps is kept constant, as we assume, then the maintenance costs for the replacement clamps are already accounted for in the annual maintenance costs for the original pool.

[15] As in the preceding footnote, maintenance costs for these replacement stops will already be accounted for in the maintenance costs for the original pool under the assumption of a constant total pool.

[16] In the PEA, OSHA estimated that 94 percent of equipment requiring rail clamps and rail stops would be exempted under the proposal, but some rail clamps and rail stops would still be required for bridgework (not exempt under the proposal). OSHA accordingly reduced the cost savings by $1,053,284 (see 83 FR 34085). The final rule, however, recognizes the FRA's preemption of all of OSHA's requirements for rail clamps and rail stops in the railroad industry, without any distinction for bridgework. Thus, in this FEA the savings attributable to rail clamps and rail stops is slightly higher than in the PEA because there are no rail clamp or rail stop costs for the railroad industry. The cost savings of $17,067,100 in 2018 dollars is calculated from the cost savings in 2015 dollars of $16,202,744 times the 2015–2018 GDP deflator markup of 1.053 (rounded).

any cost or cost savings in this FEA for the exemption for out-of-level work.

*F. Dragging a Load Sideways*

The 2010 crane rule economic analysis estimated no increased cost due to this provision, and OSHA has likewise included no cost saving for this exemption in this final rule. It is possible that the exemption does result in significant cost savings. AAR indicated that RMMs regularly need to drag long portions of rail sideways during the process of installing or replacing the rail, ties, or underlying roadbed. Therefore, AAR asserted that the prohibition on dragging a load sideways would force railroad employers to substantially change current practices for track installation and replacement. If such changes were feasible, they would likely incur significant cost. However, because OSHA did not previously estimate any increased costs for this provision, OSHA did not include any cost saving in the PEA. OSHA solicited comment on this approach but received none and is therefore not estimating any cost savings in this FEA, even though it recognizes that the total cost savings of this final rule may therefore be underestimated.

*G. Boom-Hoist Limiting Device*

The 2010 crane rule economic analysis estimated that such boom hoist limiting devices would generally already be in place, where needed. Therefore, OSHA did not include any new costs for this requirement in 2010. OSHA did not estimate any cost savings for this exemption in the PEA and received no comment on that decision, and in this FEA there are no resulting cost savings from this exemption.

*H. Manufacturer Guidance for Modifications Covered by § 1926.1434*

The 2010 crane rule economic analysis estimated that there would be no new costs due to this provision because it was similar enough to the previous subpart N crane standard. In the PEA, the agency did not identify any cost savings from the proposed exemption (83 FR at 34085). OSHA received no comment on that approach and therefore again does not estimate any cost savings for the exemption, even as expanded in the final rule.

*I. Operator Certification and Assessment*

Because FRA explicitly preempted OSHA's operator training and certification requirements when it issued its own operator training rules for railroads, in the PEA OSHA did not include any cost or savings related to operator training or certification. In this final rule OSHA has expanded its exemption to encompass all of the operator qualification requirements in the crane standard, including the evaluation requirements OSHA promulgated in 2018, consistent with the PEA. None of those changes, however, impact OSHA's economic analysis in the FEA because they are based on the recognition that FRA's explicit statement preempting OSHA's operator certification and training encompassed operator evaluations.

*J. Total Annual Cost and Savings*

Finally, adding together the rail clamp/stop costs and the base non-operator costs, the total annual cost of the 2010 rule to the railroad industry would have been $24,740,247 ($17,067,100 + 7,673,147). The non-operator costs left after excluding the items addressed in the exemptions, from above, are $7,649,824, a reduction of $17,090,423 ($24,740,247 − $7,649,824). These calculations are at a discount rate of 3 percent, using 2018 dollars. At a discount rate of 7 percent, also using 2018 dollars, the reduction is $18,579,485.

*K. Economic Impacts and Feasibility*

This section investigates the economic impacts of both the 2010 rule and this final rule, whether they are economically feasible for the railroad industry as a whole, and whether the agency can certify that both rules will not have a significant economic impact on a substantial number of small entities. Since the railroad industry will incur only a fraction of the full costs attributable to the 2010 crane standard, a finding that the 2010 crane rule would have no significant economic impact implies the same for this final rule.

In the PEA, OSHA preliminarily determined that the crane rule is economically feasible for the railroad industry and the agency certified that the proposed rule would not have a significant impact on a substantial number of small entities (83 FR at 34086–87). OSHA requested comment on those determinations but received none. The final rule does not include any provisions that added any costs not identified in the PEA, so the agency reaches the same conclusions with respect to the final rule. These conclusions rest on the same analysis as the PEA, which is repeated here.

OSHA applies two threshold tests to look at economic feasibility for firms overall, regardless of size: Whether the rule's costs as a percentage of revenues for a sector as a whole are below 1 percent, and whether those costs as a percentage of profits are below 10 percent. For small entities there are also two threshold tests: Whether the costs for small entities are 1 percent of their revenues or below, and whether those costs are 5 percent or less of the small entities' profits. None of these threshold tests are hard ceilings or determinative; they are guidelines the agency uses to examine whether there are any potential economic feasibility issues that require additional study. As for the overall totals estimated above, the agency must use indirect estimates since no public firm-by-firm information exists.

OSHA relies on the Small Business Administration's (SBA) size standards to classify a company as ''small.'' The SBA size standard for a small entity in the railroad industry is employment of 1,500 or less (SBA, 2017). The seven Class I freight railroads employ a total of 162,819 employees, or an average of 23,260 employees per firm (162,819/7) (AAR, 2014). The agency estimates that all 7 freight railroads will be above the 1,500-employee SBA size standard. Non-Class I freight railroads employ 18,445, and with 574 firms their average number of employees is 33 (18,445/574). Put together, total freight employment is 181,264 employees (162,819 + 18,445). Amtrak has more than 20,000 employees and is also well above the small entity threshold.[17] While there is likely to be a skew among non-Class I railroads, and some of these railroads may actually exceed the threshold for small businesses, for the purposes of this analysis the agency treats all 767 non-Class I firms (775 railroads − 8 Class I railroads) as below the SBA size standard of 1,500 employees.

According to AAR, the Class I freight railroads in 2012 had revenue of $67.6 billion out of the total of $71.6 billion for the entire freight industry, so the share of Class I freight revenues is 94 percent (67.6/71.6), while $4 billion (71.6 − 67.6) are the revenues for small freight railroads (AAR, 2014). OSHA did not receive revenue estimates regarding non-freight railroads, so applying the standard freight-only markup to those totals to account for passenger rail and other included entities, OSHA estimates $105.7 billion ($71.6b × 1.48) and $5.9 billion ($4b × 1.48), respectively, for total railroad and small railroad revenue. Using the GDP deflator to convert these amounts to 2018 dollars

[17] While the number of Amtrak employees is not changed from the PEA, the source has been updated to reflect a 2018 publication. See Amtrak's FY 2018 Company Profile, p. 2, available at *https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/nationalfactsheets/Amtrak-Corporate-Profile-FY2018-0319.pdf*.

results in $116.7 billion and $6.5 billion in revenue, respectively.

OSHA applied AAR's report of 2012 operating income (profits) for Class I railroads to estimate the average profits of non-Class I railroads. Class I freight railroads' net income was $11.9 billion (AAR, 2014), and assuming that the Class I net income share was the same as its operating revenue share, OSHA derives a total freight industry net income of $12.6 billion ($11.9b/.94) in 2012, and hence small freight railroad total net income of $704 million ($12.6b − $11.9b) in 2012. OSHA did not receive income estimates regarding non-freight railroads, so applying the standard freight-only markup to those totals to account for passenger rail and other included entities, OSHA estimates $18.6 billion ($12.6b × 1.48) and $1.0 billion ($704b × 1.48), respectively, for total railroad and small railroad net income. Using the GDP deflator to convert these amounts to 2018 dollars results in $20.4 billion and $1.1 billion in net income, respectively.

Finally, OSHA allocates costs to the small railroads. The share of employment, rather than revenue, was judged to be a better proxy to estimate the costs of the 2010 crane rule for small railroads. From the information provided earlier, Class I freight employment is about 90 percent of total freight railroad employment (162,819/181,264). With total railroad industry costs of $24.7 million, and, as usual, assuming the same ratio applies to non-freight railroads, total small railroad industry costs are $2.5 million ($24.7 million × (1 − .90)). The revenues, profits, and costs are set out in Table 1.

TABLE 1—TOTAL AND SMALL RAILROAD INDUSTRY ESTIMATED FINANCIAL STATISTICS

| Description | 2018 dollars |
|---|---|
| Revenue: | |
| Total Revenue | $117 billion. |
| Small Entity Revenue | $6.5 billion. |
| Profit: | |
| Total Profit | $20.4 billion. |
| Small Entity Profit | $1.1 billion. |
| Cost: | |
| Total Cost | $24.7 million. |
| Small Entity Cost | $2.5 million. |

The ratio of the 2010 crane rule's costs to revenue for all railroads is 0.02 percent ($24.7m/$117 billion) and for small railroads is 0.04 percent ($2.5m/$6.5 billion). The ratio of the 2010 crane rule's costs to profits for all railroads is 0.12 percent ($24.7m/$20.4 billion) and for small railroads it is 0.23 percent ($2.5m/$1.1 billion). Both easily pass OSHA's standard threshold impacts tests of costs being below 1 percent of revenue and 10 percent of profits (5 percent of profits for small entities).

For this final rule, from the above, the total residual costs for the railroad industry as a whole are $7,649,824. Using the same 10 percent share for small railroads gives total costs for small railroads of $778,428. The ratio of this final rule's costs to revenue for all railroads is 0.01 percent ($7.6m/$117 billion) and for small railroads is 0.01 percent ($0.8m/$6.5 billion). The ratio of this final rule's costs to profits for all railroads is 0.04 percent ($7.6m/$20.4 billion) and for small railroads it is 0.07 percent ($0.8m/$1.1 billion). These also easily pass OSHA's standard threshold impacts tests of costs being below 1 percent of revenue and 10 percent of profits (5 percent of profits for small entities).

This analysis at a few places has noted the possibility of some underestimation of the costs in previous analyses of the 2010 crane standard for the railroad industry, and thus cost savings attributable to this final rule. Even a doubling of costs for the railroad industry would still result in estimated impacts far below threshold limits and so would not affect feasibility findings even if all of the provisions of the 2010 rule had been applied to the railroad industry.

OSHA found that the 2010 crane standard is economically feasible for all affected industries because the ''[c]osts of 0.2 percent of revenues and 4% of profits will not threaten the existence of the construction industry, affected general industry sectors, or the use of cranes in affected industry sectors,'' and no change in the competitive structure of those industries was expected (75 FR at 48112). The analysis here shows that the costs of the 2010 rule on railroads are negligible compared to revenues and profits. Even more so for the residual costs of this final rule. This supports both OSHA's finding that the 2010 final rule is economically feasible for all affected industries (including railroads) and a finding that the residual costs left after the exemptions in this OSHA final rule are also economically feasible.

When OSHA determined in 2010 that the crane standard would not have a significant impact on a substantial number of small entities, OSHA found that in no case would a small entity have to increase prices more than 0.18 percent or, if costs could not be passed on, absorb costs comprising more than 5.0 percent of profits (75 FR at 47913, 48115). As discussed above, as applied to small railroads, the 2010 rule would be just 0.12 percent of revenues and 0.23 percent of costs, which shows that the 2010 final rule finding of no significant impact on a substantial number of small entities still holds true when railroads are included. The residual costs for this final rule for small railroads are even smaller, so the agency certifies that this final rule will have not have a significant impact on a substantial number of small entities.

*L. Overhead Cost Adjustment*

The agency notes that it did not include an overhead labor cost when it calculated the costs of the crane rule in 2010 and did not add overhead costs solely for the railroad industry in the PEA accompanying this rulemaking. OSHA did not receive any comments opposing that decision, and the agency is not including any such costs in this FEA. OSHA noted in the PEA that there is not one broadly accepted overhead rate and that the use of overhead to estimate the marginal costs of labor raises a number of issues that should be addressed before applying overhead costs to analyze the costs of any specific regulation. There are several approaches to examine the cost elements that fit the definition of ''overhead'' and there are a range of overhead estimates currently used within the Federal Government. For example,[18] the Environmental Protection Agency has used 17 percent,[19] and Government contractors have been reported to use an average of 77 percent.[20] Some overhead costs, such as advertising and marketing, vary with output rather than with labor costs. Other overhead costs vary with the number of new employees. Rent or payroll processing costs may change little with the addition of 1 employee in a 500-employee firm, but those costs may change substantially with the addition of 100 employees. If an employer is able to rearrange current employees' duties to implement a rule, then the marginal share of overhead costs such as rent, insurance, and major office equipment (*e.g.,* computers, printers, copiers) would be small and very difficult to measure with accuracy (*e.g.,* computer use costs associated with

[18] For a further example of overhead cost estimates, please see the Employee Benefits Security Administration's guidance at *https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-august-2016.pdf.*

[19] U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program,'' June 10, 2002.

[20] Grant Thornton LLP, *2015 Government Contractor Survey.* (*https://www.grantthornton.com/~/media/content-page-files/public-sector/pdfs/surveys/2015/Gov-Contractor-Survey.ashx*).

2 hours for rule familiarization by an existing employee).

If OSHA had included an overhead rate when estimating the marginal cost of labor, without further analyzing an appropriate quantitative adjustment, and had adopted an overhead rate of 17 percent on base wages, as was done in a sensitivity analysis in the FEA in support of OSHA's 2016 final rule on Occupational Exposure to Respirable Crystalline Silica, such a rate would have only affected the non-operator certification costs estimated from the 2010 rule. Because labor costs were only part of those costs, including this overhead adjustment would have increased the average cost per machine from $631 to $684, an 8 percent increase. Using this larger per-machine cost in the rest of the analysis would increase the final cost savings of this final rule from $17.090 million to $17.092 million at a discount rate of 3 percent, an increase of 0.01 percent. It would also have increased cost savings from $18.579 million to $18.581 million at a discount rate of 7 percent, also an increase of 0.01 percent. The agency presented a similar calculation in the PEA and received no comment.

*M. Technological Feasibility*

A safety standard must be technologically feasible. See *UAW* v. *OSHA,* 37 F.3d 665, 668 (D.C. Cir. 1994). A standard is technologically feasible when the protective measures it requires already exist, when available technology can bring the protective measures into existence, or when that technology is reasonably likely to develop (see *Am. Textile Mfrs. Inst.* v. *OSHA,* 452 U.S. 490, 513 (1981); *Am. Iron & Steel Inst.* v. *OSHA,* 939 F.2d 975, 980 (D.C. Cir. 1991)). All requirements of the final rule applicable to the railroad industry have now been in place since the promulgation of the crane standard in 2010, and the only feasibility issues for the railroad industry raised with OSHA were addressed through the settlement with AAR and reflected in the exemptions in this final rule. For example, AAR raised concerns that it would not be feasible for railroads to avoid dragging rails sideways, and OSHA is now exempting railroads from the prohibition on dragging loads sideways. Beyond the issues raised by AAR and addressed in the settlement, the agency is not aware of any special infeasibility issues that are unique to the railroad industry. The 2010 technological feasibility analysis is equally applicable to the railroad industry, so OSHA finds that the crane standard is technologically feasible for the railroad industry.

*References*

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## IV. Legal Authority

The purpose of the OSH Act, 29 U.S.C. 651 *et seq.,* is ''to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.'' 29 U.S.C. 651(b). To achieve this goal, Congress authorized the Secretary of Labor to promulgate and enforce occupational safety and health standards. 29 U.S.C. 654, 655(b), and 658. A safety or health standard ''requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'' 29 U.S.C. 652(8). A standard is reasonably necessary or appropriate within the meaning of Section 652(8) when a significant risk of material harm exists in the workplace and the standard would substantially reduce or eliminate that workplace risk. See *Indus. Union Dep't, AFL–CIO* v. *Am. Petroleum Inst.,* 448 U.S. 607 (1980). In the 2010 crane rulemaking, OSHA made such a determination with respect to the use of all cranes and derricks in construction, including cranes used in the railroad industry (75 FR at 47913, 47921–22). This rule includes a number of exemptions and does not impose any new requirements on employers. Therefore, it does not require an additional significant-risk finding (see *Edison Elec. Inst.* v. *OSHA,* 849 F.2d 611, 620 (D.C. Cir. 1988)).

OSHA standards must also be economically and technologically feasible, as discussed earlier in section III.M. of this document. In that section, OSHA finds that the crane standard, as amended by this rulemaking, is both economically and technologically feasible for the railroad industry.

This final rule includes a number of exemptions and does not impose any new requirements on employers. OSHA has the authority to promulgate these exemptions because the Act authorizes the Secretary to ''modify'' or ''revoke'' any occupational safety or health standard. 29 U.S.C. 655(b). The Supreme Court has acknowledged that regulatory agencies do not establish rules of conduct to last forever, and agencies may revise their rules if supported by a reasoned analysis for the change. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983). As explained earlier in this preamble, OSHA is exercising this authority as part of a settlement agreement. The settlement was narrowly tailored to address the aspects of the railroad industry that differ significantly from the more typical construction work covered by the crane standard, and there is consensus between labor and management groups that the exemptions and alternatives would continue practices generally accepted as safe in the railroad industry.

## V. Paperwork Reduction Act

*A. Overview*

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et. seq.) and implementing regulations (5 CFR part 1320) require agencies to consider the impact of paperwork and other information collection burdens imposed on the public.[21] 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 it is approved by the Office of Management and Budget (OMB) under the PRA and displays a valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person may generally be subject to penalty for

[21] The PRA defines ''collection of information'' as ''the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format'' (44 U.S.C. 3502(3)(A)).

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.

*B. Solicitation of Comments*

On July 19, 2018, OSHA published a **Federal Register** proposed rule that allowed the public an opportunity to comment on the proposed Information Collection Request (ICR) containing the information collection requirements in the proposed rule, as required by 44 U.S.C. 3507. Concurrent with the proposed rule, OSHA submitted the ICR (*ICR Reference Number 201707–1218–005*) to OMB for review in accordance with 44 U.S.C. 3507(d).

On August 24, 2018, OMB issued a Notice of Action (NOA) indicating that the terms of the previous clearance for the Cranes and Derricks ICR approved under OMB Control Number 1218–0261 would remain in effect and it was withholding approval for the ICR submission associated with the NPRM. OMB requested that ''[p]rior to publication of the final rule, the agency should provide a summary of any comments related to the information collection and their response, including any changes made to the ICR as a result of comments. In addition, the agency must enter the correct burden estimates.''

The proposed rule invited the public to submit comments to OMB, in addition to OSHA, on the proposed information collection requirements with regard to the following:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and cost) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the compliance burden on employers, for example, by using automation or other technologies for collecting and transmitting information.

OSHA received no public comments directly addressing the proposed ICR. However, OSHA did receive several comments that, while expressing support for the various proposed exemptions requiring approvals from RPEs, recommended those approvals be in writing. (See Docket ID: OSHA–2015–0012–0011, p. 7; OSHA–2015–0012–0014, p. 3.) OSHA also received a number of comments, described earlier in this preamble, in response to provisions of the proposed rule that contained information collection requirements in the proposed exemptions (see, *e.g.,* proposed § 1926.1442(b)(2)(i) and (iii)). For the reasons explained earlier in this preamble, OSHA did not include any of the proposed information collection in the final rule. OSHA did, however, consider the comments when it developed the revised ICR associated with the final rule. Summaries of these comments and OSHA's responses are found above in Section III, Summary and Explanation of the Proposed Amendments to subpart CC, and in the agency's final ICR analysis.

Concurrent with publication of this final rule, the Department of Labor submitted the final ICR, containing the full analysis and description of the burden hours and costs associated with the final rule, to OMB for approval. A copy of this ICR will be available at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-1218-001* on the day following publication of the final rule. OSHA will publish a separate notice in the **Federal Register** that will announce the results of OMB's review. The agency will ensure that the OMB control number for the standard is codified in § 1926.5, which is the central section in which OSHA displays any approved collection under the Paperwork Reduction Act.

*C. Summary of Information Collection Requirements*

When OSHA published the crane standard in 2010, the agency did not clearly identify any railroad respondents to the information collection requirements in that standard. The agency is now requesting OMB approval to add railroad respondents to a number of existing information collection requirements that are subject to review by OMB under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et. seq.) and the implementing regulations (5 CFR part 1320).

The final rule does not revise the regulatory text of any existing information collection requirements in the Cranes and Derricks in Construction Standard (29 CFR part 1926, subpart CC) Information Collection (IC) previously approved by OMB. It does, however, modify the number of respondents affected by information collection requirements in the IC. This results in changes to the previous burden hour and/or cost estimates associated with the current OMB-approved information collection requirements contained in the IC.

The summary below is a brief description of the significant changes between the proposal's information collection requirements and the final rule. As discussed earlier in the preamble, on March 19, 2019, following the publication of OSHA's NPRM, FRA provided OSHA further information clarifying that FRA intends for its regulations to preempt most of the OSHA requirements addressed in OSHA's NPRM (see Docket ID: OSHA–2015–0012–0015). Therefore, OSHA in this final rule expanded some of the exemptions from the proposed rule by removing conditions restricting the availability of those exemptions in response to FRA's 2019 communication. Almost all of the changes between the proposed rule and the final rule result from this removal of conditions on the exemptions.

These differences are discussed in more specific detail in Section III, Summary and Explanation of the Amendments to subpart CC. The impact on information collection requirements is also discussed in more detail in Item 8 of the ICR. This summary does not address the provisions that are unchanged from the current, OMB-approved information collection requirements. Discussion and justification of these provisions can be found in the preamble to the final 2010 crane rule (75 FR at 48017) and also in the Supporting Statements for this final rule, as well as in the approved Information Collection. Due to the agency's preemption determinations, none of the proposed information collection requirements that OSHA identified in the proposal (portions of proposed § 1926.1442(b)(2)(i) and (iii), (b)(3), (b)(6), (b)(6)(i)(A) and (B), (b)(7) introductory text, and (b)(7)(i)) are included in the final rule, as briefly explained below and in more detail above in Section III.

Rail Clamps and Work-Area Controls Exemptions

Section 1926.1442(b)(2)(i) of this final rule exempts the railroad equipment from the requirement in § 1926.1415(a)(6) for rail clamps when the manufacturer does not require them. When the manufacturer does require the clamps, the proposal would have allowed the employer to seek an exemption by obtaining an RPE's determination that rail clamps are not necessary, which OSHA had identified as creating a collection of information. The final rule does not contain the proposed requirement for an RPE's determination. Therefore, the final provision contains no information collection requirement.

Final § 1926.1442(b)(2)(iii) provides that the work-area controls specified by § 1926.1424(a)(2) do not apply when employers are subject to the on-track safety program requirements of 49 CFR 214.307(b), regardless of whether they have implemented the controls as required in the proposal. In the proposal, the potential for information collection could have come from the implementation of some controls. The agency does not consider this expanded exemption in this final rule to require any information collection.

Out-of-Level Work Restriction Exemptions

OSHA's crane standard generally prohibits out-of-level operation of cranes unless approved by the manufacturer. Proposed § 1926.1442(b)(3) would have allowed out-of-level operation for certain railroad equipment purchased after November 8, 2010, under conditions that contained information collection requirements applicable in some scenarios: Manufacturer approval or modification or approval from an RPE or a qualified person.

The final rule provision § 1926.1442(b)(3) no longer requires any conditions on the exemption for out-of-level work for RMMs. Therefore, the final provision contains no information collection requirement.

Manufacturer Guidance for Modifications Covered by § 1926.1434 Exemptions

Current § 1926.1434 requires employers to obtain and follow the equipment manufacturer's guidance for equipment modifications except in certain circumstances. OSHA proposed an exception to simplify how a railroad employer may have used modified equipment without involving the manufacturer but continuing to include safety assurances. According to proposed § 1926.1442(b)(6), an employer may have used modified railroad roadway maintenance equipment regardless of manufacturer guidance when approved by a qualified RPE.

The final rule provisions § 1926.1442(b)(6)(i)(A) and (B) no longer contain any requirements related to an employer's need to seek the approval of a qualified RPE. Therefore, the final provision contains no information collection requirement.

Other Manufacturer Guidance Exemption

Several other sections of subpart CC require employers to follow the manufacturer's guidance, instructions, procedures, prohibitions, limitations, or specifications. The proposed exemptions in § 1926.1442(b)(7) would have allowed employers to use RMMs without regard for the manufacturer's listed restrictions if approved in writing by an RPE familiar with the equipment. The final rule provision does not contain the conditions of proposed § 1926.1442(b)(7). Therefore, the final provision contains no information collection requirement.

As required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2), the following paragraphs provide information about the ICR that OSHA prepared in conjunction with this rulemaking. Through this rulemaking, OSHA is updating the ICR to include all information collections for subpart CC of 29 CFR part 1926 (OSHA's Cranes and Derricks in Construction standard), as amended by OSHA's 2018 Operator Qualification rulemaking and this rulemaking.

*Title of Collection:* Cranes and Derricks in Construction.

*OMB Control Number:* 1218–0261.

*Affected Public:* Private Sector—businesses or other for-profits.

*Estimated Number of Respondents (Railroad Industry Only):* 775 railroad industry employers.

*Estimated Number of Responses (Railroad Industry Only):* 252,714.

*Estimated Annual Time Burden Hours (Railroad Industry Only):* 40,395.

*Estimated Annual Other Costs (capital, operation and maintenance) (Railroad Industry Only):* $260,562.

*Total Estimated Number of Respondents:* 213,400 (212,625 existing employers + 775 railroad industry employers).

*Total Estimated Number of Responses:* 3,009,167.

*Total Estimated Annual Time Burden Hours:* 429,478.

*Total Estimated Annual Other Costs (capital, operation and maintenance):* $2,547,063.

## VI. Federalism

OSHA reviewed the revisions to the crane standard in accordance with the Executive order on Federalism (Executive Order 13132, 64 FR 43255, August 10, 1999), which requires that Federal agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions that would restrict state policy options, and take such actions only when clear constitutional and statutory authority exists and the problem is national in scope. Executive Order 13132 provides for preemption of state law only with the expressed consent of Congress. Federal agencies must limit any such preemption to the extent possible.

Under Section 18 of the OSH Act, Congress expressly provides that states and U.S. territories may adopt, with Federal approval, a plan for the development and enforcement of occupational safety and health standards. OSHA refers to such states and territories as ''State Plan States.'' Occupational safety and health standards developed by State Plan States must be at least as effective in providing safe and healthful employment and places of employment as the Federal standards (29 U.S.C. 667).

OSHA previously concluded from the analysis for the 2010 final rule that promulgation of subpart CC complies with Executive Order 13132 (see 75 FR at 48128–29). The revisions in this final rule do not change that conclusion.

## VII. State Plans

When Federal OSHA promulgates a new standard or a more stringent amendment to an existing standard, State Plans must either amend their standards to be identical or ''at least as effective as'' the new standard or amendment, or show that an existing state standard covering this area is already ''at least as effective'' as the new Federal standard or amendment (29 CFR 1953.5(a)). State Plan adoption must be completed within six months of the promulgation date of the final Federal rule. When OSHA promulgates a new standard or amendment that does not impose additional or more stringent requirements than an existing standard, State Plans do not have to amend their standards, although OSHA may encourage them to do so.

The provisions in this final rule are exemptions from existing OSHA requirements and will reduce compliance burdens on employers, and as such OSHA does not view any of the provisions as more stringent than the existing standard. Therefore, State Plans are encouraged to adopt comparable amendments to their standards but are not required to do so. In addition, OSHA notes that the FRA's exercise of its authority that preempted some provisions of OSHA's cranes standard with respect to railroads may also serve to preempt similar State rules, either pursuant to a state equivalent of section 4(b)(1) of the OSH Act or as the legal consequence of general Federal preemption of state laws.

The 28 states and territories with OSHA-approved State Plans are Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Nevada, New Mexico, New

Jersey, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Connecticut, Illinois, New Jersey, New York, Maine, and the Virgin Islands have OSHA-approved State Plans that apply to state and local government employees only.

## VIII. Unfunded Mandates Reform Act of 1995

OSHA reviewed this final rule in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA; 2 U.S.C. 1501 *et seq.*) and Executive Order 13132 (64 FR 43255). OSHA determined that this rule does not add new costs because the regulatory changes are exemptions.

OSHA's standards do not impose any duties on state and local governments except in states that elect voluntarily to adopt a State Plan approved by the agency. OSHA is not aware of any tribal governments that operate railroads using equipment that would be subject to this rulemaking, and the regulatory changes create exceptions to the rule, not new duties. Consequently, this rule does not meet the definition of a ''Federal intergovernmental mandate'' (see Section 421(5) of the UMRA (2 U.S.C. 658(5)).

Therefore, for the purposes of the UMRA, the agency certifies that this final rule does not mandate that state, local, or tribal governments adopt new, unfunded regulatory obligations, or increase expenditures by the private sector of more than $100 million in any year.

## IX. Consultation and Coordination With Indian Tribal Governments

OSHA reviewed this final rule in accordance with Executive Order 13175 (65 FR 67249 (November 9, 2000)) and determined that it does not have ''tribal implications'' as defined in that order. The final rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

## List of Subjects in 29 CFR Part 1926

Construction industry, Cranes, Derricks, Occupational safety and health, Railroad roadway work.

## Authority and Signature

This document was prepared under the direction of Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, Washington, DC 20210.

The agency issues the sections under the following authorities: 29 U.S.C. 653, 655, 657; 40 U.S.C. 3704; 33 U.S.C. 941; Secretary of Labor's Order 1–2012 (77 FR 3912 (1/25/2012)); and 29 CFR part 1911.

Signed at Washington, DC, on August 3, 2020.

**Loren Sweatt,**

*Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.*

For the reasons stated in the preamble of this final rule, OSHA is amending 29 CFR part 1926 as follows:

# PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

## Subpart CC—Cranes and Derricks in Construction

■ 1. The authority citation for subpart CC of 29 CFR part 1926 continues to read as follows:

**Authority:** 40 U.S.C. 3701 *et seq.;* 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 5–2007 (72 FR 31159) or 1–2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

■ 2. Amend § 1926.1400 by adding paragraph (c)(18) to read as follows:

### § 1926.1400 Scope.

* * * * *

(c) * * *

(18) *Flash-butt welding trucks.* Flash-butt welding trucks or other roadway maintenance machines not equipped with any hoisting device other than that used to suspend and move a welding device or workhead assembly. For purposes of this paragraph (c)(18), the terms *flash-butt welding truck* and *roadway maintenance machine* refer to railroad equipment that meets the definition of ''roadway maintenance machine'' in 49 CFR 214.7 and is used only for railroad track work.

* * * * *

### § 1926.1442 [Redesignated as § 1926.1443]

■ 3. Redesignate § 1926.1442 as § 1926.1443.

■ 4. Add a new § 1926.1442 to read as follows:

### § 1926.1442 Railroad roadway maintenance machines.

(a) *General rule.* Employers using equipment covered by this subpart that meets the definition of ''roadway maintenance machine,'' as defined in 49 CFR 214.7, must comply with the requirements in this subpart, except as provided in paragraphs (b)(1) through (7) of this section when subject to the authority of the Federal Railroad Administration.

(b) *Exceptions*—(1) *Operator certification, training, and evaluation.* The requirements in §§ 1926.1427 (Operator qualification and certification) and 1926.1430 (Training) do not apply. The qualification and training requirements contained in §§ 1926.1436(q) (Qualification and training for derricks), 1926.1440(a) (Sideboom cranes), and 1926.1441(a) (Equipment with a rated hoisting/lifting capacity of 2,000 pounds or less) do not apply.

(2) *Rail clamps, rail stops, and work-area controls.* (i) The requirement for rail clamps in § 1926.1415(a)(6) does not apply;

(ii) The requirement for rail stops in § 1926.1415(a)(6) does not apply; and

(iii) The work-area controls specified by § 1926.1424(a)(2) do not apply.

(3) *Out-of-level work.* The restrictions on out-of-level work, and the requirements for crane-level indicators and inspections of those indicators (including the requirements in §§ 1926.1402(b), 1926.1412(d)(1)(xi), and 1926.1415(a)(1)), do not apply.

(4) *Dragging a load sideways.* The prohibition in § 1926.1417(q) on dragging a load sideways does not apply.

(5) *Boom-hoist limiting device.* The requirement in § 1926.1416(d)(1) for a boom-hoist limiting device does not apply to roadway maintenance machines when the cranes use hydraulic cylinders to raise the booms.

(6) *Manufacturer guidance for modifications covered by § 1926.1434.* The requirements to follow the manufacturer's guidance set forth in § 1926.1434 do not apply if the employer is subject to the requirements of 49 CFR part 214.

(7) *Other manufacturer guidance.* The requirements to follow the manufacturer's guidance, instructions, procedures, prohibitions, limitations, or specifications, set forth in § 1926.1404(j), (m), or (q); § 1926.1415(a)(6); § 1926.1417(a), (r), (u), or (aa); § 1926.1433(d)(1)(i); or § 1926.1441 do not apply if the employer is subject to the requirements of 49 CFR part 214.

[FR Doc. 2020–17179 Filed 9–14–20; 8:45 am]

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## PENSION BENEFIT GUARANTY CORPORATION

### 29 CFR Parts 4022 and 4044

### Allocation of Assets in Single-Employer Plans; Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Pension Benefit Guaranty Corporation's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans to prescribe certain interest assumptions under the benefit payments regulation for plans with valuation dates in October 2020 and interest assumptions under the asset allocation regulation for plans with valuation dates in the fourth quarter of 2020. These interest assumptions are used for valuing benefits and paying certain benefits under terminating single-employer plans covered by the pension insurance system administered by PBGC.

**DATES:** Effective October 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Gregory Katz (*katz.gregory@pbgc.gov*), Attorney, Regulatory Affairs Division, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005, 202–326–4400, ext. 3829. (TTY users may call the Federal relay service toll free at 1–800–877–8339 and ask to be connected to 202–326–4400, ext. 3829.)

**SUPPLEMENTARY INFORMATION:** PBGC's regulations on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) and Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits under terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974 (ERISA). The interest assumptions in the regulations are also published on PBGC's website (*https://www.pbgc.gov*).

**Lump Sum Interest Assumption**

PBGC uses the interest assumptions in appendix B to part 4022 (''Lump Sum Interest Rates for PBGC Payments'') to determine whether a benefit is payable as a lump sum and to determine the amount to pay as a lump sum. Because some private-sector pension plans use these interest rates to determine lump sum amounts payable to plan participants (if the resulting lump sum is larger than the amount required under section 417(e)(3) of the Internal Revenue Code and section 205(g)(3) of ERISA), these rates are also provided in appendix C to part 4022 (''Lump Sum Interest Rates for Private-Sector Payments'').

This final rule updates appendices B and C of the benefit payments regulation to provide the rates for October 2020 measurement dates.

The October 2020 lump sum interest assumptions will be 0.00 percent for the period during which a benefit is (or is assumed to be) in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for September 2020, these assumptions represent no change in the immediate rate and are otherwise unchanged.

**Valuation/Asset Allocation Interest Assumptions**

PBGC uses the interest assumptions in appendix B to part 4044 (''Interest Rates Used to Value Benefits'') to value benefits for allocation purposes under section 4044 of ERISA, and some private-sector pension plans use them to determine benefits liabilities reportable under section 4044 of ERISA and for other purposes. The fourth quarter 2020 interest assumptions will be 1.62 percent for the first 20 years following the valuation date and 1.40 percent thereafter. In comparison with the interest assumptions in effect for the third quarter of 2020, these interest assumptions represent no change in the select period (the period during which the select rate (the initial rate) applies), a decrease of 0.36 percent in the select rate, and a decrease of 0.17 percent in the ultimate rate (the final rate).

**Need for Immediate Guidance**

PBGC updates appendix B of the asset allocation regulation each quarter and appendices B and C of the benefit payments regulation each month. PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to issue new interest assumptions promptly so that they are available to value benefits and, for plans that rely on our publication of them each month or each quarter, to calculate lump sum benefit amounts.

Because of the need to provide immediate guidance for the valuation and payment of benefits under plans with valuation dates during October 2020, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

**List of Subjects**

*29 CFR Part 4022*

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

*29 CFR Part 4044*

Employee benefit plans, Pension insurance, Pensions.

In consideration of the foregoing, 29 CFR parts 4022 and 4044 are amended as follows:

## PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

**Authority:** 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 324 is added at the end of the table to read as follows:

**Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments**

* * * * *

| Rate set | For plans with a valuation date | | Immediate annuity rate (percent) | Deferred annuities (percent) | | | | |
|---|---|---|---|---|---|---|---|---|
| | On or after | Before | | $i_1$ | $i_2$ | $i_3$ | $n_1$ | $n_2$ |
| * | * | | * | * | * | * | * | |
| 324 | 10–1–20 | 11–1–20 | 0.00 | 4.00 | 4.00 | 4.00 | 7 | 8 |

■ 3. In appendix C to part 4022, Rate Set 324 is added at the end of the table to read as follows:

**Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments**

* * * * *

| Rate set | For plans with a valuation date | | Immediate annuity rate (percent) | Deferred annuities (percent) | | | | |
|---|---|---|---|---|---|---|---|---|
| | On or after | Before | | $i_1$ | $i_2$ | $i_3$ | $n_1$ | $n_2$ |
| * | * | | * | * | * | * | * | |
| 324 | 10–1–20 | 11–1–20 | 0.00 | 4.00 | 4.00 | 4.00 | 7 | 8 |

## PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

■ 4. The authority citation for part 4044 continues to read as follows:

**Authority:** 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 5. In appendix B to part 4044, an entry for ''October–December 2020'' is added at the end of the table to read as follows:

**Appendix B to Part 4044—Interest Rates Used to Value Benefits**

* * * * *

| For valuation dates occurring in the month— | The values of $i_t$ are: | | | | | |
|---|---|---|---|---|---|---|
| | $i_t$ | for $t$ = | $i_t$ | for $t$ = | $i_t$ | for $t$ = |
| * * * | * | | * | | * | |
| October–December 2020 | 0.0162 | 1–20 | 0.0140 | >20 | N/A | N/A |

Issued in Washington, DC.

**Hilary Duke,**

*Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.*

[FR Doc. 2020–20179 Filed 9–14–20; 8:45 am]

**BILLING CODE 7709–02–P**

## DEPARTMENT OF THE TREASURY

### Office of Investment Security

### 31 CFR Part 800

**RIN 1505–AC68**

## Provisions Pertaining to Certain Investments in the United States by Foreign Persons

**AGENCY:** Office of Investment Security, Department of the Treasury.

**ACTION:** Final rule.

**SUMMARY:** This final rule modifies certain provisions in the regulations of the Committee on Foreign Investment in the United States that implement section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment Risk Review Modernization Act of 2018. Specifically, the rule modifies the mandatory declaration provision for certain foreign investment transactions involving a U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies. It also makes amendments to the definition of the term ''substantial interest'' and a related provision, and makes one technical revision.

**DATES:**

*Effective date:* The final rule is effective on October 15, 2020.

*Applicability date: See* § 800.104.

**FOR FURTHER INFORMATION CONTACT:** For questions about this rule, contact: Meena R. Sharma, Deputy Director of Investment Security Policy and International Relations; or David Shogren, Senior Policy Advisor, at U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220; telephone: (202) 622–3425; email: *CFIUS.FIRRMA@treasury.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On May 21, 2020, the Department of the Treasury (Treasury Department) published a notice of proposed rulemaking amending certain provisions in 31 CFR part 800 (Part 800). 85 FR 30893. (The Office of the Federal Register made the proposed rule available for public inspection on May 20, 2020.) Public comments on the proposed rule were due by June 22, 2020, and are discussed below.

The proposed rule made revisions to the requirement to submit declarations to the Committee on Foreign Investment in the United States (CFIUS or the Committee) for certain critical technology transactions. This declaration requirement in Part 800 implements section 1706 of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which amends section 721 of the Defense Production Act of 1950 (DPA) to authorize CFIUS to mandate through regulations the submission of a declaration for covered transactions involving certain U.S. businesses that produce, design, test, manufacture, fabricate, or develop one or more critical technologies.

The proposed rule made modifications to the scope of the mandatory declaration provision in Part 800—primarily reorienting it from one based on a nexus to certain industries to one based on whether certain U.S. government authorizations would be required to export, reexport, transfer (in-country), or retransfer the critical technology or technologies produced, designed, tested, manufactured, fabricated, or developed by the U.S. business to certain transaction parties and foreign persons in the ownership chain. To accomplish this, the proposed rule amended § 800.104 (applicability rule) and § 800.401 (mandatory declarations); introduced two new definitions: ''U.S. regulatory authorization'' and ''voting interest for purposes of critical technology mandatory declarations;'' and removed the North American Industry Classification System (NAICS) codes at appendix B to Part 800. The proposed rule also made amendments to the definition of ''substantial interest'' at § 800.244 of Part 800.

Further explanation of FIRRMA and the proposed rule can be found at 85 FR 30893; changes to the proposed rule are explained in further detail below.

## II. Overview of Comments on the Proposed Rule

During the public comment period, the Treasury Department received written submissions on the proposed rule. All comments received by the end of the comment period are available on the public rulemaking docket at *https://www.regulations.gov*.

The Treasury Department considered each comment submitted on the proposed rule and made certain revisions in this rule in response to comments. The Treasury Department recognizes the vital importance of foreign investment to the U.S. economy, including for businesses that are involved in critical technologies. The Treasury Department drafted the proposed rule, and made revisions in issuing this rule, taking into consideration various factors including national security considerations, the effect on foreign investment, and the effect on small business concerns.

Overall, the commenters were generally supportive of the proposed rule. Some of the commenters suggested revisions or clarification, and the section-by-section analysis below includes responses to these comments. Further edits were made to the rule for consistency and clarity, and one technical revision was made.

## III. Summary of Comments and Changes From the Proposed Rule

### *A. Subpart A—General Provisions*

#### Section 800.104—Applicability Rule

While no comments were made specifically on the applicability rule, for the avoidance of doubt, the operation of the applicability rule will be the same as detailed in the proposed rule. That is, the interim rule at 83 FR 51322 (Oct. 11, 2018) implementing a pilot program requiring declarations for certain critical technology transactions will continue to apply to transactions for which specified actions occurred on or after November 10, 2018, and prior to February 13, 2020, as specified in the regulations at 31 CFR 801.103. The critical technology mandatory declaration provision based on NAICS codes and published as part of the final rule for Part 800 at 85 FR 3112 (Jan. 17, 2020) will apply to transactions for which specified actions occurred on or after February 13, 2020, and prior to October 15, 2020, as specified at § 800.104(d) of this rule. Finally, the modifications to the critical technology mandatory declaration provision discussed in this rule apply starting on October 15, 2020, except for certain transactions for which specified actions occurred prior to that date.

### *B. Subpart B—Definitions*

#### Section 800.213—Covered Transaction

The rule makes a technical revision to example 2 in paragraph (e).

#### Section 800.244—Substantial Interest

Section 800.244 in Part 800 sets forth how to determine the percentage interest held indirectly by one entity in another for purposes of whether a foreign person obtains a ''substantial interest'' in a U.S. business where a foreign government in turn holds a ''substantial interest'' in the foreign person. This definition forms the basis for the declaration requirement for certain covered transactions where a foreign government has a substantial interest in a foreign person that will acquire a substantial interest in certain types of U.S. businesses. The proposed rule clarified that § 800.244(b) applies only where the general partner, managing member, or equivalent primarily directs, controls, or coordinates the activities of the entity. The proposed rule also removed three instances of the word ''voting'' from § 800.244(c) in order to clarify that the calculation rule applies to the calculation of ''voting interests'' as described in paragraph (a) and ''interests'' as described in paragraph (b) of that section.

One commenter suggested that the current definition at § 800.244(b) be retained and not be revised to include the language, ''primarily directed, controlled, or coordinated by or on behalf of a general partner, managing member, or equivalent,'' from the proposed rule. The commenter explained that there are situations where it is not clear whether a fund would be deemed to be ''primarily directed'' by the general partner. The commenter also expressed concern about the inclusion of the same phrase in § 800.256(b). Another commenter requested clarification of the application of § 800.244(b) where a third party controls and coordinates the activities of an entity on behalf of the general partner.

No changes were made in response to these comments. The substantial interest analysis as revised in the proposed rule at § 800.244(b) is appropriately focused on the interest held in the general partner, managing member, or equivalent when such general partner, managing member, or equivalent primarily directs, controls, or coordinates the activities of the entity rather than in all cases where an entity simply has a general partner, managing member, or equivalent. The Treasury Department expects that when analyzing the specific relationship between a general partner and an entity, it will generally be clear to the parties whether the general partner primarily directs, controls, or coordinates the activities of the entity. In a situation where a third party controls and coordinates the activities of an entity on behalf of the general partner, the general partner does not cease to primarily direct, control, or coordinate the activities of the entity simply by contracting a third party to perform such services.

#### Section 800.254—U.S. Regulatory Authorization

Consistent with the proposed rule, the new defined term at § 800.254 specifies the types of regulatory licenses or authorizations that are required under the four main U.S. export control regimes, which if applicable in the context of a particular transaction described under the rule, trigger a mandatory declaration.

#### Section 800.256—Voting Interest for Purposes of Critical Technology Mandatory Declarations

The proposed rule introduced a new defined term at § 800.256 that specified which persons in the ownership chain of the persons described in § 800.401(c)(1)(i)–(iv) should be analyzed for export licenses and authorization purposes in determining whether a particular transaction could trigger a mandatory declaration.

One commenter suggested raising the applicable voting interest threshold from 25 percent to 50 percent. No change was made in response to this comment. A threshold of 50 percent could exclude interest holders that could wield significant influence over the U.S. business, including with respect to its critical technologies. The Treasury Department concluded that a threshold of 25 percent is appropriate and sets a clear criterion with respect to the persons that need to be analyzed under this provision.

The rule makes clarifying edits, including omitting the extraneous language ''foreign'' before ''person'' in several instances, to maintain the intended meaning of the text.

### *C. Subpart D—Declarations*

The proposed rule revised the mandatory declaration provision for transactions involving U.S. businesses with critical technologies so that it applies only to the extent that a U.S. regulatory authorization would be

required to export, reexport, transfer (in-country), or retransfer the U.S. business's critical technologies to the foreign persons involved in the transaction or certain foreign persons in the ownership chain.

Several commenters noted the language referencing a ''party to the transaction'' in the proposed rule at § 800.401(c)(1) and questioned whether the intent was to include persons acquiring an indirect ownership interest in the U.S. business. In order to clarify the operation of this provision, the rule revises § 800.401(c)(1) to refer to ''a person'' that meets the criteria of 800.401(c)(1)(i)–(v), which includes direct and indirect ownership interests. The rule also omits the extraneous language ''foreign'' before ''person'' in several instances in paragraph (c) to maintain the intended meaning of the text. The Treasury Department notes that the term ''foreign person'' is defined at § 800.224 and the main U.S. export control regimes also define foreign person within their respective regulations. For avoidance of doubt, for purposes of evaluating whether certain U.S. government authorizations would be required to export, reexport, transfer (in-country), or retransfer a critical technology to a relevant ''person'' in an ownership chain, parties should consider whether such (hypothetical) export activity would require a U.S. regulatory authorization under the relevant U.S. export control regime.

One commenter discussed the reference to a ''group of foreign persons'' in § 800.401(c)(1)(v) and whether it was limited to the description in § 800.256(d). The Treasury Department notes that the proposed rule included a cross-reference to § 800.401(c)(1)(v) within § 800.256(d). Nevertheless, in the interest of clarity, the rule adds a cross-reference to § 800.256(d) in § 800.401(c)(1)(v) as well.

One commenter suggested that the mandatory declaration requirement be assessed as of the time the parties reach a binding agreement, rather than upon the closing of the transaction, given the potential for immediately effective changes to the export control regulations. The Treasury Department expects that in most circumstances, parties can reasonably anticipate if a transaction will meet the criteria of § 800.401(c) based on whether there is one or more critical technologies upon closing. Nevertheless, in response to the comment and acknowledging circumstances that may be reasonably outside the control of parties, the rule includes a new subparagraph (3) providing that for purposes of whether a declaration is mandatory under § 800.401(c), what constitutes a ''critical technology'' shall be assessed as of the earliest date of any of the conditions set forth in § 800.104(b)(1)–(4). An example of the application of § 800.401(c)(3) was added at § 800.401(j)(6). The rule similarly modifies paragraph (b) of § 800.401, creating a new subparagraph (b)(1) and adding new subparagraph (b)(2) providing that, for purposes of whether a substantial interest transaction involves a TID U.S. business under § 800.248(a), the determination of what constitutes a critical technology shall be assessed as of the earliest date of any of the conditions set forth in § 800.104(b)(1)–(4).

One commenter suggested clarifying that the persons referred to in § 800.401(c)(1)(i)–(v) must be the same persons that are eligible for the Export Administration Regulations (EAR) license exceptions described in § 800.401(e)(6). Clarifying revisions have been made to the rule to address this comment.

Several commenters requested clarification on what it means to be ''eligible'' for the EAR license exceptions specified in § 800.401(e)(6). In particular, commenters questioned whether parties were required to satisfy the procedural requirements set forth in 15 CFR 740.17(b) in order to be considered ''eligible'' for the EAR license exception for encryption commodities, software, and technology (ENC) and thus exempt from the mandatory declaration provision under § 800.401(e)(6). The rule includes revisions and an explanatory note indicating that for purposes of the CFIUS exception to the mandatory declaration provision at paragraph (e)(6), ''eligibility'' for an EAR license exception refers to having satisfied any requirements imposed by the EAR that must be satisfied prior to export (even if no export is to occur). For example, under EAR license exception ENC at 15 CFR 740.17(b)(1), a person may self-classify certain encryption items, and that self-classification is sufficient for an item to be eligible for that license exception. As a result, if the U.S. business's only critical technologies are items self-classified pursuant to 15 CFR 740.17(b)(1), a CFIUS declaration under paragraph (c) of § 800.401 would not be required (assuming other requirements of the license exception are met with respect to the person to which the hypothetical export would be made). Note that under license exception ENC at 15 CFR 740.17(b)(2) and (b)(3), a party must submit a classification request to the Commerce Department's Bureau of Industry and Security in order to be eligible for the EAR license exception; therefore, the CFIUS exception to the mandatory filing requirement would not apply unless a classification request is submitted in accordance with the procedures set out in 15 CFR 740.17(b)(2) and (b)(3), including that 30 days have elapsed since the submission of the classification request to BIS. By contrast, the reporting requirements at 15 CFR 740.17(e) are not a condition of eligibility—that is, parties availing themselves of the mandatory declaration exception in the CFIUS rule based on eligibility for EAR license exception ENC do not need to submit semiannual reporting to BIS for purposes of this aspect of the CFIUS regulations. (Though if there is a qualifying export under the EAR, parties would need to satisfy all applicable conditions of the license exception in order to comply with the EAR.) The same is true with respect to the recordkeeping requirements under the EAR license exception for technology and software-unrestricted (TSU) at 15 CFR 740.13(h) and the requirement to furnish certain commodity classifications to third parties under the EAR license exception for strategic trade authorization (STA) at 740.20(d)—satisfying these aspects of the license exceptions are not a condition of eligibility for purposes of the CFIUS regulations. The Treasury Department has determined that this clarity with respect to eligibility for a license exception under the CFIUS regulations will help parties evaluate whether to submit a mandatory declaration to CFIUS or comply with the eligibility requirements under the relevant EAR license exception and hence be excepted from the CFIUS declaration requirement.

Additionally, the Treasury Department notes that certain end users, such as entities listed in Supplement No. 4 to Part 744 of the EAR, are subject to license requirements, limitations on availability of license exceptions, and license application review policies that are in addition to those set forth elsewhere in the EAR.

This rule also makes clarifying edits to the examples in paragraph (j).

Finally, for the avoidance of doubt, in accordance with FIRRMA, the mandatory declaration provision at § 800.401(c) applies only to U.S. critical technology businesses under § 800.248(a), not to businesses that are TID U.S. businesses solely under § 800.248(b) or (c).

## IV. Rulemaking Requirements

*Executive Order 12866*

This rule is not subject to the general requirements of Executive Order 12866, which covers review of regulations by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), because it relates to a foreign affairs function of the United States, pursuant to section 3(d)(2) of that order. In addition, this rule is not subject to review under section 6(b) of Executive Order 12866 pursuant to section 7(c) of the April 11, 2018, Memorandum of Agreement between the Treasury Department and OMB, which states that CFIUS regulations are not subject to OMB's standard centralized review process under Executive Order 12866.

*Paperwork Reduction Act*

The collection of information contained in this rule has previously been submitted to OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and approved under OMB Control Number 1505–0121. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB Control Number.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* RFA) generally requires an agency to prepare a regulatory flexibility analysis unless the agency certifies that the rule will not, once implemented, have a significant economic impact on a substantial number of small entities. The RFA applies whenever an agency is required to publish a general notice of proposed rulemaking under section 553(b) of the Administrative Procedure Act (5 U.S.C. 553, APA), or any other law. As set forth in the preamble to the proposed rule at Section III, because rules issued pursuant to the DPA, such as this rule, are not subject to the APA or another law requiring the publication of a general notice of proposed rulemaking, the RFA does not apply.

Regardless of whether the RFA applies, available data does not suggest that the rule will have a significant economic impact on a substantial number of small entities. For purposes of the RFA, a ''small entity'' is (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). This rule would affect certain U.S. businesses that have particular activities involving critical technologies and that receive foreign investment (direct or indirect) of the type described in the rule. These U.S. businesses could be found across a range of industries. Accordingly, because SBA size standards are designated by industry, and not all U.S. businesses that constitute small entities within a particular industry will be affected, it is difficult to apply the SBA size standards to determine how many small entities will be affected by this rule. Additionally, some of these U.S. businesses are already subject to a declaration requirement when they receive foreign investment (direct or indirect) under the existing CFIUS regulations.

The Treasury Department considered the data on new foreign direct investment in the United States that is collected annually by the Bureau of Economic Analysis (BEA) within the Department of Commerce through its Survey of New Foreign Direct Investment in the United States (Form BE–13). While these data are self-reported, and include only direct investments in U.S. businesses in which the foreign person acquires at least 10 percent of the voting shares (and consequently, do not capture investments below 10 percent, which may nevertheless be covered transactions), they nonetheless provide relevant information on a category of U.S. businesses that receive foreign investment, some of which may be covered by the rule.

According to the BEA, in 2018, the most current year for which data is available, foreign persons obtained at least a 10 percent voting share in 832 U.S. businesses. See U.S. Bureau of Economic Analysis, ''Number of Investments Initiated in 2018, Distribution of Planned Total Expenditures, Size by Type of Investment,'' available at *https://apps.bea.gov/international/xls/Table15-14-15-16-17-18.xls* (last visited August 18, 2020). The BEA reports only the general size of the investment transaction, not the type of the U.S. business involved, nor whether the U.S. business is considered a ''small business'' by the SBA. The smallest foreign investment transactions that the BEA reports are those with a dollar value below $50,000,000. While not all U.S. businesses receiving a foreign investment of less than $50,000,000 are considered ''small'' for the purposes of the RFA, many might be, and the number of U.S. businesses receiving foreign investments of less than $50,000,000 is the best available information to estimate the number of transactions involving small U.S. businesses that might be subject to CFIUS's jurisdiction and affected by the rule.

Of the above mentioned 832 U.S. businesses receiving foreign investment in 2018, 576 were involved in transactions valued at less than $50,000,000. Although this figure is under inclusive because it does not capture all transactions that could be subject to a filing requirement pursuant to the rule, it also is over inclusive because it is not limited to any particular type of U.S. business. The Treasury Department believes the figure of 576 is the best estimate based on the available data of the number of small U.S. businesses that may be impacted by this rule, although the Treasury Department recognizes the limitations of this estimate.

Even if a substantial number of small entities were affected, the economic impact of the rule on small U.S. businesses will not be significant. First, a portion of the U.S. businesses affected by the rule are already subject to the existing declaration requirement under the existing CFIUS regulations. Second, the rule replaces the analysis and nexus to NAICS codes with an analysis of export control authorization requirements. U.S. businesses with critical technologies are already aware, or should be aware, of the application of export controls to their items and regularly analyze export authorization requirements particularly when considering a foreign investment. The process of completing the declaration form under the rule is no different from the existing CFIUS regulations. Accordingly, the revisions in this rule are not expected to change the general burden hour estimate for analyzing a transaction and preparing a declaration. For the reasons stated above, the Secretary of the Treasury certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The Treasury Department invited public comment on how the proposed rule would affect small entities, but received none.

*Congressional Review Act*

This rule has been submitted to OIRA, which has determined that the rule is not a ''major'' rule under the Congressional Review Act.

**List of Subjects in 31 CFR Part 800**

Foreign investments in the U.S., Investigations, Investments, Investment companies, National defense, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Treasury Department amends part 800 of title 31 of the Code of Federal Regulations as follows:

## PART 800—REGULATIONS PERTAINING TO CERTAIN INVESTMENTS IN THE UNITED STATES BY FOREIGN PERSONS

■ 1. The authority citation for part 800 continues to read:

**Authority:** 50 U.S.C. 4565; E.O. 11858, as amended, 73 FR 4677.

### Subpart A—General Provisions

■ 2. Amend § 800.104 by revising paragraph (a) and adding paragraphs (d) and (e) to read as follows:

#### § 800.104 Applicability Rule.

(a) Except as provided in paragraphs (b) through (e) of this section and otherwise in this part, the regulations in this part apply from February 13, 2020.

* * * * *

(d) Subject to paragraphs (b) and (c) of this section, for any transaction for which the following has occurred on or after February 13, 2020, and before October 15, 2020, the corresponding provisions of the regulations in this part that were in effect during that time will apply:

(1) The completion date;

(2) The parties to the transaction have executed a binding written agreement, or other binding document, establishing the material terms of the transaction;

(3) A party has made a public offer to shareholders to buy shares of a U.S. business; or

(4) A shareholder has solicited proxies in connection with an election of the board of directors of a U.S. business or an owner or holder of a contingent equity interest has requested the conversion of the contingent equity interest.

(e) Except as provided in paragraphs (b) through (d) of this section, the amendments to this part published in the **Federal Register** on September 15, 2020 apply from October 15, 2020.

### Subpart B—Definitions

#### § 800.213 [Amended]

■ 3. Amend § 800.213 in paragraph (e)(2) in the next to last sentence after the word ''provides'' by removing ''Corporation X'' and adding in its place ''Corporation A''.

■ 4. Amend § 800.244 by revising paragraphs (b) and (c) to read as follows:

#### § 800.244 Substantial interest.

* * * * *

(b) In the case of an entity whose activities are primarily directed, controlled, or coordinated by or on behalf of a general partner, managing member, or equivalent, the national or subnational governments of a single foreign state will be considered to have *a substantial interest* in such entity only if they hold 49 percent or more of the interest in the general partner, managing member, or equivalent of the entity.

(c) For purposes of determining the percentage of interest held indirectly by one entity in another entity under this section, any interest of a parent will be deemed to be a 100 percent interest in any entity of which it is a parent.

* * * * *

#### § 800.254 [Redesignated as § 800.255]

■ 5. Redesignate § 800.254 as § 800.255 and add a new § 800.254 to read as follows:

#### § 800.254 U.S. regulatory authorization.

The term *U.S. regulatory authorization* means:

(a) A license or other approval issued by the Department of State under the ITAR;

(b) A license from the Department of Commerce under the EAR;

(c) A specific or general authorization from the Department of Energy under the regulations governing assistance to foreign atomic energy activities at 10 CFR part 810 other than the general authorization described in 10 CFR 810.6(a); or

(d) A specific license from the Nuclear Regulatory Commission under the regulations governing the export or import of nuclear equipment and material at 10 CFR part 110.

■ 6. Add § 800.256 to read as follows:

#### § 800.256 Voting interest for purposes of critical technology mandatory declarations.

(a) The term *voting interest for purposes of critical technology mandatory declarations* means, for the purposes of § 800.401(c)(1)(v), a voting interest, direct or indirect, of 25 percent or more, subject to paragraphs (b) and (c) of this section.

(b) In the case of an entity whose activities are primarily directed, controlled, or coordinated by or on behalf of a general partner, managing member, or equivalent, a person will be considered to have a *voting interest for purposes of critical technology mandatory declarations* in such entity only if it holds 25 percent or more of the interest in the general partner, managing member, or equivalent of the entity.

(c) For purposes of determining the percentage of *voting interest for purposes of critical technology mandatory declarations* held indirectly by one person in another, any interest of a parent will be deemed to be a 100 percent interest in any entity of which it is a parent.

(d) For purposes of § 800.401(c)(1)(v), foreign persons who are related, have formal or informal arrangements to act in concert, or are agencies or instrumentalities of, or controlled by, the national or subnational governments of a single foreign state are considered part of a group of foreign persons and their individual holdings are aggregated.

### Subpart D—Declarations

■ 7. Amend § 800.401 by revising paragraphs (b), (c), and (e)(6) and adding paragraphs (j)(4) through (6) to read as follows:

#### § 800.401 Mandatory declarations.

* * * * *

(b)(1) Subject to paragraph (b)(2) of this section, a covered transaction that results in the acquisition of a substantial interest in a TID U.S. business by a foreign person in which the national or subnational governments of a single foreign state (other than an excepted foreign state) have a substantial interest.

(2) For purposes of paragraph (b)(1) of this section, the assessment of what constitutes a critical technology, as relevant to § 800.248(a), shall be as of the first date on which one of the conditions set forth in § 800.104(b)(1) through (4) is met with respect to a covered transaction.

(c)(1) Subject to paragraph (c)(3) of this section, a covered transaction involving a TID U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies for which a U.S. regulatory authorization would be required for the export, reexport, transfer (in-country), or retransfer of such critical technology to a person that:

(i) Could directly control such TID U.S. business as a result of the covered transaction;

(ii) Is directly acquiring an interest that is a covered investment in such TID U.S. business;

(iii) Has a direct investment in such TID U.S. business, the rights of such person with respect to such TID U.S. business are changing, and such change in rights could result in a covered control transaction or a covered investment;

(iv) Is a party to any transaction, transfer, agreement, or arrangement described in § 800.213(d) with respect to such TID U.S. business; or

(v) Individually holds, or as described in § 800.256(d) is part of a group of

foreign persons that, in the aggregate, holds, a voting interest for purposes of critical technology mandatory declarations in a person described in paragraphs (c)(1)(i) through (iv) of this section.

(2) For purposes of paragraph (c)(1) of this section, whether a U.S. regulatory authorization would be required for the export, reexport, transfer (in-country), or retransfer of a critical technology to a person described in paragraphs (c)(1)(i) through (v) of this section shall be determined:

(i) Without giving effect to any license exemption available under the ITAR or license exception available under the EAR except as described paragraph in (e)(6) of this section;

(ii) Based on such person's principal place of business (for entities) as defined in § 800.239, or such person's nationality or nationalities (for individuals) under the relevant U.S. regulatory authorization, as applicable; and

(iii) As if such person is an ''end user'' under the relevant U.S. regulatory authorization, as applicable.

(3) For purposes of paragraph (c)(1) of this section, the assessment of what constitutes a critical technology shall be as of the first date on which one of the conditions set forth in § 800.104(b)(1) through (4) is met with respect to a covered transaction. (See the example in paragraph (j)(6) of this section.)

* * * * *

(e) * * *

(6) A covered transaction described in paragraph (c)(1) of this section involving critical technology for which the export, reexport, transfer (in-country), or retransfer to any of the persons described in paragraphs (c)(1)(i) through (v) of this section would require one or more U.S. regulatory authorizations and each such critical technology and person, considered as if in the context of an export, reexport, or transfer, is eligible for at least one of the following license exceptions under the EAR, as applicable:

(i) 15 CFR 740.13;

(ii) 15 CFR 740.17(b); or

(iii) 15 CFR 740.20(c)(1).

**Note 1 to § 800.401(e)(6):** To be ''eligible'' for a license exception refers to any requirements imposed by the EAR that must be satisfied prior to export even if no export is to occur.

* * * * *

(j) * * *

(4) *Example 4.* Corporation A, a foreign entity with its principal place of business in Country F, acquires 100 percent of the interests of Corporation Y, a U.S. business that manufactures a critical technology controlled under the EAR. A foreign national of Country G owns 25 percent of the voting shares of Corporation A. Under the EAR, a license is required to export the critical technology to Country G but not Country F. Assuming no other relevant facts, the acquisition of Corporation Y is subject to a mandatory declaration.

(5) *Example 5.* Corporation B, a foreign entity with its principal place of business in Country G, makes a covered investment in Corporation Z, a U.S. business that designs a critical technology controlled under the EAR. Under the EAR, a license is required to export the critical technology to Country G. The license exception at 15 CFR 740.4 authorizes Corporation Z to export the critical technology to Country G without a license. Assuming no other relevant facts, the covered investment is subject to a mandatory declaration.

(6) *Example 6.* Corporation A, a foreign person, and Corporation B, a U.S. business, execute a binding written agreement pursuant to which Corporation A will acquire a 10 percent equity interest in Corporation B and will be afforded the right to appoint two members of Corporation B's board of directors. As of the date of the agreement, none of the items that Corporation B manufactures constitutes a critical technology. After the agreement is executed, but prior to the completion of the transaction, a product manufactured by Corporation B is included as a defense article on the USML. Assuming no other relevant facts, under paragraph (c)(3) of this section, the transaction is not subject to a requirement to submit a declaration to the Committee. However for purposes of § 800.211, the transaction may be a covered investment.

## Appendix B to Part 800 [Removed]

■ 8. Remove appendix B to part 800.

Dated: August 18, 2020.

**Thomas Feddo,**

*Assistant Secretary for Investment Security.*

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**DEPARTMENT OF THE TREASURY**

**31 CFR Parts 1010 and 1020**

**RIN 1506–AB28**

# Financial Crimes Enforcement Network; Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator

**AGENCY:** Financial Crimes Enforcement Network (''FinCEN''), Treasury.

**ACTION:** Final rule.

**SUMMARY:** FinCEN is issuing a final rule implementing sections 352, 326 and 312 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (''USA PATRIOT Act'') and removing the anti-money laundering program exemption for banks that lack a Federal functional regulator, including, but not limited to, private banks, non-federally insured credit unions, and certain trust companies. The Final Rule requires minimum standards for anti-money laundering programs for banks without a Federal functional regulator to ensure that all banks, regardless of whether they are subject to Federal regulation and oversight, are required to establish and implement anti-money laundering programs, and extends customer identification program requirements and beneficial ownership requirements to those banks not already subject to these requirements.

**DATES:** *Effective Date:* November 16, 2020.

*Compliance Date:* The compliance date for anti-money laundering programs, customer identification programs, and beneficial ownership requirements for banks that lack a Federal functional regulator is March 15, 2021.

**FOR FURTHER INFORMATION CONTACT:** The FinCEN Resource Center at (800) 767–2825 or email *frc@fincen.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *A. Statutory Provisions*

FinCEN exercises its regulatory functions primarily under the Currency and Financial Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (''USA PATRIOT Act'') (Public Law 107–56) and other legislation. This legislative framework is commonly referred to as the ''Bank Secrecy Act''

(''BSA'').[1] The Secretary of the Treasury (''Secretary'') has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations.[2] Pursuant to this authority, FinCEN may issue regulations requiring financial institutions to keep records and file reports that ''have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.''[3] Additionally, FinCEN is authorized to impose anti-money laundering (''AML'') program requirements for financial institutions.[4]

Section 352 of the USA PATRIOT Act requires financial institutions to establish AML programs that, at a minimum, include: (1) The development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs.[5] Section 352 of the USA PATRIOT Act authorizes FinCEN, in consultation with the appropriate Federal functional regulator (as defined by 15 U.S.C. 6809), to prescribe minimum standards for AML programs. In developing this Final Rule, FinCEN consulted with the Federal functional regulators defined in 15 U.S.C. 6809, as well as the Commodity Futures Trading Commission (''CFTC'') (collectively referred to as ''Federal functional regulators'').[6] In addition, FinCEN consulted with the Internal Revenue Service (''IRS''), which is the examining authority for all institutions regulated by FinCEN that do not have a Federal functional regulator. FinCEN also consulted with state bank supervisory authorities. Consultations with these Federal and state regulatory and supervisory agencies assisted FinCEN in determining the appropriate scope and nature of banks that are not directly regulated by Federal functional regulators and to adequately consider appropriate regulatory coverage for such institutions.

When prescribing minimum standards for AML programs, FinCEN must ''consider the extent to which the requirements imposed [under section 352 of the USA PATRIOT Act] are commensurate with the size, location, and activities of the financial institutions to which [the standards] apply.''[7] In addition, FinCEN may ''prescribe an appropriate exemption from a requirement [in the BSA] or regulations [issued under the BSA].''[8] FinCEN used this authority in 2002 to temporarily defer the requirement to establish an AML program for certain financial institutions identified in section 352 of the USA PATRIOT Act. The purpose of the temporary deferral was to give FinCEN and Treasury time to continue to study the money laundering risks posed by such financial institutions in order to develop appropriate AML program requirements.

Section 326 of the USA PATRIOT Act requires FinCEN to prescribe regulations that require financial institutions to establish procedures for account opening that, at a minimum, include: (1) Verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) determining whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency.[9] These programs are referred to as Customer Identification Programs (''CIPs'').

When prescribing CIP regulations for financial institutions, FinCEN is required to do so jointly with the appropriate Federal functional regulator.[10] The appropriate Federal functional regulator with which to promulgate joint CIP regulations is the particular agency that regulates and supervises the affected financial institutions.[11] Because the financial institutions covered under this Final Rule do not have a Federal functional regulator, and there is no other Federal agency with comparable direct supervisory authority over such financial institutions, there is no other appropriate Federal agency with which FinCEN is required to issue the CIP rules jointly.[12] Accordingly, FinCEN is issuing the CIP rule set forth here under its sole authority.

Section 312 of the USA PATRIOT Act requires each U.S. financial institution that establishes, maintains, administers, or manages a correspondent account or a private banking account in the United States for a non-U.S. person to subject such accounts to certain AML measures.[13] In particular, financial institutions must establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls that are reasonably designed to enable the financial institution to detect and report instances of money laundering through these accounts. In addition to the general due diligence requirements, which apply to all correspondent accounts for non-U.S. persons, section 5318(i)(2) of the BSA specifies additional standards for correspondent accounts maintained for certain foreign banks. Section 5318(i) also sets forth minimum due diligence requirements for private banking accounts for non-U.S. persons. Specifically, a covered financial institution must take reasonable steps to ascertain the identity of the nominal and beneficial owners of, and the source of funds deposited into, private banking accounts, as necessary to guard against money laundering and to report suspicious transactions. The institution must also conduct enhanced

[1] The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 31 U.S.C. 5311–5314 and 5316–5332, and notes thereto, with implementing regulations at 31 CFR Chapter X. *See* 31 CFR 1010.100(e).

[2] Treasury Order 180–01 (Jan. 14, 2020).

[3] 31 U.S.C. 5311.

[4] 31 U.S.C. 5318(h).

[5] *Id.*

[6] 31 CFR 1010.100(r) (defining Federal functional regulator to include the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Board of Directors of the Federal Deposit Insurance Corporation; the Office of Thrift Supervision (which was merged into other regulatory agencies and ceased to exist in 2011); the National Credit Union Administration; the Securities and Exchange Commission; and the Commodity Futures Trading Commission).

[7] Public Law 107–56, title III, Sec. 352(c), 115 Stat. 322, codified at 31 U.S.C. 5318 note.

[8] 31 U.S.C. 5318(a)(6).

[9] 31 U.S.C. 5318(*l*); *see also* Joint Final Rule—Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks, 68 FR 25103 (May 9, 2003) (codified at 31 CFR 1020.220(a)(4)) (''The CIP must include procedures for determining whether the customer appears on any list of known or suspected terrorists or terrorist organizations issued by any Federal government agency and designated as such by Treasury in consultation with the Federal functional regulators.'').

[10] 31 U.S.C. 5318(*l*)(4) (''Certain financial institutions.—In the case of any financial institution the business of which is engaging in financial activities described in section 4(k) of the Bank Holding Company Act of 1956 (including financial activities subject to the jurisdiction of the Commodity Futures Trading Commission), the regulations prescribed by the Secretary under paragraph (1) shall be prescribed jointly with each Federal functional regulator (as defined in section 509 of the Gramm-Leach-Bliley Act, including the Commodity Futures Trading Commission) appropriate for such financial institution.''). The financial institutions subject to the CIP rule that will be covered by this Final Rule engage in financial activities within the meaning of 12 U.S.C. 1843(k), in particular lending money and providing financial advisory services. *See* 12 U.S.C. 1843(k)(4)(A) and (C).

[11] *See, e.g.,* 31 CFR 1020.210(a).

[12] *See* Notice of Proposed Rulemaking—Customer Identification Programs for Certain Banks Lacking a Federal Functional Regulator, 68 FR 25163 (May 9, 2003).

[13] These requirements are set forth and cross-referenced in sections 31 CFR1020.610 (cross-referencing to 31 CFR 1010.610) and 31 CFR 1020.620 (cross-referencing to 31 CFR 1010.620).

scrutiny of private banking accounts requested or maintained for, or on behalf of, senior foreign political figures (which includes family members or close associates). Enhanced scrutiny must be reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.

*B. Regulatory Background*

The following information describes the effect of certain previous rulemakings on banks, and specifically on banks lacking a Federal functional regulator.

AML Program Requirements

Most banks became subject to an AML program requirement under the BSA when FinCEN issued an Interim Final Rule on April 29, 2002 (''Interim Final Rule'').[14] The Interim Final Rule stated that an institution regulated by a Federal functional regulator ''shall be deemed to satisfy the requirements of 31 U.S.C. 5318(h)(1) if it implements and maintains an [AML] program that complies with the regulation of its Federal functional regulator governing such programs.'' [15] ''Federal functional regulator'' is defined at 31 CFR 1010.100(r) to include each of the Federal banking agencies, as well as the SEC and the CFTC.[16]

The Interim Final Rule temporarily deferred AML program requirements for certain financial institutions, including ''private bankers.'' [17] On November 6, 2002, FinCEN amended the Interim Final Rule to extend the exemption from the requirement to establish an AML program indefinitely for private bankers and to expand the exemption to other financial institutions, including any bank ''that is not subject to regulation by a Federal functional regulator.'' [18]

Although banks that lack a Federal functional regulator are exempt from the requirement to establish an AML program, they are required to comply with many other BSA requirements. For example, FinCEN regulations require all banks, regardless of whether they have a Federal functional regulator, to file currency transaction reports (''CTRs'') and suspicious activity reports (''SARs''), as well as to make and maintain certain records.[19] In addition, like other covered financial institutions, banks that lack a Federal functional regulator are prohibited from maintaining correspondent accounts for foreign shell banks and are required to obtain and retain information on the ownership of foreign banks.[20]

FinCEN has incrementally eliminated the Interim Final Rule's temporary exemption and promulgated AML program rules for certain other institutions, including insurance companies, certain loan or finance companies, and dealers in precious metals, precious stones, or jewels. FinCEN determined that the gap in AML coverage between banks with and without a Federal functional regulator presented a vulnerability to the U.S. financial system that could be exploited by bad actors, prompting this rulemaking. In the 2016 U.S. Mutual Evaluation, the Financial Action Task Force (FATF) recommended that three categories of non-Federal state-chartered banks be subject to an AML program requirement in addition to their reporting obligations.[21] The rulemaking covers non-Federal state chartered banks. Further, subsequent to the 2016 notice of proposed rulemaking to amend the AML, CIP, and beneficial ownership regulations to include coverage for banks lacking a Federal functional regulator, and according to the 2020 National Strategy for Combatting Terrorist and Other Illicit Financing, law enforcement identified specific instances of illicit actors taking advantage of this lack of regulatory coverage.[22]

Customer Identification Program Requirements

CIP requirements were finalized, through a joint final rule, for banks, savings associations, credit unions, and certain non-federally regulated banks on May 9, 2003. With this action, certain banks that lack a Federal functional regulator—namely, private banks, non-federally insured credit unions and trust companies lacking a federal functional regulator—were required to comply with CIP requirements.[23] On the same day, FinCEN published a notice of proposed rulemaking (''NPRM'') that would have imposed CIP requirements on all other banks without a Federal functional regulator that were not already included in the joint rule.[24] The 2003 NPRM was never finalized.

Beneficial Ownership Requirement

On May 11, 2016, FinCEN published a final rule (''CDD Rule'') [25] to clarify and strengthen customer due diligence requirements for certain financial institutions, including federally regulated banks. Specifically, the CDD Rule requires these financial institutions to identify and verify the identity of the beneficial owners of their legal entity customers, subject to certain exclusions and exemptions. The CDD Rule also amended the AML program requirements for these financial institutions. For purposes of regulatory consistency and for the reasons noted above, FinCEN believes it is necessary that these requirements apply to non-federally regulated banks as well.

[14] *See* Interim Final Rule—Anti-Money Laundering Programs for Financial Institutions, 67 FR 21110 (Apr. 29, 2002). In 1987, Federal banking regulators issued regulations requiring federally insured depository institutions and credit unions to have anti-money laundering programs ''to assure and monitor compliance with the requirements of subchapter II of chapter 53 of Title 31, United States Code.'' Final Rule—Procedures for Monitoring Bank Secrecy Act Compliance, 52 FR 2858 (Jan. 27, 1987). The USA PATRIOT Act made developing and implementing an AML program a statutory requirement under the BSA in 2001.

[15] 67 FR at 21113. Since the issuance of the 2002 Interim Final Rule, FinCEN has reorganized its regulations under 31 CFR Chapter X. *See* Final Rule—Transfer and Reorganization of Bank Secrecy Act Regulations, 75 FR 65806 (Oct. 26, 2010). The cited AML program requirement can currently be found at 31 CFR 1020.210, with an added cross-reference to enhanced due diligence requirements imposed by rulemakings later than the Interim Final Rule.

[16] *See* supra note 6.

[17] ''Private banker'' is included in the list of financial institutions set out in the BSA. 12 U.S.C. 5312(a)(2)(C).

[18] Amendment of Interim Final Rule—Anti-Money Laundering Programs for Financial Institutions, 67 FR 67547 (Nov. 6, 2002) (codified at 31 CFR 1010.205).

[19] *See* 31 CFR 1010.306–315 (CTRs); 31 CFR 1020.320 (SAR rule for banks); 31 CFR 1010.410 (records to be made and retained by financial institutions).

[20] 31 CFR 1010.630 (governing prohibitions against establishing, maintaining, administering, or managing correspondent accounts for foreign shell companies and records required for correspondent accounts); 31 CFR 1010.670 (governing summons or subpoena of foreign bank records and termination of correspondent relationships); 31 CFR 1010.605(e)(2) (defining covered financial institutions to include institutions not regulated by a Federal functional regulator, including private banks, trust companies, and credit unions). By contrast, covered financial institutions for purposes of due diligence program requirements for correspondent accounts and private banking accounts do not include private banks. Rather, such due diligence program requirements apply only to federally insured banks and credit unions, as well as certain trust companies that are federally regulated and subject to an anti-money laundering program requirement. *See* 31 CFR 1010.605(e)(1) (covered financial institution); 31 CFR 1010.610 (correspondent accounts); 31 CFR 1010.620 (private banking accounts).

[21] See page 136 of the 2016 U.S. Mutual Evaluation at *https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf.*

[22] See page 41 of the 2020 National Strategy for Combatting Terrorist and Other Illicit Financing at *https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf.*

[23] *See* 68 FR 25090 (May 9, 2003) (codified at 31 CFR 1020.220).

[24] *See* supra note 12.

[25] *See* Customer Due Diligence Requirements for Financial Institutions, 81 FR 29398 (May 11, 2016) (codified at 31 CFR 1010.230).

## II. Notice of Proposed Rulemaking

On August 25, 2016, FinCEN issued an NPRM proposing to amend certain definitions and to amend the AML, CIP, and beneficial ownership regulations to include coverage for banks lacking a Federal functional regulator.[26] FinCEN proposed amending the definition of ''bank'' in 31 CFR 1020 specifically to include, at a minimum, the following categories: (1) State-chartered non-depository trust companies; (2) non-federally insured credit unions; (3) private banks; (4) non-federally insured state banks and savings associations; and (5) international banking entities. In the NPRM, FinCEN noted that the gap in AML coverage between banks with and without a Federal functional regulator presented a vulnerability to the U.S. financial system that could be exploited by bad actors, prompting this rulemaking. Subsequent to the NPRM, law enforcement has identified to FinCEN specific instances of illicit actors taking advantage of this lack of coverage. This activity has involved different types of institutions that would be subject to this rule, and includes multiple investigations related to terrorist financing, espionage, narcotics trafficking, and public corruption. FinCEN further proposed technical amendments to the definition of the term ''bank'' to create one standard definition to be used throughout the regulations. FinCEN did not propose any amendments to the definition of ''financial institution,'' because the amendments proposed in the NPRM would not impact how that term is defined in 31 CFR 1010.100(t).

In addition, FinCEN proposed amending the existing rules to impose standards and requirements for banks lacking a Federal functional regulator that are identical to those in FinCEN's AML, CIP, and beneficial ownership regulations for banks with a Federal functional regulator. Specifically, the NPRM proposed requiring any entity meeting the definition of ''bank'' in 31 CFR 1010.100(d), whether or not regulated by a Federal functional regulator, to establish AML and CIP programs and to comply with beneficial ownership requirements.

Finally, because there would no longer be a need to exclude banks without a Federal functional regulator from AML and CIP requirements if the proposal were finalized, FinCEN also proposed removing 31 CFR 1020.100(b) and (d). FinCEN also invited comment on all aspects of the NPRM.

[26] *See* 81 FR 58425 (Aug. 25, 2016).

## III. Comments on the NPRM—Overview and General Issues

The comment period on the NPRM ended on October 24, 2016. FinCEN received eight comments. Comments were submitted by one anonymous source, three industry representatives, and four trade associations. FinCEN has reviewed and considered all the comments to the extent they addressed aspects of the proposed rulemaking. All the comments supported the issuance of this Final Rule. The Final Rule adopts the proposal in its entirety, but establishes a later date by which affected banks must be in compliance. One commenter requested a two-year implementation period. Another suggested an implementation date in May 2018, to coincide with that of the CDD Rule. A third commenter suggested an implementation period of six months to a year, and a fourth commenter suggested a minimum of six months.

As FinCEN emphasized in the NPRM, and described in more detail above, banks lacking a Federal functional regulator are already obligated to comply with a number of BSA regulations. In addition, banks lacking a Federal functional regulator generally are required by state banking regulation and guidance to have policies, management oversight, personnel training, and internal compliance review and various procedures and systems in place to comply with regulation and guidance. Even banks not subject to these state regulatory requirements must develop such policies and procedures to properly function and comply with their BSA obligations and state banking regulations. FinCEN views the existence of such policies and procedures as minimizing the amount of time needed to prepare for implementation of the Final Rule's requirements. Accordingly, FinCEN does not expect the transition to compliance with the Final Rule to be unreasonably difficult or costly, and does not believe a two-year implementation period is needed or warranted. However, in light of these comments, FinCEN has determined that it would be appropriate to provide affected banks more time to comply with the Final Rule. Banks lacking a Federal functional regulator, therefore, will have 180 days from the day the Final Rule is published to be in compliance. FinCEN believes that this time frame is reasonable and adequate to ensure compliance with these requirements, given the framework that these banks are expected to already have in place.

## IV. Section-by-Section Analysis

### *A. Section 1010.100 General Definitions*

Because the definition of bank in Part 1010 makes no distinction as to whether a bank has a Federal functional regulator, FinCEN did not propose any changes to the definition of bank in paragraph 1010.100(d). Likewise, there were no proposed changes to the general definition of financial institution in paragraph 1010.100(t). Because these existing definitions do not make distinctions based on whether a bank has a Federal functional regulator, they will be used for Part 1020. There were no objections to this general formulation, and FinCEN is adopting it as proposed.

### *B. Section 1010.605 Definition*

The beneficial ownership rule refers to the definition of covered financial institution set forth in paragraph 1010.605(e)(1), which excludes certain financial institutions lacking a Federal functional regulator. To ensure that all banks are subject to the beneficial ownership requirements under section 1010.230, FinCEN proposed amending the definition in paragraph 1010.605(e)(1) by replacing paragraphs (i) through (vii) with a single paragraph (e)(1)(i) to include all banks within the rule's definition of ''covered financial institution.'' With these changes, all banks will now be required to comply with the beneficial ownership requirements to identify and verify the beneficial owners of legal entity customers, regardless of whether they are federally regulated. As with the previous sections, there were no objections to this general formulation, and FinCEN is adopting it as proposed.

### *C. Section 1020.100 Definitions*

FinCEN proposed removing paragraph 1020.100(b), because the definition of bank for purposes of complying with CIP requirements only included banks subject to regulation by a Federal functional regulator. There were no objections to this general formulation, and FinCEN is removing the definition as proposed.

Likewise, FinCEN proposed removing paragraphs 1020.100(d)(1) and (2), because the definitions of financial institution for purposes of complying with AML and CIP requirements only included banks subject to regulation by a Federal functional regulator. There were no objections to this general formulation, and FinCEN is removing these paragraphs as proposed.

*D. Amendments to Section 1010.205*

FinCEN proposed amending section 1010.205 to reflect the removal of: (1) The exemption for private bankers (paragraph 1010.205(b)(1)(vi)); (2) the broader exemption for banks that lack a Federal functional regulator (paragraph 1010.205(b)(2)); and (3) the exemption for persons subject to supervision by a state banking authority (paragraph 1010.205(b)(3)). There were no objections to this amendment, and FinCEN is adopting it as proposed.

*E. Amendments to Section 1020.210*

FinCEN proposed amending the title for this section to reflect that all banks, regardless of whether they are subject to Federal regulation and oversight, are required to establish and implement AML programs. There were no objections to this amendment, and FinCEN is adopting it as proposed. The title for this section now reads: ''Anti-money laundering program requirements for banks.''

FinCEN proposed amending the introductory paragraph in 1020.210 and redesignating the introductory paragraph as paragraph (a) in order to detail the AML program requirements specific to banks regulated only by a Federal functional regulator, including banks, savings associations, and credit unions. FinCEN also proposed removing from the introductory paragraph in 1020.210 the reference to regulation by a self-regulatory organization. There were no objections to these amendments, and FinCEN is adopting them as proposed.

FinCEN proposed adding new paragraph 1020.210(b) to detail the AML program requirements specific to banks that lack a Federal functional regulator, including, but not limited to, private banks, non-federally insured credit unions, and certain trust companies. Paragraph 1020.210(b)(2) requires banks that lack a Federal functional regulator to establish and implement AML programs under the specified minimum standards. Paragraph 1020.210(b)(3) requires banks that lack a Federal functional regulator to obtain approval of the AML program by their board of directors, or an equivalent governing body, and to make the AML program available to FinCEN or its designee upon request. There were no objections to these amendments, and FinCEN is adopting them as proposed.

*F. Amendments to Section 1020.220*

FinCEN proposed amending the title for this section to reflect that, going forward, CIP requirements would apply to all banks. There were no objections to this amendment, and FinCEN is adopting it as proposed.

**V. Final Regulatory Flexibility Act Analysis**

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (''RFA'') requires the agency to ''prepare and make available for public comment an initial regulatory flexibility analysis'' that will ''describe the impact of the proposed rule on small entities.'' 5 U.S.C. 603(a). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

*A. Reasons Why Action by the Agency Is Being Considered*

The Anti-Money Laundering Program

The statutory mandate that all financial institutions establish AML programs is a key element in the national effort to prevent and detect money laundering and the financing of terrorism. Banks without a Federal functional regulator are at least as vulnerable to the risks of money laundering and terrorist financing as banks with one. The Final Rule eliminates the present regulatory gap in AML coverage between banks with and without a Federal functional regulator. FinCEN expects that uniform regulatory requirements for all banks will reduce the opportunity for criminals to seek out and exploit banks subject to less rigorous AML requirements.

Customer Identification Program

For the reasons of regulatory consistency and protection against the systemic vulnerability discussed above in connection with AML programs, FinCEN believes that CIP requirements should also apply to all banks, regardless of whether they are federally regulated. In May 2003, FinCEN issued a Notice of Proposed Rulemaking to ensure that there would be no gaps in the scope of the CIP obligations as they apply to banks. However, this proposal was never finalized.

Beneficial Ownership Requirements

As noted above, the beneficial ownership requirements of the CDD Rule require that from and after May 11, 2018, federally regulated banks and certain other financial institutions identify, and verify the identity of, the beneficial owners of their legal entity customers, as set forth in section 1010.230. For purposes of regulatory consistency, and protection against the systemic vulnerability discussed above in connection with AML programs, FinCEN believes that this requirement should apply to non-federally regulated banks as well.

*B. Objectives of, and Legal Basis for, the Final Rule*

Section 352 of the USA PATRIOT Act requires financial institutions to establish AML programs that, at a minimum, include: (1) The development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs. In addition, the CDD Rule described above added an explicit requirement to understand the nature and purpose of customer relationships; to conduct ongoing monitoring to identify and report suspicious transactions; and, on a risk basis, to maintain and update customer information.[27]

Section 326 of the USA PATRIOT Act requires FinCEN to prescribe regulations that require financial institutions to establish programs for account opening that, at a minimum, include: (1) Verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) determining whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency.

Section 312 of the USA PATRIOT Act requires each U.S. financial institution that establishes, maintains, administers, or manages a correspondent account or a private banking account in the United States for a non-U.S. person to subject such accounts to certain AML measures.

*C. Small Entities Subject to the Final Rule*

Based upon available data, for the purposes of the RFA, FinCEN estimates that these rules will impact approximately 297 state-chartered non-depository trust companies, 228 non-federally insured credit unions, 12 non-federally insured state-chartered banks and savings and loan or building and loan associations, 1 private bank, and 29 international banking entities.[28]

[27] 31 CFR 1020.210(b)(5).

[28] The Small Business Administration (''SBA'') size standards define a trust company as a small business if it has assets of $38.5 million or less. The SBA defines a depository institution (including a credit union) as a small business if it has assets of $550 million or less. FinCEN was unable to find an

Continued

FinCEN's expectation, as expressed in the NPRM, is that many of the banks without a Federal functional regulator are small entities. No comments received in response to the NPRM indicated anything to the contrary. Therefore, FinCEN concludes that the Final Rule applies to a substantial number of small entities.

*D. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule*

The Final Rule prescribes minimum standards for AML programs for banks without a Federal functional regulator to ensure that all banks, regardless of whether they are subject to Federal regulation and oversight, are required to establish and implement written AML programs, including conducting ongoing customer due diligence, and to identify and verify the identity of the beneficial owners of their legal entity customers. The changes also extend customer identification program requirements to those banks not already subject to these requirements.

Banks lacking a Federal functional regulator are currently required to comply with many existing requirements under the BSA. All banks, including those not subject to Federal supervision, are already required to file CTRs and SARs, which necessarily requires a bank to establish a process to detect unusual activity. In addition, certain banks lacking a Federal functional regulator—namely, private banks, non-federally insured credit unions, and certain trust companies—must maintain CIPs.[29]

With respect to the beneficial ownership requirement, the Final Rule requires banks lacking a Federal functional regulator to obtain and maintain identifying information for each beneficial owner from each legal entity customer that opens a new account, including name, address, date of birth, and identification number. The financial institution is also required to verify the identity of such persons by documentary or non-documentary methods and to maintain in its records for five years a description of (i) any document relied on for verification, (ii) any such non-documentary methods and results of such measures undertaken, and (iii) the resolution of any substantive discrepancies discovered in verifying the identification information.

The burden on a small non-federally regulated bank at account opening resulting from the Final Rule would be a function of the number of beneficial owners of each legal entity customer opening a new account, the additional time required to identify and verify each beneficial owner, and the number of new accounts opened for legal entities by the small banks during a specified period.

None of the small businesses that commented on the CDD Rule's Initial Regulatory Flexibility Analysis (''IRFA'') included an estimate of the amount of time to open a legal entity account; rather, only one noted the number of such accounts it opens per year (70). As a result of the comments FinCEN received to the CDD Rule's regulatory impact assessment (''RIA''), FinCEN concluded in its Final Regulatory Flexibility Analysis (''FRFA'')[30] that the estimated time for financial institutions to open accounts ranges from 20 to 40 minutes.[31] On December 30, 2019, FinCEN published in the **Federal Register** a notice of intent to renew without change, information collection requirements in connection with beneficial ownership requirements for legal entity customers.[32] As a result of public comments received on the notice, FinCEN increased its estimate of the burden from an average of 30 minutes to an average of 80 minutes per new account opened for a legal entity customer.

*E. Overlapping or Conflicting Federal Rules*

FinCEN is unaware of any existing Federal regulations that would overlap or conflict with the Final Rule.

*F. Consideration of Significant Alternatives*

FinCEN has not identified any alternative means for bringing these categories of non-Federally regulated banks into compliance with the same standards as all other banks in the United States. Were FinCEN to exempt small entities from this requirement, those entities would potentially be at greater risk of abuse by criminals, terrorists, and other bad actors and would expose the U.S. financial system to money laundering, terrorist financing, proliferation financing, and other serious illicit finance threats.

With respect to beneficial ownership requirements in the CDD Rule, FinCEN considered several alternatives to the requirements proposed. As described in greater detail in the preamble to the final CDD Rule,[33] these alternatives included exempting small financial institutions below a certain asset or legal entity customer threshold from the requirements, as well as utilizing a lower or higher threshold for the minimum level of equity ownership for the definition of beneficial owner. FinCEN determined, however, that identifying the beneficial owner of a financial institution's legal entity customers and verifying that identity are necessary requirements to strengthen financial transparency and to combat the misuse of companies to engage in illicit activities. Were FinCEN to exempt from this requirement small entities or entities that establish a limited number of accounts for legal entities, those financial institutions would be at greater risk of abuse by criminals, terrorists, and other bad actors and would expose the U.S. financial system to money laundering, terrorist financing, proliferation financing, and other serious illicit finance threats.

FinCEN also considered increasing the threshold for ownership of equity interests in the definition of beneficial ownership to 50 percent or more of the equity interests. Although this higher threshold would reduce the maximum number of individuals whose identity would need to be verified from five to three, thus reducing marginally the onboarding time, this change would not impact the training or IT costs and, therefore, would not substantially reduce the overall costs of the rule and also would provide less useful information. After considering all the alternatives, FinCEN concluded that an ownership threshold of 25 percent is appropriate to maximize the benefits of the requirement while minimizing the burden.[34]

To minimize burden to covered financial institutions, which would apply to banks covered under this Final Rule, FinCEN did exempt such financial institutions from the beneficial ownership requirements in connection with legal entity customers opening certain low risk accounts.[35]

FinCEN believes, based on its exposure to other similarly regulated businesses that are required to comply

authoritative figure on the number of non-federally regulated depository institutions that would meet the definition of small entity.

[29] *See* 31 CFR 1020.220.

[30] *See* 81 FR at 29448.

[31] *See id.* As a result of the comments FinCEN received to the draft RIA from other commenters, FinCEN increased the estimated time for financial institutions to open accounts, from a range of 15 to 30 minutes in the IRFA, to a range of 20 to 40 minutes.

[32] *See* 84 FR 72137 (Dec. 30, 2019).

[33] *See* 81 FR at 29450.

[34] *Id.* at 29410.

[35] 31 CFR 1010.230(h); *see also* FIN–2018–R004, ''Exceptive Relief from Beneficial Ownership Requirements for Legal Entity Customers of Rollovers, Renewals, Modifications, and Extensions of Certain Accounts,'' (Sept. 7, 2018).

with AML and CIP programs and beneficial ownership requirements, that banks lacking a Federal functional regulator will be able to build on their existing compliance policies and procedures and prudential business practices to ensure compliance with this Final Rule with relatively minimal cost and effort. As FinCEN has done with the other industries subject to the requirements of the BSA, FinCEN will actively engage with banks lacking a Federal functional regulator to provide guidance and feedback, and endeavor to make compliance with the regulations as cost-effective and efficient as possible for all affected banks.

FinCEN believes that the flexibility incorporated into the Final Rule permits each bank lacking a Federal functional regulator to take a risk-based approach to tailor its AML and CIP programs to fit its own size, needs, and operational risks. In this regard, FinCEN believes that expenditures associated with establishing and implementing an AML program will be commensurate with a bank's size, complexity, and risk profile. Based on inherent risks, some banks may deem it appropriate to implement more comprehensive policies, procedures, and internal controls than others. FinCEN does not intend for each bank lacking a Federal functional regulator to have identical policies and procedures for their AML and CIP programs. The AML regulations are risk-based. Accordingly, each bank has broad discretion to design and implement programs that reflect and respond to the bank's unique money laundering, terrorist and proliferation financing, and other serious illicit finance risks. As with other financial institutions subject to the requirements of the BSA, if a bank lacking a Federal functional regulator is small or does not have high-risk customers, or does not engage in high-risk transactions, the burden to comply with the Final Rule likely will be commensurately minimal. FinCEN anticipates that the impact of the AML and CIP program and beneficial ownership requirements and the assessment of associated risks will not be significant for covered banks lacking a Federal functional regulator.

*G. Certification*

The additional burden under the Final Rule is a requirement to maintain AML and CIP programs and comply with beneficial ownership requirements. As discussed above, FinCEN anticipates that the impact from these requirements will not be significant. Accordingly, FinCEN certifies that the Final Rule will not have a significant economic impact on small entities.

## VI. Unfunded Mandates Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), Public Law 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. Taking into account the factors noted above and using conservative estimates of average labor costs in evaluating the cost of the burden imposed by the proposed regulation, FinCEN has determined that it is not required to prepare a written statement under section 202.

## VII. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This Final Rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the Final Rule has been reviewed by the Office of Management and Budget (''OMB''). As noted above, FinCEN believes the new requirements imposed on banks without a Federal functional regulator, as a result of this Final Rule, will result in a minimal additional compliance burden for such banks for the following reasons:

- Banks lacking a Federal functional regulator are currently required to comply with many existing requirements under the BSA, including the requirements to file CTRs and SARs, which necessarily require a bank to establish a process to detect unusual activity.
- Certain banks lacking a Federal functional regulator—namely, private banks, non-federally insured credit unions, and certain trust companies—must maintain CIPs.
- Banks lacking a Federal functional regulator generally are required by state banking regulation and guidance to have policies, management oversight, personnel training, internal compliance review, and various procedures and systems in place to comply with regulation and guidance. Even banks not subject to these state regulatory requirements must develop such policies and procedures to properly function and comply with their BSA obligations and state banking regulations.

## VIII. Paperwork Reduction Act

The collections of information contained in the Final Rule were submitted to OMB for review in accordance with the Paperwork Reduction Act of 1995 (''PRA'').[36] The information collections have been approved under OMB control numbers 1506–0035 (Anti-money laundering program requirements for banks), 1506–0026 (Customer identification program requirements for banks), and 1506–0070 (Beneficial ownership requirements for legal entity customers).

In accordance with the requirements of the PRA, and its implementing regulations, 5 CFR part 1320, the following information concerning the collection of information is presented. The information collections in this Final Rule are contained in 31 CFR 1020.210 (Anti-money laundering program requirements for banks), 31 CFR 1020.220 (Customer identification program requirements for banks), and 31 CFR 1010.230 (Beneficial ownership requirements for legal entity customers). The information will be used by examining agencies to verify compliance with these provisions. The collection of information is mandatory. Records required to be retained under the BSA must be retained for five years.

*a. 31 CFR 1020.210—Anti-Money Laundering Program Requirements for Banks*

Under this Final Rule, banks that lack a Federal functional regulator are required to establish and implement written AML programs under the specified minimum standards. All financial institutions are required to document their AML programs and are permitted to use the method most suitable to their requirements. In addition, banks that lack a Federal functional regulator are required to obtain approval of their AML program by their board of directors, or an equivalent governing body.

*Description of Recordkeepers:* Banks that lack a Federal functional regulator, including, but not limited to, state-

[36] 44 U.S.C. 3507(d).

chartered non-depository trust companies, non-federally insured credit unions, non-federally insured state-chartered banks and savings and loan or building and loan associations, private banks, and international banking entities.

*Estimated Number of Recordkeepers:* 567 financial institutions.[37]

*Estimated Annual Records:* 567 AML programs.

*Estimated Annual Burden Hours:* 1,134 hours.[38]

*Estimated Total Annual Burden for AML Program Requirements:* 1,134 hours.

This burden is added to the existing burden listed under OMB control number 1506–0035 currently titled ''Anti-Money Laundering Programs for Insurance Companies and Non-Bank Residential Mortgage Lenders and Originators.'' The new title for this control number will be ''Anti-Money Laundering Programs for Insurance Companies, Non-Bank Residential Mortgage Lenders and Originators, and Banks Lacking a Federal Functional Regulator.'' The new total estimated annual burden for this control number is 33,334 hours.[39]

*b. 31 CFR 1020.220—Customer Identification Program Requirements for Banks*

Under the CIP requirements, financial institutions are required to implement risk-based, written CIPs that address the following: (1) Procedures for verifying the identify of each new customer; (2) procedures for making and maintaining a record of all information obtained under the customer identification program; (3) procedures for determining whether a new customer appears on any list of known or suspected terrorist organizations issued by the Federal government; and (4) procedures for providing customers adequate notice that the financial institution is requesting information to verify their identities.

*Description of Recordkeepers:* Banks that lack a Federal functional regulator, such as non-federally insured state-chartered banks and savings and loan or building and loan associations, and international banking entities.[40]

1. Implementing Written CIP Procedures

*Estimated Number of Recordkeepers:* 41 financial institutions. [41]

*Estimated Annual Records:* 41 written CIP programs.

*Estimated Annual Burden Hours:* 41 hours.[42]

2. Recording Information Required To Identify and Verify New Customers

*Estimated Number of Recordkeepers:* 41 financial institutions.

*Estimated Annual Records:* 30,750 records on new accounts.[43]

*Estimated Annual Burden Hours:* 2,563 hours.[44]

3. Providing Customers Notice of Identification Requirements

*Estimated Number of Recordkeepers:* 41 financial institutions.

*Estimated Annual Records:* 41 disclosure notices.

*Estimated Annual Burden Hours:* 41 hours.[45]

4. Total Annual Burden Applicable to CIP Requirements

*Estimated Total Annual Burden Hours for CIP Requirements:* 2,645 hours (41 + 2,563 + 41).

- 41 hours—Implementing written CIP procedures.
- 2,563 hours—Recording information required to identify and verify new customers.
- 41 hours—Providing customers notice of identification requirements.

This burden is added to the existing burden listed under OMB control number 1506–0026 currently titled ''Customer Identification Programs for Banks, Savings Associations, Credit Unions, and Certain Non-Federally Regulated Banks.'' The new title for this control number will be ''Customer Identification Program Requirements for Banks.'' The new total estimated annual burden for this control number is 178,205 hours.[46]

*c. 31 CFR 1010.230—Beneficial Ownership Requirements for Legal Entity Customers*

Under 31 CFR 1010.230, financial institutions are required to establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of new accounts opened by legal entity customers and to include such procedures in their AML programs. Financial institutions may obtain the required identifying information by either using the optional certification form from the individual opening the account on behalf of a legal entity

[37] Approximately 297 state-chartered non-depository trust companies, 228 non-federally insured credit unions, 12 non-federally insured state-chartered banks and savings and loan or building and loan associations, 1 private bank, and 29 international banking entities will be required to implement written AML programs as a result of this Final Rule.

[38] The estimated average burden associated with the development of a written AML program is one hour per recordkeeper annually. Although this is a new requirement for banks lacking a Federal functional regulator, they are already obligated to comply with a number of BSA regulations and state banking regulations. For example, FinCEN regulations require all banks, regardless of whether they have a Federal functional regulator, to file CTRs and SARs, as well as to make and maintain certain records. These banks likely maintain procedures to comply with such BSA and state banking regulations. For that reason, FinCEN estimates that the burden associated with the development of a written AML program is one hour because the impacted financial institutions will be able to incorporate existing applicable procedures. In addition, the estimated average burden associated with obtaining board approval of the AML program is one hour per recordkeeper annually. This equates to 2 hours of annual burden per impacted financial institution to comply with these requirements (567 financial institutions × 2 hours = 1,134 hours).

[39] The current annual burden hours estimate for OMB control number 1506–0035 is 32,200. One thousand one hundred thirty four (1,134) burden hours will be added to this control number as a result of this Final Rule (32,200 + 1,134 = 33,334).

[40] FinCEN has previously implemented CIP requirements for credit unions, private banks, and trust companies that do not have a Federal functional regulator. *See* 31 CFR 1020.220. For that reason, the CIP requirements in this Final Rule only apply to the non-federally insured state-chartered banks and savings and loan or building and loan associations and international banking entities.

[41] Approximately 12 non-federally insured state-chartered banks and savings and loan or building and loan associations and 29 international banking entities depository institutions will be required to implement CIP requirements as a result of this Final Rule.

[42] The estimated average burden associated with the development of written CIP procedures is one hour per recordkeeper annually. Although this is a new requirement for some banks lacking a Federal functional regulator, they are already obligated to comply with a number of BSA regulations and state banking regulations. These banks likely maintain procedures to comply with such BSA and state banking regulations. Further, certain identity verification documents for new customers are collected as standard practice for the financial industry. For that reason, FinCEN estimates that the burden associated with the development of written CIP procedures is one hour because it will incorporate existing applicable procedures.

[43] FinCEN estimates that, on average, small financial institutions, such as those covered by this Final Rule, will open approximately 3 new accounts per business day. There are 250 business days per year. (41 financial institutions × 3 accounts per day × 250 business days = 30,750 records per year).

[44] In past PRA burden analysis, FinCEN estimated that the burden to collect account information as a result of CIP requirements for other types of financial institutions was 2 minutes per new account. However, because CIP is a new regulatory requirement for the financial institutions impacted by this Final Rule, FinCEN will conservatively estimate that the time it takes to collect and document identification and verification information for purposes of CIP is 5 minutes per new account opened. (30,750 records on new accounts × 5 minutes per account and converted to hours = 2,563 annual burden hours).

[45] FinCEN estimates that it will take each financial institutions impacted by this Final Rule 1 hour to draft and post a CIP disclosure notification for customers (41 financial institutions × 1 hour = 41 hours).

[46] The current annual burden hours estimate for OMB control number 1506–0026 is 175,560, and 2,645 burden hours will be added to this control number as a result of this rulemaking (175,560 + 2,645 = 178,205).

customer, or by obtaining from the individual the information required by the form by another means, provided the individual certifies the accuracy of the information. Financial institutions must also maintain a record of the identifying information obtained, as well as a description of any document relied on, of any non-documentary methods and results of any measures undertaken, and the resolutions of substantive discrepancies.

*Description of Recordkeepers:* Banks that lack a Federal functional regulator, including, but not limited to, state-chartered non-depository trust companies, non-federally insured credit unions, non-federally insured state-chartered banks and savings and loan or building and loan associations, private banks, and international banking entities.

1. Develop and Maintain Beneficial Ownership Identification Procedures

*Estimated Number of Recordkeepers:* 567 financial institutions.[47]

*Estimated Annual Records:* 567 beneficial ownership identification procedures.

*Estimated Annual Burden Hours:* 22,680 hours.[48]

2. Customer Identification, Verification, and Review and Recordkeeping of the Beneficial Ownership Information

*Estimated Number of Recordkeepers:* 567 financial institutions.

*Estimated Annual Records:* 212,625 beneficial ownership identification records.[49]

*Estimated Annual Burden Hours:* 283,500 hours.[50]

3. Total Annual Burden Applicable to Beneficial Ownership Requirements

*Estimated Total Annual Burden Hours for Beneficial Ownership Requirements:* 306,180 hours (22,680 + 283,500).

- 22,680 hours—Develop and maintain beneficial ownership identification procedures.
- 283,500 hours—Customer identification, verification, and review and recordkeeping of the beneficial ownership information.

This burden is added to the existing burden listed under OMB control number 1506–0070 titled Beneficial Ownership Requirements for Legal Entity Customers. The new total estimated annual burden for this control number is 12,190,880 hours.[51]

*Total Estimated Annual Burden Hours as a Result of this Final Rule:* 309,959 hours (1,134 + 2,645 + 306,180).

- Anti-money laundering program requirements for banks—1,134 hours.
- Customer identification program requirements for banks—2,645 hours.
- Beneficial ownership requirements for legal entity customers—306,180 hours.

**List of Subjects in 31 CFR Parts 1010 and 1020**

Administrative practice and procedure, Banks, Banking, Currency, Foreign banking, Foreign currencies, Investigations, Penalties, Reporting and recordkeeping requirements, Terrorism.

**Authority and Issuance**

For the reasons set forth in the preamble, Parts 1010 and 1020 of Chapter X of Title 31 of the Code of Federal Regulations are amended as follows:

## PART 1010—GENERAL PROVISIONS

■ 1. The authority citation for part 1010 continues to read as follows:

**Authority:** 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314, Pub. Law 107–56, 115 Stat. 307; sec. 701, Pub. L. 114–74, 129 Stat. 599.

**§ 1010.205 [Amended]**

■ 2. Section 1010.205 is amended by:
■ a. Removing paragraph (b)(1)(vi);
■ b. Redesignating paragraphs (b)(1)(vii) through (ix) as paragraphs (b)(1)(vi) through (viii); and
■ c. Removing and reserving paragraphs (b)(2) and (b)(3).
■ 3. Section 1010.605 is amended by:
■ a. Revising paragraph (e)(1)(i);
■ b. Removing paragraphs (e)(1)(ii) through (vii); and
■ c. Redesignating paragraphs (e)(1)(viii) through (x) as paragraphs (e)(1)(ii) through (iv).

The revision reads as follows:

**§ 1010.605 Definitions**

* * * * *

(e) * * *

(1) * * *

(i) A bank required to have an anti-money laundering compliance program under the regulations implementing 31 U.S.C. 5318(h), 12 U.S.C. 1818(s), or 12 U.S.C. 1786(q)(1);

* * * * *

## PART 1020—RULES FOR BANKS

■ 4. The authority citation for part 1020 continues to read as follows:

**Authority:** 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314, Pub. Law 107–56, 115 Stat. 307.

**§ 1020.100 [Amended]**

■ 5. Section 1020.100 is amended by:
■ a. Removing paragraphs (b) and (d); and
■ b. Redesignating paragraph (c) as paragraph (b).
■ 6. Section 1020.210 is revised to read as follows:

**§ 1020.210 Anti-money laundering program requirements for banks.**

(a) *Anti-money laundering program requirements for banks regulated by a Federal functional regulator, including banks, savings associations, and credit unions.* A bank regulated by a Federal functional regulator shall be deemed to satisfy the requirements of 31 U.S.C. 5318(h)(1) if it implements and maintains an anti-money laundering program that:

(1) Complies with the requirements of §§ 1010.610 and 1010.620 of this chapter;

(2) Includes, at a minimum:

(i) A system of internal controls to assure ongoing compliance;

(ii) Independent testing for compliance to be conducted by bank personnel or by an outside party;

(iii) Designation of an individual or individuals responsible for coordinating and monitoring day-to-day compliance;

[47] Approximately 297 state-chartered non-depository trust companies, 228 non-federally insured credit unions, 12 non-federally insured state-chartered banks and savings and loan or building and loan associations, 1 private bank, and 29 international banking entities will be required to implement beneficial ownership identification procedures as a result of this Final Rule.

[48] The beneficial ownership final rule recognized a burden of 56 hours to develop the initial procedures (40 hours for small entities). *See* 81 FR at 29451. Based on FinCEN's data, banks lacking a Federal functional regulator are generally considered small entities. For that reason, FinCEN estimates it will take 40 hours for financial institutions impacted by this Final Rule to develop and document initial beneficial ownership identification procedures. (567 × 40 = 22,680).

[49] The beneficial ownership final rule recognized a burden of 20 to 40 minutes (average of 30 minutes) to obtain identification records for each legal entity customer. The final rule also estimated that a financial institution would open 1.5 new legal entity accounts per business day. There are 250 business days per year. *See id.* at 29451 n.191. On December 30, 2019, FinCEN published in the **Federal Register** a notice of intent to renew without change, information collection requirements in connection with beneficial ownership requirements for legal entity customers. *See* supra note 30. As a result of public comments received on the notice, FinCEN increased its estimate of the burden from an average of 30 minutes to an average of 80 minutes per new account opened for a legal entity customer. (1.5 accounts per day × 250 days per year = 375 accounts per financial institution). (567 financial institutions × 375 accounts per year = 212,625 accounts per year).

[50] (212,625 accounts × 80 minutes per account and converted to hours = 283,500 hours).

[51] The current annual burden hours estimate for OMB control number 1506–0070 is 11,884,700. 306,180 burden hours will be added to this control number as a result of this Final Rule (11,884,700 + 306,180 = 12,190,880).

(iv) Training for appropriate personnel; and

(v) Appropriate risk-based procedures for conducting ongoing customer due diligence, to include, but not be limited to:

(A) Understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and

(B) Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. For purposes of this paragraph, customer information shall include information regarding the beneficial owners of legal entity customers (as defined in § 1010.230 of this chapter); and

(3) Complies with the regulation of its Federal functional regulator governing such programs.

(b) *Anti-money laundering program requirements for banks lacking a Federal functional regulator including, but not limited to, private banks, non-federally insured credit unions, and certain trust companies.* A bank lacking a Federal functional regulator shall be deemed to satisfy the requirements of 31 U.S.C. 5318(h)(1) if the bank establishes and maintains a written anti-money laundering program that:

(1) Complies with the requirements of §§ 1010.610 and 1010.620 of this chapter; and

(2) Includes, at a minimum:

(i) A system of internal controls to assure ongoing compliance with the Bank Secrecy Act and the regulations set forth in 31 CFR Chapter X;

(ii) Independent testing for compliance to be conducted by bank personnel or by an outside party;

(iii) Designation of an individual or individuals responsible for coordinating and monitoring day-to-day compliance;

(iv) Training for appropriate personnel; and

(v) Appropriate risk-based procedures for conducting ongoing customer due diligence, to include, but not be limited to:

(A) Understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and

(B) Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. For purposes of this paragraph, customer information shall include information regarding the beneficial owners of legal entity customers (as defined in § 1010.230); and

(3) Is approved by the board of directors or, if the bank does not have a board of directors, an equivalent governing body within the bank. The bank shall make a copy of its anti-money laundering program available to the Financial Crimes Enforcement Network or its designee upon request.

■ 7. Amend § 1020.220 by revising the section heading and paragraph (a)(1) to read as follows:

**§ 1020.220 Customer identification program requirements for banks.**

(a) * * *

(1) *In general.* A bank required to have an anti-money laundering compliance program under the regulations implementing 31 U.S.C. 5318(h), 12 U.S.C. 1818(s), or 12 U.S.C. 1786(q)(1) must implement a written Customer Identification Program (CIP) appropriate for the bank's size and type of business that, at a minimum, includes each of the requirements of paragraphs (a)(1) through (5) of this section. The CIP must be a part of the anti-money laundering compliance program.

* * * * *

**Michael Mosier,**

*Deputy Director, Financial Crimes Enforcement Network.*

[FR Doc. 2020–20325 Filed 9–14–20; 8:45 am]

**BILLING CODE 4810–02–P**

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## DEPARTMENT OF EDUCATION

## 34 CFR Chapter VI

**[Docket ID ED–2020–OPE–0031]**

## Final Priorities, Requirements, and Definitions—Fund for the Improvement of Postsecondary Education—Open Textbooks Pilot Program

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Final priorities, requirements, and definitions.

**SUMMARY:** The Assistant Secretary for Postsecondary Education announces priorities, requirements, and definitions for the Open Textbooks Pilot (OTP) program conducted under the Fund for the Improvement of Postsecondary Education (FIPSE), CFDA number 84.116T. The Assistant Secretary may use one or more of these priorities, requirements, and definitions for competitions in fiscal year (FY) 2020 and later years. We take this action to focus Federal financial assistance on the creation of new open textbooks (as defined in this notice) and to expand the use of open textbooks in courses that are part of a degree-granting program, particularly those with high enrollments. We intend this action to further develop and identify programs and practices that improve instruction and student learning outcomes, as well as increase access, affordability, and completion rates, for students seeking postsecondary education degrees through the development, enhancement, and use of open textbooks.

**DATES:** These priorities, requirements, and definitions are effective October 15, 2020.

**FOR FURTHER INFORMATION CONTACT:** Stacey Slijepcevic, U.S. Department of Education, 400 Maryland Avenue SW, Room 268–34, Washington, DC 20202. Telephone: (202) 453–6150. Email: *stacey.slijepcevic@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

*Purpose of Program:* The OTP program supports projects at institutions of higher education (IHEs) that create new open textbooks and expand the use of open textbooks in courses that are part of a degree-granting program, particularly those with high enrollments. Applicants are encouraged to develop projects that demonstrate the greatest potential to achieve the highest level of savings for students through sustainable, expanded use of open textbooks in high-enrollment courses (as defined in this notice) or in programs that prepare individuals for in-demand fields.

*Program Authority:* 20 U.S.C. 1138–1138d.

We published a notice of proposed priorities, requirement, and definitions (NPP) for this program in the **Federal Register** on March 31, 2020 (85 FR 17805). That document contained background information and our reasons for proposing the particular proposed priorities, requirement, and definitions.

There are differences between the proposed priorities, requirement, and definitions and the final priorities, requirements, and definitions as discussed in the *Analysis of Comments and Changes* section elsewhere in this document.

*Public Comment:* In response to our invitation in the NPP, 78 parties submitted comments on the proposed priorities, requirement, and definitions.

We group major issues according to subject. We discuss other substantive issues under the title of the item to which they pertain. Generally, we do not address technical and other minor changes, or suggested changes the law

does not authorize us to make under the applicable statutory authority. In addition, we do not address general comments that raised concerns not directly related to the proposed priorities, requirement, or definitions.

*Analysis of Comments and Changes:* An analysis of the comments and of any changes in the priorities, requirements, and definitions since publication of the NPP follows.

**Award Size**

*Comment:* In the NPP, the Department specifically requested feedback from the public on a variety of items that are established in the notice inviting applications (NIA) for this program, namely the maximum award, range in award size, estimated number of awards, and estimated average award. Most commenters suggested that the Department establish a maximum award, range of awards, and average award in the NIA that would support a greater number of smaller awards than the Department supported through the FY 2018 competition, which established a maximum award of $4,950,000. The maximum award amounts suggested by commenters ranged from $500,000 to $2 million, with the latter amount the most common maximum award suggested by the commenters. Many commenters suggested that the Department adopt a tiered framework in which a different maximum award would apply to consortia than would apply to single institution applicants. Most commenters encouraged the Department to support a greater number of awards, though most commenters were not specific. Of those comments that were specific, there was substantial variation. For example, one commenter suggested 3–6 awards while another suggested that 15–20 awards would be ideal. A few commenters urged the Department to ensure that adequate funding is provided to be impactful and to support the software technology that is necessary under this program. Finally, many commenters suggested that the Department shorten the project period to either 24 or 36 months to serve a number of goals such as increasing the amount available to the grantees on an annual basis, and enabling the program to produce results more quickly.

*Discussion:* We appreciate these comments and have relied on this feedback to establish a funding framework in the FY 2020 OTP NIA published elsewhere in this issue of the **Federal Register**. Although we appreciate the suggestion that we establish a tiered funding structure to support larger awards for consortia and smaller awards for single institutions, we believe that it is essential to maintain the consortia arrangement, which ensures collaboration by requiring applicants to develop partnerships among multiple IHEs, educational technology or electronic curriculum design experts, and workforce advisors, to maximize the impact of this program. Finally, although we note that the project period established in the FY 2018 OTP NIA allowed applicants to propose a project period shorter than 48 months, we appreciate that many applicants consider the maximum project period as a default project period. Furthermore, we appreciate the feedback that this work can be accomplished in a shorter timeframe and agree with those commenters that noted that establishing a shorter project period would enable this program to yield results more quickly.

*Changes:* These comments were in response to a directed question on issues that do not require rulemaking, but we have incorporated the feedback into the FY 2020 OTP NIA. Specifically, in contrast to the FY 2018 OTP NIA, which established a maximum award of $4,950,000, in the FY 2020 NIA, we are setting $2,000,000 as the maximum award, $1,000,000 as the average award, $500,000–$2,000,000 as the range in award size, and 3–12 as the estimated number of awards. In addition, we have shortened the project period from 48 months to 36 months.

**Matching Contribution**

*Comment:* The Department received several comments in response to the directed question seeking feedback on the use of a priority to require or encourage applicants to propose matching contributions. Although several commenters responded that the Department should either require or encourage matching contributions to support the sustainability of the project and to achieve other objectives, the majority of commenters advised against a matching priority for a variety of reasons. Some commenters raised concerns that a matching priority could disadvantage lower-resourced institutions. Many commenters were supportive of the idea in general but advised that the COVID–19 pandemic and its impact on the budgets of institutions, States, and nonprofit partners make a matching priority ill-suited to the FY 2020 competition.

*Discussion:* The Department appreciates these responses. In general, given the small appropriation for this program, we are interested in encouraging matching as a way to maximize the impact of the program and support the sustainability of the funded projects. We also share the concerns many commenters have raised and do not want to disadvantage under-resourced institutions, including community colleges and minority serving institutions. We also recognize the impact COVID–19 has had, and is likely to continue to have, on IHEs.

Accordingly, the Department is not establishing a matching priority for this program. We note that, through the priority 2(f) established in the *Secretary's Supplemental Priorities,* we have the authority to use a matching priority in OTP competitions without establishing such a priority for this program. However, given the concerns raised regarding the impact of COVID–19 on applicants' ability to secure matching contributions, the Department is not including a matching priority in the FY 2020 OTP NIA.

*Changes:* None.

**Degree-Granting Programs**

*Comment:* In general, commenters expressed support for the broader definition of high-enrollment courses and high-enrollment programs.

*Discussion:* Upon further review of the Explanatory Statement that accompanied the FY 2020 Appropriations Act, we recognized that Congress intended to limit the FY 2020 OTP program to degree-granting programs. Accordingly, we are revising Priority 2 and the definitions of ''high-enrollment courses'' and ''high-enrollment programs'' to remove references to credentials and solely reference degree-granting programs.

*Changes:* We have revised Priority 2 and the definitions of ''high-enrollment courses'' and ''high-enrollment programs'' to remove references to credentials and solely reference degree-granting programs.

**Proposed Priority 1—Improving Collaboration and Dissemination**

*Comment:* In response to this proposed priority designed to encourage collaboration and dissemination, several commenters noted that collaborations can be challenging, especially with large-scale projects, and costly. One commenter noted that consortia arrangements can be inefficient and ineffective at managing grant funds, particularly if they are ad hoc or spread over a wide area. For this reason, the commenter encouraged the Department to prioritize consortia with a demonstrated connection between partners.

*Discussion:* We appreciate the support and critical feedback on collaborations and consortia arrangements. The

Department believes the consortia arrangement can be impactful on a larger scale than individual projects, but we agree that such consortia need to focus on identifying members of the consortia who bring a synergistic combination of participants, experience, and program management. It is the applicant's responsibility to demonstrate the effectiveness of the consortia arrangement and how the consortium will meet this priority.

*Changes:* None.

*Comment:* One commenter recommended expanding the priority to include collaborations that promote the development of communication infrastructures that support the sharing of resources among open education practitioners.

*Discussion:* The Department appreciates this comment. We understand the importance of sustainable support systems within and across institutions, as well as the broader open education community. Applicants have the flexibility to develop projects that are tailored to the consortium or the broader community to support this identified need.

*Changes:* None.

*Comment:* Several commenters recommended prioritizing certain combinations of collaborative arrangements—for example, collaborations with private institutions or non-profit and private sector businesses. One commenter recommended prioritizing collaboration with campus bookstores to assist with companion platforms and services, and to provide information on the use of open textbooks and the associated savings.

*Discussion:* The Department appreciates the recommendations. However, to encourage a broad range of consortia arrangements, we support providing applicants the flexibility to develop collaborative arrangements with entities that can best address their identified needs.

*Changes:* None.

*Comment:* One commenter recommended a requirement that applicants propose how they might collaborate with existing OTP program grantees to leverage the current investments made in those programs.

*Discussion:* The Department appreciates this comment. We recognize the importance of building upon existing efforts, including current OTP program projects, and leveraging other Federal investments to maximize program impact. Since the previous awards made under this grant program are currently active, information regarding the effectiveness of the projects and deliverables may not be readily available to all applicants. Because of this, we do not believe it is appropriate to impose this requirement. We will continue to support activities that build collaboration between our grantees and dissemination to the broader education community to increase the impact of our investment.

*Changes:* None.

*Comment:* Several commenters recommended that we include in the priority a requirement to increase awareness of open educational resources (OER).

*Discussion:* The Department appreciates these comments. We recognize the importance of improving awareness of OER to encourage its usage and adoption. We believe there is an opportunity to improve awareness of OER and engage various communities more broadly about it through the collaboration and dissemination efforts developed under this priority, as well as through professional development for faculty, instructors, and staff, which is supported by this priority and priority 2.

*Changes:* None.

**Proposed Priority 2—Addressing Gaps in the Open Textbook Marketplace and Bringing Solutions to Scale**

*Comment:* Several commenters provided specific recommendations to make more explicit the requirement in subpart (c) regarding accessibility. These commenters recommended that the Department require adherence to Section 508 of the Rehabilitation Act of 1973 and the Web Content Accessibility Guidelines (WCAG 2.0) Level AA. In addition, commenters recommended that under this priority, the OTP program include support for both implementation and maintenance of these standards.

*Discussion:* The Department appreciates the commenters' concerns and agrees that the openly licensed materials created through this grant program, especially digital resources, should be widely available and accessible to ensure all students are able to benefit. To ensure that the materials created through this grant program are accessible, the Department is adding an additional program requirement that all digital content developed under this grant program must incorporate principles of universal design to ensure that they are accessible to students with disabilities, and that the content and courses must be in full compliance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, as amended, and the W3C Web Content Accessibility Guidelines 2.0, Level AA (*http://www.w3.org/TR/WCAG/*).

*Changes:* The Department has added an additional accessibility program requirement.

*Comment:* Commenters noted that the OER content created through this grant program should abide by the same Federal and State laws and commonly accepted standards governing student data privacy and intellectual property rights that may be used by the private sector.

*Discussion:* Department grantees under all grant programs, including this grant program, must comply with student data privacy and State and Federal privacy laws, including the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. 1232) and its implementing regulations in 34 CFR part 99. Additional privacy protections in these priorities are not necessary.

With regards to intellectual property rights, grants awarded under the OTP program are subject to the Department's open licensing requirements in 2 CFR 3474.20, which speaks to copyrightable intellectual property created with Department grant funds. We believe that the open licensing regulations properly balance the intellectual property interests of grantees and the public's interest in ensuring that copyrightable material produced with Department grant funds is widely disseminated. In addition, we believe the suggested change would not be consistent with the intent of this grant program to expand the use of openly licensed textbooks.

*Changes:* None.

*Comment:* Commenters recommended broadening the scope of this priority to include English Language Learners (ELLs) and students eligible as a Dislocated Worker under the Workforce Innovation and Opportunity Act.

*Discussion:* The Department appreciates this comment. We recognize the importance of improving access for ELs and those students eligible for services under the Workforce Innovation and Opportunity Act. We believe there is opportunity to serve these students under the priority and applicants have the flexibility to develop projects that are tailored to the consortium or broader community to support these identified needs, as appropriate.

*Changes:* None.

*Comment:* Several commenters noted that digital materials created under this grant program would benefit the broader community of stakeholders using a variety of applications, platforms, and systems if these materials conformed with standards for interoperability. These commenters recommended

including more explicit language that conveys the necessity for content that is interoperable across various platforms and systems.

*Discussion:* The Department agrees with the commenters that digital materials developed in conformance with open standards is consistent with the goals of this grant program and the intent of the Department to broaden the impact of its investments.

*Changes:* We have added an additional program requirement that digital assets created through this grant program should conform with technical standards for interoperability.

*Comment:* Several commenters noted that this priority, as well as priorities 1 and 3, contain multiple required components that may be difficult to complete for some applicants. The commenters recommended removing select components, such as subparts (d) and (e), from the priority; clarifying the language to state that applicants should strive to meet as many of the requirements as possible; and encouraging teams of applicants to focus on some components more than others, rather than expecting all applicants to address all the components. One commenter noted that requiring all subparts of the priority to be met disregards differences in, among other things, demographics, financial capabilities, and institution type and may put certain institutions at a disadvantage.

*Discussion:* The Department appreciates this critical feedback. We understand the concerns raised and do not want to disadvantage applicants with impractical requirements. We aim to administer a program that will meet the needs of a broad community without imposing unnecessary burden. To this end, we believe the proposed elements of the program will provide the basic framework to support the program's purpose and address the program's goal. The Department also expects applicants to expand upon this framework and propose projects that are tailored to their needs. We believe the consortia arrangement will be beneficial to all as it is an opportunity to collaborate and leverage the complementary strengths of the consortia members.

However, in the NIA published elsewhere in this issue of the **Federal Register**, the Department has established a new tiebreaker mechanism, and incorporated selection criteria and a priority, to address the concerns and facilitate the support of a diverse range of applications.

*Changes:* None.

*Comment:* One commenter recommended requiring applicants to explain how the development and distribution of the grant deliverables will be sustained after grant funding ends.

*Discussion:* The Department appreciates this comment. The applicant will have an opportunity to describe plans for sustainability as part of the program's selection criteria.

*Changes:* None.

**Proposed Priority 3—Promoting Student Success**

*Comment:* Many commenters expressed support for this priority. There were several commenters that suggested the priority would benefit from expanded metrics to track and evaluate educational outcomes and cost savings because the current metrics for this priority are limited and are focused on whole-textbook adoption and associated student cost savings.

*Discussion:* We appreciate the commenters' support and recommendations for this priority. With the broadened definition of an open textbook, the Department believes the priority does not imply that cost savings can only be measured by the displacement of a textbook. We understand that in some instances the open textbook will supplement and not displace a textbook. The Department expects applicants to use the broadened definition of an open textbook to identify the best method for monitoring and evaluating the impact of open textbooks on instruction, learning outcomes, course outcomes, and educational costs. Furthermore, we expect applicants to develop clear, specific, and actionable metrics that will address the performance of the proposed grant project.

*Changes:* None.

*Comment:* One commenter recommended including professional development in this priority.

*Discussion:* Although we did not specifically incorporate professional development into this priority, the applicant is not precluded from incorporating professional development to address this priority.

*Changes:* None.

*Comment:* One commenter recommended revising the priority to incorporate Universal Design for Learning as an exemplar for evidence-based practices, and one commenter recommended that we require any materials used, promoted, or disseminated through the project to comply with Federal accessibility standards under Section 508 of the Rehabilitation Act of 1973.

*Discussion:* The Department agrees with the former recommendation, and has added a program requirement that all digital content developed under this program must incorporate principles of universal design to ensure that the content is accessible to students with disabilities, and that the content and courses must be in full compliance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, as amended, and the W3C Web Content Accessibility Guidelines 2.0, Level AA (*http://www.w3.org/TR/WCAG/*). With respect to the latter recommendation, Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d) requires Federal agencies to make electronic and information technologies that they develop, procure, maintain, or use accessible to individuals with disabilities. This law is not applicable to recipients of Federal financial assistance that are not Federal agencies.

*Changes:* The Department has added an additional accessibility program requirement.

*Comment:* One commenter stated that this priority introduces an inequitable barrier for institutions like community colleges, technical colleges, and institutions that support local industry demand for career and technical programs. It was noted that many of these institutions have courses that are in high demand for creation of open textbooks but they will not meet the definition for ''high-enrollment'' because the courses cannot accommodate large class sizes due to industry and safety specifications. The commenter recommended the inclusion of the proposed definitions for ''in-demand industry sector'' and ''in-demand occupation'' in this priority.

*Discussion:* We acknowledge the concern that establishing a stricter definition for ''high-enrollment courses'' could preclude some applicants from proposing open textbooks for certain courses. However, the Department needs to balance this concern with the key program objective of maximizing savings for students. The Department must also take into consideration how the program priorities may achieve broad-scale impact. We do not believe that limiting this priority to courses in in-demand industry sectors and in-demand occupations would sufficiently support promoting student success on a broader scale.

*Changes:* None.

**Proposed Priority 4—Using Technology-Based Strategies for Personalized Learning and Continuous Improvement**

*Comment:* One commenter recommended including professional development in this priority.

*Discussion:* Although we did not specifically incorporate professional development into this priority, the applicant is not precluded from incorporating professional development to address this priority.

*Changes:* None.

*Comment:* Multiple commenters recommended broadening the priority so that it is not limited to projects that integrate personalized learning strategies. There was concern that applicants with projects involving technologies that are less complex to develop would be deterred by this requirement. It was recommended to broaden the priority to include all technology developments.

*Discussion:* The Department appreciates the critical feedback and recommendations. We recognize that in addition to personalized learning there are a multitude of strategies and pathways towards improving instruction and student learning outcomes. While artificial intelligence and adaptive learning are examples of technologies that may provide personalized learning experiences for students, applicants are not prohibited from undertaking other types of technology developments under this priority. The Department encourages applicants to choose the technology that fits the context of their proposed project. Therefore, we agree that it will be beneficial to broaden the language of this priority.

*Changes:* We have revised priority 4 to include all technology-based strategies.

*Comment:* Multiple commenters expressed concern over consumer data privacy and stated that the priority lacks explicit language requiring grantees to protect the privacy of students.

*Discussion:* As State and Federal privacy laws apply to this grant program, including FERPA and its implementing regulations in 34 CFR part 99, additional privacy protections in these regulations are not necessary.

*Changes:* None.

*Comment:* Multiple commenters expressed concern over accessibility requirements and recommended the addition of language requiring adherence to Section 508 of the Rehabilitation Act of 1973.

*Discussion:* Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d) requires Federal agencies to make electronic and information technologies that they develop, procure, maintain, or use accessible to individuals with disabilities. This law is not applicable to recipients of Federal financial assistance that are not Federal agencies. To ensure that the materials created through this grant program are accessible, the Department is adding an additional program requirement that all digital content developed under this grant program must incorporate principles of universal design to ensure that they are accessible to students with disabilities, and that the content and courses must be in full compliance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, as amended, and the W3C Web Content Accessibility Guidelines 2.0, Level AA (*http://www.w3.org/TR/WCAG/*).

*Changes:* The Department has added an additional accessibility program requirement.

*Comment:* Multiple commenters expressed concern over intellectual property and recommended the Department follow all applicable laws with regard to the protection of intellectual property rights including those of copyright, patent, and trademark holders.

*Discussion:* Grants awarded under the OTP program are subject to the Department's open licensing requirements under 2 CFR 3474.20, which speaks to copyrightable intellectual property created with Department grant funds. We believe that the Department's regulations properly balance the intellectual property interests of grantees and the public's interest in ensuring that copyrightable material produced with Department grant funds is widely disseminated. In addition, we believe the suggested change would not be consistent with the intent of this grant program to expand the use of openly licensed textbooks.

*Changes:* None.

*Comment:* A number of commenters did not support this priority primarily because of the technology focus and, for some commenters, a lack of alignment with the goal to achieve cost savings for students. Commenters noted the technology focus of this priority may present a barrier to applicants with smaller projects that may not be capable of delivering some of the OER technology, or it may exclude applicants with projects that are not focused on technology-enabled content and instruction. There were also concerns about the burden to implement technology-based strategies and the high costs associated with the development and maintenance of technology-based solutions.

*Discussion:* The Department appreciates the critical feedback for this priority. Although cost savings are a primary goal for this program, the Department recognizes the possibility of other tangible benefits. Through the use of technology-based strategies, the open textbook materials can be further tailored and enhanced to meet the needs of the students. We believe this priority is in alignment with priorities 1, 2, and 3, which are more directly focused on the development of open textbooks content and materials, because this priority leverages the use of technology to support the open textbook content. The Department encourages applicants to identify consortium members that can help fill gaps, such as academic or technology gaps, that may exist at their institution. We recognize that grantees may need to invest in a variety of resources and that the burden to access and implement these resources may vary across institutions. To get optimal value from these investments, the Department expects applicants to leverage the resources of their consortium and thereby benefit from the access and offerings provided by the consortium members.

*Changes:* None.

*Comment:* One commenter stated that complex technologies may make it more difficult for other users to revise, remix, and customize the materials for their own learning objectives and student population despite the open license.

*Discussion:* The Department appreciates the commenter's concern that some digital assets or technology-enabled materials may be difficult to revise, remix, and customize. Digital assets developed through this grant program will be openly licensed. In addition, the Department has included an additional program requirement that all technology-enabled assets will conform with open standards to ensure interoperability across multiple applications, platforms, and systems.

*Changes:* None.

*Comment:* One commenter recommended that, for any technology-based or personalized learning focused projects, there should also be a focus on the integration and reuse of the technologies with learning management systems. In addition, since the development and maintenance of these technologies can be costly, it was recommended that a plan be proposed to sustain and update the systems and content beyond the grant period.

*Discussion:* The Department appreciates this comment. The Department has included an additional program requirement that all technology-enabled assets will conform with open standards to ensure interoperability across multiple applications, platforms, and systems. The applicant will have an opportunity to describe plans for sustainability as part of the program's selection criteria.

*Changes:* None.

**Proposed Requirement**

*Applicant Eligibility*

*Comment:* Several commenters recommended that the Department expand the entities eligible to apply to lead the activities of the consortium, to include private non-profit institutions, for-profit organizations, State Higher Education Executive Officers Association (SHEEO), State higher education systems, and state-wide OER initiatives.

*Discussion:* We appreciate these comments and support the participation of a diverse array of institutions and organizations in this grant program. However, the Department adhered to the explanatory statement accompanying the FY 2020 appropriations bill, which recommended that IHEs, as defined in section 101 of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1001), or State higher education agencies serve as fiscal agent for a consortium. Applicants are reminded that as part of the consortium they may include private non-profit institutions, for-profit organizations, SHEEO, State higher education systems, and state-wide OER initiatives. Additionally, a system is eligible to apply as the lead applicant as long as the eligibility parameters are met, and the lead applicant is an eligible IHE from the system that serves as the fiscal agent.

*Changes:* None.

*Comment:* Many commenters were supportive of applicants collaborating between multiple institutions, as well as with employers. There were also many comments with recommendations for less restrictive eligibility requirements, and flexibility to construct their own consortia based on their needs and scope of expertise. The recommended eligibility requirements included: Decreasing the number of IHEs; reducing the size of the advisory group; eliminating the requirement for an educational technology or electronic curriculum design expert; eliminating the requirement for an advisory group; eliminating the requirement for a consortium altogether; and supporting single institution projects. Some commenters also noted the potential burden of constructing a consortium due to the COVID–19 pandemic and its impact on IHEs, as well as employers.

*Discussion:* The Department appreciates these responses and we share some of the concerns many commenters have raised regarding the impact of the COVID–19 pandemic. We do not want to unnecessarily create additional burden on the applicants and are revising the eligibility requirement to make it less restrictive. However, we believe that consortia are necessary to facilitate the sharing of resources and help ensure adequate scale of the projects. Additionally, the composition of the consortium is intended to represent at a minimum the constituents and stakeholders that can provide support and expertise that aligns with the project scope.

*Changes:* We have revised the requirement for an advisory group to provide that it must include at least three, rather than five, employers, workforce organizations, or sector partners (as defined in this notice).

*Comment:* One commenter requested clarification on the involvement of employers and workforce partners in the advisory group and what role they may serve.

*Discussion:* An advisory group was included in the consortium to provide expertise and support for facilitating the alignment of postsecondary education to workforce opportunities and employer needs. Specifically, in the case of a career and technical postsecondary program, the consortium should work together to develop and implement open textbooks that meet industry standards in in-demand industry sectors or in-demand occupations.

*Changes:* None.

*Comment:* Commenters sought clarification on what qualifies as an educational technology or electronic curriculum design expert.

*Discussion:* Individuals in this role should be able to provide expertise in the design, development, and delivery of open textbooks and instructional resources. Ideally, the experts will possess the skills needed to create content for learning and have qualifications that facilitate designing, developing, implementing, and assessing instruction and learning.

*Changes:* None.

**Proposed Definitions**

*High Enrollment*

*Comment:* A number of commenters raised concerns that increasing the threshold for high enrollment from programs and courses with ''above-average'' enrollment to those with ''top-third'' enrollment could discourage applicants form proposing open textbooks for certain programs and courses, such as those in the humanities.

*Discussion:* We appreciate the concerns raised by some commenters that establishing a stricter definition for ''high-enrollment'' could preclude applicants from proposing open textbooks for certain programs and courses. However, the Department needs to balance this concern with the key program objective of maximizing savings for students. We believe that our proposed revision strikes the right balance. However, the Department has established a new tiebreaker mechanism to ensure that the funded projects support a diverse range of programs and courses.

*Changes:* None.

*Open Textbook*

*Comment:* One commenter disagreed with the expansion of the definition and suggested that the word ''textbook'' already had a specific definition, and that redefining the term may result in confusion.

*Discussion:* The Department believes that while a textbook is an item with a prior known definition, the proposed definition mirrors the actual use of learning materials for teaching and learning. As other commenters also note, the textbook is no longer the single source of learning enrichment in a classroom and by itself is insufficient to create a rich and engaging learning experience for students. Furthermore, the use of a textbook in the context of this program goes beyond digitizing a book, as such; without these ancillary materials, the Department would not be able to accomplish the goals of this grant program.

*Changes:* None.

*Comment:* One commenter stated that the definition of ''open textbooks'' may be too broad and imply that the grantees must use openly licensed software to support the entire delivery of their course.

*Discussion:* The Department does not believe that the definition suggests that all aspects of course delivery should be openly licensed. It is beyond the authority and scope of this grant program to require any grantee to re-license any previously copyrighted materials or to direct the usage of any applications, platforms, or systems.

*Changes:* None.

*Comment:* One commenter suggested that the Department should provide a definition for ''ancillary materials'' to avoid the use of openly licensed assessments.

*Discussion:* The Department appreciates this comment. However, we believe there is value in open assessments as they provide the opportunity to demonstrate mastery of the competencies. Therefore, we do not want to limit applicants from developing or using these materials. We also believe there is opportunity to develop a wide variety of materials to

serve students and that applicants have the flexibility to develop projects that are tailored to the consortium or broader community to support their identified needs, as appropriate.

*Changes:* None.

*Comment:* One commenter suggested revising the definition so that it specifies how the original source code is guaranteed to be made freely available to the public.

*Discussion:* Unless an exception applies, all new intellectual property created in whole or in part with Department grant funds, including those awarded under this grant program, are subject to the Department's open licensing requirements under 2 CFR 3474.20. This includes source code for any new, copyrightable digital assets.

*Changes:* None.

*Sector Partner*

*Comment:* One commenter recommended that we expand the definition of ''sector partner'' to include entities such as non-profit and private sector businesses, and for the Department to establish a competitive preference priority for partnerships with these entities.

*Discussion:* We appreciate the commenter's recommendation, but we do not believe that it is necessary to revise the definition of ''sector partner'' to include non-profit and private sector businesses. Applicants have the flexibility to include entities such as non-profit and private sector businesses in their consortia arrangement and may choose to include these types of entities to meet priority 1.

*Changes:* None.

**Final Priorities**

This notice contains four final priorities. The Assistant Secretary may use one or more of these priorities for the FY 2020 OTP program competition or for any subsequent competitions. We may use one or more of these priorities in any year in which this program is in effect.

**Priority 1—Improving Collaboration and Dissemination**

To meet this priority, an eligible applicant must propose to lead and carry out projects that involve a consortia of institutions, instructors, and subject matter experts, including no less than three IHEs, along with relevant employers, workforce stakeholders (as defined in this notice), and/or trade or professional associations (as defined in this notice). Applicants must explain how the members of the consortium will work together to develop and implement open textbooks that: (a) Reduce the cost of college for large numbers of students through a variety of cost saving measures; and (b) contain instructional content and ancillary instructional materials that align student learning objectives with the skills or knowledge required by large numbers of students (at a given institution or nationally), or in the case of a career and technical postsecondary program, meet industry standards in in-demand industry sectors or in-demand occupations (as defined in this notice).

*Priority 2—Addressing Gaps in the Open Textbook Marketplace and Bringing Solutions to Scale*

To meet this priority, an applicant must identify the gaps in the open textbook marketplace in courses that are part of a degree-granting program that it seeks to address and propose how to close such gaps. An applicant must propose a comprehensive plan to: (a) Identify and assess existing open educational resources in the proposed subject area before creating new ones, such as by identifying any existing open textbooks that could potentially be used as models for the design of the project or ancillary learning resources that would support the development of courses that use open textbooks; (b) focus on the creation and expansion of education and training materials that can be scaled, within and beyond the participating consortium members, to reach a broad range of students participating in high-enrollment courses or preparing for in-demand industry sectors or in-demand occupations; (c) create and disseminate protocols to review any open textbooks created or adapted through the project for accuracy, rigor, and accessibility for students with disabilities; (d) disseminate information about the results of the project to other IHEs, including promoting the adoption of any open textbooks created or adapted through the project, or adopting open standard protocols and processes that support the interoperability for any digital assets created; (e) include professional development to build capacity of faculty, instructors, and other staff to adapt and use open textbooks; and (f) describe the courses for which open textbooks and ancillary materials are being developed.

*Priority 3—Promoting Student Success*

To meet this priority, an applicant must propose to build upon existing open textbook materials and/or develop new open textbooks for high-enrollment courses or high-enrollment programs in order to achieve the highest level of savings for students.

Additionally, this priority requires the applicant to include plans for: (a) Promoting and tracking the use of open textbooks in postsecondary courses across participating members of the consortium, including an estimate of the projected direct cost savings for students which will be reported during the annual performance review; (b) monitoring the impact of open textbooks on instruction, learning outcomes, course outcomes, and educational costs; (c) investigating and disseminating evidence-based practices associated with using open textbooks that improve student outcomes; and (d) updating the open textbooks beyond the funded period.

*Priority 4—Using Technology-Based Strategies for Personalized Learning and Continuous Improvement*

To meet this priority, an applicant must propose a project that focuses on improving instruction and student learning outcomes by integrating technology-based strategies, such as personalized learning, and providing support to faculty, instructors, and other staff who are delivering courses using these techniques. The project must enable students to tailor and monitor their own learning and/or allow instructors to monitor the individual performance of each student in the classes or courses for which the applicant proposes to develop open textbooks. In addition, online and technology-enabled content and courses developed under this project must incorporate the principles of universal design in order to ensure that they are accessible by all students, including students with disabilities. The openly licensed resources that are developed should support traditional, text-based materials, including through such tools as adaptive learning modules, digital simulations, and tools to assist student engagement.

**Types of Priorities**

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

*Absolute priority:* Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

*Competitive preference priority:* Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority

(34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

*Invitational priority:* Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

**Final Requirements**

The Assistant Secretary for Postsecondary Education establishes the following requirements for this program. We may apply one or more of these requirements in any year in which this program is in effect.

*Eligible Applicants:* Eligible applicants are IHEs as defined in section 101 of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1001), or State higher education agencies that—

(a) Lead the activities of a consortium that is comprised of at least—

(1) Three IHEs, as defined in section 101 of the HEA;

(2) An educational technology or electronic curriculum design expert (which may include such experts that are employed by one or more of the consortium institutions); and

(3) An advisory group of at least three employers, workforce organizations, or sector partners (as defined in this notice); and

(b) Have demonstrated experience in the development and implementation of open educational resources.

*Accessibility:* All digital content developed under this grant program must incorporate the principles of universal design (*www.cast.org/udl/*) to ensure that they are accessible to individuals with disabilities. The content and courses must be in full compliance with the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, as amended, and the Web Content Accessibility Guidelines 2.0, Level AA (*www.w3.org/TR/WCAG/*).

*Technical Standards for Interoperability:* All digital assets developed under this grant program must be produced to maximize interoperability, exchange, and reuse and must conform to industry-recognized open standards and specifications. Applicants must identify the industry standard they will use. All digital assets created in whole or in part under this grant program must be licensed for free, attributed public use and distribution as required under 2 CFR 3474.20.

**Final Definitions**

The Assistant Secretary for Postsecondary Education establishes the following definitions for this program. We may apply one or more of these definitions in any year in which this program is in effect.

*High-enrollment courses* means courses that are required for a degree granting program offered by an eligible IHE that either have total student enrollments within the top third of courses: (a) At the lead institution, if applicable, or at one or more of the consortia partner institutions; (b) in the State; or (c) nationally as compared to other academic or career and technical education courses.

*High-enrollment program* means a program that yields a postsecondary degree that either has total student enrollments within the top third of programs: (a) At the lead institution, if applicable, or at one or more of the consortia partner institutions; (b) in the State; or (c) nationally as compared to other academic or career and technical education courses.

*In-demand industry sector* means an industry sector that has a substantial current or potential impact (including through jobs that lead to economic self-sufficiency and opportunities for advancement) on the State, regional, or local economy, as appropriate, and that contributes to the growth or stability of other supporting businesses, or the growth of other industry sectors.

*In-demand occupation* means an occupation that currently has or is projected to have a number of positions (including positions that lead to economic self-sufficiency and opportunities for advancement) in an industry sector so as to have a significant impact on the State, regional, or local economy, as appropriate.

*Open textbook* means a textbook that is licensed under a worldwide, nonexclusive, royalty-free, perpetual, and irrevocable license to the public to exercise any of the rights under copyright conditioned only on the requirement that attribution be given as directed by the copyright owner. An open textbook may also include a variety of open educational resources or materials used by instructors in the development of a course and those learning activities necessary for successful completion of a course by students. These include any learning exercises, technology-enabled experiences (*e.g.,* simulations), and adaptive support and assessment tools.

*Sector partner* means a member of a workforce collaborative, convened by or acting in partnership with a State board or local board, that organizes key stakeholders interconnected by labor markets, technologies, and worker skill needs into a working group that focuses on shared goals and resource needs.

*Trade or professional association* means a membership organization that inspects employers or practitioners, or leads credentialing programs, in a specific industry or sector.

*Workforce stakeholder* means an individual or organization with an interest in the employability of others either for self-interest or the interest of other employers.

This document does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

**Note:** This document does *not* solicit applications. In any year in which we choose to use any of the proposed priorities, requirements, or definitions, we invite applications through a notice in the **Federal Register**.

**Executive Orders 12866, 13563, and 13771**

*Regulatory Impact Analysis*

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine 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.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

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 significant regulatory action must be fully offset by the elimination of existing costs through deregulatory actions. Because this regulatory action is not significant, the requirements of Executive Order 13771 do not apply.

We have also reviewed this final regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these final priorities, requirements, and definitions 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 this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

Paperwork Reduction Act of 1995

The final priorities, requirements, and definitions contain information collection requirements that are approved by OMB under OMB control number 1894–0006; the final priorities, requirements, and definitions do not affect the currently approved data collection.

*Regulatory Flexibility Act Certification:* The Secretary certifies that this regulatory action will not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration (SBA) Size Standards define ''small entities'' as for-profit or nonprofit institutions with total annual revenue below $7,000,000 or, if they are institutions controlled by small governmental jurisdictions (that are comprised of cities, counties, towns, townships, villages, school districts, or special districts), with a population of less than 50,000.

The small entities that this regulatory action will affect are public or private nonprofit agencies and organizations, including IHEs that may apply. We believe that the costs imposed on an applicant by the final priorities, requirements, and definitions would be limited to paperwork burden related to preparing an application and that the benefits of the final priorities, requirements, and definitions would outweigh any costs incurred by the applicant.

Participation in the OTP program is voluntary. For this reason, the final priorities, requirements, and definitions will impose no burden on small entities unless they applied for funding under the program. We expect that in determining whether to apply for OTP program funds, an eligible entity will evaluate the requirement of preparing an application and any associated costs, and weigh them against the benefits likely to be achieved by receiving a program grant. An eligible entity will probably apply only if it determines that the likely benefits exceed the costs of preparing an application.

We believe that the final priorities, requirements, and definitions will not impose any additional burden on a small entity applying for a grant than the entity would face in the absence of the proposed action. That is, the length of the applications those entities would submit in the absence of the regulatory action and the time needed to prepare an application would likely be the same.

This regulatory action will not have a significant economic impact on a small entity once it receives a grant because it will be able to meet the costs of compliance using the funds provided under this program.

*Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

*Accessible Format:* Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the 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 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.

**Robert L. King,**

*Assistant Secretary for Postsecondary Education.*

[FR Doc. 2020–20378 Filed 9–14–20; 8:45 am]

BILLING CODE 4000–01–P

# Proposed Rules

Federal Register
Vol. 85, No. 179
Tuesday, September 15, 2020

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

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 35

**[Docket No. PRM–35–22; NRC–2020–0141]**

## Reporting Nuclear Medicine Injection Extravasations as Medical Events

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Petition for rulemaking; notification of docketing and request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) has received a petition for rulemaking from Ronald K. Lattanze on behalf of Lucerno Dynamics, LLC, dated May 18, 2020. The petitioner requests that the NRC revise its regulations to require reporting of certain nuclear medicine injection extravasations as medical events. The NRC docketed the petition on June 5, 2020, and assigned it Docket No. PRM–35–22. The NRC is examining the issues raised in PRM–35–22 to determine whether they should be considered in rulemaking. The NRC is requesting public comment on this petition at this time.

**DATES:** Submit comments by November 30, 2020. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0141. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov*. For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov*. If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Pamela Noto, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6795; email: *Pamela.Noto@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Obtaining Information and Submitting Comments

*A. Obtaining Information*

Please refer to Docket ID NRC–2020–0141 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0141.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''*Begin Web-based ADAMS Search*.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section.
- *Attention:* The Public Document Room (PDR), where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

*B. Submitting Comments*

Please include Docket ID NRC–2020–0141 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

### II. The Petitioner

The petition for rulemaking (PRM) was filed by Ronald K. Lattanze, on behalf of Lucerno Dynamics, LLC. Ronald K. Lattanze is the Chief Executive Officer of Lucerno Dynamics, LLC. Lucerno Dynamics, LLC, is a North Carolina-based company that specializes in the design and development of systems that detect the presence of radiolabeled biomarkers in patients.

### III. The Petition

The petitioner requests that the NRC amend part 35 of title 10 of the *Code of Federal Regulations* to require the reporting of certain nuclear medicine injection extravasations as medical events. Extravasation is the infiltration of injected fluid into the tissue surrounding a vein or artery. The petition may be found in ADAMS at Accession No. ML20157A266.

### IV. Discussion of the Petition

The petition states that, in 1980, the NRC exempted extravasations from medical event reporting with the understanding that extravasations are virtually impossible to avoid. The petition further states that, since that time, ample evidence has been published demonstrating that nuclear medicine extravasations are avoidable and are capable of causing considerable harm to patients. Referencing literature research and case studies, the petition asserts that extravasations can result in

patient tissue doses that exceed existing NRC medical reporting limits and can harm patients in many ways. In light of this evidence, the petition requests that the NRC revisit the policy established in 1980 and require the reporting of medical events of extravasations that result in a localized dose equivalent exceeding 50 rem (0.5 Sv). The petition asserts that the reporting of certain extravasations as medical events will not only alert the NRC to instances of serious misuse of byproduct material, but also will incentivize practitioners to improve injection and infusion quality. The petition states that this is intended to ensure that diagnostic and therapeutic nuclear medicine patients are protected from avoidable irradiation and given access to vital information to understand when and how medical events impact their care.

## V. Request for Public Comment

The NRC's Medical Use Policy Statement (65 FR 47654) states, in part, that the NRC will not intrude into medical judgments affecting patients, except as necessary to provide for the radiation safety of workers and the general public. It also states that the NRC will, when justified by the risk to patients, regulate the radiation safety of patients primarily to assure the use of radionuclides is in accordance with the physician's directions. Considering these policy objectives and how they may relate to radiopharmaceutical extravasations, the NRC is requesting public comment on the following specific questions.

*Injection Quality Monitoring*

The NRC encourages licensees to use quality assurance tools and available technology to ensure that the licensee delivers the administration that the physician intended. The NRC requires certain quality assurance procedures—such as calibrating instruments used to measure patient dosages and recording dosages administered—but there are other procedures that the NRC does not require that could be relevant to extravasation. The NRC is seeking information on use of quality assurance tools and technologies for radiopharmaceutical injection quality monitoring and extravasation.

1. How frequently does radiopharmaceutical extravasation occur?

2. Do you know of any extravasations that have resulted in harm to patients? If so and without including information that could lead to the identification of the individual, describe the circumstances, type of effect harm, and the impacts.

3. For medical use licensees, does your facility currently monitor for radiopharmaceutical extravasation? If so, why and how do you monitor? If not, why not?

4. Do you expect that monitoring for extravasation and reviewing the results would improve radiopharmaceutical administration techniques at medical use licensee facilities? If so, how? If not, why not?

5. Do you believe an NRC regulatory action requiring monitoring and review of extravasation would improve patient radiological health and safety? If so, how? If not, why not?

*Medical Event Classification and Reporting Criteria*

Currently, the NRC excludes extravasation of radiopharmaceuticals from its medical event reporting regulations. Medical events may not necessarily result in harm to the patient, but they can indicate a potential problem in a medical facility's use of radioactive materials or in administration as directed by the physician. Because licensees are not required to report extravasations to the NRC, extravasation events are not documented in the NRC's Nuclear Material Events Database (NMED), which contains records of events involving nuclear material reported to the NRC.

1. Are there any benefits, not related to medical techniques, to monitoring and reporting certain extravasations as medical events? What would be the burden associated with monitoring for and reporting certain extravasations as medical events?

2. If the NRC were to require that licensees report certain extravasations as medical events (recorded in NMED), what reporting criteria should be used to provide the NRC data that can be used to identify problems, monitor trends, and ensure that the licensee takes corrective action(s)?

3. If the NRC requires reporting of extravasations that meet medical event reporting criteria, should a distinction be made between reporting extravasations of diagnostic and therapeutic radiopharmaceuticals? If so, why? If not, why not?

## VI. Conclusion

The NRC has determined that the petition meets the sufficiency requirements for docketing at § 2.803. The NRC will examine the issues raised in PRM–35–22 and any comments received on this document to determine whether these issues should be considered in rulemaking.

Dated: September 3, 2020.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

[FR Doc. 2020–19903 Filed 9–14–20; 8:45 am]

BILLING CODE 7590–01–P

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**DEPARTMENT OF ENERGY**

**10 CFR Part 431**

**[EERE–2017–BT–STD–0032]**

**RIN 1904–AE07**

# Energy Conservation Program: Energy Conservation Standards for Evaporatively-Cooled Commercial Package Air Conditioners and Water-Cooled Commercial Package Air Conditioners

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of proposed determination and request for comment.

**SUMMARY:** The Energy Policy and Conservation Act (''EPCA''), as amended, prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including evaporatively-cooled commercial package air conditioners and water-cooled commercial package air conditioners (referred to as evaporatively-cooled commercial unitary air conditioners (''ECUACs'') and water-cooled commercial unitary air conditioners (''WCUACs'') in this document). EPCA also requires the U.S. Department of Energy (''DOE'') to periodically determine whether more stringent, amended standards would result in significant additional conservation of energy, be technologically feasible, and be economically justified. In this notice of proposed determination (''NOPD''), DOE has tentatively determined that the standards for small (cooling capacity less than 135,000 Btu/h), large (cooling capacity greater than or equal to 135,000 and less than 240,000 Btu/h), and very large (cooling capacity greater than or equal to 240,000 and less than 760,000 Btu/h) ECUACs and WCUACs do not need to be amended, and DOE requests comment on this proposed determination and the associated analyses and results.

**DATES:**

*Meeting:* DOE will hold a webinar on Thursday, October 1, 2020, from 10:00 a.m. to 3:00 p.m. See section V, ''Public Participation,'' for webinar registration information, participant instructions,

and information about the capabilities available to webinar participants.

*Comments:* Written comments and information are requested and will be accepted on or before November 30, 2020.

Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov*. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2017–BT–STD–0032 and/or regulatory information number (RIN) 1904–AE07, by any of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

(2) *Email: WCandECUAC2017STD0032@ee.doe.gov*. Include the docket number EERE–2017–BT–STD–0032 in the subject line of the message.

(3) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

(4) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section V of this document.

*Docket:* The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov*. All documents in the docket are listed in the *http://www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at *http://www.regulations.gov/#!docketDetail;D=EERE-2017-BT-STD-0032*. The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section V, ''Public Participation,'' for information on how to submit comments through *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:**

Ms. Catherine Rivest, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–7335. Email: *ApplianceStandardsQuestions@ee.doe.gov*.

Mr. Pete Cochran, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–9496. Email: *Peter.Cochran@hq.doe.gov*.

For further information on how to submit a comment, or review other public comments and the docket contact the Appliance and Equipment Standards Program staff at (202) 586–6636 or by email: *ApplianceStandardsQuestions@ee.doe.gov*.

**SUPPLEMENTARY INFORMATION:**

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## I. Synopsis of the Proposed Determination

Title III, Part C [1] of EPCA [2] established the Energy Conservation Program for Certain Industrial Equipment, which sets forth a variety of provisions designed to improve energy efficiency. (42 U.S.C. 6311–6317, as codified) This equipment includes ECUACs and WCUACs, the subject of this NOPD. (42 U.S.C. 6311(1)(B)–(D))

DOE is issuing this NOPD pursuant to EPCA's requirement that every six years DOE evaluate the energy conservation standards for certain commercial equipment, including ECUACs and WCUACs, and publish either a notice of determination that the standards do not need to be amended, or a notice of proposed rulemaking (''NOPR'') that includes new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6313(a)(6)(C)(i))

For this proposed determination, DOE analyzed ECUACs and WCUACs subject to standards specified in 10 CFR 431.97. Based on the analysis and comments received, DOE proposes that the standards for ECUACs and WCUACs do not need to be amended, because there is not clear and convincing evidence that amended standards would result in significant additional conservation of energy. (42 U.S.C. 6313(a)(6)(A)(ii))

## II. Introduction

The following section briefly discusses the statutory authority underlying this proposed determination, as well as the historical background relevant to the establishment of standards for ECUACs and WCUACs.

### *A. Authority*

The Energy Policy and Conservation Act, among other things, authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part C of EPCA, added by Public Law 95–619, Title IV, 441(a) (42 U.S.C. 6311–6317, as codified), established the Energy Conservation Program for Certain Industrial Equipment, which sets forth a variety of provisions designed to improve energy efficiency. This equipment includes the ECUACs and WCUACs that are the subject of this NOPD. (42 U.S.C. 6311(1)(B)–(D))

[1] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A–1.

[2] All references to EPCA in this document refer to the statute as amended through America's Water Infrastructure Act of 2018, Public Law 115–270 (Oct. 23, 2018).

The energy conservation program under EPCA consists essentially of four parts: (1) Testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6311), energy conservation standards (42 U.S.C. 6313), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), and the authority to require information and reports from manufacturers (42 U.S.C. 6316).

Federal energy conservation requirements for covered equipment established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6316(a) and (b); 42 U.S.C. 6297) DOE may, however, grant waivers of Federal preemption in limited instances for particular State laws or regulations, in accordance with the procedures and other provisions set forth under 42 U.S.C. 6316(b)(2)(D).

EPCA contains mandatory energy conservation standards for commercial heating, air-conditioning, and water-heating equipment. (42 U.S.C. 6313(a)) Specifically, the statute sets standards for small, large, and very large commercial package air conditioning and heating equipment, packaged terminal air conditioners (PTACs) and packaged terminal heat pumps (PTHPs), warm-air furnaces, packaged boilers, storage water heaters, instantaneous water heaters, and unfired hot water storage tanks. *Id.* In doing so, EPCA established Federal energy conservation standards that generally correspond to the levels in American Society of Heating, Refrigerating, and Air-Conditioning Engineers (''ASHRAE'') Standard 90.1, ''Energy Standard for Buildings Except Low-Rise Residential Buildings,'' in effect on October 24, 1992 (*i.e.,* ASHRAE Standard 90.1–1989). ECUACs and WCUACs are covered under EPCA's definition of commercial package air conditioning and heating equipment. (42 U.S.C. 6311(8)) EPCA established initial standards for ECUACs and WCUACs with cooling capacity less than 240,000 Btu/h. (42 U.S.C. 6313(a))

If ASHRAE Standard 90.1 is amended with respect to the standard levels or design requirements applicable under that standard for certain commercial equipment, including ECUACs and WCUACs, not later than 180 days after the amendment of the standard, DOE must publish in the **Federal Register** for public comment an analysis of the energy savings potential of amended energy efficiency standards. (42 U.S.C. 6313(a)(6)(A)(i)) Within certain exceptions,[3] DOE must adopt amended energy conservation standards at the new efficiency level in ASHRAE Standard 90.1, unless DOE determines that there is clear and convincing evidence to support a determination that the adoption of a more stringent efficiency level as a uniform national standard would produce significant additional energy savings and be technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(A)(ii))

On February 14, 2020, DOE published an update to appendix A to subpart C of 10 CFR part 430, ''Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment'' (''Process Rule''). 85 FR 8626. The updated Process Rule[4] codifies in regulation the ''clear and convincing'' threshold that EPCA requires DOE meet when establishing standards more-stringent than those specified by ASHRAE 90.1. 85 FR 8626, 8704–8708; Section 9(a)(1) of appendix A to subpart C of 10 CFR part 430. DOE will establish more stringent standards only if it can meet the very high bar to demonstrate the ''clear and convincing evidence'' threshold, which only exists where the specific facts and data made available to DOE demonstrate that there is no substantial doubt that a standard more stringent than that contained in the ASHRAE Standard 90.1 amendment is permitted because it would result in a significant additional amount of energy savings, is technologically feasible and economically justified. *Id.;* Section 9(b) of appendix A to subpart C of 10 CFR part 430.

DOE also established a significance threshold for energy savings in the updated Process Rule. Specifically, DOE established a two-step approach that considers both an absolute site energy savings threshold value (over a 30-year period) of 0.3 quadrillion Btu (''quads'') and a percentage threshold value of a 10 percent reduction in the covered product or equipment's energy use. *Id.;* Section 6(a) of appendix A to subpart C of 10 CFR part 430. DOE first evaluates the projected energy savings from a potential maximum technologically feasible (''max-tech'') standard against the 0.3 quads of site energy threshold. *Id.;* Section 6(b)(2) of appendix A to subpart C of 10 CFR part 430. If the 0.3 quad-threshold is not met or exceeded, DOE then compares the max-tech savings to the total energy usage of the covered equipment to calculate a percentage reduction in energy usage. *Id.;* Section 6(b)(3) of appendix A to subpart C of 10 CFR part 430. If this comparison does not yield a reduction in site energy use of at least 10 percent over a 30-year period, DOE proposes that no significant energy savings would likely result from setting new or amended standards. *Id.;* Section 6(b)(4) of appendix A to subpart C of 10 CFR part 430. If either one of these thresholds is reached, DOE will conduct analyses to ascertain whether a standard can be prescribed that produces the maximum improvement in energy efficiency that is both technologically feasible and economically justified and still constitutes significant energy savings at the level determined to be economically justified. *Id.;* Section 6(b)(5) of appendix A to subpart C of 10 CFR part 430. The two-step approach allows DOE to ascertain whether a potential standard considered satisfies EPCA's significant energy savings requirements in 42 U.S.C. 6313(a)(6)(A) to ensure that DOE avoids setting a standard that ''will not result in significant conservation of energy.'' 85 FR 8626, 8655.

To determine whether a standard is economically justified, EPCA requires that DOE determine whether the benefits of the standard exceed its burdens by considering, to the greatest extent practicable, the following seven factors:

(1) The economic impact of the standard on the manufacturers and consumers of the affected products;

(2) The savings in operating costs throughout the estimated average life of the product compared to any increases in the initial cost, or maintenance expenses;

(3) The total projected amount of energy and water (if applicable) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary of Energy (''Secretary'') considers relevant.

(42 U.S.C. 6313(a)(6)(B)(ii))(I)–(VII))

If DOE decides to adopt as a uniform national standard the efficiency levels specified in the amended ASHRAE Standard 90.1, DOE must establish such

[3] DOE cannot adopt an ASHRAE standard that (1) increases energy use or decreases the minimum required energy efficiency. (42 U.S.C. 6313(a)(6)(B)(iii))

[4] As updated, the Process Rule explicitly applies to the evaluation of ASHRAE equipment under 42 U.S.C. 6313(a)(6). 85 FR 8626, 8704–8708; Sections 2 and 9 of appendix A to subpart C of 10 CFR part 430.

standard not later than 18 months after publication of the amended industry standard. (42 U.S.C. 6313(a)(6)(A)(ii)(I)) However, if DOE determines, supported by clear and convincing evidence, that a more stringent uniform national standard would result in significant additional conservation of energy and is technologically feasible and economically justified, then DOE must establish the more stringent standard not later than 30 months after publication of the amended ASHRAE Standard 90.1. (42 U.S.C. 6313(a)(6)(A)(ii)(II) and (B)(i))

EPCA also requires that every six years DOE evaluate the energy conservation standards for certain commercial equipment, including ECUACs and WCUACs, and publish either a notice of determination that the standards do not need to be amended, or a NOPR that includes new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6313(a)(6)(C)(i)) EPCA further provides that, not later than three years after the issuance of a final determination not to amend standards, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a NOPR including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6313(a)(6)(C)(iii)(II)) DOE must make the analysis on which the determination is based publicly available and provide an opportunity for written comment. (42 U.S.C. 6313(a)(6)(C)(ii)) Further, a determination that more stringent standards would (1) result in significant additional conservation of energy and (2) be both technologically feasible and economically justified must be supported by clear and convincing evidence. (42 U.S.C. 6313(a)(6)(C)(i); 42 U.S.C. 6313(a)(6)(A); 85 FR 8626, 8704–8708; Section 9(c) of appendix A to subpart C of 10 CFR part 430)

DOE is publishing this NOPD pursuant to the six-year review required by EPCA, having initially determined that amended standards for ECUACs and WCUACs would not result in significant additional conservation of energy, be technologically feasible, and be economically justified.

*B. Rulemaking History*

On October 29, 2010, ASHRAE updated ASHRAE Standard 90.1 with respect to small, large, and very large commercial package air conditioning and heating equipment (*i.e.,* ASHRAE 90.1–2010). With regard to ECUACs and WCUACs, ASHRAE 90.1–2010 updated efficiency levels for certain small (*i.e.,* cooling capacity greater than or equal to 65,000 Btu/h and less than 135,000 Btu/h), large, and very large ECUACs and WCUACs. ASHRAE 90.1–2010 also updated its referenced test procedures for this equipment. ASHRAE 90.1–2010 did not amend the efficiency levels for certain small (*i.e.,* cooling capacity less than 65,000 Btu/h) WCUACs and ECUACs, but did amend the test procedure for this equipment.

In a final rule published May 16, 2012, DOE amended the standards for ECUACs and WCUACs by adopting the energy efficiency ratio (''EER'') levels for this equipment established in ASHRAE 90.1–2010. 77 FR 28928 (''May 2012 final rule''). For certain small (*i.e.,* cooling capacity greater than or equal to 65,000 Btu/h and less than 135,000 Btu/h), large, and very large WCUACs and ECUACs, DOE estimated the energy savings potential of standards at the max-tech [5] efficiency levels over those efficiency levels in ASHRAE 90.1–2010 (*i.e.,* energy savings estimates for max-tech levels do not include the energy savings from increasing the Federal standard at the time to the level found in ASHRAE 90.1–2010). 76 FR 25622, 25644–25646 (May 5, 2011). Based on an analysis of two different shipment scenarios (shipments based on historical trends and constant shipments fixed to 2009 shipment levels), DOE estimated that efficiency standards at the max-tech level would result in additional energy savings of between 0.0061 to 0.0102 quads primary energy savings for the six classes of small, large, and very large WCUACs analyzed (76 FR 25622, 25644–25645), representing approximately 4.9 percent to 5.5 percent of estimated WCUAC energy use during the analysis period. DOE estimated that efficiency standards at the max-tech level would result in additional energy savings of between 0.0013 to 0.0021 quads primary energy for the two classes of very large ECUACs analyzed (76 FR 25622, 25646), representing approximately 3.7 percent to 3.9 percent of estimated ECUAC energy use during the analysis period. DOE did not examine certain small WCUACs and ECUACs (*i.e.,* equipment less than 65,000 Btu/h cooling capacity) because the levels in ASHRAE 90.1–2010 for such equipment were not amended. 76 FR 25622, 25631. Additionally, DOE did not assess potential energy savings for ECUACs with cooling capacity greater than or equal to 65,000 Btu/h but less than 240,000 Btu/h because it did not find any equipment in this capacity range on the U.S. market. *Id.*

Based on its analysis and the review of the market, DOE determined that it did not have ''clear and convincing evidence'' that significant additional conservation of energy would result from adoption of more stringent standard levels than those in ASHRAE 90.1–2010 for ECUACs and WCUACs. 77 FR 28928, 28979. DOE did not conduct an economic analysis of standards more stringent than the ASHRAE 90.1–2010 levels for ECUACs and WCUACs because of the conclusion that more stringent standards would result in minimal energy savings. *Id.*

Since ASHRAE 90.1–2010 was published, ASHRAE 90.1 has undergone three revisions. On October 9, 2013, ASHRAE published ASHRAE 90.1–2013; on October 26, 2016, ASHRAE published ASHRAE 90.1–2016; and on October 24, 2019, ASHRAE published ASHRAE 90.1–2019. In none of these publications did ASHRAE amend minimum EER levels for small, large, and very large WCUACs or ECUACs; therefore, DOE was not triggered to examine amended standards for this equipment under 42 U.S.C. 6313(a)(6)(A). As a result, the current Federal standards for ECUACs and WCUACs are those set forth in the May 2012 final rule and codified in Table 1 of 10 CFR 431.97. These standards and their compliance dates are provided in Table II.1 of this NOPD.

TABLE II.1—FEDERAL ENERGY CONSERVATION STANDARDS FOR WATER-COOLED AND EVAPORATIVELY-COOLED COMMERCIAL PACKAGE AIR-CONDITIONING AND HEATING EQUIPMENT

| Equipment type | Cooling capacity (Btu/h) | Heating type | Minimum EER | Compliance date |
|---|---|---|---|---|
| Small Water-Cooled | <65,000 | All | 12.1 | October 29, 2003. |

[5] The max-tech level represented the highest efficiency level of equipment available on the market at the time of the analysis.

TABLE II.1—FEDERAL ENERGY CONSERVATION STANDARDS FOR WATER-COOLED AND EVAPORATIVELY-COOLED COMMERCIAL PACKAGE AIR-CONDITIONING AND HEATING EQUIPMENT—Continued

| Equipment type | Cooling capacity (Btu/h) | Heating type | Minimum EER | Compliance date |
|---|---|---|---|---|
| Small Water-Cooled | ≥65,000 and <135,000 | No Heating or Electric Resistance Heating. | 12.1 | June 1, 2013. |
| | | All Other Types of Heating | 11.9 | June 1, 2013. |
| Large Water-Cooled | ≥135,000 and <240,000 | No Heating or Electric Resistance Heating. | 12.5 | June 1, 2014. |
| | | All Other Types of Heating | 12.3 | June 1, 2014. |
| Very Large Water-Cooled | ≥240,000 and <760,000 | No Heating or Electric Resistance Heating. | 12.4 | June 1, 2014. |
| | | All Other Types of Heating | 12.2 | June 1, 2014. |
| Small Evaporatively-Cooled | <65,000 | All | 12.1 | October 29, 2003. |
| Small Evaporatively-Cooled | ≥65,000 and <135,000 | No Heating or Electric Resistance Heating. | 12.1 | June 1, 2013. |
| | | All Other Types of Heating | 11.9 | June 1, 2013. |
| Large Evaporatively-Cooled | ≥135,000 and <240,000 | No Heating or Electric Resistance Heating. | 12.0 | June 1, 2014. |
| | | All Other Types of Heating | 11.8 | June 1, 2014. |
| Very Large Evaporatively-Cooled | ≥240,000 and <760,000 | No Heating or Electric Resistance Heating. | 11.9 | June 1, 2014. |
| | | All Other Types of Heating | 11.7 | June 1, 2014. |

On July 29, 2019, DOE published a request for information (''RFI'') to collect information and data to consider amendments to DOE's energy conservation standards for ECUACs and WCUACs. 84 FR 36480 (''July 2019 ECS RFI''). In the July 2019 ECS RFI, DOE solicited information to help determine whether amended standards for ECUACs and WCUACs would result in significant additional conservation of energy and whether such standards would be technologically feasible and economically justified. 84 FR 36480, 36483. DOE specifically sought information and data on whether the market size and shipment data used in the May 2012 final rule reflect the current market size and shipments of WCUACs and ECUACs; the range of efficiency levels currently on the market for each equipment class of ECUACs and WCUACs; the integrated energy efficiency ratio (''IEER'') metric and weighting factors and its applicability to the average use cycles of ECUACs and WCUACs; the share of ECUAC and WCUAC models on the market that are currently rated for both EER and IEER; and any information regarding the regulatory burden amended standards might impose on manufacturers. 84 FR 36480.

DOE received several comments from interested parties in response to the publication of the July 2019 ECS RFI. Table II.2 lists the commenters, their abbreviated names used throughout this NOPD, and organization type. Discussion of the relevant comments provided by these organizations and DOE's responses are provided in the appropriate sections of this document.

TABLE II.2—INTERESTED PARTIES THAT PROVIDED COMMENT ON THE JULY 2019 ECS RFI

| Name | Abbreviation | Organization type |
|---|---|---|
| Trane | Trane | Manufacturer. |
| Air-Conditioning, Heating, and Refrigeration Institute | AHRI | Industry Representative. |
| California Investor Owned Utilities (Pacific Gas and Electric Company, San Diego Gas and Electric, and California Edison). | CA IOUs | Utilities. |
| Appliance Standards Awareness Project; Natural Resources Defense Council | ASAP and NRDC | Efficiency/Environmental Advocates. |

## III. Discussion and Rationale

DOE developed this proposed determination after considering comments, data, and information from interested parties that represent a variety of interests. This notice addresses issues raised by these commenters.

### *A. General Comments*

CA IOUs expressed general support for analyzing updated energy conservation standards for ECUACs and WCUACs. (CA IOUs, No. 6 at p. 4) ASAP and NRDC commented that DOE should analyze the potential for energy savings from amended standards for ECUACs and WCUACs, and in particular for ''large'' and ''very large'' WCUACs. (ASAP and NRDC, No. 7 at p. 1) CA IOUs recommended that DOE complete the test procedure rulemaking prior to initiating any energy conservation standards rulemaking to provide an opportunity for stakeholders to understand the test procedure on which equipment is being rated before analyzing more stringent energy conservation standards. (CA IOUs, No. 6 at p. 3) As stated and explained further in the subsequent sections, DOE is not proposing more stringent standards for WCUACs or ECUACs. CA IOUs also suggested consolidating any energy conservation standards rulemaking for ECUACs and WCUACs with that of water-source heat pumps (''WSHPs''). (CA IOUs, No. 6 at p. 4) CA IOUs stated given the technical similarities among ECUACs, WCUACs, and WSHPs, and the limited shipments of this equipment, DOE should consolidate the rulemakings for all three equipment categories as a means to reduce regulatory burden for industry and DOE. *Id.* While these equipment categories may share some technical similarities, WSHPs are subject to different test procedures and standards than those of ECUACs and WCUACs. Furthermore, the WSHP market is about 100 times larger than the ECUAC and WCUAC market combined, with about 200,000 shipments annually. (Docket EERE–

2014–BT–STD–0015–0043 at p. 133) For these reasons, DOE has not consolidated the evaluation of ECUAC and WCUAC energy conservation standards with that of WSHPs.

Trane commented generally about the cumulative regulatory burden that manufacturers face, stressing that increased Federal efficiency standards for air-cooled commercial unitary air conditioners (''ACUACs'') and commercial warm air furnaces (''CWAFs'') as well as alternative refrigerant requirements would make testing and product development for ECUACs and WCUACs particularly burdensome. (Trane, No. 4 at p. 3) Again, as discussed in the following sections, DOE is not proposing to amend standards for ECUACs or WCUACs.

*B. Market Analysis*

For this proposed determination, DOE conducted a review of the current market for ECUACs and WCUACs, including equipment literature, the AHRI Directory of Certified Product Performance (''AHRI Directory''),[6] and the DOE Compliance Certification Management System (''CCMS'') database.[7] DOE also considered market data and stakeholder comments received in response to the July 2019 ECS RFI, the analysis performed in the previous standards rulemaking for ECUACs and WCUACs, and the energy savings potential for amended standards determined in the May 2012 final rule. The following sub-sections discuss DOE's analysis of the current market for ECUACs and WCUACs, relevant analyses and results from the May 2012 final rule, including shipments estimates, and comments received in response to the July 2019 ECS RFI.

1. Shipments Estimates

As part of the previous standards rulemaking for ECUACs and WCUACs, AHRI provided historical shipments data from 1989 to 2009 for WCUACs by cooling capacity range. (Docket No. EERE–2011–BT–STD–0029–0005 at pp. 54–55) This previously submitted historical data showed strongly decreasing shipments for certain small (*i.e.,* 65,000 to 134,900 Btu/h cooling capacity), large (*i.e.,* 135,000 to 249,000 Btu/h cooling capacity), and very large (*i.e.,* 250,000 Btu/h and over cooling capacity) WCUACs from 1989 to 2009. DOE developed shipments projections for the two smaller equipment classes using an exponential curve fit to the available historical data. Because the historical trends showed a steep decline in shipments for these classes, the shipment projections resulted in very few shipments by the end of the 30-year analysis period. 76 FR 25622, 25642. For very large WCUACs, the decline in shipments was less definitive, although a linear fit of the available 21 years of shipment data showed gradually declining shipments. For each of the WCUAC equipment classes analyzed, DOE used the historical shipments data to analyze two shipment scenarios: (1) Based on historical trends of declining shipments described earlier in this paragraph, and (2) based on shipments remaining constant at 2009 levels. DOE analyzed the energy savings potential by equipment class for both scenarios to provide a range of energy savings estimates. 76 FR 25622, 25641–25642.

In the May 2012 final rule analysis, DOE did not identify any models of certain small (*i.e.,* greater than 65,000 Btu/h but less than 135,000 Btu/h cooling capacity) or large ECUACs, and thus DOE assumed no shipments for these equipment classes. 76 FR 25622, 25639. DOE identified multiple models of very large ECUACs, but because no shipments data were available for ECUACs, DOE developed shipment estimates based on the ratio of the number of identified models of very large ECUACs (9) to the number of models of very large WCUACs (35). 76 FR 25622, 25642.

In the July 2019 ECS RFI, DOE presented the shipment estimates relied on in the May 2012 final rule, noting that average shipments of ECUACs and WCUACs with cooling capacity greater than or equal to 65,000 Btu/h were previously estimated to be less than 1,000 for each equipment class and noted that such equipment is only a small fraction of shipments of the commercial unitary air conditioner (''CUAC'') market. 84 FR 36480, 36484. In development of the present evaluation, DOE searched for, but was unable to identify, publicly available sources of shipments of ECUACs and WCUACs. In the July 2019 ECS RFI, DOE presented a model count of the available models certified in the CCMS database and preliminarily finding that the number of models of ECUACs and WCUACs currently on the market is significantly less than the number of ACUAC models on the market for all capacity ranges, suggesting that the current market for ECUACs and WCUACs is much smaller than the present-day market for ACUACs. 84 FR 36480, 36484–36485.

In the July 2019 ECS RFI, DOE requested comment on whether the shipments estimates for WCUACs and ECUACs analyzed in the May 2012 final rule are representative of the current market. DOE also requested data on historical and recent shipments for each of the equipment classes of WCUACs and ECUACs, including for units with cooling capacity less than 65,000 Btu/h. DOE requested feedback on whether the historical decline in shipments for WCUACs that was found in the May 2012 final rule analysis still applies for the current WCUAC market, and specifically, information on market forces that are expected to influence future WCUAC and ECUAC shipment trends, and whether there is any information to suggest a growing or declining ECUAC market. 84 FR 36480, 36484–36485.

In response to the July 2019 ECS RFI, Trane agreed with DOE's assessment that the WCUAC and ECUAC market is a fraction of all CUAC shipments, and that the historical data from the last rulemaking is generally representative of the WCUAC market. (Trane, No. 4 at p. 1) Trane stated that it may be prudent to add more recent shipping history to the analysis to determine if it changes any assumptions as this market is tied specifically to multi-floor office building construction. *Id.* AHRI also stated most WCUAC products are linked to multi-floor office buildings. (AHRI, No. 5 at p. 2) AHRI further stated that DOE's WCUAC shipment estimates from the May 2012 final rule do not reflect the current market trend. (AHRI, No. 5 at p. 2) Trane and AHRI commented that estimates developed for the May 2012 final rule were based on shipment analysis data through 2009, which was at a point of a very large downturn in the market due to the great recession. (Trane, No. 4 at p. 1; AHRI, No. 5 at p. 2) AHRI stated that for this reason, and the fact that shipments are linked to investment in the commercial building sector, DOE's 30-year shipment prediction models are not based on representative data and do not reflect reasonable assumptions. (AHRI, No. 5 at p. 2) Trane commented that the market has since rebounded and grown to more typical historical levels. (Trane, No. 4 at p. 1) Trane and CA IOUs recommended adding more recent WCUAC shipments history to the analysis, with the CA IOUs stating that the data did not break out shipments by cooling type or geographic locations of where shipments are sold. (Trane, No. 4 at p. 1; CA IOUs, No. 6 at p. 3) Trane

[6] The AHRI Directory for unitary large equipment can be found at *https://www.ahridirectory.org/Search/SearchHome.* AHRI's certification program does not currently include ECUACs of any cooling capacities or WCUACs with cooling capacity greater than 250,000 Btu/h.

[7] Data from the DOE CCMS database used in the July 2019 ECS RFI was accessed on April 1, 2019. Updated data for this document was accessed on December 16, 2019. This database can be found at *http://www.regulations.doe.gov/certification-data/.*

recommended the shipments analysis should reflect the relationship to multi-floor office building construction. (Trane, No. 4 at p. 1) AHRI provided recent data on the current WCUAC market size and trend. (AHRI, No. 5 at p. 5)

Trane stated that the ECUAC market is declining as other manufacturers have exited this market. Trane also stated both the ECUAC and WCUAC markets are small and that it is questionable whether additional analysis would significantly affect conclusions about the market size. (Trane, No. 4 at pp. 1–2) Trane suggested that because of the small market size for this equipment and the significant burden associated with compliance with recent regulations for similar equipment (*i.e.,* ACUACs and CWAFs), if the energy conservation standards for ECUACs and WCUACs were to exceed the requirements in ASHRAE 90.1, manufacturers would consider exiting the market. (Trane, No. 4 at p. 3)

DOE acknowledges the market downturn that occurred in the years at the end of the range of historical shipments used in the May 2012 final rule. DOE incorporated the additional shipments data from AHRI to develop revised shipment projections using the same model specification as used for the May 2012 final rule. Table III.1 presents the historical shipments for WCUACs from the May 2012 final rule (1984–2009) along with historical shipments in the following years as provided by AHRI (2010–2018). As shown in Table III.1 for the small and large WCUACs, shipments starting in 2009 are lower than in prior years. The very large WCUAC shipments fell in the years immediately following 2008, and while the shipments have rebounded, they did not rebound to the highest shipment levels seen previously.

TABLE III.1—HISTORICAL SHIPMENTS DATA FOR WCUACS

| Year* | Small AC water-cooled (<64.9 kBtu/h) | Small AC water-cooled (65 to 134.9 kBtu/h) | Large AC water-cooled (135 to 249 kBtu/h) | Very large AC water-cooled (≥250 kBtu/h) |
|---|---|---|---|---|
| 1989 | | 1,437 | 793 | 1,622 |
| 1990 | | 1,503 | 779 | 1,211 |
| 1991 | | 1,107 | 621 | 908 |
| 1992 | | 1,068 | 537 | 720 |
| 1993 | | 985 | 520 | 668 |
| 1994 | | 922 | 504 | 815 |
| 1995 | | 1,121 | 493 | 805 |
| 1996 | | 1,217 | 652 | 1,020 |
| 1997 | | 989 | 522 | 1,216 |
| 1998 | | 795 | 623 | 1,886 |
| 1999 | | 874 | 477 | 898 |
| 2000 | | 1,478 | 1,621 | 1,170 |
| 2001 | | 606 | 409 | 762 |
| 2002 | | 502 | 355 | 1,227 |
| 2003 | | 390 | 287 | 740 |
| 2004 | | 447 | 291 | 711 |
| 2005 | | 177 | 188 | 861 |
| 2006 | | 316 | 278 | 1,231 |
| 2007 | | 359 | 317 | 1,231 |
| 2008 | | 282 | 311 | 1,390 |
| 2009 | 91 | 152 | 182 | 585 |
| 2010 | 119 | 139 | 186 | 531 |
| 2011 | 84 | 209 | 180 | 609 |
| 2012 | 95 | 230 | 137 | 624 |
| 2013 | 59 | 198 | 164 | 751 |
| 2014 | 54 | 216 | 114 | 829 |
| 2015 | 52 | 137 | 147 | 770 |
| 2016 | 44 | 105 | 154 | 946 |
| 2017 | 45 | 62 | 128 | 985 |
| 2018 | 39 | 106 | 108 | 844 |

*Data for 1989–2009 from the May 2012 Final Rule. This data does not include WCUACs with cooling capacity less than 65,000 Btu/h because this class was not included in that rulemaking. Data for 2009–2018 provided by AHRI in response to the July 2019 ECS RFI.

Similar to the approach in the May 2012 final rule, for this analysis DOE developed two shipment projections; one based on historical trends and one that held shipments constant at the 2018 shipment level (referred to as ''2019 trend'' and ''2019 constant'', respectively). The 2019 trend and 2019 constant projections are compared to projections from the May 2012 final rule that were based on the historical trends and fixed at the level of the 2009 shipments (referred to as ''2012 trend'' and ''2012 constant'', respectively). This comparison is shown in Table III.2 of this document.

DOE was unable to identify shipments data for the ECUAC equipment classes and none were provided by the stakeholders. As was the approach used in the May 2012 final rule for the present analysis, shipment projections were developed by scaling the WCUAC shipment projections using a ratio of unique model counts for each equipment class (see section III.B.3 of this document). For the small (cooling capacity less than 65,000 Btu/h) ECUAC class of products, the shipment projection was further adjusted by a factor of 0.5 to better reflect the approximate size of the market in the mid-2000s.[8]

AHRI commented that WCUACs are typically sold as part of a large project

[8] Pacific Gas and Electric Company; Emerging Technologies Program, Application Assessment Report # 0605. Evaluation of the Freus Residential Evaporative Condenser System in PG&E Service Territory. *https://www.etcc-ca.com/sites/default/files/OLD/images/stories/pdf/ETCC_Report_464.pdf* accessed December 18, 2019.

(*i.e.,* a multi-tenant, multi-story office building). (AHRI, No. 5 at p. 4) To account for shipments being a function of large office construction, DOE also developed a third projection for the very large WCUAC equipment class, using a regression analysis with historical data and projections of large office existing floor space and large office additions as the variables (referred to as ''2019 regression'' in Table III.2 of this document).

TABLE III.2—COMPARISON OF SHIPMENTS FOR WCUACS AND ECUACS BY EQUIPMENT CLASS

| | 2018 | 2020 | 2025 | 2030 | 2035 | 2040 | 2045 |
|---|---|---|---|---|---|---|---|
| Small WCUAC, <65,000 Btu/h: | | | | | | | |
| 2012 trend | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| 2012 constant (=2009) | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| 2019 trend | 39 | 33 | 18 | 10 | 6 | 3 | 2 |
| 2019 constant (=2018) | 39 | 39 | 39 | 39 | 39 | 39 | 39 |
| Small WCUAC, ≥65,000 and <135,000 Btu/h: | | | | | | | |
| 2012 trend | 93 | 76 | 46 | 28 | 17 | 10 | 6 |
| 2012 constant (=2009) | 152 | 152 | 152 | 152 | 152 | 152 | 152 |
| 2019 trend | 106 | 87 | 52 | 32 | 19 | 11 | 7 |
| 2019 constant (=2018) | 106 | 106 | 106 | 106 | 106 | 106 | 106 |
| Large WCUAC, ≥135,000 and <240,000 Btu/h: | | | | | | | |
| 2012 trend | 132 | 117 | 87 | 64 | 47 | 35 | 26 |
| 2012 constant (=2009) | 182 | 182 | 182 | 182 | 182 | 182 | 182 |
| 2019 trend | 108 | 110 | 78 | 55 | 39 | 28 | 20 |
| 2019 constant (=2018) | 108 | 108 | 108 | 108 | 108 | 108 | 108 |
| Very Large WCUAC, ≥240,000 and ≤760,000 Btu/h: | | | | | | | |
| 2012 trend | 953 | 944 | 923 | 903 | 882 | 861 | 840 |
| 2012 constant (=2009) | 585 | 585 | 585 | 585 | 585 | 585 | 585 |
| 2019 trend | 844 | 777 | 721 | 664 | 608 | 551 | 495 |
| 2019 constant (=2018) | 844 | 844 | 844 | 844 | 844 | 844 | 844 |
| 2019 regression | 844 | 1,000 | 929 | 927 | 865 | 844 | 828 |
| Small ECUAC, <65,000 Btu/h: | | | | | | | |
| 2012 trend | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| 2012 constant (=2009) | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| 2019 trend | 156 | 132 | 72 | 40 | 24 | 12 | 8 |
| 2019 constant (=2018) | 156 | 156 | 156 | 156 | 156 | 156 | 156 |
| Very Large ECUAC, ≥240,000 and ≤760,000 Btu/h: | | | | | | | |
| 2012 trend | 245 | 243 | 238 | 232 | 227 | 221 | 216 |
| 2012 constant (=2009) | 150 | 150 | 150 | 150 | 150 | 150 | 150 |
| 2019 trend | 14 | 13 | 12 | 11 | 10 | 9 | 9 |
| 2019 constant (=2018) | 14 | 14 | 14 | 14 | 14 | 14 | 14 |
| 2019 regression | 14 | 17 | 16 | 16 | 14 | 14 | 14 |

In the May 2012 final rule, DOE did not analyze small ECUACs and WCUACs with cooling capacity less than 65,000 Btu/h. For the July 2019 ECS RFI, DOE identified a single manufacturer of ECUACs in this capacity range, and the models offered are single-phase equipment and appear to be predominantly marketed for residential applications in regions of the United States with hot and dry climates, suggesting that there are few if any shipments in other regions of the United States. 84 FR 36480, 36485. DOE identified only two distinct product lines of WCUACs with cooling capacity less than 65,000 Btu/h, and DOE's examination of manufacturer literature for these WCUACs suggested that these models do not comprise a significant share of the market for air conditioners in residential or commercial applications. *Id.*

In response to the July 2019 ECS RFI, AHRI provided shipment data for WCUACs with cooling capacity less than 65,000 Btu/h. (AHRI, No. 5 at p. 5) Based on the shipments data, DOE's analysis points to declining future shipments for WCUACs and ECUACs with cooling capacity less than 65,000 Btu/h.

The projected trends from the May 2012 final rule and those based on the updated data both generally show declines in shipments for small (≥65,000 and <135,000 Btu/h), large and very large WCUACs, and very large ECUACs. The shipment levels under the 2019 constant projections are lower than the 2012 constant projections for small (≥65,000 and <135,000 Btu/h) and large WCUACs and very large ECUACs. The 2019 constant projections for very large WCUACs are higher than the 2012 constant projections (but lower than the 2012 trend projections). The 2019 regression projections for very large WCUACs and ECUACs show a more stable level of shipments over the analysis period than the 2019 trend models, but are lower than the 2012 trend projection.

As DOE did not analyze ECUACs and WCUACs with cooling capacity less than 65,000 Btu/h for the May 2012 final rule, no comparisons to the current projections are possible. The current trended shipments projections for the small (cooling capacity less than 65,000 Btu/h) equipment classes reach 10 or fewer shipments by 2045.

2. Model Counts

For the July 2019 ECS RFI, DOE conducted a review of the current market for WCUACs and ECUACs, based on models included in the DOE CCMS database.[7] 84 FR 36480, 36484. DOE also compared the number of ECUAC and WCUAC models to the number of ACUAC models listed in DOE's CCMS database.

In the July 2019 ECS RFI, DOE requested comment on the size of the current market for ECUACs and WCUACs, as compared to the market for ACUACs. 84 FR 36480, 36485. Trane commented that DOE's analysis clearly shows that the market for ECUACs and WCUACs is much smaller than the market for ACUACs. Trane further stated that ECUACs and WCUACs differ from ACUACs in that shipments of ECUACs and WCUACs are somewhat regionalized in the United States due to

their more niche applications. (Trane, No. 4 at p. 2)

Table III.3 shows the number of models listed within the DOE CCMS database that DOE identified for each class of ACUACs, ECUACs, and WCUACs.[7]

TABLE III.3—MODEL COUNTS FOR ECUACS, WCUACS, AND ACUACS

| Cooling capacity range (Btu/h) | Number of models | | |
|---|---|---|---|
| | ECUAC | WCUAC | ACUAC |
| <65,000 | 11 | 9 | *2,748 |
| ≥65,000 and <135,000 | 0 | 47 | 2,274 |
| ≥135,000 and <240,000 | 0 | 34 | 2,194 |
| ≥240,000 and <760,000 | 15 | 363 | 4,817 |

*This <65,000 Btu/h air-cooled model count includes only basic models of three-phase air-cooled commercial air conditioners with cooling capacity less than 65,000 Btu/h.

As shown in Table III.3, the number of ECUAC and WCUAC models currently on the market is substantially less than the number of ACUAC models on the market for all capacity ranges. This is consistent with the relationship between model counts identified in the May 2012 final rule, further suggesting that the current market for ECUACs and WCUACs is much smaller than the market for ACUACs.

3. Current Market Efficiency Distributions

For the July 2019 ECS RFI, DOE examined the efficiency ratings of ECUACs and WCUACs currently on the market. DOE requested comment on the range of efficiency levels for each equipment class of ECUACs and WCUACs currently on the market and on whether efficiency levels above the current baseline standard are achievable for equipment across all cooling capacity ranges. 84 FR 36480, 36485.

In response to the July 2019 ECS RFI, ASAP and NRDC encouraged DOE to analyze energy savings potential from amended standards for both ECUACs and WCUACs, particularly those of large and very large WCUACs. They stated that the efficiency distribution for WCUACs presented in the July 2019 ECS RFI illustrates that the average and maximum EERs of WCUACs on the market are significantly higher than the current standard. (ASAP and NRDC, No. 7 at pp. 1–2) They stated that this shows there is a wide availability of models that exceed the standard across all covered capacity ranges. (ASAP and NRDC, No. 7 at p. 1)

AHRI recommended that DOE not change the baseline standard for WCUACs. (AHRI, No. 5 at p. 2) AHRI also commented that a significant part of WCUAC shipments are moving towards replacement installations in renovated buildings, specifically in mechanical rooms of office buildings, which constrains the size and thus the potential for increased EER performance. (AHRI, No. 5 at p. 2) AHRI also stated the potential improvements in EER ratings are limited for WCUACs based on existing technology. (AHRI, No. 5 at p. 2) Trane also stated that WCUACs are typically only available from a manufacturer in one efficiency tier, and are therefore not offered as part of ''standard'' or ''high efficiency'' model lines. Trane also commented that the WCUAC EER data from the CCMS Database presented in the July 2019 ECS RFI is representative of what is currently available today in the market. (Trane, No. 4 at p. 2) With respect to ECUACs, Trane stated that the market is primarily for replacement purposes and that because of this, ECUACs face size constraints similar to WCUACs despite being installed outdoors, which limits the potential for increased EER levels. (Trane, No. 4 at p. 2)

In response to comments, DOE updated the estimated energy savings and percent of no-new-standards energy consumption for 30 years of shipments (2020–2049) using the 2012 final rule model and input assumptions, but updated the shipment projections to reflect more recent information outlined in sections above. DOE also updated efficiency distributions to reflect the current market and Table III.4 presents the summary of statistics by equipment category and capacity range of equipment for unique models[9] from DOE's CCMS Database.[7]

TABLE III.4—CURRENT MARKET EFFICIENCY DISTRIBUTIONS FOR WCUACS AND ECUACS

| Cooling capacity range (Btu/h) | Number of unique models | Average cooling capacity (Btu/h) | EER | | | Current Federal EER standard level* |
|---|---|---|---|---|---|---|
| | | | Minimum | Average | Maximum | |
| **Water-Cooled Air Conditioners** | | | | | | |
| <65,000 | 1 | 58,000 | 12.2 | 12.2 | 12.2 | 12.1 |
| ≥65,000 and <135,000 | 23 | 99,478 | 12.1 | 12.8 | 15.3 | 12.1 |
| ≥135,000 and <240,000 | 15 | 175,600 | 13.5 | 14.6 | 16.3 | 12.5 |
| ≥240,000 and <760,000 | 234 | 493,556 | 12.5 | 13.8 | 16.1 | 12.4 |
| **Evaporatively-Cooled Air Conditioners** | | | | | | |
| <65,000 | 8 | 37,950 | 13.2 | 15 | 16.0 | 12.1 |
| ≥65,000 and <135,000 | 0 | N/A | N/A | N/A | N/A | N/A |
| ≥135,000 and <240,000 | 0 | N/A | N/A | N/A | N/A | N/A |

[9] The count of unique models excludes basic models that appear to be duplicates—*i.e.,* basic models sharing the same manufacturer and certified cooling capacity and EER ratings. For basic models that had multiple individual models certified with different capacities and different EER ratings, the individual models were considered to be unique models.

TABLE III.4—CURRENT MARKET EFFICIENCY DISTRIBUTIONS FOR WCUACS AND ECUACS—Continued

| Cooling capacity range (Btu/h) | Number of unique models | Average cooling capacity (Btu/h) | EER | | | Current Federal EER standard level * |
|---|---|---|---|---|---|---|
| | | | Minimum | Average | Maximum | |
| ≥240,000 and <760,000 | 4 | 442,750 | 11.8 | 12.7 | 13.4 | 11.7 |

* For all capacity ranges except very large evaporatively-cooled air conditioners, the Federal EER standard listed is for ''no heat or electric heat'' class. For the very large evaporatively-cooled air conditioner class, the Federal EER standard listed is the ''all other types of heating'' class.

Savings were estimated based on the forecasted shipments labeled 2019 trend, 2019 constant, and 2019 regression. For the savings estimates labeled 2019 regression, as noted in Section III.B.1 of this NOPD, a regression projection was only developed for the very large equipment class.

As mentioned in section II.B of this NOPD, the cumulative site energy savings are calculated using the max-tech level, which is the highest value of efficiency in DOE's CCMS Database within each capacity range of ECUACs and WCUACs (*i.e.,* <65,000 Btu/h, 65,000–135,000 Btu/h, 135,000–240,000 Btu/h, and 240,000–760,000 Btu/h). However, for very large WCUACs, consideration of the highest efficiency value in DOE's CCMS database may not be appropriate for evaluating potential amendments to the energy conservation standards.

The very large WCUAC equipment class represents a wide range of cooling capacities (≥240,000 and <760,000 Btu/h). For the very large WCUAC class, there is only one individual model rated at the highest level of 16.1 EER, and that individual model is part of a larger model line with many other offerings, all of which have EER ratings significantly lower than 16.1. As explained in the following discussion, DOE's examination of this model line indicates that the individual model in question is an outlier among: (1) Models in the product line rated within the same basic model (and at approximately the same capacity as) the individual model in question; as well as (2) models in the product line rated at capacities across the capacity range of the very large equipment class. This individual model rated at 16.1 EER is within a basic model for which all other individual models (with similar technology options and approximately the same cooling capacity as the model rated at 16.1 EER) have an EER rating of 15 or lower. Within this product line, the model numbers certified in DOE's CCMS Database indicate that among individual models rated as part of the same basic model, the differences in these models' rated efficiencies depend on fan diameter and number of fan blades. This unique model (rated at 16.1 EER) shows a relationship between technology options and rated efficiency that appears inconsistent with all other models of the product line. Specifically, there are two options for number of fan blades, and all other individual models in the basic model except for the model rated at 16.1 EER show that for the same fan diameter, the model with the higher number of fan blades has a lower EER rating. It is unclear why a higher number of fan blades results in a higher EER rating for only this specific individual model.

Moreover, there are basic models within this product line rated at a wide range of capacities across the very large WCUAC class that have the same combination of technology options that distinguish the individual model rated at 16.1 EER. However, the EER ratings for all of these models are significantly lower than 16.1, between 13.5–14.5. It is not clear why this combination of technology options results in a higher efficiency at only one rated capacity; and this discrepancy suggests that a 16.1 EER level may not be achievable with these technology options at other capacities within the very large WCUAC equipment class. Therefore, DOE considered the model rated at 16.1 to be an outlier. As such, DOE calculated the energy savings from potential amended standards for very large WCUACs using the next highest level that was achievable across the range of capacities (*i.e.,* an EER of 15).

The estimated energy savings, which vary by shipment scenario and equipment class, are presented in Table III.5 of this NOPD. Selecting the minimum and maximum estimated savings level for each equipment class resulted in a range of total estimated site energy savings for the WCUAC classes of between 0.0030 quads (8.5 percent of estimated site energy use) and 0.0046 quads (8.6 percent of estimated site energy use), and for the ECUAC classes of 0.00006 quads (6.2 percent of estimated site energy use) and 0.00011 quads (6.0 percent of estimated site energy use) during the analysis period. For all equipment classes, the resulting estimated savings ranged between 0.0031 quads (8.5 percent of estimated site energy consumption) and 0.0047 quads (8.5 percent of estimated site energy consumption) during the analysis period.

TABLE III.5—ESTIMATED NATIONAL SITE ENERGY SAVINGS AND PERCENT ENERGY REDUCTIONS FOR WCUACS AND ECUACS AT THE MAX-TECH LEVEL

| Cooling capacity range (Btu/h) | Cumulative site national energy savings (quads) * | | | Reduction in national site energy consumption (percent) |
|---|---|---|---|---|
| | Trend | Constant | Regression | |
| **WCUACs** | | | | |
| <65,000 | 0.00000 | 0.00000 | ..... | 0.0 |
| ≥65,000 and <135,000 | 0.00005 | 0.00019 | ..... | 13.3 |
| ≥135,000 and <240,000 | 0.00011 | 0.00025 | ..... | 10.1 |
| ≥240,000 and <760,000 | 0.00287 | 0.00395 | 0.00413 | 8.4 |

TABLE III.5—ESTIMATED NATIONAL SITE ENERGY SAVINGS AND PERCENT ENERGY REDUCTIONS FOR WCUACS AND ECUACS AT THE MAX-TECH LEVEL—Continued

| Cooling capacity range (Btu/h) | Cumulative site national energy savings (quads) * | | | Reduction in national site energy consumption (percent) |
|---|---|---|---|---|
| | Trend | Constant | Regression | |
| **ECUACs** | | | | |
| <65,000 | 0.00001 | 0.00004 | ..... | 5.3 |
| ≥65,000 and <135,000 | N/A | N/A | N/A | N/A |
| ≥135,000 and <240,000 | N/A | N/A | N/A | N/A |
| ≥240,000 and <760,000 | 0.00005 | 0.00006 | 0.00007 | 6.5 |

* Cumulative national energy savings are measured over the lifetime of ECUACs and WCUACs purchased in the 30-year analysis period (2020–2049).

For the May 2012 final rule analysis, DOE did not incorporate changing trends in shipments by efficiency over time in the no-new-standards case, and the updated energy savings estimates presented in Table III.5 of this NOPD also use a constant efficiency distribution of shipments over time. DOE does not have data on efficiency trends for WCUAC and ECUACs and seeks comment on efficiency trends specific to this equipment.

*C. Energy Efficiency Descriptors*

The current energy efficiency descriptor for the ECUAC and WCUAC Federal standards is EER. 10 CFR 431.97. ASHRAE 90.1 specifies both EER and IEER minimum efficiency levels. The EER metric represents the efficiency of the equipment operating at full load. The IEER metric factors in the efficiency of operating at part loads of 75 percent, 50 percent, and 25 percent of capacity as well as the efficiency at full load. The IEER metric weights the full- and part-load efficiencies based on the average amount of time operating at each loading point. Additionally, IEER incorporates reduced condenser temperatures (*i.e.,* reduced entering water temperature for WCUACs and reduced outdoor air dry-bulb and wet-bulb temperatures for ECUACs) to reflect the representative ambient conditions for part-load operation in the field. ASHRAE 90.1 has included minimum efficiency levels for ECUACs and WCUACs in terms of both EER and IEER since 2010. In the July 2019 ECS RFI, DOE requested comment on the representativeness of IEER for WCUACs and ECUACs, and more specifically that of ECUACs with cooling capacity less than 65,000 Btu/h, and the burden that IEER testing may impose on manufacturers. 84 FR 36480, 36486–36487.

In response to the July 2019 ECS RFI, Trane and AHRI generally supported adopting the IEER metric for the Federal standards for WCUACs. (Trane, No. 4 at p. 2; AHRI No. 5 at p. 3) Trane also supported adopting the IEER metric for Federal standards for ECUACs. Trane further stated that WCUACs and ECUACs are space constrained, which significantly limits the ability to develop products with any further increase in full load efficiency, and that a part load metric therefore provides many more opportunities to increase efficiency performance without requiring physically larger units. (Trane, No. 4 at p. 2) ASAP and NRDC stated that it would make sense to move to a part-load metric for ECUACs and WCUACs to better represent field performance and reflect the efficiency benefits of technologies that improve part-load performance, and encouraged DOE to investigate appropriate test points and weighting factors that could be used for a part-load metric for ECUACs and WCUACs. (ASAP and NRDC, No. 7 at p. 2) CA IOUs recommended that DOE maintain the current performance metric of EER. (CA IOUs, No. 6 at p. 1) CA IOUs expressed general support for including part-load conditions in an integrated metric, but strongly recommended that DOE not adopt IEER as it is currently specified in the industry standards. (CA IOUs, No. 6 at p. 3)

As discussed in the following subsections, DOE is not proposing to change the metric for the ECUAC and WCUAC energy conservation standards.

1. Representativeness of IEER for ECUACs and WCUACs

As previously mentioned, IEER includes lower condenser temperatures for part-load tests. Table III.6 shows the IEER test conditions for ECUACs and WCUACs specified in AHRI Standard 340/360–2019, ''Performance Rating of Commercial and Industrial Unitary Air-conditioning and Heat Pump Equipment'' (''AHRI 340/360–2019'').[10]

TABLE III.6—IEER TEST CONDITIONS FOR WATER-COOLED AND EVAPORATIVELY-COOLED AIR CONDITIONERS FROM AHRI 340/360–2019

| Percent load | Water-cooled | | Evaporatively-cooled | |
|---|---|---|---|---|
| | Entering water temperature (°F) | Entering air dry-bulb temperature (°F) | Entering air wet-bulb temperature (°F) | Makeup water temperature (°F) |
| 100 | 85.0 | 95.0 | 75.0 | 85.0 |
| 75 | 73.5 | 81.5 | 66.2 | 81.5 |
| 50 | 62.0 | 68.0 | 57.5 | 68.0 |

[10] AHRI 340/360–2019 is the industry test procedure referenced in ASHRAE 90.1–2019 for testing CUACs with cooling capacity greater than or equal to 65,000 Btu/h.

TABLE III.6—IEER TEST CONDITIONS FOR WATER-COOLED AND EVAPORATIVELY-COOLED AIR CONDITIONERS FROM AHRI 340/360–2019—Continued

| Percent load | Water-cooled | | Evaporatively-cooled | |
|---|---|---|---|---|
| | Entering water temperature (°F) | Entering air dry-bulb temperature (°F) | Entering air wet-bulb temperature (°F) | Makeup water temperature (°F) |
| 25 | 55.0 | 65.0 | 52.8 | 65.0 |

Performance of equipment at each of the four IEER testing conditions are combined in a weighted average to determine the IEER rating. The following equation shows the weighting factors for each testing condition.

$$IEER = (0.020 \cdot A) + (0.617 \cdot B) + (0.238 \cdot C) + (0.125 \cdot D)$$

Where (see Table III.6 for condenser temperature for all four test points):

A = EER, Btu/W·h, at 100 percent capacity at standard rating conditions

B = EER, Btu/W·h, at 75 percent capacity and reduced condenser temperature

C = EER, Btu/W·h, at 50 percent capacity and reduced condenser temperature

D = EER, Btu/W·h, at 25 percent capacity and reduced condenser temperature.

The intent of this weighted average across a range of condenser temperatures is to produce an IEER rating that is more representative of outdoor conditions that air conditioners face for much of the year, rather than just the peak temperature experienced in most climates for only a small minority of operating hours.

In the July 2019 ECS RFI, DOE requested comment on whether the weighting factors and IEER metric are an appropriate representation of average use cycles for ECUACs and WCUACs. 84 FR 36480, 36486. DOE also sought comment on the extent to which ECUACs and/or WCUACs are installed in hot and dry climates as compared to other climates as well as the types of building that represent the primary markets for all equipment classes of ECUACs and WCUACs. *Id.*

Trane stated that IEER is more representative of the applied energy efficiency performance of WCUACs and ECUACs than EER, which is only representative of full load operation, and that the current IEER test conditions and weightings in the industry standards are representative of typical applications and average use cycles for WCUACs and ECUACs. (Trane, No. 4 at p. 2) AHRI supported adopting IEER for WCUACs as defined by AHRI Standard 340/360 and AHRI Standard 210/240, ''Performance Rating of Unitary Air-conditioning & Air-source Heat Pump Equipment''.[11] (AHRI, No. 5 at p. 3)

Trane stated that WCUACs are installed primarily in 6- to 10-story office buildings in large metropolitan areas with varying climates in the Northeast, Southeast, Midwest, and South. (Trane, No. 4 at p. 2) AHRI stated that WCUACs are mostly installed in office buildings, and that IEER was developed, in part, based on operation in such building types, and as such IEER is a representative metric for WCUACs. (AHRI, No. 5 at p. 3) AHRI commented that the small market size prohibits a full study of WCUAC-specific IEER weighting factors. (AHRI, No. 5 at p. 3)

ASAP and NRDC encouraged DOE to investigate appropriate test conditions and weighting factors for IEER for both ECUACs and WCUACs based on the wide range of EER performance for WCUACs (see section III.B.3). (ASAP and NRDC, No. 7 at p. 2) CA IOUs suggested aligning the temperature test points of WCUACs with that of water-cooled variable refrigerant flow equipment. (CA IOUs, No. 6 at p. 3)

CA IOUs recommended that DOE determine the geographic concentration of ECUAC sales to ensure the temperature test conditions and weightings are reflective of their installation locations; CA IOUs provided data on the reference climates for California's 16 climate zones with some of the hottest, driest regions in the country where ECUACs may be installed, emphasizing that the average U.S. climate is not where ECUACs are installed and so the IEER metric based on the average U.S. climate has limited utility. (CA IOUs, No. 6 at p. 2) Trane stated that the IEER weighting factors and test conditions were representative for ECUACs and also stated that ECUACs are installed more frequently in low humidity regions like the West. (Trane, No. 4 at p. 2)

For ECUACs, the weighting factors for IEER may not be representative of typical applications. As suggested by commenters, ECUACs may be disproportionally marketed and sold in relatively hot and dry climates in which there is a larger efficiency benefit to using evaporative condenser cooling. As shown in the IEER equation, the weighting factor for the full-load test point is only 2 percent, so almost all of the IEER rating for ECUACs reflects performance at outdoor air temperatures cooler than what would be typically experienced in hot and dry climates.

Regarding WCUACs, the IEER weighting factors were developed based on an analysis of ACUACs. AHRI's comment indicates that an analysis of IEER weighting factors specific to WCUACs has not been conducted. As such, it is uncertain whether the IEER weighting factors appropriately reflect the average use of WCUACs, and therefore, whether the IEER metric is representative of typical applications for WCUACs.

2. Representativeness of IEER for ECUACs With Cooling Capacity Less Than 65,000 Btu/h

ASHRAE 90.1–2016 includes IEER efficiency requirements for all classes of ECUACs, including ECUACs with cooling capacity less than 65,000 Btu/h. However, DOE's preliminary analysis of models in this equipment class certified in DOE's CCMS database suggests that these units are primarily marketed for residential applications. In contrast, the IEER metric was developed for commercial applications by analyzing air conditioner energy use in commercial buildings. Therefore, it is not clear whether IEER would be representative of average use cycles for ECUACs with cooling capacity less than 65,000 Btu/h.

Several issues relating to the representativeness of average use cycles for ECUACs less than 65,000 Btu/h and the IEER metric are apparent. One issue is the condenser conditions and weighting factors used for determining IEER. Over one-third of the weighting for determining IEER for ECUACs is based on performance at outdoor air dry-bulb temperatures of 68 °F and 65 °F. While many commercial buildings

[11] AHRI 210/240 is an industry test procedure for testing CUACs with cooling capacity less than 65,000 Btu/h.

have substantial cooling loads at these temperatures, residential cooling loads at these temperatures are likely significantly lower. This is due in part to the lower density of people and electronics (both of which generate heat) typically seen in residential buildings as compared to commercial buildings. Also, commercial buildings tend to be larger and thus have lower surface area to volume ratios than low-rise residential buildings, which results in less heat loss through the building envelope per volume of conditioned air in commercial buildings (all other things being equal). Therefore, for residential applications, IEER may overweight cooling at lower outdoor ambient temperatures and underweight cooling at higher ambient temperatures.

Another issue relating to the representativeness of average use cycles for ECUACs less than 65,000 Btu/h and the IEER metric is that the IEER equation for adjusting for cyclic degradation [12] (see equation 4 of AHRI 340/360–2019) assumes continuous operation of the indoor fan when the compressor is not operating. While this may be representative of commercial applications (in which the indoor fan often runs continuously to provide ventilation), the indoor fan presumably does not run continuously in many residential applications because most residential air conditioning systems are not installed to provide ventilation.

In the July 2019 ECS RFI, DOE requested comment on whether the IEER metric is representative of the average use cycle for ECUACs with cooling capacity less than 65,000 Btu/h. Specifically, DOE sought feedback on whether the outdoor air dry-bulb and wet-bulb temperatures and IEER weighting factors from AHRI 340/360–2019 are representative for this equipment class. DOE also sought comment on whether this equipment class of ECUACs is typically installed residentially or commercially and whether the indoor fan runs continuously in the field. 84 FR 36480, 36487. DOE received no comments regarding this issue.

3. Burden of IEER Testing

IEER requires at least four tests whereas EER requires a single test. In the July 2019 ECS RFI, DOE requested comment on the share of ECUAC and WCUAC models that rate with both EER and IEER. For those models that are not already rated for IEER, DOE requested comment on the extent to which IEER would impose testing and certification burden on manufacturers. 84 FR 36480, 36487.

AHRI indicated that all its members that manufacture WCUACs already rate most products with both EER and IEER because IEER is required for ASHRAE 90.1 compliance. (AHRI, No. 5 at p. 3) Trane stated that although it rates all its WCUAC and ECUAC equipment with EER and IEER, it would need to do some design work and testing in order to comply with a newly-instated Federal IEER standard. (Trane, No. 4 at p. 2) Trane stated that this burden might be reduced by adopting the test conditions and definition for IEER in ASHRAE 90.1. *Id.*

AHRI urged DOE to delay implementation of a new WCUAC metric until after 2023 to reduce the cumulative regulatory burden for manufacturers that make several types of air-conditioning equipment covered by DOE. (AHRI, No. 5 at p. 3) AHRI requested clarification on the estimated implementation timeline if IEER were to be adopted for WCUACs, and on whether the timeline would be similar to the timeline and compliance date for the May 2012 final rule. (*Id.,* at p. 4)

Of the models listed in the CCMS database,[7] 62 out of 115 WCUAC basic models did not have any online product literature demonstrating that they are rated with IEER. For ECUACs, 8 out of 12 basic models listed in the CCMS database [7] also did not have any online product literature with IEER ratings. This suggests that many WCUAC and ECUAC models would need to be retested in order to comply with Federal IEER standards.

4. Maintaining the EER Metric

DOE is not proposing to adopt standards in terms of IEER for WCUACs and ECUACs. As discussed, it is unclear whether the IEER weighting factors are representative of typical installations of WCUACs. It is even less clear whether the weighting factors and test conditions of IEER as currently calculated under the industry standard are appropriately representative of the average use of ECUACs, including ECUACs with a cooling capacity less than 65,000 Btu/h. In addition, a survey of the market indicates that a number of basic models of WCUACs and ECUACs do not currently rate to IEER. Complying with Federal standards in terms of IEER for WCUACs and ECUACs would require additional testing and certification, and given the small market, may be unduly burdensome.

*D. Proposed Determination*

DOE proposes that the energy conservation standards for WCUACs and ECUACs do not need to be amended, having initially determined that it lacks ''clear and convincing'' evidence that amended standards would result in significant additional conservation of energy. EPCA specifies that for any commercial and industrial equipment addressed under 42 U.S.C. 6313(a)(6)(A)(i), including WCUACs and ECUACs, DOE may prescribe an energy conservation standard more stringent than the level for such equipment in ASHRAE Standard 90.1 only if ''clear and convincing evidence'' shows that a more stringent standard would result in significant additional conservation of energy and is technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(C)(i); 42 U.S.C. 6313(a)(6)(A)(ii)(II)) As discussed, the ''clear and convincing'' threshold is a very high bar. ASHRAE not acting to amend the minimum efficiency levels in Standard 90.1, as in the present case for the classes of WCUACs and ECUACs evaluated in this document, is tantamount to a decision that the existing Federal standards, which align with the minimum levels in Standard 90.1, remain in place and requires clear and convincing evidence for DOE to determine otherwise. 85 FR 8626, 8704–8708; Section 9(c) of appendix A to subpart C of 10 CFR part 430.

In considering more stringent efficiency levels for WCUACs and ECUACs than those specified by the current ASHRAE Standard 90.1, DOE evaluated the significance of their potential energy savings as well as the specific facts and data made available to DOE.

As stated in section II.A of this NOPD, the Process Rule establishes a two-step process for determining the significance of energy savings using an absolute and percentage threshold. *Id.;* Section 6 of appendix A to subpart C of 10 CFR part 430. DOE first evaluates whether standards at the max-tech level would result in a minimum site-energy savings of 0.3 quads over a 30-year period. *Id.;* Section 6(b)(2) of appendix A to subpart C of 10 CFR part 430. If the 0.3 quads threshold is not met, DOE then evaluates whether energy savings at the max-tech level represent at least 10 percent of the total energy usage of the covered equipment over a 30-year period. *Id.;* Section 6(b)(3) of appendix A to subpart C of 10 CFR part 430. If the percentage threshold is not met by a showing of clear and convincing evidence, DOE proposes to determine that no significant energy savings would

[12] For units that cannot reduce compressor capacity sufficiently to meet a target IEER load fraction during steady-state operation, the cyclic degradation adjustment in AHRI 340/360–2019 quantifies the reduced efficiency that would be seen in field applications from compressor cycling at part-load conditions.

likely result from setting amended standards. *Id.;* Section 6(b)(4) of appendix A to subpart C of 10 CFR part 430.

An analysis of updated shipments data and a review of the CCMS database and the AHRI Directory indicate that WCUACs and ECUACs continue to be a minor portion of total commercial air-cooled shipments with total combined shipments of less than 1,300 units in 2018. The shipments of very large WCUACs may be cyclical, linked to investment in commercial buildings, but the shipment projections also suggest that shipments may be continuing to decline.

Using updated shipments and efficiency ratings from the CCMS database, DOE estimated that amended standards at current max-tech levels would result in additional site energy savings of between 0.00006 quads (6.2 percent of estimated site energy use) and 0.00011 quads (6.0 percent of estimated site energy use) for the ECUAC classes during the analysis period.[13] Neither the estimated absolute savings nor the estimated percentage savings meet the applicable significance thresholds. Therefore, DOE has tentatively determined that no significant energy savings would likely result from setting amended standards for ECUACs.

For WCUACs, DOE estimated the additional energy savings based on the max-tech levels for small and large WCUACs, which were determined by identifying the highest efficiency ratings in the DOE CCMS Database. For very large WCUACs DOE initially determined that there is substantial doubt as to the appropriateness of using the highest efficiency reported in the DOE CCMS Database as the max-tech level. As discussed, there is a substantial question of whether the combination of technologies used to achieve the highest reported level for very large WCUACs is practicable for basic models across the capacity range of that equipment class. As such, DOE has initially determined that an energy savings calculation that would rely on the highest reported efficiency for very large WCUACs would not meet the ''clear and convincing evidence'' threshold required by EPCA. Instead DOE analyzed the next most efficient level reported in the DOE CCMS Database for very large WCUACs, which did not raise similar concerns, as the max-tech level for very large WCUACs.

Using this next highest efficiency level for very large WCUACs, DOE calculated that amended standards would result in additional site energy savings of between 0.0030 quads (8.5 percent of estimated site energy use) and 0.0046 quads (8.6 percent of estimated site energy use) for all WCUAC classes during the analysis period.[14] Neither the estimated absolute savings nor the estimated percentage savings meet the applicable significance thresholds. Therefore, DOE has tentatively determined that no significant energy savings would likely result from setting amended standards for WCUACs.

DOE requests comment and data on its tentative determinations regarding the energy savings from amended standards for ECUACs and WCUACs.

## IV. Procedural Issues and Regulatory Review

### *A. Review Under Executive Orders 12866 and 13563*

This proposed determination is not a ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget.

### *B. Review Under Executive Orders 13771 and 13777*

On January 30, 2017, the President issued Executive Order (E.O.) 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' E.O. 13771 stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. E.O. 13771 stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued E.O. 13777, ''Enforcing the Regulatory Reform Agenda.'' E.O. 13777 required the head of each agency to designate an agency official as its Regulatory Reform Officer (''RRO''). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

(1) Eliminate jobs, or inhibit job creation;

(2) Are outdated, unnecessary, or ineffective;

(3) Impose costs that exceed benefits;

(4) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(5) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(6) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

DOE initially concludes that this determination is consistent with the directives set forth in these executive orders.

As discussed in this document, DOE is proposing not to amend energy conservation standards for WCUACs and ECUACs. Therefore, if finalized as proposed, this determination is expected to be an E.O. 13771 other action.

### *C. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (*http://energy.gov/gc/office-general-counsel*).

DOE reviewed this proposed determination under the provisions of

[13] The range of site energy savings for ECUACs was determined using the resulting minimum and maximum estimated energy savings by shipment projection scenario at the equipment class level (presented in Table III.5 of this NOPD).

[14] The range of site energy savings for WCUACs was determined using the resulting minimum and maximum estimated energy savings by shipment projection scenario at the equipment class level (presented in Table III.5 of this NOPD).

the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. Because DOE is proposing not to amend standards for ECUACs and WCUACs, if adopted, the determination would not amend any energy conservation standards. On the basis of the foregoing, DOE certifies that the proposed determination, if adopted, would have no significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared an IRFA for this proposed determination. DOE will transmit this certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

*D. Review Under the Paperwork Reduction Act*

Manufacturers of ECUACs and WCUACs must certify to DOE that their equipment complies with any applicable energy conservation standards. In certifying compliance, manufacturers must test their equipment according to the DOE test procedures for ECUACs and WCUACs, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including ECUACs and WCUACs. 76 FR 12422 (March 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

*E. Review Under the National Environmental Policy Act of 1969*

DOE is analyzing this proposed action in accordance with the National Environmental Policy Act (''NEPA'') and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for actions that are interpretations or rulings with respect to existing regulations. 10 CFR part 1021, subpart D, Appendix A4. DOE anticipates that this action qualifies for categorical exclusion A4 because it is an interpretation or ruling in regard to an existing regulation and otherwise meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final action.

*F. Review Under Executive Order 13132*

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed determination and has tentatively determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 5316(a) and (b); 42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

*G. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this NOPD meets the relevant standards of Executive Order 12988.

*H. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also

available at *http://energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf*. This proposed determination contains neither an intergovernmental mandate, nor is it expected to require expenditure of $100 million or more in one year by the private sector. As a result, the analytical requirements of UMRA do not apply.

*I. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed determination would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*J. Review Under Executive Order 12630*

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 15, 1988), DOE has determined that this proposed determination would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

*K. Review Under the Treasury and General Government Appropriations Act, 2001*

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this NOPD under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*L. Review Under Executive Order 13211*

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Because this proposed determination does not propose amended energy conservation standards for ECUACs and WCUACs, it is not a significant energy action, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects.

*M. Information Quality*

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (''OSTP''), issued its Final Information Quality Bulletin for Peer Review (''the Bulletin''). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' *Id.* at 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and has prepared a report describing that peer review.[15] Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. DOE has determined that the peer-reviewed analytical process continues to reflect current practice, and the Department followed that process for developing energy conservation standards in the case of the present rulemaking.

[15] ''Energy Conservation Standards Rulemaking Peer Review Report.'' 2007. Available at *http://energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0*.

## V. Public Participation

*A. Participation in the Webinar*

The time and date of the webinar are listed in the **DATES** section at the beginning of this document. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: *https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=3*. Participants are responsible for ensuring their systems are compatible with the webinar software.

*B. Submission of Comments*

DOE will accept comments, data, and information regarding this proposed rulemaking no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information on using any of the methods described in the **ADDRESSES** section at the beginning of this document.

*Submitting comments via http://www.regulations.gov*. The *http://www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any

documents submitted with the comments.

Do not submit to *http://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through *http://www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *http://www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *http://www.regulations.gov* provides after you have successfully uploaded your comment.

*Submitting comments via email, hand delivery/courier, or postal mail.* Comments and documents submitted via email, hand delivery/courier, or mail also will be posted to *http://www.regulations.gov*. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

*Campaign form letters.* Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

*Confidential Business Information.* Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: One copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

DOE considers public participation to be a very important part of the process for developing energy conservation standards. DOE actively encourages the participation and interaction of the public during the comment period in each stage of the rulemaking process. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in the rulemaking process. Anyone who wishes to be added to the DOE mailing list to receive future notices and information about this process or would like to request a public meeting should contact Appliance and Equipment Standards Program staff at (202) 586–6636 or via email at *ApplianceStandardsQuestions@ee.doe.gov*.

## VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed determination.

This document of the Department of Energy was signed on August 21, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on August 21, 2020.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

[FR Doc. 2020–18800 Filed 9–14–20; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2020–0797; Product Identifier 2018–SW–081–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Leonardo S.p.a. Helicopters (Type Certificate Previously Held by Agusta S.p.A.)

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

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

**SUMMARY:** The FAA proposes to supersede Airworthiness Directive (AD) 2017–23–08 for Agusta S.p.A. (now Leonardo S.p.a.) Model AB139 and AW139 helicopters. AD 2017–23–08 requires repetitively inspecting the main rotor (M/R) rotating scissors, removing certain lower half scissor spherical bearings (bearings) from service, replacing the removed bearings with a new bearing, and installing a special nut. Since the FAA issued AD 2017–23–08, investigation results determined that a quality control issue may have affected the production of the affected bearings. This proposed AD would retain the requirements of AD 2017–23–08 and require replacing each affected bearing with a certain part-numbered bearing. The actions of this proposed AD are intended to address an unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by October 30, 2020.

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

- *Federal eRulemaking Docket:* Go to *https://www.regulations.gov*. Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.

• *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

• *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**Examining the AD Docket**

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0797; 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 European Aviation Safety Agency (now European Union Aviation Safety Agency) (EASA) AD, 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 service information identified in this proposed rule, contact Leonardo S.p.a. Helicopters, Emanuele Bufano, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–225074; fax +39–0331–229046; or at *https://www.leonardocompany.com/en/home*. You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

**FOR FURTHER INFORMATION CONTACT:** Matt Fuller, AD Program Manager, Continued Operational Safety Branch, Airworthiness Products Section, General Aviation and Rotorcraft Unit, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *Matthew.Fuller@faa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

The FAA invites you to participate in this rulemaking by submitting written comments, data, or views. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

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 file in the docket all comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments received on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments received.

**Confidential Business Information**

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Matt Fuller, AD Program Manager, Continued Operational Safety Branch, Airworthiness Products Section, General Aviation and Rotorcraft Unit, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *Matthew.Fuller@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 FAA issued AD 2017–23–08, Amendment 39–19102 (82 FR 55752, November 24, 2017) (''AD 2017–23–08'') for Agusta S.p.A. (now Leonardo S.p.a.) Model AB139 and AW139 helicopters. AD 2017–23–08 requires repetitively inspecting the M/R rotating scissors, removing certain bearings from service, installing a special nut and requires replacing the removed bearings with certain part-numbered bearings.

AD 2017–23–08 was prompted by EASA Emergency AD (EAD) No. 2017–0028–E, dated February 15, 2017 (EASA EAD 2017–0028–E) issued by EASA, which is the Technical Agent for the Member States of the European Union. EASA advised of a report of a dislodged bearing on an M/R rotating scissor equipped with a certain special nut. EASA EAD 2017–0028–E requires repetitive inspections of certain M/R rotating scissor bearings, and depending on the findings, replacement of the bearing and affected M/R parts. The EASA AD also requires replacement of certain bearings as a terminating action for the repetitive inspections. According to EASA, this condition, could result in failure of the M/R rotating scissor bearing and subsequent loss of control of the helicopter.

**Actions Since AD 2017–23–08 Was Issued**

Since the FAA issued AD 2017–23–08, investigation results by the supplier of the bearings determined that a quality control issue may have affected the production of bearing part number (P/N) 3G6230V00654. Accordingly, this proposed AD retains the requirements of AD 2017–23–08 and proposes replacing bearing P/N 3G6230V00654 with P/N 3G6230V00655.

**FAA's Determination**

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its AD. The FAA is proposing this AD after evaluating all known relevant information and determining that an unsafe condition is likely to exist or develop on other helicopters of the same type design.

**Differences Between This Proposed AD and the EASA AD**

The EASA AD specifies some compliance times using calendar time, whereas this proposed AD does not. The EASA AD requires reporting information to Leonardo S.p.a. Product Support Engineering, whereas this proposed AD does not.

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

The FAA reviewed Leonardo Helicopters Alert Bollettino Tecnico No. 139–392, Revision A, dated February 14, 2017. This service information specifies repetitively inspecting the M/R rotating scissors to monitor the bearings and replacing the bearing with a new part-numbered bearing. This service info also specifies installing a special nut in case of lower scissor bearing dislodging.

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.

### Other Related Service Information

The FAA reviewed Leonardo Helicopters AW139 IETP Document Code AMP–39–A–62–31–00–00A–31AC–A, Rotating control installation—Fixed swashplate and rotating scissors—Detailed inspection, Issue 29, dated July 31, 2017, which describes procedures for a detailed inspection of the fixed swashplate and rotating scissors.

### Proposed AD Requirements

This proposed AD would retain the repetitive inspection requirements of AD 2017–23–08, and continue to require replacing the bearing with an improved bearing, replacing the rotating scissor attachment flange with a certain part-numbered rotating scissor attachment flange, and replacing the nut with a certain part-numbered special nut. This proposed AD would also require removing each bearing P/N 3G6230V00654 from service and replacing it with bearing P/N 3G6230V00655 within 100 hours TIS.

### Costs of Compliance

The FAA estimates that this proposed AD would affect 102 helicopters of U.S. Registry. The FAA estimates that operators may incur the following costs in order to comply with this proposed AD. Labor costs are estimated at $85 per work-hour.

Inspecting for bearing liner wear, seat movement, and play would take about 1 work-hour for a cost of $85 per helicopter and $8,670 for the U.S. fleet per inspection cycle.

Replacing a bearing would take about 2 work-hours and parts would cost about $950 for a cost of $1,120 per bearing.

Replacing a rotating scissor attachment flange would take about 0.25 work-hours and parts would cost about $25,629 for a cost of $25,650 per flange.

Installing two special nuts would take about 1 work-hour and parts would cost about $755 for a cost of $840 per helicopter and $85,680 for the U.S. fleet.

### 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, 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:

■ a. Removing Airworthiness Directive (AD) 2017–23–08, Amendment 39–19102 (82 FR 55752, November 24, 2017); and

■ b. Adding the following new AD:

**Leonardo S.p.a. (Type Certificate Previously Held by Agusta S.p.A.):** Docket No. FAA–2020–0797; Product Identifier 2018–SW–081–AD.

**(a) Applicability**

This AD applies to Leonardo S.p.a. Model AB139 and AW139 helicopters, certified in any category, with main rotor (M/R) rotating scissors with a lower half scissor spherical bearing (bearing) P/N 3G6230V00654 installed.

**(b) Unsafe Condition**

This AD defines the unsafe condition as excessive play of the bearing in the M/R rotating scissors. This condition could result in failure of the M/R rotating scissor bearing and loss of helicopter control.

**(c) Affected ADs**

This AD replaces AD 2017–03–08, Amendment 39–19102; (82 FR 55752, November 24, 2017) (''AD 2017–23–08'').

**(d) Comments Due Date**

The FAA must receive comments by October 30, 2020.

**(e) Compliance**

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

**(f) Required Actions**

(1) Within 5 hours time-in-service (TIS) after December 11, 2017 (the effective date of AD 2017–23–08), and thereafter before the first flight of each day or at intervals not exceeding 24-clock hours, whichever occurs later:

(i) Using a magnifying glass and a flashlight, visually inspect each bearing for wear of the bearing liner. Some examples of wear are shown in Figures 4 through 8 of Leonardo Helicopters Alert Bollettino Tecnico No. 139–392, Revision A, dated February 14, 2017 (BT 139–392). If there is any wear of the liner, before further flight, replace the bearing with bearing P/N 3G6230V00655 and install special nut P/N 3G6230A06851. Replacing the bearing with bearing P/N 3G6230V00655 constitutes terminating action for the remaining actions of this AD for the bearing.

(ii) Inspect each bearing for movement. Refer to Figure 9 of BT 139–392. If the bearing moves freely out of its seat, before further flight, replace the rotating scissor attachment flange with flange P/N 3G6220A00633, replace the bearing with bearing P/N 3G6230V00655 and install special nut P/N 3G6230A06851. Replacing the bearing with bearing P/N 3G6230V00655 constitutes terminating action for the remaining actions of this AD for the bearing.

(iii) Inspect the M/R rotating scissors for play and wear of each bearing, paying particular attention to the bearing staking condition, by manually moving the lower half scissor along the axis of the spherical bearing. Refer to Figure 1 of BT 139–392. If there is any play or wear beyond allowable limits, before further flight, replace the bearing with bearing P/N 3G6230V00655 and install special nut P/N 3G6230A06851. Replacing the bearing with bearing P/N 3G6230V00655 constitutes terminating action for the remaining actions of this AD for the bearing.

(2) Within 100 hours TIS after the effective date of this AD, replace and torque each lower half scissor nut with special nut P/N 3G6230A06851 to the M/R rotating scissor in accordance with the Compliance Instructions, Part II, steps 5.1 through 5.9 of

BT 139–392, except you are not required to discard parts.

(3) Within 100 hours TIS after the effective date of this AD, remove each bearing P/N 3G6230V00654 from service and replace with bearing P/N 3G230V00655.

(4) After December 11, 2017 (the effective date of AD 2017–23–08), do not install on any helicopter any M/R rotating scissors with a bearing P/N 3G6230V00654 installed.

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

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

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

**(h) Additional Information**

The subject of this AD is addressed in European Aviation Safety Agency (now European Union Aviation Safety Agency) (EASA) AD No. 2017–0028–E, dated February 15, 2017. You may view the EASA AD on the internet at *https://www.regulations.gov* in the AD Docket.

**(i) Subject**

Joint Aircraft Service Component (JASC) Code: 6200, Main Rotor System.

Issued on September 9, 2020.

**Lance T. Gant,**

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

[FR Doc. 2020–20228 Filed 9–14–20; 8:45 am]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2020–0840; Project Identifier MCAI–2020–00907–T]**

**RIN 2120–AA64**

## Airworthiness Directives; Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics) Airplanes

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

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

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all Saab AB, Support and Services Model 340A (SAAB/SF340A) and SAAB 340B airplanes; and Model SAAB 2000 airplanes. This proposed AD was prompted by reports that certain nose landing gear (NLG) door attachment bolts are susceptible to hydrogen embrittlement. This proposed AD would require replacing certain NLG door attachment bolts with serviceable bolts, as specified in a European Union Aviation Safety Agency (EASA) AD, which will be incorporated by reference. The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by October 30, 2020.

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

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

For material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu*. You may find this IBR material on the EASA website at *https://ad.easa.europa.eu*. You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0840.

### 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–2020–0840; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

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

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

The FAA invites you to participate in this rulemaking by submitting written comments, data, or views about this proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–0840; Project Identifier MCAI–2020–00907–T'' at the beginning of your comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments received by the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this NPRM because of those comments.

### Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be

placed in the public docket of this NPRM. Submissions containing CBI should be sent to the person identified in the **FOR FURTHER INFORMATION CONTACT** section. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

## Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0149, dated July 7, 2020 (''EASA AD 2020–0149'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Saab AB, Support and Services Model 340A (SAAB/SF340A) and SAAB 340B airplanes; and Model SAAB 2000 airplanes.

This proposed AD was prompted by reports that certain NLG door attachment bolts are susceptible to hydrogen embrittlement. The FAA is proposing this AD to address NLG door attachment bolts that were incorrectly manufactured and are susceptible to hydrogen embrittlement, decreasing the mechanical characteristics. This condition could lead to failure of the affected parts, which would impair the link between the NLG and NLG door and could prevent the extension or retraction of the NLG, and cause consequent damage to the airplane and possible loss of control during landing. See the MCAI for additional background information.

## Related IBR Material Under 1 CFR Part 51

EASA AD 2020–0149 describes procedures for identifying and replacing certain NLG door attachment bolts with serviceable bolts.

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

## FAA's Determination and Requirements of This Proposed AD

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

## Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2020–0149 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

## Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0149 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2020–0149 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0149 that is required for compliance with EASA AD 2020–0149 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0840 after the FAA final rule is published.

## Costs of Compliance

The FAA estimates that this proposed AD affects 103 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS *

| Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|
| 2 work-hours × $85 per hour = $170 | $* | $170* | $17,510* |

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

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

## Authority for This Rulemaking

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

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

## Regulatory Findings

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

responsibilities among the various levels of government.

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

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

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

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

### List of Subjects in 14 CFR Part 39

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

### The Proposed Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

**Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics):** Docket No. FAA–2020–0840; Project Identifier MCAI–2020–00907–T.

**(a) Comments Due Date**

The FAA must receive comments by October 30, 2020.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to all Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics) Model 340A (SAAB/SF340A) and SAAB 340B airplanes; and Model SAAB 2000 airplanes, certificated in any category.

**(d) Subject**

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

**(e) Reason**

This AD was prompted by reports that certain nose landing gear (NLG) door attachment bolts are susceptible to hydrogen embrittlement. The FAA is issuing this AD to address NLG door attachment bolts that were incorrectly manufactured and are susceptible to hydrogen embrittlement, decreasing the mechanical characteristics. This condition could lead to failure of the affected parts, which would impair the link between the NLG and NLG door and could prevent the extension or retraction of the NLG, and cause consequent damage to the airplane and possible loss of control during landing.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0149, dated July 7, 2020 (''EASA AD 2020–0149'').

**(h) Exceptions to EASA AD 2020–0149**

(1) Where EASA AD 2020–0149 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0149 does not apply to this AD.

**(i) Other FAA AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov*. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Saab AB, Support and Services' EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

**(j) Related Information**

(1) For information about EASA AD 2020–0149, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu*. You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu*. You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0840.

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

Issued on September 9, 2020.

**Gaetano A. Sciortino,**

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

[FR Doc. 2020–20226 Filed 9–14–20; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2020–0766; Airspace Docket No. 20–AWP–38]**

**RIN 2120–AA66**

## Proposed Modification of Class D and Establishment of Class E Airspace; Hayward, CA

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

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

**SUMMARY:** This action proposes to modify the Class D airspace, establish Class E airspace extending upward from the surface, and establish Class E airspace as an extension to the Class D and Class E surface areas at Hayward Executive Airport, Hayward, CA. After a biennial review of the airspace, the FAA found it necessary to amend the existing airspace for the safety and management of Instrument Flight Rules (IFR) operations at this airport. This action would also update the airport name, amend the geographical coordinates for Hayward Executive and Metropolitan Oakland International airports to match the FAA's database and make a minor editorial change replacing the outdated term Airport/Facility Directory with the term Chart Supplement.

**DATES:** Comments must be received on or before October 30, 2020.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1–800–647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–0766; Airspace Docket No. 20–AWP–38, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov*.

FAA Order 7400.11E, Airspace Designations and Reporting Points, and

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

**FOR FURTHER INFORMATION CONTACT:** Richard Roberts, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–2245.

**SUPPLEMENTARY INFORMATION:**

## Authority for This Rulemaking

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

## Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Persons wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2020–0766; Airspace Docket No. 20–AWP–38''. The postcard will be date/time stamped and returned to the commenter.

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

## Availability of NPRMs

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

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

## Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

## The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying the lateral dimensions of the Class D, establishing a new Class E surface area and establishing a Class E extension to the Class D and Class E surface areas.

The Class D would be expanded from 3.5 miles to within a 4-mile radius of the airport, excluding the airspace in the Oakland Metropolitan Airport Class C Surface Area. The extension 1.8 miles each side of the 119° bearing to the southeast is no longer needed and would be removed. These modifications would bring the airspace up to current standards and provide additional protection for circling.

Class E airspace extending upward from the surface would be established with the same lateral boundaries as the Class D. This would provide improved safety for operations within this area when the Airport Traffic Control Tower is not staffed.

Class E airspace as an extension to the Class D and Class E surface areas would be established to capture aircraft as they descend through 1,000 feet AGL while using the RNAV Approach to Runway 28L.

In addition, the term Airport Facility/Directory would be replaced with Chart Supplement, the name of the airport and the geographical coordinates for Hayward Executive and Metropolitan Oakland International airports would be updated to match the FAA's National Airspace System Resource (NASR) database.

Class D and Class E airspace designations are published in paragraph 5000, 6002, 6004, of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

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

## Regulatory Notices and Analyses

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

**Environmental Review**

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

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

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR Part 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

*Paragraph 5000 Class D Airspace.*

* * * * *

**AWP CA D Hayward, CA [Amended]**

Hayward Executive Airport, CA
(Lat. 37°39′32″ N, long. 122°07′18″ W)
Metropolitan Oakland International Airport
(Lat. 37°43′17″ N, long. 122°13′16″ W)

That airspace extending upward from the surface to, but not including, 1,500 feet MSL within a 4-mile radius of the Hayward Executive Airport, Hayward CA excluding that portion within the Metropolitan Oakland International Airport, Class C airspace. This Class D airspace is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

*Paragraph 6002 Class E Airspace Designated as Surface Areas.*

* * * * *

**AWP CA E2 Hayward, CA [New]**

Hayward Executive Airport, CA
(Lat. 37°39′32″ N, long. 122°07′18″ W)
Metropolitan Oakland International Airport
(Lat. 37°43′17″ N, long. 122°13′16″ W)

That airspace extending upward from the surface to but not including 1,500 feet MSL within a 4-mile radius of the Hayward Executive Airport, Hayward CA excluding that portion within the Metropolitan Oakland International Airport, Class C airspace. This Class E airspace is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

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

* * * * *

**AWP CA E4 Hayward, CA [New]**

Hayward Executive Airport, CA
(Lat. 37°39′32″ N, long. 122°07′18″ W)

That airspace extending upward from the surface 1.2 miles each side of the 120° bearing from the Hayward Executive Airport extending from the Class D and E2 airspace 4-mile radius to 9 miles from the airport.

Issued in Seattle, Washington, on September 8, 2020.

**Byron Chew,**

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

[FR Doc. 2020–20223 Filed 9–14–20; 8:45 am]

BILLING CODE 4910–13–P

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## FEDERAL TRADE COMMISSION

## 16 CFR Part 641

**RIN 3084–AB63**

## Duties of Users of Consumer Reports Regarding Address Discrepancies

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice of proposed rulemaking; request for public comment.

**SUMMARY:** The Federal Trade Commission (''FTC'' or ''Commission'') requests public comment on its Duties of Users of Consumer Reports Regarding Address Discrepancies Rule (''Address Discrepancy Rule'') as part of its systematic review of all current Commission regulations and guides. The FTC also proposes to amend the Rule to accord with changes made to the Fair Credit Reporting Act (''FCRA'') by the Dodd-Frank Act.

**DATES:** Written comments must be received on or before November 30, 2020.

**ADDRESSES:** Interested parties may file comments online or on paper by following the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Address Discrepancy Rule, 16 CFR part 641, Project No. P205408'' on your comment and file your comment online through *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** David Lincicum (202–326–2773), Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:**

### I. Background

*A. The Address Discrepancy Rule*

The Fair and Accurate Credit Transactions Act of 2003 (''FACT Act'') was signed into law on December 4, 2003. Public Law 108–159, 117 Stat. 1952. The FACT Act added section 605(h) to the Fair Credit Reporting Act (''FCRA''), requiring a national consumer reporting agency (''CRA'') that receives a request for a consumer report that contains an address substantially different from the address on file for the consumer to notify the requester of the existence of the discrepancy.[1] Section 605(h) also required federal banking agencies, the National Credit Union Administration and the FTC to issue regulations providing guidance regarding reasonable policies and procedures that a user of a consumer report should employ when the user receives a notice of such discrepancy.[2] In 2007, the agencies issued the Address Discrepancy Rule to satisfy this requirement.[3]

The Address Discrepancy Rule requires users of consumer reports to develop and implement reasonable policies and procedures designed to enable the user to form a reasonable belief that a consumer report relates to the consumer about whom it has requested a consumer report, when the user receives a notice of address discrepancy.[4] Users must also develop and implement reasonable policies and procedures for furnishing an address for the consumer that the user has reasonably confirmed as accurate to the CRA from whom it received the notice when the user (1) can confirm that the consumer report relates to the consumer about whom the user requested the report, (2) establishes a continuing relationship with the consumer, and (3)

[1] Section 605 is codified at 15 U.S.C. 1681c.
[2] 15 U.S.C. 1681c(h)(2).
[3] 16 CFR part 641.
[4] 16 CFR 641.1(c).

regularly furnishes information about the consumer to the CRA.[5]

*B. Dodd-Frank Act*

The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') was signed into law in 2010.[6] The Dodd-Frank Act substantially changed the federal legal framework for financial services providers. Among the changes, the Dodd-Frank Act transferred to the Consumer Financial Protection Bureau (''CFPB'') the Commission's rulemaking authority under portions of the FCRA.[7] Accordingly, in 2012, the Commission rescinded several of its FCRA rules, which had been replaced by rules issued by the CFPB.[8] The FTC retained rulemaking authority for other rules promulgated under the act to the extent the rules apply to motor vehicle dealers described in section 1029(a) of the Dodd-Frank Act[9] that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both (''motor vehicle dealers'').[10] The rules for which the FTC retains rulemaking authority include the Address Discrepancy Rule, which now applies only to motor vehicle dealers.[11] Consumer report users that are not motor vehicle dealers are covered by the CFPB's rule.[12]

## II. Technical Changes To Correspond to Statutory Changes Resulting From the Dodd-Frank Act

The Commission adopted the Address Discrepancy Rule at a time when it had rulemaking authority for a broader group of consumer report users. While the Dodd-Frank Act did not change the Commission's enforcement authority for the Address Discrepancy Rule, it did narrow the Commission's rulemaking authority with respect to the Rule. It now covers only motor vehicle dealers.[13] The amendments in the Dodd-Frank Act necessitate a technical revision to the Address Discrepancy Rule to ensure that the regulation is consistent with the text of the amended FCRA. Accordingly, the Commission proposes to modify the Address Discrepancy Rule to reflect its scope.

The proposed amendment to section 641.1 narrows the scope of the Address Discrepancy Rule to motor vehicle dealers excluded from Consumer Financial Protection Bureau jurisdiction as described in the Dodd-Frank Act.[14]

## III. Regulatory Review of the Address Discrepancy Rule

In addition to proposing the changes described above, the Commission seeks information about the costs and benefits of the Rule, and its regulatory and economic impact. Consistent with its practice of reviewing all of its rules and guides periodically, the Commission seeks to ascertain whether changes in technology, business models, or the law warrant modification or rescission of the Rule. As part of this review the Commission solicits comments on, among other things, the economic impact and benefits of the Address Discrepancy Rule; possible conflict between the Address Discrepancy Rule and state, local, or other federal laws or regulations; and the effect on the Address Discrepancy Rule of any technological, economic, or other industry changes.

## IV. Issues for Comment

The Commission requests written comment on any or all of the following questions. These questions are designed to assist the public and should not be construed as a limitation on the issues about which public comments may be submitted. The Commission requests that responses to its questions be as specific as possible, including a reference to the question being answered, and refer to empirical data or other evidence upon which the comment is based whenever available and appropriate.

1. Is there a continuing need for specific provisions of the Address Discrepancy Rule? Why or why not?

2. What benefits has the Address Discrepancy Rule provided to consumers? What evidence supports the asserted benefits?

3. What modifications, if any, should be made to the Address Discrepancy Rule to increase the benefits to consumers?

a. What evidence supports the proposed modifications?

b. How would these modifications affect the costs imposed by the Address Discrepancy Rule?

4. What significant costs, if any, has the Address Discrepancy Rule imposed on consumers? What evidence supports the asserted costs?

5. What modifications, if any, should be made to the Address Discrepancy Rule to reduce any costs imposed on consumers?

a. What evidence supports the proposed modifications?

b. How would these modifications affect the benefits provided by the Address Discrepancy Rule?

6. What benefits, if any, has the Address Discrepancy Rule provided to businesses, including small businesses? What evidence supports the asserted benefits?

7. What modifications, if any, should be made to the Address Discrepancy Rule to increase its benefits to businesses, including small businesses?

a. What evidence supports the proposed modifications?

b. How would these modifications affect the costs the Address Discrepancy Rule imposes on businesses, including small businesses?

c. How would these modifications affect the benefits to consumers?

8. What significant costs, if any, including costs of compliance, has the Address Discrepancy Rule imposed on businesses, including small businesses? What evidence supports the asserted costs?

9. What modifications, if any, should be made to the Address Discrepancy Rule to reduce the costs imposed on businesses, including small businesses?

a. What evidence supports the proposed modifications?

b. How would these modifications affect the benefits provided by the Address Discrepancy Rule?

10. What evidence is available concerning the degree of industry compliance with the Address Discrepancy Rule?

11. What modification, if any, should be made to the Address Discrepancy Rule to account for changes in relevant technology or economic conditions? What evidence supports the proposed modifications?

12. Does the Address Discrepancy Rule overlap or conflict with other federal, state, or local laws or regulations? If so, how?

a. What evidence supports the asserted conflicts?

b. With reference to the asserted conflicts, should the Address Discrepancy Rule be modified? If so, why, and how? If not, why not?

13. The Commission proposes to amend the Rule to reflect that the Commission's rulemaking authority has been revised by statute to apply exclusively to motor vehicle dealers. Are the proposed modifications

[5] 16 CFR 641.1(d).

[6] Public Law 111–203 (2010).

[7] 15 U.S.C. 1681 *et seq.* The Dodd-Frank Act does not transfer to the CFPB rulemaking authority for section 615(e) of the FCRA (''Red Flag Guidelines and Regulations Required'') and section 628 of the FCRA (''Disposal of Records''). *See* 15 U.S.C. 1681s(e).

[8] 77 FR 22200 (April 13, 2012).

[9] 12 U.S.C. 5519.

[10] 77 FR 22200 (April 13, 2012).

[11] *Id.*

[12] 12 CFR 1022.82.

[13] 15 U.S.C. 1681s(e)(1); 12 U.S.C. 5519.

[14] 12 U.S.C. 5519.

appropriate? Should additional amendments be made? Would these amendments create conflicts with any other Federal, State, or local regulations or laws?

## V. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before November 30, 2020. Write ''Address Discrepancy Rule, 16 CFR part 641, Project No. P205408'' on the comment. Your comment, including your name and your state, will be placed on the public record of this proceeding, including the *https://www.regulations.gov* website.

Because of the public health emergency in response to the COVID–19 outbreak and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through the *https://www.regulations.gov* website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form provided by *regulations.gov*.

If you file your comment on paper, write ''Address Discrepancy Rule, 16 CFR part 641, Project No. P205408'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website, *https://www.regulations.gov,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential,'' as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2), including in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on *https://www.regulations.gov,* we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the Commission website at *https://www.ftc.gov* to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before November 30, 2020. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy*.

## VI. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or Commissioner's advisor, will be placed on the public record.[15]

## VII. Paperwork Reduction Act

The Address Discrepancy Rule contains information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget (''OMB'') regulations that implement the Paperwork Reduction Act (''PRA''). OMB has approved the Rule's existing information collection requirements through December 31, 2021 (OMB Control No. 3084–0137).

This proposal would amend 16 CFR part 641. The proposed amendments do not modify or add to information collection requirements that were previously approved by OMB. The proposed amendments do not make any substantive changes to the Rule, other than to narrow the scope to motor vehicle dealers. The existing clearance already reflects that change in scope. Therefore, the Commission does not believe that the proposed amendments would substantially or materially modify any ''collections of information'' as defined by the PRA.

## VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to either provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule, or certify that the proposed rule will not have a significant impact on a substantial number of small entities.[16] The Commission does not expect that the proposed changes to this Rule, if adopted, would have the threshold impact on small entities. The Commission does not expect the proposal to impose costs on small motor vehicle dealers because the amendments are primarily for clarification purposes and should not result in any increased burden on any motor vehicle dealer. Thus, a small entity that complies with current law need not take any different or additional action if the proposal is adopted.

Therefore, based on available information, the Commission certifies that amending the Address Discrepancy Rule as proposed will not have a significant economic impact on a substantial number of small businesses. Although the Commission certifies under the RFA that the proposed amendment would not, if promulgated, have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, that it is appropriate to publish an IRFA to inquire into the impact of the proposed amendment on small entities. Therefore, the Commission has prepared the following analysis:

[15] 16 CFR 1.26(b)(5).

[16] 5 U.S.C. 603–605.

*A. Description of the Reasons for the Proposed Rule*

To address the Dodd-Frank Act's changes to the Commission's rulemaking authority, the Commission proposes to clarify that the Rule applies only to motor vehicle dealers.

*B. Succinct Statement of the Objectives, and Legal Basis for, the Proposed Rule*

The objectives of the proposed Rule are discussed above. The legal basis for the proposed Rule is 15 U.S.C. 1681c(h).

*C. Description of Small Entities To Which the Proposed Rule Will Apply*

Determining a precise estimate of the number of small entities [17] is not readily feasible. Financial institutions covered by the Rule include certain motor vehicle dealers. A substantial number of these entities likely qualify as small businesses. The Commission estimates that the proposed amendment will not have a significant impact on small businesses because it imposes no new obligations.

*D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Covered Small Entities and Professional Skills Needed To Comply*

The proposed amendments would impose no new reporting, recordkeeping, or other compliance requirements. The small entities potentially covered by the proposed amendment will include all such entities subject to the Rule.

*E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules*

The Commission has not identified any other federal statutes, rules, or policies that would duplicate, overlap, or conflict with the proposed amendment. Nonetheless, the Commission requests comment on the extent to which other federal standards involving consumer reports may duplicate, satisfy, or potentially conflict with the Rule's requirements for any covered financial institutions.

*F. Description of Any Significant Alternatives to the Proposed Rule*

The Commission has not proposed any specific small entity exemption or other significant alternatives because the proposed amendment would not impose any new requirements or compliance costs. Nonetheless, the Commission welcomes comment on any significant alternative consistent with the FCRA that would minimize the impact of the proposed Rule change on small entities.

**List of Subjects in 16 CFR Part 641**

Consumer protection, Credit, Trade Practices.

**IX. Proposed Rule Language**

For the reasons stated above, the Federal Trade Commission proposes to amend part 641 of title 16 of the Code of Federal Regulations as follows:

## PART 641—DUTIES OF USERS OF CONSUMER REPORTS REGARDING ADDRESS DISCREPANCIES

■ 1. Revise the authority section for part 641 to read as follows:

**Authority:** Public Law 108–159, sec. 315; 15 U.S.C. 1681c(h); 12 U.S.C. 5519(d).

■ 2. In § 641.1 revise paragraph 641.1(a) to read as follows:

**§ 641.1 Duties of users of consumer reports regarding address discrepancies.**

(a) *Scope.* This section applies to users of consumer reports that are motor vehicle dealers excluded from Consumer Financial Protection Bureau jurisdiction as described in 12 U.S.C. 5519.

* * * * *

By direction of the Commission, Commissioner Slaughter and Commissioner Wilson not participating.

**April J. Tabor,**

*Acting Secretary.*

[FR Doc. 2020–19141 Filed 9–14–20; 8:45 am]

BILLING CODE 6750–01–P

[17] The U.S. Small Business Administration Table of Small Business Size Standards Matched to North American Industry Classification System Codes (NAICS) are generally expressed in either millions of dollars or number of employees. A size standard is the largest that a business can be and still qualify as a small business for Federal Government programs. For the most part, size standards are the annual receipts or the average employment of a firm. New car dealers (NAICS code 441100) are classified as small if they have fewer than 200 employees. Used car dealers (NAICS code 441120) are classified as small if their annual receipts are $27 million or less. Recreational vehicle dealers, boat dealers, motorcycle, ATV and all other motor vehicle dealers (NAICS codes 441210, 441222 and 441228) are classified as small if their annual receipts are $35 million or less. The 2019 Table of Small Business Size Standards is available at *https://www.sba.gov/document/support--table-size-standards.*

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket Number USCG–2020–0501]**

**RIN 1625–AA87**

## Safety Zone; Ocean Cup, Pacific Rum Run, Catalina Island, California

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Coast Guard proposes to establish a one-time, temporary safety zone near Ship Rock, Catalina Island, in support of the Ocean Cup Pacific Rum Run. This action is necessary to protect the area near Ship Rock, Catalina Island, public vessels, and the high speed vessels participating in the event. This regulation would prohibit vessels from entering into, transiting through, or remaining within the designated area unless specifically authorized by the Captain of the Port, Los Angeles—Long Beach, or her designated representative.

**DATES:** Comments and related material must be received by the Coast Guard on or before September 30, 2020.

**ADDRESSES:** You may submit comments identified by docket number USCG–2020–0501 using the Federal eRulemaking Portal at *http://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email, Waterways Management, U.S. Coast Guard Sector Los Angeles—Long Beach; telephone (310) 521–3860, email *D11-SMB-SectorLALB-WWM@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

**I. Table of Abbreviations**

CFR Code of Federal Regulations
DHS Department of Homeland Security
E.O. Executive order
FR Federal Register
LLNR Light List Number
NPRM Notice of proposed rulemaking
Pub. L. Public Law
§ Section
U.S.C. United States Code

**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 comments 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 noted in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions. Documents mentioned in this proposed rule, and all public comments, are available 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.

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 the docket, visit *https://www.regulations.gov/privacyNotice*.

We are not planning to hold a public meeting but will consider doing so if public comments indicate a meeting would be helpful. We would issue a separate **Federal Register** notice to announce the date, time, and location of such a meeting.

## III. Background Information

The Pacific Rum Run race is the 5th race planned as part of the Ocean Cup Over the Horizon World Speed Record Series with a concept sanctioned by Union Internationale Motonautique (UIM), American Power Boat Association (APBA), and Powerboat P1 USA (P1). The race course begins off of Huntington Beach Pier, proceeds to Ship Rock and circumnavigates Catalina Island back to Ship Rock, and returns to the finish at the Huntington Beach Pier. The event will have under ten racing vessels, and several safety vessels that will transit a course of approximately 80 miles at speeds in excess of 100 miles per hour. The Captain of the Port (COTP), Los Angeles—Long Beach has determined that potential hazards associated with event safety may arise due to the expected high concentration of vessels in the general area along with the high speed race vessels. For these reasons the Coast Guard believes that a safety zone is necessary to ensure the safety of, and reduce the risk to, the public, and mariners around Catalina Island.

## IV. Discussion of Proposed Rule

Based on the safety risks described above the Coast Guard is proposing to establish a temporary safety zone in the vicinity of the Two Harbors, Catalina Island. This proposed safety zone would encompass all navigable waters from the surface to the sea floor consisting of a line connecting the following coordinates: 33°27′38″ N, 118°30′09″ W, 33°27′51″ N, 118°29′53″ W 33°27′34″ N, 118°28′54″, 33°27′12″ N, 118°29′17″ W. All coordinates displayed are referenced by North American Datum of 1983, World Geodetic System, 1984.

During the enforcement period, vessels and persons would be prohibited from entering into, transiting through, or remaining within the designated area unless authorized by the Captain of the Port or their designated representative. The safety zone would be enforced on the day of the Pacific Rum Run which is scheduled for October 10, 2020. The Coast Guard would publish a notice of enforcement in the **Federal Register** announcing the exact date and times planned for enforcement of the safety zone. The general boating public would also be notified prior to the enforcement of the safety zone via Broadcast Notice to Mariners.

## V. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders (E.O.s) related to rulemaking. Below we summarize our analyses based on a number of these statutes and E.O.s, 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 NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, and duration of the safety zone. Commercial vessel traffic will be able to safely transit through this safety zone, with coordination by the Captain of the Port or their designated representative. The Coast Guard and Vessel Traffic Service/Marine Exchange will coordinate and mitigate all inbound and outbound commercial traffic movements through the race course. Recreational traffic will be able to transit around this safety zone, which is near the Two Harbors, Catalina entrance.

### *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 proposed 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 IV.A above, this proposed rule will not have a significant economic impact on any vessel owner or operator. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

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 proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions rely 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 proposed rule or any policy or action of the Coast Guard.

*C. Collection of Information*

This proposed 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 E.O. 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 proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in E.O. 13132.

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

*E. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed 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 proposed rule under Department of Homeland Security Management Directive 023–01 and 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 encompassing an area near Ship Rock, Catalina Island for the Ocean Cup Pacific Rum Run. Such actions are categorically excluded from further review under paragraph 60(a) of Appendix A, Table 1 of the Department of Homeland Security Directive 023–01–001–01, Rev. 01. An environmental analysis and checklist supporting this determination and Record of Environmental Consideration (REC) are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

*G. Protest Activities*

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

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

Harbors, Marine safety, Navigation (water), reporting and record keeping requirements, security measures, waterways management.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 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.T11–0501 to read as follows:

**§ 165.T11–0501 Safety Zone; Ocean Cup, The Pacific Rum Run, Catalina, California.**

(a) *Location.* The following area is a safety zone: All navigable waters from the surface to the sea floor consisting of a line connecting the following coordinates: 33°27′38″ N, 118°30′09″ W, 33°27′51″ N, 118°29′53″ W 33°27′34″ N, 118°28′54″, 33°27′12″ N, 118°29′17″ W. All coordinates displayed are referenced by North American Datum of 1983, World Geodetic System, 1984.

(b) *Definitions.* For the purposes of this section:

*Designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Los Angeles-Long Beach (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) During the enforcement period, vessels and persons are prohibited from entering into, transiting through, or remaining within the safety zone described in paragraph (a) of this section unless authorized by the Captain of the Port or their designated representative.

(2) To seek permission to enter, hail Coast Guard Sector Los Angeles—Long Beach on VHF–FM Channel 16 or call at (310) 521–3801. 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) *Notification.* Coast Guard Sector Los Angeles—Long Beach will use all appropriate means to notify the public in advance of an event of the enforcement of this safety zone to include publishing a Notice of Enforcement in the **Federal Register** and through the Local Notice to Mariners and Broadcast Notice to Mariners.

(e) *Enforcement period.* This safety zone will be enforced on October 10, 2020. The exact times will be announced via publication of a Notice of Enforcement and Local Mariners and Broadcast Notice to Mariners.

Dated: September 9, 2020.

**K.L. Bernstein,**

*Captain, U.S. Coast Guard, Acting Captain of the Port, Los Angeles Long Beach.*

[FR Doc. 2020–20282 Filed 9–14–20; 8:45 am]

BILLING CODE 9110–04–P

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## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 1 and 52

**[FAR Case 2017–014, Docket No. FAR–2017–0014, Sequence No. 1]**

**RIN 9000–AN43**

## Federal Acquisition Regulations: FAR Case 2017–014, Use of Acquisition 360 To Encourage Vendor Feedback

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal

Acquisition Regulation (FAR) to encourage use of voluntary feedback mechanisms, where appropriate, to support continual improvement of the acquisition process.

**DATES:** Interested parties should submit written comments at the address shown below on or before November 16, 2020 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2017–014 to *http://www.regulations.gov*. Submit comments via the Federal eRulemaking portal by searching for ''FAR Case 2017–014''. Select the link ''Comment Now'' that corresponds with ''FAR Case 2017–014''. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FAR Case 2017–014'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

*Instructions:* Please submit comments only and cite ''FAR case 2017–014'' in all correspondence related to this case. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** Mr. Curtis E. Glover, Sr., Procurement Analyst, at 202–501–1448, or by email at *Curtis.glover@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov*. Please cite FAR Case 2017–014.

**SUPPLEMENTARY INFORMATION:**

## I. Background

DoD, GSA and NASA are proposing to revise the FAR to encourage use of voluntary feedback mechanisms, where appropriate, to support continual improvement of the acquisition process. These mechanisms were largely developed through pilot efforts conducted in accordance with the Office of Federal Procurement Policy (OFPP) memorandum ''Acquisition 360—Improving the Acquisition Process through Timely Feedback from External and Internal Stakeholders.'' The memorandum established the Acquisition 360 Survey tool, a voluntary online survey to elicit industry feedback on the pre-award and debriefing processes in a consistent and standardized manner.

An advanced notice of proposed rulemaking (ANPR) was published at 83 FR 34820 on July 23, 2018, to obtain public input regarding matters related to contractor feedback, the overall cost of compliance and any specific regulatory requirements that are particularly burdensome. The proposed Acquisition 360 survey questions were also posted as part of the rulemaking.

## II. Discussion and Analysis

This proposed rule seeks to amend FAR part 1, adding a new section at FAR 1.102–3, Evaluating agency acquisition processes, which encourages agencies to develop internal procedures to seek voluntary feedback from interested parties in the acquisition process. Contracting officers are encouraged to use a new provision at 52.201–XX, Acquisition 360: Voluntary Survey, to solicit feedback from actual and potential offerors, in accordance with agency procedures.

The proposed revisions are intended to implement a standard process for obtaining voluntary feedback on various aspects of the acquisition process. While use of feedback is encouraged, DoD, GSA, and NASA appreciate that tailored solicitation of feedback may be more manageable and useful than blanket application and, for this reason, have crafted the proposed rule to provide agencies the flexibility to target specific types of requirements or aspects of the acquisition lifecycle where feedback may be most helpful to the agency and its efforts to drive continual process improvements. The feedback will be anonymous, unless the participant self-identifies in the survey.

The proposed text is moved to FAR part 1 from parts 5 and 42 because the survey tool may be applied to procurements in general, as determined by agency procedure.

## III. Applicability to Contracts At or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This proposed rule seeks to add a provision for a voluntary survey. The provision is not prescribed for any particular kind of procurement; agencies may include it in solicitations below the SAT and in solicitations for commercial items, including COTS. However, because it is voluntary, impact on offerors or contractors is expected to be minimal.

## IV. Executive Orders 12866 and 13563

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

## V. Executive Order 13771

This proposed rule is not expected to be subject to E.O. 13771, Reducing Regulation and controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

## VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Nevertheless, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

The reason for this proposed rule is to encourage use of voluntary feedback mechanisms, where appropriate, to support continual improvement of the acquisition process. The use of the voluntary Acquisition 360 survey is one mechanism to elicit feedback on the pre-award and debriefing processes in a consistent and standardized manner.

The objective of the rule is to encourage agency use of the Acquisition 360 survey tool in accordance with agency procedures, to obtain feedback from offerors which may be used to improve their acquisition processes. The Office of Management and Budget is providing and hosting the centralized survey portal which will facilitate data access and analysis across the Government. The legal basis for the proposed rule is 40 U.S.C. 121(c), 10 U.S.C. chapter 137, and 51 U.S.C. 20113.

Data generated from the Federal Procurement Data System (FPDS) and the System for Award Management (SAM) have been used as the basis for estimating the number of small entities affected by this rule. Currently, there are approximately 327,000 small entities registered in SAM that were small in at least one North American Industry Classification Systems (NAICS) code. The rule, therefore, will potentially impact all 327,000 small entities.

In order to estimate the likely number of small entities impacted by the rule, we used the average of FPDS data for fiscal years (FY) 2017, 2018, and 2019. Examination of the data reveals that the number of unique small entities that received contract awards was 60,912. DoD, GSA, and NASA estimate that each unique small entity would respond to approximately 3 solicitations, equating to 182,736 potential offers. It is anticipated that 33 percent of these potential offerors will submit a response to the survey based upon the outcome of a previous OFPP-conducted pilot. Based upon this data, it is anticipated that 60,302 small entities will likely be affected by the rule.

The proposed rule encourages potential offerors to provide feedback at *https://www.acquisition.gov/360* on agency acquisition processes.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There were other alternatives considered, to include the status quo, for Government acquisition officials to elicit feedback from their contractors, such as vendor outreach with industry days on the agency's performance of its contract administration responsibilities; however, these would not accomplish the stated objective of the rule nor would they minimize the economic impact of the rule on small entities.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2017–014) in correspondence.

## VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies as this proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat Division has submitted a request for approval of a new information collection requirement concerning the Voluntary Pre-award Survey.

A. The public reporting burden for this collection of information is estimated at 10 minutes per response to the voluntary online survey. This estimate includes entering the online portal and providing input to as few as one or as many as 18 questions, as determined by the respondent.

This new information collection uses the common form method to calculate the public burden hours. GSA data is provided to estimate the initial burden information for the collection. In the future, each executive branch agency will provide information on the agency use and contractor participation in the voluntary survey. This information will be included in the renewal of the collection at that time.

The annual reporting burden is estimated as follows:

**Respondents:* 4,573.

**Responses per respondent:* 1.

**Total annual responses:* 4,573.

**Preparation hours per response:* .1667.

**Total response burden hours:* 762.

B. Request for Comments Regarding Paperwork Burden.

As part of this proposed rulemaking, the FAR Council is soliciting comments from the public in order to:

Evaluate whether this collection of information is necessary for the proper performance of functions of the FAR, including whether the information will have practical utility;

Evaluate the accuracy of the FAR Council's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

Enhance the quality, utility, and clarity of the information to be collected; and

Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate collection techniques or other forms of information technology.

Organizations and individuals desiring to submit comments on the information collection requirements associated with this rulemaking should submit comments, including suggestions for reducing this burden, not later than November 16, 2020 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405–0001.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405–0001. Please cite OMB Control Number 9000–XXXX.

**List of Subjects in 48 CFR Parts 1 and 52.**

Government procurement.

**William F. Clark,**

*Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.*

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 1 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1 and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

## PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

### 1.102–3 and 1.102–4 [Redesignated]

■ 2. Redesignate sections 1.102–3 and 1.102–4 as sections 1.102–4 and 1.102–5.

■ 3. Add new section 1.102–3 to read as follows:

### 1.102–3 Evaluating agency acquisition processes.

(a) Agencies are encouraged to develop internal procedures seeking voluntary feedback from interested parties in an acquisition to assess process strengths and weaknesses and improve effectiveness and efficiency of the acquisition process. Agencies may—

(1) Utilize a variety of feedback mechanisms available to the public (*e.g.,* surveys, in-person, and/or group exchanges);

(2) Utilize the core pre-award and debriefing survey questions at *https://www.acquisition.gov/360;* and

(3) Seek additional feedback on targeted aspects of an acquisition throughout its lifecycle (*e.g.,* performance standards at 1.102(b) or post-award contract administration responsibilities at 42.302).

(b) Contracting officers are encouraged to insert the provision 52.201–XX, Acquisition 360: Voluntary Survey, in accordance with agency procedures.

(c) Contracting officers shall not review information until after contract award and shall not consider it in the award decision.

■ 4. In section 1.106, amend the table by adding an entry for ''52.201–XX'' in numerical order to read as follows:

### 1.106 OMB approval under the Paperwork Reduction Act.

* * * * *

| FAR segment | OMB control No. |
|---|---|
| * * * * * | |
| 52.201–XX ..... | 9000–XXXX |
| * * * * * | |

**1.108 [Amended]**

■ 5. Amend section 1.108 by removing from paragraph (b) ''1.102–4(b)'' and adding ''1.102–5(b)'' in its place.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Add section 52.201–XX to read as follows:

**52.201–XX Acquisition 360: Voluntary Survey.**

As prescribed in 1.102–3(b), insert the following provision:

**Acquisition 360: Voluntary Survey (DATE)**

(a) All actual and potential offerors are encouraged to provide feedback on the preaward and debriefing process. Feedback may be provided to agencies up to 45 days after award. The feedback is anonymous, unless the participant self-identifies in the survey. Actual and potential offerors can participate in the survey by selecting the following link: *https://www.acquisition.gov/360*.

(b) The Contracting Officer will not review the information provided until after contract award and will not consider it in the award decision. The survey is voluntary and does not convey any protections, rights, or grounds for protest. It creates a way for actual and potential offerors to provide the Government constructive feedback about the pre-award and debriefing process on a specific acquisition.

[FR Doc. 2020–18375 Filed 9–14–20; 8:45 am]

BILLING CODE 6820–EP–P

# Notices

Federal Register

Vol. 85, No. 179

Tuesday, September 15, 2020

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

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Information Collection: Special Use Administration

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice; request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and entities on substantive revisions of a currently approved information collection, Special Use Administration.

**DATES:** Comments must be received in writing by November 16, 2020.

**ADDRESSES:** Send comments to USDA Forest Service, Attn: Lands, 1400 Independence Avenue SW, Stop 1124, Washington, DC 20250–1124. Comments also may be submitted via facsimile to 202–644–4700 or by email to *reply_lands_staff@usda.gov*. All comments, including names and addresses when provided, will be placed in the record and will be available for public inspection and copying. The public may review comments on the Forest Service forms *web page at https://www.fs.usda.gov/managing-land/lands-and-realty-management/forms*. Comments will be summarized in the Forest Service's request for Office of Management and Budget approval of the information collection for special uses and will be addressed in a **Federal Register** Notice of the final revisions to the approved information collection.

**FOR FURTHER INFORMATION CONTACT:** Mark Chandler, Realty Specialist, Lands, National Forest Systems can be reached by phone at 202–205–1117, or by email at *mark.chandler@usda.gov*. Individuals who use telecommunication devices for the deaf may call the Federal Relay Service at 800–877–8339 between 8 a.m. and 8 p.m. eastern time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

*Title:* Special Use Administration.

*OMB Number:* 0596–0082.

*Expiration Date of Approval:* August 31, 2020.

*Type of Request:* Substantive Revision of Approved Forms and Creation of New Forms.

*Type of Respondents:* Individuals, businesses, and non-federal governmental entities.

*Abstract:* The Forest Service manages approximately 193 million acres of federal lands, known as National Forest System (NFS) lands. Several statutes authorize the Forest Service to issue and administer authorizations for use and occupancy of NFS lands and collect information from the public for those purposes, including but not limited to the Organic Administration Act (16 U.S.C. 551); Title V of the Federal Land Policy and Management Act (43 U.S.C. 1761–1772); the National Forest Roads and Trails Act (16 U.S.C. 532–538); section 28 of the Mineral Leasing Act (30 U.S.C. 185); the Act of March 4, 1915 (16 U.S.C. 497); the Term Permit Act (16 U.S.C. 497); the National Forest Ski Area Permit Act (16 U.S.C. 497b); section 7 of the Granger-Thye Act (16 U.S.C. 480d); the Act of May 26, 2000 (16 U.S.C. 460*l*–6d); the Federal Lands Recreation Enhancement Act (16 U.S.C. 6801–6814); the Archaeological Resources Protection Act (16 U.S.C. 470aa *et seq.*); and section 111 of the National Historic Preservation Act (54 U.S.C. 306121).

Forest Service regulations implementing these authorities, found at 36 CFR part 251, subpart B, contain information collection requirements, including submission of applications, execution of forms, and imposition of terms and conditions that entail information collection requirements. The uses authorized cover a variety of activities and improvements, including recreation residences, apiaries, domestic water supply conveyance systems, electric transmission lines, communications uses, outfitting and guiding, campground concessions, resorts, and marinas. Standard special use permit, easement, and lease forms (authorization forms) are used to authorize these activities and improvements.

Forest Service regulations require each special use authorization to contain terms and conditions that will carry out the purposes of applicable statutes and their implementing regulations; minimize damage to scenic and aesthetic values, fish and wildlife habitat, and otherwise protect the environment; require compliance with applicable air and water quality standards; and require compliance with state standards that are more stringent than federal standards for public safety, environmental protection, and siting, construction, operation, and maintenance (36 CFR 251.56(a)(1)(i)). In addition, Forest Service regulations require each special use authorization to contain such terms and conditions deemed necessary by the Forest Service to protect federal property and economic interests; efficiently manage the authorized lands and adjacent lands; protect other lawful users of the authorized lands and adjacent lands; protect lives and property; protect the interests of those living in the vicinity of the authorized use who rely on the fish, wildlife, and other biotic resources of the area for subsistence; require siting to cause the least environmental damage, taking into consideration feasibility and other relevant factors; and otherwise protect the public interest (36 CFR 251.56(a)(1)(ii)).

The information collection requirements are necessary for the Forest Service to issue and administer special use authorizations that allow the public to use and occupy NFS lands under these authorities. The information collected is used by Forest Service officials (unless otherwise noted) to ensure that uses of NFS lands are authorized, in the public interest, and compatible with the agency's mission or record authorization of use granted by appropriate Forest Service officials.

In conjunction with its Paperwork Reduction Act compliance for its special uses program, the Forest Service is seeking public comment on substantive revisions to the information collection for that program. In particular, the Forest Service is seeking public comment on a proposed update of the Communications Use Lease, FS–2700–10b; proposed updates to Holder Initiated Revocation of Existing Authorization/Request for a New Special-Use Permit or Term Special-Use Permit, FS–2700–3a; and proposed updates of the following road permit and easement forms:

• FS–2700–4b, FLPMA Forest Road Special Use Permit;
• FS–2700–4c, FLPMA Private Road Special Use Permit;
• FS–2700–9f, FRTA Public Road Easement;
• FS–2700–9g, FRTA Forest Road Easement;
• FS–2700–9h, FRTA Private Road Easement;
• FS–2700–9i, FLPMA Forest Road Easement; and
• FS–2700–9j, FLPMA Private Road Easement.

The proposed updates to the communications use lease and road easement and permit forms would make those forms consistent with current standard language in other authorization forms. The proposed updates to FS–2700–3a would make it consistent with standard terms in special use authorization forms that provide for termination of the authorization upon a change in ownership of the authorized improvements or upon a change in ownership or control of the business entity that holds the authorization.

The Forest Service is also seeking public comment on proposed revision or addition of standard clauses in the following 12 authorization forms:

• FS–2700–4, Special Use Permit, the form used by the Forest Service to authorize a variety of uses on NFS lands not covered by another form;
• FS–2700–4h, Special Use Permit for Campground and Related Granger-Thye Concessions, the form used by the Forest Service to authorize operation and maintenance of a federally owned recreation site on NFS lands, including Appendix B, Annual Granger-Thye Fee Offset Agreement, and Appendix G, Granger-Thye Fee Offset Claim Form;
• FS–2700–4i, Special Use Permit for Outfitting and Guiding, the form used by the Forest Service to authorize the use and occupancy of NFS lands to provide outfitting and guiding services;
• FS–2700–4j, Powerline Facility Permit for Non-Federal Entities, the form used by the Forest Service to authorize the use and occupancy of NFS lands by a non-federal entity for operation and maintenance of powerline facilities;
• FS–2700–4k, Powerline Facility Permit for Federal Entities, the form used by the Forest Service to authorize the use and occupancy of NFS lands by a federal entity for operation and maintenance of powerline facilities;
• FS–2700–31, Powerline Facility Easement, the form used by the Forest Service to authorize the use and occupancy of NFS lands by a non-federal entity for operation and maintenance of powerline facilities;
• FS–2700–5, Term Special Use Permit, the form used by the Forest Service to authorize long-term use of NFS lands involving privately owned facilities;
• FS–2700–5a, Term Special Use Permit for Recreation Residences, the form used by the Forest Service to authorize a privately owned recreation residence on NFS lands;
• Grand Island FS–2700–5a, Term Special Use Permit for Recreation Residences in the Grand Island Recreation Area, the form used by the Forest Service to authorize a privately owned recreation residence on NFS lands in the Grand Island Recreation Area;
• FS–2700–5b, Ski Area Term Special Use Permit, the form used by the Forest Service to authorize ski areas on NFS lands;
• FS–2700–5c, Resort/Marina Term Special Use Permit, the form used by the Forest Service authorize a resort/marina on NFS lands; and
• FS–2700–10c, Communications Use Permit for Federal Agencies, the form used by the Forest Service to authorize communications facilities under the jurisdiction of another federal agency on NFS lands.

Although the proposed revisions to the FS–2700–4k and FS–2700–10c are not subject to public notice and comment as information collections under the Paperwork Reduction Act, the proposed revisions are subject to public notice and comment under 16 U.S.C. 1612a.

The Forest Service is not seeking comment on any other provisions in these 12 authorization forms.

The Forest Service is also seeking public comment on several new forms:

• A proposed lease form for historic properties under the National Historic Preservation Act (NHPA), including the information collection associated with that form;
• Proposed forms for leasing Forest Service administrative sites, including the information collection associated with those forms; and
• A proposed waiver of liability and assumption of risk form for implementation of the search and recovery provisions in Section 9002 of the John D. Dingell, Jr. Conservation, Management, and Recreation Act.

The following is a description of the proposed historic property lease form; the proposed forms for leasing Forest Service administrative sites; the proposed waiver of liability and assumption of risk form; and the proposed revision or addition of standard clauses in the 12 authorization forms.

**Proposed Historic Property Lease Form, FS–2700–13**

Section 111 of the NHPA authorizes federal agencies to lease historic properties if the lease will adequately ensure the preservation of the historic property. 54 U.S.C. 306121. The Forest Service intends to use this authority to develop new uses for certain qualifying historic properties that it maintains. This practice will help ensure that historic properties do not fall into disrepair or lose their physical integrity due to continued neglect.

The Forest Service manages over 10,000 historic buildings, and many of them could benefit from some form of alternative reuse. Some of the agency's buildings could also serve communities better if the agency authorized them for more active adaptive reuse while still ensuring their protection. Use of this authority in the NHPA would offer uses and flexibility designed specifically for historic properties. The new historic property lease largely contains the standard term permit clauses in form FS–2700–5, with the following important differences:

• *Authority.* These leases would be issued under section 111 of the NHPA, codified at 54 U.S.C. 306121, which allows leasing of qualifying historic properties as described above. This authority allows for the leasing of historic properties, provided the agency determines that the lease will adequately ensure the preservation of the historic property. Qualifying historic properties include those eligible or listed on the National Register of Historic Places.
• *Duration.* Section 111 of the NHPA does not limit a lease's duration, given the unique nature of historic properties and the investment often needed to adapt these structures to a new use. The flexibility in the lease term facilitates the preservation of these historic properties by attracting rehabilitation support and financing.
• *Rent Retention.* Section 111 of the NHPA provides that rent for the lease may be retained by the agency to defray the costs of administration, maintenance, repair, and related expenses incurred by the agency with respect to that property or other properties listed on the National Register of Historic Places that are owned or controlled by the agency. Thus, rent obtained under a section 111 lease can assist the agency in meeting its requirements to plan for and responsibly steward these historic properties.
• *Property Insurance.* Property insurance is generally required for

historic property leasing, given the requirement to ensure continued preservation of historic properties. The requirements for property insurance are laid out in the lease and will vary depending upon the historic property being leased.

*Estimated Annual Burden:* 2 burden hours per response.

*Type of Respondents:* Individuals, businesses, non-profit organizations, and non-federal governmental entities.

*Estimated Annual Number of Respondents:* 2 respondents.

*Estimated Annual Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 2 hours.

Comment is invited on (1) whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

**Proposed Forms for Leasing Forest Service Administrative Sites**

The Forest Service Facilities Realignment and Enhancement Act of 2005 (FSFREA) and section 8623 of the Agriculture Improvement Act of 2018 (Farm Bill) authorize the Forest Service to lease administrative sites on NFS lands. The following forms are needed to implement the Forest Service's authority to lease administrative sites under those statutes:

- Lease for Forest Service Administrative Sites, FS–2700–14;
- Prospectus for Leasing Administrative Sites, FS–2700–14a;
- In-Kind Consideration Agreement, FS–2700–14b; and
- Claim for In-Kind Consideration Costs, FS–2700–14c.

These information collections correspond to a proposed directive published for public comment (85 FR 34171; June 3, 2020) that would implement the Forest Service's authority to lease administrative sites under FSFREA and section 8623 of the Farm Bill. The information collected would be submitted by parties interested in leasing or leasing a Forest Service administrative site. In particular, those interested in leasing a Forest Service administrative site under either statute could be submitting an application in response to a standard prospectus, and those leasing a Forest Service administrative site under either statute would be executing a standard lease. Those leasing a Forest Service administrative site under section 8623 of the Farm Bill also could be executing forms for recording acceptance and valuation of in-kind consideration as partial or full payment of rent for the lease.

*Estimated Annual Burden:* 14 burden hours per response.

*Type of Respondents:* Individuals, businesses, and other non-federal organizations and entities.

*Estimated Annual Number of Respondents:* 14 respondents.

*Estimated Annual Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* 196 hours.

Comment is invited on (1) whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

**Proposed Waiver of Liability and Assumption of Risk Form, FS–2700–40**

Section 9002 of the John D. Dingell, Jr. Conservation, Management, and Recreation Act (section 9002 of the Dingell Act), Public Law 116–9, 43 U.S.C. 1742a, establishes criteria for accepting a waiver of liability in lieu of insurance for search and recovery missions conducted by good Samaritans on federal lands. A waiver of liability form is needed to implement section 9002 of the Dingell Act.

*Estimated Annual Burden:* .25 burden hour per response.

*Type of Respondents:* Organizations and individuals acting for private purposes.

*Estimated Annual Number of Respondents:* 1 respondent.

*Estimated Annual Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents:* .25 hour.

Comment is invited on (1) whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

**Proposed Revision or Addition of Standard Clauses in the 12 Authorization Forms**

The proposed revision or addition of standard clauses in the 12 authorization forms, as applicable, would make those forms consistent with current standard language in authorization forms. Corresponding standard clauses in Forest Service Handbook 2709.11, Chapter 50, would be revised to conform with revisions to standard clauses in the 12 authorization forms. The following describes the proposed clause revisions and additions.

*No Warranty of Access, Site Suitability, or Services.* The services not provided clause would be revised to address access and site suitability as well as services.

*Risk of Loss.* The risk of loss clause would be clarified to address risk of loss to the authorized improvements as well as risk of loss to the use and occupancy of NFS lands due to public health and safety or environmental hazards. In addition, revisions to the risk of loss clause would clarify that termination under that clause would not give rise to any claim for damages against the Forest Service.

*Pesticide Use.* The pesticide use clause would be revised to include a requirement for a safety plan and a requirement to report pesticide applications to the Forest Service.

*Consent To Store Hazardous Materials.* The consent to store hazardous materials clause would be revised to provide that hazardous material transportation and disposal manifests must clearly identify the authorization holder as the generator of the hazardous waste. In addition, the consent to store hazardous materials clause would be revised for

authorizations issued to non-federal entities to provide that the Forest Service may require a surety bond if hazardous materials are used or stored on NFS lands under the authorization.

*Revocation for Specific and Compelling Reasons in the Public Interest.* This clause is included in term permits and communications use leases and specifies the compensation that the Forest Service will pay for revocation of a term permit for specific and compelling reasons in the public interest. The valuation standard in this clause would be updated consistent with input from the U.S. Department of Justice, Land Acquisition Section, Environment and Natural Resources Division.

**Proposed Revision or Addition of Standard Clauses in Specific Authorization Forms**

*FS–2700–4, Special Use Permit.* The standard clauses addressing water pollution, scenic values, and continuation of obligations and liabilities beyond permit expiration or revocation, which are included in other authorization forms, would be added to FS–2700–4. In addition, a standard clause providing for termination for development of hydroelectric power or reclamation purposes is included in permits when the authorized NFS lands are withdrawn for hydroelectric power or reclamation purposes. This clause would be added to FS–2700–4 for inclusion as applicable.

*FS–2700–4h, Special Use Permit for Campground and Related Granger-Thye Concessions.* The Forest Service is proposing to add a clause to form FS–2700–4h to clarify that concession site names, facility names, and expressions used by the holder to identify goods and services provided under the permit are a trademark that is the property of the Forest Service, the use of which is subject to Forest Service supervision and control. The Forest Service is also proposing clarifications to Appendix B, the Annual Granger-Thye Fee Offset Agreement form, and Appendix G, the Granger-Thye Fee Offset Claim form, to FS–2700–4h.

*FS–2700–4i, Special Use Permit for Outfitting and Guiding.* The standard clause addressing liabilities beyond permit expiration or revocation, which is included in other authorization forms, would be added to FS–2700–4i.

*FS–2700–4j, Powerline Facility Permit for Non-Federal Entities; FS–2700–4k, Powerline Facility Permit for Federal Entities; and FS–2700–31, Powerline Facility Easement.* The renewal clause in FS–2700–4j, Powerline Facility Permit for Non-Federal Entities, would be revised to provide for issuance of a new permit at the discretion of the authorized officer, rather than renewal of the permit subject to conditions. The Forest Service believes issuance of a new permit should be discretionary, since a permit does not convey an interest in real property. In contrast, the renewal clause in FS–2700–31, Powerline Facility Easement, would be revised to provide for renewal subject to conditions, since an easement conveys an interest in real property.

The change of control clause in FS–2700–4j would also be revised to provide an exception to termination due to a change in control of the business entity that holds the permit when the change of control occurs through a merger or through the acquisition of stock or an ownership interest if the holder's corporate structure and operational management remain unchanged and the holder continues to have sufficient financial and technical capability to meet its obligations under the permit. The Forest Service believes that for this type of use and under these circumstances there is no legal or programmatic need to issue a new permit.

The leasing of powerline facilities clause in FS–2700–4j and FS–2700–31 would be revised to provide for submission of an annual certification of leases for the authorization holder's fiber optic cable that contains the information needed by the authorized officer to charge the requisite land use fee, rather than a facility use map displaying specified information. The Forest Service believes an annual certification would be simpler for both the agency and the authorization holder to implement than a facility use map. A clause would be added to provide for Forest Service approval for leasing of the holder's fiber optic cable. Additionally, a clause would be added to provide for the issuance of an appropriate special use authorization for leases involving communications uses and other third-party uses involving the authorized powerline facilities.

Clauses would be added to FS–2700–4j and FS–2700–31 to provide for preparation of an environmental site assessment prior to use and occupancy and prior to termination or upon revocation of the authorization. The purpose of the initial and follow-up environmental site assessments would be to identify Recognized Environmental Conditions in the authorized area, that is, the presence or likely presence of any hazardous substances or petroleum products in, on, or at the authorized area: (1) Due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment. A comparison of the initial and follow-up environmental site assessments would assist the Forest Service in determining whether any environmental cleanup or restoration is required as a result of the use and occupancy.

An optional insurance clause would be added to FS–2700–4j and FS–2700–31 that would provide for self-insurance only if the holder or grantee is unable to provide coverage for the United States under a commercial general liability insurance policy and the holder or grantee meets all the insurance requirements in the optional self-insurance clause. Given the risks involved, owners and operators of powerline facilities typically obtain commercial general liability insurance only for excess coverage, *e.g.,* for liability of $10 million or more. In addition, the revised insurance clause would provide for $2 million of coverage per occurrence and $5 million of coverage in the aggregate per authorized powerline facility.

The rights and responsibilities upon revocation or termination without issuance of a new easement clause in FS–2700–31 would be revised to remove the reference to consultation with affected agencies, which is unnecessary in this context.

A clause would be added to FS–2700–4j to provide for permit termination if the holder fails to pay the land use fee, interest, or other charges within 90 calendar days of the due date, consistent with other special use authorization forms. The nonpayment clause in FS–2700–31 would be revised to provide for permit termination if the grantee fails to pay the land user fee, interest, or other charges within 90 calendar days of the due date, consistent with other special use authorization forms.

In addition, a standard clause providing for termination for development of hydroelectric power or reclamation purposes is included in permits when the authorized NFS lands are withdrawn for hydroelectric power or reclamation purposes. This clause would be added to FS–2700–4j, FS–2700–4k, and FS–2700–31 for inclusion as applicable.

*FS–2700–5, Term Special Use Permit, and FS–2700–5c, Resort/Marina Term Special Use Permit.* The nonpayment clause in both forms would be revised to provide for permit termination if the holder fails to pay the land user fee, interest, or other charges within 90 calendar days of the due date, consistent

with other special use authorization forms.

*FS–2700–5a, Term Special Use Permit for Recreation Residences, and Grand Island FS–2700–5a Grand Island, Term Special Use Permit for Recreation Residences in the Grand Island National Recreation Area.* The maintenance of improvements clause in both forms would be revised to conform to the wording for that clause in other authorization forms. In particular, the revisions would provide for consistency with other permit terms and for changes to maintenance standards when deemed necessary to meet statutory, regulatory, or policy requirements or to protect national forest resources. The standard bonding clause in special use authorization forms, which gives the authorized officer discretion to require a bond, would be added to both forms.

The nonpayment clause in both forms would be revised to provide for permit termination if the holder fails to pay the cabin user fee, interest, or other charges within 90 calendar days of the due date, consistent with other special use authorization forms.

The standard clause addressing continuation of obligations and liabilities beyond permit expiration or revocation would be added to FS–2700–5a and Grand Island FS–2700–5a. In addition, a standard clause providing for termination of the permit for development of hydroelectric power or reclamation purposes is included in the permit when the authorized NFS lands are withdrawn for hydroelectric power or reclamation purposes. This clause would be added to FS–2700–5a and Grand Island FS–2700–5a for inclusion as applicable.

*FS–2700–10c, Communications Use Permit for Federal Agencies.* The risk of loss clause in this form would be revised to track the risk of loss clause for federal entities in FS–2700–4 with regard to conducting an analysis to determine whether the authorized facilities can be safety occupied in the future and whether rebuilding should be allowed. In addition, the standard clause providing for termination of the permit for development of hydroelectric power or reclamation purposes would be added to FS–2700–10c for inclusion in the permit when the authorized NFS lands are withdrawn for hydroelectric power or reclamation purposes.

**Access to Proposed Forms and Proposed Revision or Addition of Standard Clauses**

The proposed updated communications use lease and updated road easement and permit forms; the proposed historic property lease, proposed forms for leasing Forest Service administrative sites; and the proposed revision or addition of standard clauses in the 12 authorization forms can be found at *https://www.fs.usda.gov/managing-land/lands-and-realty-management/forms*.

Dated: September 9, 2020.

**Gregory C. Smith,**

*Director, Lands and Realty Management, National Forest System.*

[FR Doc. 2020–20316 Filed 9–14–20; 8:45 am]

**BILLING CODE 3411–15–P**

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## DEPARTMENT OF AGRICULTURE

### Forest Service

### Ravalli Resource Advisory Committee

**AGENCY:** Forest Service, Agriculture (USDA).

**ACTION:** Notice of meeting.

**SUMMARY:** The Ravalli Resource Advisory Committee (RAC) will hold a virtual meeting. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the Act. RAC information can be found at the following website: *https://www.fs.usda.gov/main/bitterroot/workingtogether/advisorycommittees*.

**DATES:** The meeting will be held on Friday, October 16, 2020, at 7:00 p.m., Mountain Time.

All RAC 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. For virtual meeting information, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

**FOR FURTHER INFORMATION CONTACT:** Eric Winthers, Designated Federal Officer (DFO), by phone at 406–821–4244 or email at *eric.winthers@usda.gov;* or Joni Lubke, RAC Coordinator, at 406–363–7100 or email at *joni.lubke@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. Vote on nominations for chairperson and vice-chairperson;

2. Discuss and make recommendations on recreation fee proposals for sites located within Ravalli County on the Bitterroot National Forest;

3. Discuss timeline and content to develop outreach for project proposals; and

4. Select date for next meeting.

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 October 5, 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 Joni Lubke, RAC Coordinator, Bitterroot National Forest Supervisor's Office, 24 1801 North 1st, Hamilton, Montana 59840; or by email to *joni.lubke@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: September 10, 2020.

**Cikena Reid,**

*USDA Committee Management Officer.*

[FR Doc. 2020–20335 Filed 9–14–20; 8:45 am]

**BILLING CODE 3411–15–P**

## DEPARTMENT OF AGRICULTURE

### Rural Business-Cooperative Service

**[Docket #: RBS–20–BUSINESS–0034]**

### Notice of Solicitation of Applications for Inviting Applications for the Rural Economic Development Loan and Grant Programs for Fiscal Year 2021

**AGENCY:** Rural Business-Cooperative Service, USDA.

**ACTION:** Notice.

**SUMMARY:** This notice is to invite applications for loans and grants under the Rural Economic Development Loan and Grant (REDLG) Programs for fiscal year (FY) 2021, subject to the availability of funding. This notice is being issued in order to allow applicants sufficient time to leverage financing, prepare and submit their applications, and give the Agency time to process applications within FY 2021. Successful applications will be selected by the Agency for funding and subsequently awarded to the extent that funding may ultimately be made available through appropriations. An announcement on the website at *https://www.rd.usda.gov/newsroom/fy2021-appropriated-funding* will identify the amount received in the appropriations. All applicants are responsible for any expenses incurred in developing their applications.

**DATES:** The deadline for completed applications to be received in the USDA Rural Development State Office no later than 4:30 p.m. (local time) are: First Quarter, September 30, 2020; Second Quarter, December 31, 2020; Third Quarter, March 31, 2021 and Fourth Quarter, June 30, 2021.

**ADDRESSES:** Applications must be submitted to the USDA Rural Development State Office for the State where the Project is located. Applications may be submitted in paper or electronic format to the appropriate Rural Development State Office and must be received by 4:30 p.m. local time on the deadline date(s). Applicants are encouraged to contact their respective State Office listed below for an email contact to submit an electronic application prior to the submission deadline date(s).

**FOR FURTHER INFORMATION CONTACT:** Cindy Mason at (202) 690–1433, *cindy.mason@usda.gov* or David Chestnut at (202) 692–5233, *david.chestnut@usda.gov,* Program Management Division, Business Programs, Rural Business-Cooperative Service, U.S. Department of Agriculture, 1400 Independence Avenue SW, Stop 3226, Room 4202-South, Washington, DC 20250–3226, or call (202) 720–1400. For further information on this notice, please contact the USDA Rural Development State Office in the State in which the applicant's headquarters is located. A list of Rural Development State Office contacts is provided at the following link: *http://www.rd.usda.gov/contact-us/state-offices*.

**SUPPLEMENTARY INFORMATION:** The Agency encourages applications that will support recommendations made in the Rural Prosperity Task Force report to help improve life in rural America, *www.usda.gov/ruralprosperity*. Applicants are encouraged to consider projects that provide measurable results in helping rural communities build robust and sustainable economies through strategic investments in infrastructure, partnerships, and innovation.

Key strategies include:

- Achieving e-Connectivity for Rural America
- Developing the Rural Economy
- Harnessing Technological Innovation
- Supporting a Rural Workforce
- Improving Quality of Life

### Overview

*Solicitation Opportunity Type:* Rural Economic Development Loans and Grants.

*Announcement Type:* Initial Solicitation Announcement.

*Catalog of Federal Domestic Assistance Number:* 10.854.

*Dates:* The deadline for completed applications to be received in the USDA Rural Development State Office no later than 4:30 p.m. (local time) are: First Quarter, September 30, 2020; Second Quarter, December 31, 2020; Third Quarter, March 31, 2021 and Fourth Quarter, June 30, 2021.

*Persistent Poverty Counties*

The Further Consolidated Appropriations Act, 2020, SEC. 740 designates funding for projects in Persistent Poverty counties. Persistent Poverty counties as defined in SEC. 740 is ''any county that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1990 and 2000 decennial censuses, and 2007–2011 American Community Survey five year average, or any territory or possession of the United States''. Another provision in SEC. 740 expands the eligible population in Persistent Poverty counties to include any county seat of such a persistent poverty county that has a population that does not exceed the authorized population limit by more than 10 percent. This provision expands the current 50,000 population limit to 55,000 for only county seats located in Persistent Poverty counties. Therefore, applicants and/or beneficiaries of technical assistance services located in Persistent Poverty county seats with populations up to 55,000 (per the 2010 Census) are eligible.

### A. Program Description

1. *Purpose of the Program.* The purpose of the program is to promote rural economic development and job creation projects.

2. *Statutory Authority.* These Programs are authorized under 7 U.S.C. 940c and 7 CFR part 4280, subpart A. Assistance provided to Rural areas, as defined, under this program may include business startup costs, business expansion, business incubators, Technical assistance feasibility studies, Advanced telecommunications services and computer networks for medical, educational, and job training services, and Community Facilities Projects for economic development.

Awards under the REDLG Programs will be made on a competitive basis using specific selection criteria contained in 7 CFR part 4280, subpart A. Information required to be in the application package includes Standard Form (SF) 424, ''Application for Federal Assistance;'' a Resolution of the Board of Directors; SF LLL, Restrictions on Lobbying; RD 400–1, ''Equal Opportunity Agreement;'' Assurance Statement for the Uniform Act; Seismic Certification (if construction); and paperwork required in accordance with 7 CFR part 1970, ''Environmental Policies and Procedures.'' If the proposal involves new construction; large increases in employment; hazardous waste; a change in use, size, capacity, purpose, or location from an original facility; or is publicly controversial, the following is required: Environmental documentation in accordance with 7 CFR part 1970;'' RUS Form 7, ''Financial and Statistical Report;'' RUS Form 7a, ''Investments, Loan Guarantees, and Loans,'' or similar information; and written narrative of Project description. Applications will be tentatively scored by the State Offices and submitted to the National Office for review.

3. *Definition of Terms.* The definitions applicable to this notice are published at 7 CFR 4280.3.

4. *Application Awards.* The Agency will review, evaluate, and score applications received in response to this notice based on the provisions found in 7 CFR part 4280, subpart A, and as indicated in this notice. However, the

Agency advises all interested parties that the applicant bears the burden in preparing and submitting an application in response to this notice whether or not funding is appropriated for these Programs in FY 2021.

**B. Federal Award Information**

*Type of Awards:* Loans and Grants.

*Fiscal Year Funds:* FY 2021.

*Available Funds:* Anyone interested in submitting an application for funding under these Programs are encouraged to consult the Rural Development Notices of Solicitation of Applications website at *http://www.rd.usda.gov/newsroom/notices-solicitation-applications-nosas*.

*Maximum Award:* The Agency anticipates the following maximum amounts per award: Loans—$1,000,000; Grants—$300,000.

*Anticipated Award Dates:* First Quarter, November 30, 2020; Second Quarter, February 28, 2021; Third Quarter, May 31, 2021; and Fourth Quarter, August 31, 2021.

*Performance Period:* October 1, 2021, through September 30, 2022.

*Renewal or Supplemental Awards:* None.

**C. Eligibility Information**

*1. Eligible Applicants*

Loans and grants may be made to any entity that is identified by USDA Rural Development as an eligible borrower under the Rural Electrification Act of 1936, as amended (Act). In accordance with 7 CFR 4280.13, applicants that are not delinquent on any Federal debt or not otherwise disqualified from participation in these Programs are eligible to apply. An applicant must be eligible under 7 U.S.C. 940c. Notwithstanding any other provision of law, any former Rural Utilities Service borrower that has repaid or prepaid an insured, direct, or guaranteed loan under the Act, or any not-for-profit utility that is eligible to receive an insured or direct loan under such Act shall be eligible for assistance under section 313(b)(2)(B) of such Act in the same manner as a borrower under such Act. All other restrictions in this notice will apply.

The Agency requires information to make an eligibility determination through applications that must include, but are not limited to, the following:

(a) An original and one copy of Form SF 424, ''Application for Federal Assistance (for non-construction);''

(b) Copies of applicant's organizational documents showing the applicant's legal existence and authority to perform the activities under the REDLG Programs;

(c) A proposed scope of work, including a description of the proposed Project, details of the proposed activities to be accomplished and timeframes for completion of each task, the number of months duration of the Project, and the estimated time it will take from approval to beginning of Project implementation;

(d) A written narrative that includes, at a minimum, the following items:

(i) An explanation of why the Project is needed, the benefits of the proposed Project, and how the Project meets the Grant eligible purposes, if applicable;

(ii) Area to be served, identifying each governmental unit, *i.e.,* tribe, town, county, etc., to be affected by the Project;

(iii) Description of how the Project will coordinate economic development activities with other economic development activities within the Project area;

(iv) Businesses to be assisted, if appropriate, and economic development to be accomplished;

(v) An explanation of how the proposed Project will result in newly created, increased, or supported jobs in the area and the number of projected new and supported jobs within the next three years;

(vi) A description of the applicant's demonstrated capability and experience in providing the proposed Project assistance, including experience of key staff members and persons who will be providing the proposed Project activities and managing the Project;

(vii) The method and rationale used to select the areas and businesses that will receive the service;

(viii) A brief description of how the work will be performed, including whether organizational staff or consultants or contractors will be used; and

(ix) Other information the Agency may request to assist it in making an award determination.

(e) The last three years of financial information to show the applicant's financial capacity to carry out the proposed work. If the applicant is less than three years old, at a minimum, the information should include all balance sheet(s), income statement(s), and cash flow statement(s). A current audited report is required if available;

(f) Documentation regarding the availability and amount of other funds to be used in conjunction with the funds from REDLG; and

(g) A budget which includes salaries, fringe benefits, consultant costs, indirect costs, and other appropriate direct costs for the Project.

*2. Cost Sharing or Matching*

For loans, either the Ultimate Recipient or the Intermediary must provide supplemental funds for the Project equal to at least 20 percent of the loan to the Intermediary. For grants, the Intermediary must establish a Revolving Loan Fund (or Fund) and contribute an amount equal to at least 20 percent of the Grant. The supplemental contribution must come from Intermediary's funds which may not be from other Federal Grants, unless permitted by law.

*3. Other*

Applications will only be accepted for projects that promote rural economic development and job creation.

There are no ''responsiveness'' or ''threshold'' eligibility criteria for these loans and grants. There is no limit on the number of applications an applicant may submit under this announcement.

None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

*4. Completeness Eligibility*

Applications will not be considered for funding if they do not provide sufficient information to determine eligibility or are missing required elements.

**D. Application and Submission Information**

*1. Address to Request Application Package*

For further information, entities wishing to apply for assistance should contact the USDA Rural Development State Office provided in the **ADDRESSES** section of this notice to obtain copies of the application package.

Prior to official submission of grant applications, applicants may request technical assistance or other application guidance from the Agency, as long as such requests are made at least 15 days prior to each quarter submission date. Technical assistance is not meant to be an analysis or assessment of the quality of the materials submitted, a substitute for agency review of completed applications, nor a determination of eligibility, if such determination requires in-depth analysis. The Agency will not solicit or consider scoring or eligibility information that is submitted after the application deadline. The Agency reserves the right to contact applicants to seek clarification information on materials contained in the submitted application.

Applications may be submitted in paper or electronic format to appropriate Rural Development State Office and must be received by 4:30 p.m. local time on the deadline date(s). Applicants are encouraged to contact their respective State Office for an email contact to submit an electronic application prior to the submission deadline date(s).

All applicants must have a Dun and Bradstreet Data Universal Numbering System (DUNS) number which can be obtained at no cost via a toll-free request line at (866) 705–5711 or at *http://fedgov.dnb.com/webform*. Each applicant applying for grant funds (unless the applicant is an individual or Federal awarding agency that is excepted from the requirements under 2 CFR 25.110(b) or (c) or has an exception approved by the Federal awarding agency under 2 CFR 25.110(d) is required to: (i) Be registered in the System for Award Management (SAM) before submitting its application; (ii) provide a valid unique entity identifier in its application; and (iii) continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency. The Federal awarding agency may not make a Federal award to an applicant until the applicant has complied with all applicable unique entity identifier and SAM requirements and, if an applicant has not fully complied with the requirements by the time the Federal awarding agency is ready to make a Federal award, the Federal awarding agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant.

Please note that applicants must locate the downloadable application package for this program by the Catalog of Federal Domestic Assistance Number or FedGrants Funding Opportunity Number, which can be found at *http://www.grants.gov*.

*2. Content and Form of Application Submission*

An application must contain all of the required elements. Each selection priority criterion outlined in 7 CFR 4280.42(b) must be addressed in the application. Failure to address any of the criterion will result in a zero-point score for that criterion and will impact the overall evaluation of the application. Copies of 7 CFR part 4280, subpart A, will be provided to any interested applicant making a request to a Rural Development State Office. An original copy of the application must be filed with the Rural Development State Office for the State where the Intermediary is located.

The applicant documentation and forms needed for a complete application are located in the PROGRAM DESCRIPTION section of this notice, and 7 CFR part 4280, subpart A. There are no specific formats required per this notice, and applicants may request forms and addresses from the **ADDRESSES** section of this notice. Any form that requires an original signature but is signed electronically in the application submission, must be signed in ink by the authorized person prior to the disbursement of funds.

(a) There are no specific limitations on the number of pages or other formatting requirements other than those described in the PROGRAM DESCRIPTION section.

(b) There are no specific limitations on the number of pages, font size and type face, margins, paper size, number of copies, and the sequence or assembly requirements.

(c) The component pieces of this application should contain original signatures on the original application.

*3. Submission Dates and Times*

(a) Application Deadline Dates: No later than 4:30 p.m. (local time) on: First Quarter, September 30, 2020; Second Quarter, December 31, 2020; Third Quarter, March 31, 2021; and Fourth Quarter, June 30, 2021.

Explanation of Dates: Applications must be in the USDA Rural Development State Office by the dates and times as indicated above. If the due date falls on a Saturday, Sunday, or Federal holiday, the application is due the next business day.

(b) The deadline date means that the completed application package must be received in the USDA Rural Development State Office by the deadline date and time established above. All application documents identified in this notice are required.

(c) If completed applications are not received by the deadline established above, the application will neither be reviewed nor considered under any circumstances.

(d) The Agency will determine the application receipt date based on the actual date postmarked.

(e) If the grantee has a previously approved indirect cost rate, it is permissible, otherwise, the applicant may elect to charge the 10 percent indirect cost permitted under 2 CFR 200.414(f). Due to the time required to evaluate Indirect Cost Rates, it is likely that all funds will be awarded by the time the Indirect Cost Rate is determined. No foreign travel is permitted. Pre-Federal award costs will only be permitted with prior written approval by the Agency.

(f) Applicants may submit applications in hard copy or electronic format as previously indicated in the Application and Submission Information section of this notice. If the applicant wishes to hand deliver its application, the addresses for these deliveries can be located in the **ADDRESSES** section of this notice.

(g) If you require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, etc.) please contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

**E. Application Review Information**

*1. Criteria*

All eligible and complete applications will be evaluated and scored based on the selection criteria and weights contained in 7 CFR part 4280, subpart A. Failure to address any one of the criteria by the application deadline will result in the application being determined ineligible, and the application will not be considered for funding.

*2. Review and Selection Process*

The State Offices will review applications to determine if they are

eligible for assistance based on requirements contained in 7 CFR part 4280, subpart A. If determined eligible, your application will be submitted to the National Office. Funding of projects is subject to the Intermediary's satisfactory submission of the additional items required by that subpart and the USDA Rural Development Letter of Conditions. The Agency reserves the right to award additional discretionary points under 7 CFR 4280.43.

In order to distribute funds among the greatest number of projects possible, applications will be reviewed, prioritized, and funded by ranking each State's highest scoring Project in highest to lowest score order. The highest scoring Project from each State will be considered that State's Priority One Project. Priority One projects from each State will be ranked by the National Office according to score from highest to lowest. The second highest scoring Project from each State will be considered the State's Priority Two Project and all Priority Two projects will be ranked according to score from highest to lowest and so forth until all projects have been scored and ranked in priority order. All Priority One projects will be funded before any Priority Two projects and so forth until funds are depleted, so as to ensure broad geographic distribution of funding.

**F. Federal Award Administration Information**

*1. Federal Award Notices*

Successful applicants will receive notification for funding from the Rural Development State Office. Applicants must comply with all applicable statutes and regulations before the loan/grant award can be approved. Provided the application and eligibility requirements have not changed, an eligible application not selected will be reconsidered in three subsequent quarterly funding competitions for a total of four competitions. If an application is withdrawn, it can be resubmitted and will be evaluated as a new application.

*2. Administrative and National Policy Requirements*

Additional requirements that apply to intermediaries or grantees selected for these Programs can be found in 7 CFR part 4280, subpart A. Awards are subject to USDA grant regulations at 2 CFR Chapter IV which incorporated the Office of Management and Budget (OMB) regulations 2 CFR 200.

All successful applicants will be notified by letter which will include a Letter of Conditions, and a Letter of Intent to Meet Conditions. This letter is not an authorization to begin performance. If the applicant wishes to consider beginning performance prior to the loan or grant being officially closed, all pre-award costs must be approved in writing and in advance by the Agency. The loan or grant will be considered officially awarded when all conditions in the Letter of Conditions have been met and the Agency obligates the funding for the Project.

Additional requirements that apply to intermediaries or grantees selected for these Programs can be found in 7 CFR 4280, subpart A; the Grants and Agreements regulations of the U.S. Department of Agriculture codified in 2 CFR 400.1to 400.2 and 2 CFR part 415 to 422, and successor regulations to these parts.

In addition, all recipients of Federal financial assistance are required to report information about first-tier sub-awards and executive compensation (see 2 CFR part 170). You will be required to have the necessary processes and systems in place to comply with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282) reporting requirements (see 2 CFR 170.200(b), unless you are exempt under 2 CFR 170.110(b)).

The following additional requirements apply to intermediaries or grantees selected for these Programs:

(a) Form RD 4280–2 ''Rural Business-Cooperative Service Financial Assistance Agreement.''

(b) Letter of Conditions.

(c) Form RD 1940–1, ''Request for Obligation of Funds.''

(d) Form RD 1942–46, ''Letter of Intent to Meet Conditions.''

(e) F LLL, ''Disclosure of Lobbying Activities,'' if applicable.

(f) Use Form SF 270, ''Request for Advance or Reimbursement.''

You no longer must complete the following forms for acceptance of a Federal award. This information is now collected through your registration or annual recertification in *SAM.gov* in the Financial Assistance General Certifications and Representations section:

- Form RD 400–4, ''Assurance Agreement.''
- Form AD–3031, ''Assurance Regarding Felony Conviction or Tax Delinquent Status for Corporate Applicants.''

*3. Reporting*

(a) A Financial Status Report and a Project performance activity report will be required of all grantees on a quarterly basis until initial funds are expended and yearly thereafter, if applicable, based on the Federal fiscal year. The grantee will complete the Project within the total time available to it in accordance with the Scope of Work and any necessary modifications thereof prepared by the grantee and approved by the Agency. A final Project performance report will be required with the final Financial Status Report. The final report may serve as the last quarterly report. The final report must provide complete information regarding the jobs created and supported as a result of the Grant if applicable. Grantees must continuously monitor performance to ensure that time schedules are being met, projected work by time periods are being accomplished, and other performance objectives are being achieved. Grantees must submit an original of each report to the Agency no later than 30 days after the end of the quarter. The Project performance reports must include, but not be limited to, the following:

(1) A comparison of actual accomplishments to the objectives established for that period;

(2) Problems, delays, or adverse conditions, if any, which have affected or will affect attainment of overall Project objectives, prevent meeting time schedules or objectives, or preclude the attainment of particular Project work elements during established time periods. This disclosure shall be accompanied by a statement of the action taken or planned to resolve the situation; and

(3) Objectives and timetable established for the next reporting period.

(4) Any special reporting requirements, such as jobs supported and created, businesses assisted, or economic development which results in improvements in median household incomes, and any other specific requirements, should be placed in the reporting section of the Letter of Conditions.

(5) Within 90 days after the conclusion of the Project, the Intermediary will provide a final Project evaluation report. The last quarterly payment will be withheld until the final report is received and approved by the Agency. Even though the Intermediary may request reimbursement on a monthly basis, the last 3 months of reimbursements will be withheld until a final report, Project performance, and financial status report are received and approved by the Agency.

(b) In addition to any reports required by 2 CFR part 200 and 2 CFR 400.1 to 400.2 and 2 CFR part 415 to 422, the Intermediary or grantee must provide

reports as required by 7 CFR part 4280, subpart A.

**G. Federal Awarding Agency Contact(s)**

For general questions about this announcement, please contact your USDA Rural Development State Office provided in the **ADDRESSES** section of this notice.

**H. Civil Rights Requirements**

All grants made under this notice are subject to Title VI of the Civil Rights Act of 1964 as required by the USDA (7 CFR part 15, subpart A) and Section 504 of the Rehabilitation Act of 1973, Title VIII of the Civil Rights Act of 1968, Title IX, Executive Order 13166 (Limited English Proficiency), Executive Order 11246, and the Equal Credit Opportunity Act of 1974.

**I. Other Information**

*Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995, the information collection requirement contained in this notice is approved by OMB under OMB Control Number 0570–0070.

*Federal Funding Accountability and Transparency Act*

All applicants, in accordance with 2 CFR part 25, must have a DUNS number, which can be obtained at no cost via a toll-free request line at (866) 705–5711 or online at *http://fedgov.dnb.com/webform.* Similarly, all applicants applying for grant funds must be registered in SAM prior to submitting an application. Applicants may register for the SAM at *http://www.sam.gov/SAM.* All recipients of Federal financial grant assistance are required to report information about first-tier sub-awards and executive total compensation in accordance with 2 CFR part 170.

*Nondiscrimination Statement*

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its agencies, offices, and employees, and institutions participating in or administering USDA Programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *http://www.ascr.usda.gov/complaint_filing_cust.html* and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; or

(2) *Email: program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

**Rebecka Adcock,**

*Administrator, Rural Business-Cooperative Service.*

[FR Doc. 2020–20251 Filed 9–14–20; 8:45 am]

BILLING CODE 3410–XY–P

## DEPARTMENT OF COMMERCE

### Census Bureau

### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Household Pulse Survey

On July 31, 2020, the Department of Commerce received emergency clearance from the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (PRA), Emergency Processing to continue collection for the Household Pulse Survey (OMB No. 0607–1013, Exp. 10/31/20). This notice serves to inform of the Department's submission of an Information Collection Request (ICR) to OMB for the purposes of obtaining regular (non-emergency) clearance for the Household Pulse Survey, with the intention of administering the survey from November, 2020 (upon expiration of the current emergency clearance) through December, 2021. The Department invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on May 19, 2020 (in response to notice of the Household Pulse Survey as a new, 90-day collection) and again on June 3, 2020 (in response to subsequent notice of the Department's intention to continue the Household Pulse Survey beyond the initial 90 days) during a 60-day comment period. This notice allows for an additional 30 days for public comments.

*Agency:* U.S. Census Bureau.

*Title:* Household Pulse Survey.

*OMB Control Number:* 0607–1013.

*Form Number(s):* None.

*Type of Request:* New Request for Regular Clearance for Collection; Collection is Currently Active Under Emergency Clearance Approval.

*Number of Respondents:* 3,150,000.

*Average Hours per Response:* 20 minutes.

*Burden Hours:* 1,039,500.

*Needs and Uses:* Data produced by the Household Pulse Survey are designed to inform on a range of dimensions that American households are experiencing during the Coronavirus (COVID–19) pandemic, including employment, facility to telework, travel patterns, income loss, spending patterns, food and housing security, access to benefits, mental health and access to care, and educational disruption (K–12 and post-secondary). The Household Pulse Survey was initially launched in April 2020 as an experimental project (see *https://www.census.gov/data/experimental-data-products.html*) slated to last 90 days; the Office of Management and Budget (OMB) granted emergency clearance for this effort on April 19, 2020. However, as the pandemic has continued and the survey's data have proven useful to government officials and policy makers managing pandemic response and recovery efforts, the Department requested and OMB approved an extension of the emergency clearance on July 31, 2020, which will permit the collection to continue through October 31, 2020. As this will exhaust the emergency clearance authority (180 days), the Department of Commerce is preparing a new Information Collection Request (ICR) to request regular clearance for the continuation of this collection beyond October 31, 2020. This new ICR package

will follow shortly upon publication of this notice.

*Affected Public:* Households.

*Frequency:* Households will be selected once to participate in a 20-minute survey.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* Title 13, United States Code, Sections 8(b), 182; 5 CFR part 1320, Controlling Paperwork Burden on the Public, Section 1320.13.

This information collection request may be viewed at *www.reginfo.gov*. Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0607–1013.

**Sheleen Dumas,**

*Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.*

[FR Doc. 2020–20338 Filed 9–14–20; 8:45 am]

**BILLING CODE 3510–07–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### U.S. Department of Commerce Trade Finance Advisory Council; Charter Renewal and Solicitations of Nominations for Membership

**AGENCY:** International Trade Administration, U.S. Department of Commerce.

**ACTION:** Notice.

**SUMMARY:** Pursuant to provisions of the Federal Advisory Committee Act (FACA), as amended, the Department of Commerce (the Department) announces that the charter for the U.S. Department of Commerce Trade Finance Advisory Council was renewed on August 7, 2020. This discretionary federal advisory committee advises the Secretary in identifying effective ways to help expand access to finance for U.S. exporters and their foreign buyers. The charter renewal of this advisory committee was necessary to provide the Secretary with advice from industry stakeholders on the development of effective policies and programs that support the Department's strategic goal of enhancing job creation by strengthening U.S. companies' export capabilities and reducing the costs and complexities associated with exporting. This notice also requests nominations for membership.

**DATES:** Nominations for membership must be received on or before 5:00 p.m. Eastern Daylight Time (EDT), Friday, November 13, 2020. After that date, the Department will continue to accept nominations under this notice through February 2022 to fill any vacancies that may arise.

**ADDRESSES:** All nominations should be submitted by email to *TFAC@trade.gov,* Attention: Yuki Fujiyama, Designated Federal Officer and Executive Secretary, U.S. Department of Commerce Trade Finance Advisory Council.

**FOR FURTHER INFORMATION CONTACT:** Yuki Fujiyama, Trade Finance Specialist, Office of Finance and Insurance Industries, Industry and Analysis, International Trade Administration, U.S. Department of Commerce at (202) 482–3468; email: *Yuki.Fujiyama@trade.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Background and Authority

Pursuant to provisions of the FACA, as amended, 5 U.S.C. App., the Department announces that the charter for the U.S. Department of Commerce Trade Finance Advisory Council (TFAC or the ''Council'') was renewed on August 7, 2020. The TFAC Secretariat, housed in the Office of Finance and Insurance Industries at the Department's International Trade Administration, is accepting nominations for membership on the Council. The Secretary of Commerce, pursuant to the duties imposed by 15 U.S.C. 1512, first established the TFAC on August 11, 2016, in accordance with the FACA, as amended, 5 U.S.C. App. The current TFAC charter was renewed for a two-year term and will expire on August 7, 2022.

The TFAC functions solely as an advisory committee and its main objectives are to advise the Secretary in identifying effective ways to help (1) expand access to finance for U.S. exporters, including small- and medium-sized enterprises (SMEs), and their foreign buyers, and (2) remove obstacles to such finance, capital and related resources. The description of duties is as follows:

A. Provide a forum to facilitate discussion among a diverse group of stakeholders such as banks, non-bank financial institutions, other trade finance related organizations, and exporters, so that the TFAC can better perform its advisory work for the Secretary by obtaining a better understanding of current challenges facing U.S. exporters and their foreign buyers in accessing financing and capital;

B. Develop actionable recommendations for the Secretary to help achieve the objectives stated in this charter;

C. Address access to private sector trade finance by identifying proactive and effective ways for the Department to support and collaborate with private sector trade finance providers, which facilitate 98 percent of U.S. export transactions, to contribute to the growth of U.S. exports;

D. Recommend effective ways for the Department to expand use of U.S. government export finance programs by increasing awareness of programs offered by the U.S. Export-Import Bank (EXIM Bank), the Small Business Administration (SBA) and the U.S. Department of Agriculture's Foreign Agricultural Service (USDA/FAS), and promoting their use among U.S. exporters, especially SMEs, which are unable to obtain financing in the private-sector due to credit, commercial and/or country risks;

E. Draw upon the experience of its members to identify how new financial technologies and other innovative solutions can expand access to trade finance for U.S. exporters; and

F. Report to the Secretary on its activities and recommendations. In creating its reports, the TFAC shall: (1) Evaluate current credit conditions and specific financing challenges faced by U.S. exporters, including SMEs, and their foreign buyers; (2) identify emerging financing sources that could address these gaps; (3) explore actions U.S. exporters can take to manage various risks more effectively, thus minimizing risk of non-payment or delayed payment to help enhance their ability to obtain financing; and (4) address any other issues requested by the Secretary, the Under Secretary for International Trade, or the Assistant Secretary for Industry and Analysis

### II. Structure, Membership, and Operation

The TFAC under the new charter will consist of up to twenty (20) members with a balanced and broad range of interests, including representatives from the trade finance industry and the U.S. exporting community, as well as experts from academia and public policy organizations.

The Secretary will seek to appoint to the TFAC individuals representing the following areas:

• U.S. companies that are exporters of goods and services;

• U.S. commercial banks that provide trade finance products, cross-border payment services, or foreign exchange solutions;

• Non-bank U.S. financial institutions that provide trade finance products, cross-border payment services, or foreign exchange solutions;

• Associations that represent: (a) U.S. exporters; and (b) U.S. commercial banks or non-bank financial institutions or other professionals that facilitate international trade transactions;

• U.S. companies or entities whose business includes trade-finance-related activities or services;

• U.S. scholars, academic institutions, or public policy organizations with expertise in global business, trade finance, and international banking related subjects; and

• Economic development organizations and other U.S. regional, state and local governmental and non-governmental organizations whose missions or activities include the analysis, provision, or facilitation of trade finance products/services.

Members will represent companies and organizations from a broad range of products and services, company sizes, and geographic locations. In accordance with applicable Department guidelines and in a manner that ensures that the TFAC is balanced in terms of points of view, Members will be selected based on their ability to carry out the objectives of the TFAC. Members, with the exception of those that serve as experts from academia and public policy organizations, serve in a representative capacity and representing their own views and interests and those of their particular sector, not as special government employees. The members that serve as experts (rather than as representatives) from academia and public policy organizations are Special Government Employees (SGEs), pursuant to 18 U.S.C. 202, are required to comply with certain ethics laws and rules, including filing a Confidential Financial Disclosure form. Additionally, a member serving as an expert must not be a Federally Registered Lobbyist. Prospective nominees should designate the capacity in which they are applying to serve and identify either their area of expertise or the U.S. industry sector they wish to represent.

Each member shall be appointed for a term of two years and will serve at the pleasure of the Secretary. The Secretary may at his/her discretion reappoint any member to an additional term or terms, provided that the member proves to work effectively on the TFAC, and his/her knowledge and advice is still needed.

In addition, designees from EXIM Bank, SBA, and the Trade Promotion Coordinating Committee Secretariat will serve as ex officio non-voting members.

### III. Compensation

Members will neither be paid for their engagement in the performance of their duties as members of the Council nor will receive per diem and travel expenses.

### IV. Nomination

The Department will consider nominations of all qualified individuals to ensure that the TFAC includes representatives of the viewpoint areas of subject matter expertise noted above (see Section II. ''Structure, Membership and Operation''). Individuals may nominate themselves or a company, institution, trade association, or organization may nominate a qualified representative for membership on the TFAC.

Applications for immediate consideration must be received by 5:00 p.m. EDT, Friday, November 13, 2020.

All applicants must submit the following:

1. Name and title of the individual requesting consideration.

2. The applicant's personal resume and short biography (less than 300 words).

3. A brief statement describing how the applicant will contribute to the work of the TFAC based on his/her unique experience and perspective (not to exceed 100 words).

4. All relevant contact information, including mailing address, fax, email, phone number, and support staff information where relevant.

5. An affirmative statement that the applicant meets all eligibility criteria, including an affirmative statement that the applicant is not required to register as a foreign agent under the Foreign Agents Registration Act of 1938, as amended.

6. For applicants to serve in a representative capacity, also submit:

a. A sponsor letter on the sponsoring entity's letterhead containing a brief statement of why the applicant should be considered for membership on the TFAC. This sponsor letter should also address the applicant's experience and leadership related to trade finance;

b. A brief description of the company, institution, trade association, or organization to be represented and its business activities and export market(s) served, if applicable;

c. Information regarding the ownership and control of the sponsoring entity, including the stock holdings as appropriate; and

d. The sponsoring entity's size (number of employees and annual sales), place of incorporation, product or service line, major markets in which the entity operates, and the entity's export or import experience.

7. For applicants to serve as experts (*i.e.,* not in a representative capacity), also submit:

a. A statement that the applicant is not a Federally registered lobbyist and that the applicant understands that, if appointed, the applicant will not be allowed to continue to serve as a Committee member if the applicant becomes a Federally registered lobbyist.

**Michael Fuchs,**

*Acting Director, Office of Finance and Insurance Industries, Industry & Analysis, International Trade Administration, U.S. Department of Commerce.*

[FR Doc. 2020–20302 Filed 9–14–20; 8:45 am]

BILLING CODE 3510–DR–P

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–533–840]**

### Certain Frozen Warmwater Shrimp From India: Notice of Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review

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

**SUMMARY:** The Department of Commerce (Commerce) is initiating a changed circumstances review (CCR) to determine if Hyson Exports Private Limited (Hyson Exports) is the successor-in-interest to Hyson Logistics and Marine Exports Private Limited (Hyson Logistics) in the context of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from India. We preliminarily determine that Hyson Exports is the successor-in-interest to Hyson Logistics.

**DATES:** Applicable September 15, 2020.

**FOR FURTHER INFORMATION CONTACT:** Adam Simons, 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) 482–6172.

**SUPPLEMENTARY INFORMATION:**

### Background

On February 1, 2005, Commerce published in the **Federal Register** an antidumping duty (AD) order on shrimp

from India.[1] On July 23, 2020, Hyson Exports requested that, pursuant to section 751(b) of the Tariff Act of 1930, as amended (the Act), 19 CFR 351.216, and 19 CFR 351.221(c)(3), Commerce conduct a CCR of the *Order* to confirm that Hyson Exports is the successor-in-interest to Hyson Logistics and, accordingly, to assign it the cash deposit rate of Hyson Logistics.[2] In its submission, Hyson Exports stated that Hyson Logistics undertook a name change to Hyson Exports but is otherwise unchanged.[3]

## Scope of the Order

The merchandise subject to the order is certain frozen warmwater shrimp.[4] The product is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) item numbers: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. Although the HTSUS numbers are provided for convenience and customs purposes, the written product description remains dispositive.

## Initiation and Preliminary Results of CCR

Pursuant to section 751(b)(1) of the Act, Commerce will conduct a CCR upon receipt of information concerning, or a request from, an interested party for a review of an AD order which shows changed circumstances sufficient to warrant a review of the order. The information submitted by Hyson Exports supporting its claim that it is the successor-in-interest to Hyson Logistics demonstrates changed circumstances sufficient to warrant such a review.[5] Therefore, in accordance with section 751(b)(1)(A) of the Act and 19 CFR 351.216(d) and (e), we are initiating a CCR based upon the information contained in Hyson Exports' submission.

Section 351.221(c)(3)(ii) of Commerce's regulations permits Commerce to combine the notice of initiation of a CCR and the notice of preliminary results if Commerce concludes that expedited action is warranted.[6] In this instance, because the record contains information necessary to make a preliminary finding, we find that expedited action is warranted and have combined the notice of initiation and the notice of preliminary results.[7]

In this CCR, pursuant to section 751(b) of the Act, Commerce conducted a successor-in-interest analysis. In making a successor-in-interest determination, Commerce examines several factors, including, but not limited to, changes in the following: (1) Management; (2) production facilities; (3) supplier relationships; and (4) customer base.[8] While no single factor or combination of factors will necessarily provide a dispositive indication of a successor-in-interest relationship, generally, Commerce will consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor.[9] Thus, if the record evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, Commerce may assign the new company the cash deposit rate of its predecessor.[10]

In accordance with 19 CFR 351.216, we preliminarily determine that Hyson Exports is the successor-in-interest to Hyson Logistics. Record evidence, as submitted by Hyson Exports, indicates that Hyson Exports operates as essentially the same business entity as Hyson Logistics with respect to the subject merchandise.[11] For the complete successor-in-interest analysis, including discussion of business proprietary information, refer to the accompanying successor-in-interest memorandum.[12] Commerce will issue its final results of the review in accordance with the time limits set forth in 19 CFR 351.216(e).

## Public Comment

Pursuant to 19 CFR 351.310(c), any interested party may request a hearing within 30 days of publication of this notice. In accordance with 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the case briefs, in accordance with 19 CFR 351.309(d). Parties who submit case or rebuttal briefs are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[13] All comments are to be filed electronically using Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) available to registered users at *https://access.trade.gov,* and must also be served on interested parties. An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the day it is due.[14] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[15]

Consistent with 19 CFR 351.216(e), we will issue the final results of this CCR no later than 270 days after the date on which this review was initiated, or within 45 days if all parties agree to our preliminary finding. This notice is published in accordance with sections 751(b)(1) and 777(i) of the Act and 19

[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India,* 70 FR 5147 (February 1, 2005) (*Order*).

[2] *See* Hyson Exports' Letter, ''Request for Changed Circumstances Review: Certain Frozen Warmwater Shrimp from India,'' dated July 23, 2020 (Hyson Exports CCR Request).

[3] *Id.* at 3–4.

[4] For a complete description of the scope of the *Order, see Certain Frozen Warmwater Shrimp from India: Final 2016–2017,* 83 FR 32835 (July 16, 2018), and accompanying Issues and Decision Memorandum at ''Scope of the Order.''

[5] *See* 19 CFR 351.216(d).

[6] *See* 19 CFR 351.221(c)(3)(ii); *see also Certain Pasta from Italy: Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review,* 80 FR 33480, 33480–41 (June 12, 2015) (*Pasta from Italy Preliminary Results*), unchanged in *Certain Pasta from Italy: Final Results of Changed Circumstances Review,* 80 FR 48807 (August 14, 2015) (*Pasta from Italy Final Results*).

[7] *See, e.g., Pasta from Italy Preliminary Results,* 80 FR at 33480–41, unchanged in *Pasta from Italy Final Results,* 80 FR at 48807.

[8] *See, e.g., Certain Frozen Warmwater Shrimp from India: Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review,* 81 FR 75376 (October 31, 2016) (*Shrimp from India Preliminary Results*), unchanged in *Certain Frozen Warmwater Shrimp from India: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 81 FR 90774 (December 15, 2016) (*Shrimp from India Final Results*).

[9] *See, e.g., Shrimp from India Preliminary Results,* 81 FR at 75377, unchanged in *Shrimp from India Final Results,* 81 FR at 90774.

[10] *Id.; see also Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber from Japan,* 67 FR 58, 59 (January 2, 2002); *Ball Bearings and Parts Thereof from France: Final Results of Changed-Circumstances Review,* 75 FR 34688, 34689 (June 18, 2010); and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Preliminary Results of Antidumping Duty Changed Circumstances Review,* 63 FR 14679 (March 26, 1998), unchanged in *Circular Welded Non-Alloy Steel Pipe from Korea; Final Results of Antidumping Duty Changed Circumstances Review,* 63 FR 20572 (April 27, 1998), in which Commerce found that a company which only changed its name and did not change its operations is a successor-in-interest to the company before it changed its name.

[11] *See* Hyson Exports CCR Request.

[12] *See* Memorandum, ''Certain Frozen Warmwater Shrimp from India: Initiation and Preliminary Results of Changed Circumstances Review,'' dated concurrently with this notice.

[13] *See* 19 CFR 351.309(c)(2).

[14] *See* 19 CFR 351.303(b).

[15] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

CFR 351.216(b), 351.221(b) and 351.221(c)(3).

Dated: September 9, 2020.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2020–20317 Filed 9–14–20; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XA488]**

### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meeting (online).

**SUMMARY:** The Pacific Fishery Management Council (Pacific Council, Council) will hold an online meeting of its Coastal Pelagic Species Management Team (CPSMT) to discuss coastal pelagic species (CPS) stock assessment priorities and other CPS-related topics. This meeting is open to the public.

**DATES:** The online meeting will be held Tuesday, September 29, 2020, 1 p.m. to 5 p.m. Pacific Daylight Time, or until business for the day has been completed.

**ADDRESSES:** The meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2412 for technical assistance.

*Council address:* Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

**FOR FURTHER INFORMATION CONTACT:** Kerry Griffin, Pacific Council; telephone: (503) 820–2409.

**SUPPLEMENTARY INFORMATION:** The CPSMT will be developing recommendations regarding CPS stock assessments to be conducted in 2022 and 2023 as guided by the Council's stock assessment prioritization process. The Council is scheduled to establish stock assessment priorities for 2022 and 2023 at its November 2020 meeting. The CPSMT may discuss a proposed CPS Fishery Management Plan amendment to address stock categories, as well as topics on the Council's November 2020 agenda, including the CPS methodology review process and workload planning.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

### Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov;* (503) 820–2412) at least ten days prior to the meeting date.

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

Dated: September 9, 2020.

**Tracey L. Thompson,**

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

[FR Doc. 2020–20272 Filed 9–14–20; 8:45 am]

**BILLING CODE 3510–22–P**

## COMMODITY FUTURES TRADING COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** 10:00 a.m. EDT, Thursday, September 17, 2020.

**PLACE:** Conference call.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') will hold this meeting to consider the following matters:

- Final Rule: Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations;
- Final Rule: Amendments to Real-Time Public Reporting Requirements (Part 43);
- Final Rule: Amendments to Swap Data Recordkeeping and Reporting Requirements (Part 45);
- Final Rule: Amendments to the CFTC's Regulations Relating to Certain Swap Data Repository and Data Reporting Requirements (43, 45, and 49 Verification); and
- Supplemental Notice of Proposed Rulemaking: Part 190 Bankruptcy Regulations.

The agenda for this meeting will be available to the public and posted on the Commission's website at *https://www.cftc.gov*. Instructions for public access to the live audio feed of the meeting will also be posted on the Commission's website. In the event that the time, date, or place of this meeting changes, an announcement of the change, along with the new time, date, or place of the meeting, will be posted on the Commission's website.

**CONTACT PERSON FOR MORE INFORMATION:** Christopher Kirkpatrick, Secretary of the Commission, 202–418–5964.

**Authority:** 5 U.S.C. 552b.

Dated: September 10, 2020.

**Christopher Kirkpatrick,**

*Secretary of the Commission.*

[FR Doc. 2020–20367 Filed 9–11–20; 11:15 am]

**BILLING CODE 6351–01–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Notice of Intent To Prepare an Environmental Impact Statement for a Submarine Dry Dock and Waterfront Production Facility at the Pearl Harbor Naval Shipyard and Intermediate Maintenance Facility, Oahu, Hawaii, and To Announce the Public Scoping Meeting

**AGENCY:** Department of the Navy, Defense (DoD).

**ACTION:** Notice.

**SUMMARY:** Pursuant to the National Environmental Policy Act (NEPA) of 1969, as implemented by the Council on Environmental Quality Regulations, the Department of the Navy (Navy) announces its intent to prepare an Environmental Impact Statement (EIS) to evaluate the potential environmental effects associated with construction and operation of a submarine dry dock (DD) replacement and waterfront production facility (WPF) at the Pearl Harbor Naval Shipyard and Intermediate Maintenance Facility (PHNSY & IMF) at Joint Base Pearl Harbor-Hickam (JBPHH), Oahu, Hawaii. PHNSY & IMF is situated on the eastern shore of Pearl Harbor on the south side of the island of Oahu. The DD and WPF will provide required capability to perform depot-level maintenance on current and future classes of fast-attack submarines and improve operational readiness. An EIS is considered the appropriate document for comprehensively analyzing the proposed action, which is to demolish existing facilities and construct new facilities, utilities, and infrastructure at PHNSY & IMF.

**DATES:** The Navy is initiating a 32-day public scoping process beginning on September 11, 2020 and extending through October 13, 2020. The purpose of the public scoping process is to identify community interests and to receive comments on the scope of the EIS and the project's potential to affect historic properties pursuant to Section 106 of the National Historic Preservation Act of 1966. This public scoping process starts with the publication of this Notice of Intent. The Navy is providing two web-based platforms for the public to learn about the Proposed Action and provide scoping comments. All comments are due by October 13, 2020.

**ADDRESSES:** The two web-based platforms include the following:

1. A virtual Open House. The virtual Open House will be available at *www.PearlHarborDryDockEISOpen House.org* from 12:00 a.m. Hawaii Standard Time (HST) on September 11, 2020, to 11:59 p.m. (HST) on October 13, 2020. The virtual Open House will present an overview of the Proposed Action, preliminary alternatives, and the NEPA process, and will allow the public to electronically submit comments on the scope of the EIS and to identify specific environmental concerns or topics for consideration in the document. Additionally, the public will have the opportunity to participate in the Section 106 process through the virtual Open House. The public will be able to electronically submit comments on the project's potential to affect historic properties pursuant to Section 106 of the National Historic Preservation Act of 1966 (NHPA), and the Navy's ongoing development of a Nationwide Programmatic Agreement for the Shipyard Infrastructure Optimization Program. The public is invited to visit *https://www.navalshipyards-nhpa.com* to find out more about the Section 106 consultation.

2. A virtual Public Scoping Meeting. The virtual Public Scoping Meeting will be held on September 29, 2020, from 4:30 to 6:00 p.m. (HST) as an additional means to learn about the Proposed Action through a live presentation and question and answer session held by Navy representatives. Additionally, resource-specific breakout sessions are planned for 6:00–7:00 p.m. HST. Information concerning the virtual Public Scoping Meeting and resource-specific breakout sessions time and web location is available on the EIS website at: *www.PearlHarborDryDockEIS.org*. The Navy will also announce the virtual Public Scoping Meeting date, time, and location in the local newspaper. The virtual Public Scoping Meeting provides another opportunity for the public to participate in the NEPA and NHPA Section 106 processes and electronically submit comments.

If the virtual Scoping Meeting cannot be held on September 29, 2020, due to an unforeseen challenge, please check the EIS website at *www.PearlHarbor DryDockEIS.org* for information on the rescheduled meeting.

**FOR FURTHER INFORMATION CONTACT:** Andréa M. Von Burg Hall, Navy PHNSY DD/WPF EIS Project Manager, by telephone (808–472–1425), email (*andrea.vonburg-hall@navy.mil*), or by mail at Naval Facilities Engineering Command Pacific, Attn: PHNSY DD/WPF EIS Project Manager, 258 Makalapa Drive, Suite 100, Joint Base Pearl Harbor-Hickam, HI 96860–3134.

**SUPPLEMENTAL INFORMATION:** Depot maintenance for PHNSY & IMF requires four DDs capable of docking current and future classes of submarines. In addition, to accommodate future submarine maintenance demands at PHNSY & IMF and improve operational readiness, the time spent servicing each submarine at the DD must be reduced. Infrastructure improvements and rearrangement of functions at PHNSY are, therefore, needed to ensure adequate capacity and operational efficiency.

The purpose of the Proposed Action is to provide appropriate DD capacity at PHNSY & IMF to meet depot maintenance requirements and to provide a properly sized and configured WPF to enable efficient submarine maintenance.

The Navy proposes DD replacement at PHNSY & IMF capable of performing depot-level maintenance on current and future fast-attack submarines. To meet the purpose and need, the Navy's Proposed Action is to construct and operate a graving DD replacement and WPF at PHNSY & IMF, including permanent ancillary facilities such as new power and utilities. A graving or excavated DD is one that is constructed on land near the shore, using concrete. Other construction-related actions would include dredging, upgrade or replacement of new in-water structures, demolition of existing upland structures, and construction of new upland facilities.

The Navy has identified four preliminary action alternatives to carry forward for analysis in the EIS along with the No Action alternative. These alternatives will be further refined based on input received from the public and resource agencies during scoping.

Alternative 1 (No Action Alternative) would be no change from the status quo. A submarine DD replacement and WPF would not be built, and PHNSY & IMF would continue to service submarines using its existing infrastructure. Following the phasing out of the Los Angeles Class submarine in 2022, DD 3 would no longer be capable of servicing any active submarines due to size limitations.

Alternative 2 would consist of a covered graving DD replacement and bridge crane. A new WPF would be located east of the DD, servicing both the replacement DD and DD #2.

Alternative 3 would consist of a covered graving DD replacement and bridge crane. A new WPF would be located west of the DD and would service only the replacement DD.

Alternative 4 would consist of an uncovered graving DD replacement, operated using a portal or gantry crane. A new WPF would be located east of the DD, servicing both the DD replacement and DD #2.

Alternative 5 would consist of an uncovered graving DD replacement, operated using a portal or gantry crane. A new WPF would be located west of the DD and would service only the DD replacement.

Environmental issues and resource areas to be examined in the EIS include, but are not limited to the following: Cultural Resources, Visual Resources, Public Health and Safety, Land Use, Socioeconomics, Environmental Justice, Soils, Water Quality, Topography and Geology, Air Quality, Terrestrial Biology, Marine Biology, Traffic, Marine Navigation, Noise, Utilities, and Hazardous Materials. The EIS will also analyze measures that would avoid, minimize, or mitigate environmental effects. Additionally, the Navy will conduct all coordination and consultation activities required by the National Historic Preservation Act, the Endangered Species Act, the Magnuson-Stevens Fishery Conservation and Management Act, the Clean Water Act, the Coastal Zone Management Act, and other laws and regulations determined to be applicable to the project.

The Navy encourages federal, state, and local agencies, and interested persons to provide comments concerning the alternatives proposed for study and environmental issues for analysis in the EIS, as well as to identify specific environmental resources that the Navy should consider when developing the Draft EIS. The Navy will prepare the Draft EIS, including analysis of potential effects to those resources, which the Navy and the commenting public has identified. All comments

received during the public scoping period will receive consideration during EIS preparation.

Written comments on the scope of the EIS or the project's potential to affect historic properties pursuant to Section 106 of the National Historic Preservation Act of 1966 can be mailed or submitted electronically via the virtual Open House. To receive consideration, comments submitted by mail must be postmarked no later than October 13, 2020. Comments may be mailed to the following address: Naval Facilities Engineering Command Pacific, Attn: PHNSY DD/WPF EIS Project Manager, 258 Makalapa Drive, Suite 100, Joint Base Pearl Harbor-Hickam, HI 96860–3134.

Comments may also be submitted electronically through the EIS website at *www.PearlHarborDryDockEIS.org* or the virtual Open House website, online at *www.PearlHarborDryDockEISOpen House.org*. Comments must be posted by 11:59pm HST on October 13, 2020.

Dated: September 3, 2020.

**D.J. Antenucci,**

*Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. 2020–19961 Filed 9–14–20; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF EDUCATION

### Applications for New Awards; Fund for the Improvement of Postsecondary Education—Open Textbooks Pilot Program

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2020 for the Open Textbooks Pilot program conducted under the Fund for the Improvement of Postsecondary Education (FIPSE), Catalog of Federal Domestic Assistance (CFDA) number 84.116T. This notice relates to the approved information collection under OMB control number 1894–0006.

**DATES:** *Applications available:* September 15, 2020.

*Deadline for transmittal of applications:* November 16, 2020.

**ADDRESSES:** For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 12, 2018 (83 FR 6003) and available at *www.gpo.gov/fdsys/pkg/FR-2018-02-12/pdf/2018-02558.pdf*.

**FOR FURTHER INFORMATION CONTACT:** Stacey Slijepcevic, U.S. Department of Education, 400 Maryland Avenue SW, room 268–34, Washington, DC 20202. Telephone: (202) 453–6150. Email: *stacey.slijepcevic@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The Open Textbooks Pilot program supports projects at eligible institutions of higher education (IHEs) that create new open textbooks (as defined in this notice) and expand the use of open textbooks in courses that are part of a degree-granting program, particularly those with high enrollments. Applicants are encouraged to develop projects that demonstrate the greatest potential to achieve the highest level of savings for students through sustainable, expanded use of open textbooks in high-enrollment courses (as defined in this notice) or in programs that prepare individuals for in-demand fields.

*Priorities:* These priorities are from the notice of final priorities, requirements, and definitions (NFP) for this program published elsewhere in this issue of the **Federal Register**.

*Absolute Priorities:* For FY 2020 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), we consider only applications that meet each of these priorities.

These priorities are:

*Absolute Priority 1—Improving Collaboration and Dissemination.*

To meet this priority, an eligible applicant must propose to lead and carry out projects that involve a consortia of institutions, instructors, and subject matter experts, including no less than three IHEs, along with relevant employers, workforce stakeholders (as defined in this notice), and/or trade or professional associations (as defined in this notice). Applicants must explain how the members of the consortium will work together to develop and implement open textbooks that: (a) Reduce the cost of college for large numbers of students through a variety of cost saving measures; and (b) contain instructional content and ancillary instructional materials that align student learning objectives with the skills or knowledge required by large numbers of students (at a given institution or nationally), or in the case of a career and technical postsecondary program, meet industry standards in in-demand industry sectors or in-demand occupations (as defined in this notice).

*Absolute Priority 2—Addressing Gaps in the Open Textbook Marketplace and Bringing Solutions to Scale.*

To meet this priority, an applicant must identify the gaps in the open textbook marketplace in courses that are part of a degree-granting program that it seeks to address and propose how to close such gaps. An applicant must propose a comprehensive plan to: (a) Identify and assess existing open educational resources in the proposed subject area before creating new ones, such as by identifying any existing open textbooks that could potentially be used as models for the design of the project or ancillary learning resources that would support the development of courses that use open textbooks; (b) focus on the creation and expansion of education and training materials that can be scaled, within and beyond the participating consortium members, to reach a broad range of students participating in high-enrollment courses or preparing for in-demand industry sectors or in-demand occupations (as defined in this notice); (c) create and disseminate protocols to review any open textbooks created or adapted through the project for accuracy, rigor, and accessibility for students with disabilities; (d) disseminate information about the results of the project to other IHEs, including promoting the adoption of any open textbooks created or adapted through the project, or adopting open standard protocols and processes that support the interoperability for any digital assets created; (e) include professional development to build capacity of faculty, instructors, and other staff to adapt and use open textbooks; and (f) describe the courses for which open textbooks and ancillary materials are being developed.

*Absolute Priority 3—Promoting Student Success.*

To meet this priority, an applicant must propose to build upon existing open textbook materials and/or develop new open textbooks for high-enrollment courses or high-enrollment programs in order to achieve the highest level of savings for students.

Additionally, this priority requires the applicant to include plans for: (a) Promoting and tracking the use of open textbooks in postsecondary courses across participating members of the

consortium, including an estimate of the projected direct cost savings for students which will be reported during the annual performance review; (b) monitoring the impact of open textbooks on instruction, learning outcomes, course outcomes, and educational costs; (c) investigating and disseminating evidence-based practices associated with using open textbooks that improve student outcomes; and (d) updating the open textbooks beyond the funded period.

*Competitive Preference Priority:* For FY 2020 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 5 points to an application, depending on how well the application meets this priority.

This priority is:

*Using Technology-Based Strategies for Personalized Learning and Continuous Improvement (up to 5 points).*

To meet this priority, an applicant must propose a project that focuses on improving instruction and student learning outcomes by integrating technology-based strategies, such as personalized learning, and providing support to faculty, instructors, and other staff who are delivering courses using these techniques. The project must enable students to tailor and monitor their own learning and/or allow instructors to monitor the individual performance of each student in the classes or courses for which the applicant proposes to develop open textbooks. In addition, online and technology-enabled content and courses developed under this project must incorporate the principles of universal design in order to ensure that they are readily accessible by all students. The openly licensed resources that are developed should support traditional, text-based materials, including through such tools as adaptive learning modules, digital simulations, and tools to assist student engagement.

*Invitational Priority:* For FY 2020 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an invitational priority. Under 34 CFR 75.105(c)(1), we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

An application from a Minority-Serving Institution (MSI) (as defined in this notice) or community college (as defined in this notice) that leads the activities of the consortium and serves as the fiscal agent; or an application from a consortium in which an MSI or community college is a member of the consortium but not the lead applicant.

For the purpose of this priority:

*Community college* means an institution that meets the definition in section 312(f) of the HEA (20 U.S.C. 1058(f)); or an IHE (as defined in section 101 of the HEA) that awards degrees and certificates, more than 50 percent of which are not bachelor's degrees (or an equivalent) or master's, professional, or other advanced degrees.

*Minority-Serving Institution* means an institution that is eligible to receive assistance under sections 316 through 320 of part A of title III, under part B of title III, or under title V of the HEA.

**Note:** The list of institutions currently designated as eligible under title III and title V is available at: *www2.ed.gov/about/offices/list/ope/idues/eligibility.html#el-inst.*

*Requirements:* These requirements are from the NFP and apply to this competition for FY 2020 and any subsequent year in which we make awards from the list of unfunded applications from this competition.

*Eligible Applicants:* Eligible applicants are IHEs as defined in section 101 of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1001), or State higher education agencies that—

(a) Lead the activities of a consortium that is comprised of at least—

(1) Three IHEs, as defined in section 101 of the HEA;

(2) An educational technology or electronic curriculum design expert (which may include such experts that are employed by one or more of the consortium institutions); and

(3) An advisory group of at least three employers, workforce organizations, or sector partners (as defined in this notice); and

(b) Have demonstrated experience in the development and implementation of open educational resources.

*Accessibility:* All digital content developed under this grant program must incorporate the principles of universal design (*www.cast.org/udl/*) to ensure that they are accessible to individuals with disabilities. The content and courses must be in full compliance with the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, as amended, and the Web Content Accessibility Guidelines 2.0, Level AA (*www.w3.org/TR/WCAG/*).

*Technical Standards for Interoperability:* All digital assets developed under this grant program must be produced to maximize interoperability, exchange, and reuse and must conform to industry-recognized open standards and specifications. Applicants must identify the industry standard they will use. All digital assets created in whole or in part under this grant program must be licensed for free, attributed public use and distribution as required under 2 CFR 3474.20.

*Definitions:* The following definitions are from the NFP and apply to this competition for FY 2020 and any subsequent year in which we make awards from the list of unfunded applications from this competition.

*High-enrollment courses* means courses that are required for a degree granting program offered by an eligible IHE that either have total student enrollments within the top third of courses: (a) At the lead institution, if applicable, or at one or more of the consortia partner institutions; (b) in the State; or (c) nationally as compared to other academic or career and technical education courses.

*High-enrollment program* means a program that yields a postsecondary degree that either has total student enrollments within the top third of programs: (a) At the lead institution, if applicable, or at one or more of the consortia partner institutions; (b) in the State; or (c) nationally as compared to other academic or career and technical education courses.

*In-demand industry sector* means an industry sector that has a substantial current or potential impact (including through jobs that lead to economic self-sufficiency and opportunities for advancement) on the State, regional, or local economy, as appropriate, and that contributes to the growth or stability of other supporting businesses, or the growth of other industry sectors.

*In-demand occupation* means an occupation that currently has or is projected to have a number of positions (including positions that lead to economic self-sufficiency and opportunities for advancement) in an industry sector so as to have a significant impact on the State, regional, or local economy, as appropriate.

*Open textbook* means a textbook that is licensed under a worldwide, nonexclusive, royalty-free, perpetual, and irrevocable license to the public to exercise any of the rights under copyright conditioned only on the requirement that attribution be given as directed by the copyright owner. An open textbook may also include a variety of open educational resources or materials used by instructors in the development of a course and those

learning activities necessary for successful completion of a course by students. These include any learning exercises, technology-enabled experiences (*e.g.,* simulations), and adaptive support and assessment tools.

*Sector partner* means a member of a workforce collaborative, convened by or acting in partnership with a State board or local board, that organizes key stakeholders interconnected by labor markets, technologies, and worker skill needs into a working group that focuses on shared goals and resource needs.

*Trade or professional association* means a membership organization that inspects employers or practitioners, or leads credentialing programs, in a specific industry or sector.

*Workforce stakeholder* means an individual or organization with an interest in the employability of others either for self-interest or the interest of other employers.

*Program Authority:* 20 U.S.C. 1138–1138d; the explanatory statement accompanying H.R. 1865 (Pub. L. 116–94), Congressional Record, daily edition, Dec. 17, 2019, at H11083.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The NFP.

**Note:** The regulations in 34 CFR part 86 apply to IHEs only.

**Note:** Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $6,029,425.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in subsequent years from the list of unfunded applications for this competition.

*Estimated Range of Awards:* $500,000–$2,000,000.

*Estimated Average Size of Awards:* $1,000,000.

*Maximum Award:* We will not make an award exceeding $2,000,000 for a single budget period of 36 months.

*Estimated Number of Awards:* 3–12.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 36 months.

## III. Eligibility Information

1. *Eligible Applicants:* Eligible applicants are IHEs as defined in section 101 of the HEA (20 U.S.C. 1001), or State higher education agencies that:

(a) Lead the activities of a consortium that is comprised of at least:

(i) Three IHEs as defined in section 101 of the HEA;

(ii) An educational technology or electronic curriculum design expert (which may include such experts that are employed by one or more of the consortium institutions); and

(iii) An advisory group of at least three employers, workforce organizations, or sector partners; and

(b) Have demonstrated experience in the development and implementation of open educational resources.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* Under 34 CFR 75.708(b) and (c) a grantee under this competition may award subgrants—to directly carry out project activities described in its application—to entities listed in the grant application.

## IV. Application and Submission Information

1. *Application Submission Instructions:* For information on how to submit an application please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 12, 2018 (83 FR 6003), and available at *www.gpo.gov/fdsys/pkg/FR-2018-02-12/pdf/2018-02558.pdf.*

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the Open Textbook Pilot, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. However, under 34 CFR 79.8(a), we waive intergovernmental review in order to make awards by the end of FY 2020.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 60 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions.
- Use a readable 12-point font such as Times New Roman, Courier, Courier New, or Arial.

The recommended 60 page limit applies only to the application narrative and does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support.

6. *Program Profile:* Applicants must indicate in the recommended one-page abstract and on the FY 2020 Open Textbook Pilot program Profile Form in the application package all of the IHEs that comprise the consortium, and whether they addressed the competitive preference priority and the invitational priority.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210. The maximum score for all of the selection criteria is 100 points. The maximum score for each criterion is included in parentheses following the title of the specific selection criterion. Each criterion also includes the factors that reviewers will consider in

determining the extent to which an applicant meets the criterion.

Points awarded under the competitive preference priority are in addition to any points an applicant earns for all of the selection criteria in this notice. The maximum score that an application may receive under the competitive preference priority and the selection criteria is 105. The selection criteria are as follows:

a. *Significance (up to 20 points).*

The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers the following factors:

(1) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population (up to 10 points).

(2) The potential replicability of the proposed project or strategies, including, as appropriate, the potential for implementation in a variety of settings (up to 10 points).

b. *Quality of the Project Design (up to 16 points).*

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable (up to 4 points).

(2) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs (up to 4 points).

(3) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance (up to 4 points).

(4) The extent to which the proposed project represents an exceptional approach to the priority or priorities established for the competition (up to 4 points).

c. *Quality of Project Services (up to 15 points).*

The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following factors:

(1) The likelihood that the services to be provided by the proposed project will lead to improvements in the achievement of students as measured against rigorous academic standards (up to 5 points).

(2) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services (up to 5 points).

(3) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services (up to 5 points).

d. *Quality of Project Personnel (up to 9 points).*

The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Secretary considers the following factors:

(1) The qualifications, including relevant training and experience, of the project director or principal investigator (up to 5 points).

(2) The qualifications, including relevant training and experience, of key project personnel (up to 4 points).

e. *Adequacy of Resources (up to 20 points).*

The Secretary considers the adequacy of resources for the proposed project. In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

(1) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project (up to 10 points).

(2) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project (up to 10 points).

f. *Quality of the Management Plan (up to 10 points).*

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks (up to 5 points).

(2) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project (up to 5 points).

g. *Quality of the Project Evaluation (up to 10 points).*

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

(1) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project (up to 5 points).

(2) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible (up to 5 points).

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For this competition, a panel of external reviewers will read, prepare a written evaluation of, and score all eligible applications using the selection criteria and the competitive preference priority, if applicable, provided in this notice. The individual scores of the reviewers will be added and the sum divided by the number of reviewers to determine the peer review score. The Department may use more than one tier of reviews in evaluating grantees. The Department will prepare a rank order of applications based solely on the evaluation of their quality according to

the selection criteria and competitive preference priority points.

In the event there are two or more applications with the same final score in the rank order listing, and there are insufficient funds to fully support each of these applications, the Department will apply the following procedure to determine which application or applications will receive an award:

First Tiebreaker: The first tiebreaker will be the highest average score for the selection criterion ''Quality of the Project Design.'' If a tie remains, the second tiebreaker will be utilized.

Second Tiebreaker: The second tiebreaker will be the highest average score for the selection criterion ''Significance.'' If a tie remains, the third tiebreaker will be utilized.

Third Tiebreaker: The third tiebreaker will be the highest average score for the competitive preference priority. If a tie remains, the fourth tiebreaker will be utilized.

Fourth Tiebreaker: The applicant that proposes the highest estimate of projected savings that will be achieved for students in response to Absolute Priority 3.

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we will notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also. If your application is not evaluated or not selected for funding, we will notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html*.

5. *Performance Measures:* The Department will use the following performance measures in assessing the performance of the Open Textbooks Pilot program grants:

a. The number of students who enrolled in courses that use open textbooks and/or ancillary materials developed through the grant;

b. The number of students who completed courses that used open textbooks and/or ancillary materials developed through the grant;

c. The failure rate or withdrawal rate in courses that use open textbooks and/or ancillary materials compared with equivalent courses that used commercial textbooks;

d. The number of faculty/instructors that use open textbooks and/or ancillary materials developed through the grant;

e. The number of institutions within the consortium, and the number of institutions outside of the consortium, that adopted the use of open textbooks and/or ancillary materials developed through the grant;

f. The number of courses among consortium members that adopted the use of open textbooks and/or ancillary materials developed through the grant, compared to those that continued to use commercial textbooks;

g. The number of faculty/instructors or institutions that use tools for revising and remixing open educational resources content to facilitate adoption of open textbooks and/or ancillary materials developed through the grant;

h. The average grade of students who completed a course that used open textbooks and/or ancillary materials developed through the grant compared with the equivalent average grade of students that used commercial textbooks;

i. The average cost savings per student; and

j. The total cost savings for students who used open textbooks and/or ancillary materials developed through the grant compared to students in the same course of study who used traditional textbooks.

**VII. Other Information**

*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.

**Robert L. King,**

*Assistant Secretary for Postsecondary Education.*

[FR Doc. 2020–20379 Filed 9–14–20; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2020–SCC–0146]**

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application for Grants Under the Educational Opportunity Centers Program

**AGENCY:** Office of Postsecondary Education, Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, ED is proposing a reinstatement with change.

**DATES:** Interested persons are invited to submit comments on or before October 15, 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 Rachael Wiley, 202–453–6078.

**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

*Title of Collection:* Application for Grants under the Educational Opportunity Centers Program.

*OMB Control Number:* 1840–0820.

*Type of Review:* Reinstatement with Change.

*Respondents/Affected Public:* Private Sector; State, Local, and Tribal Governments.

*Total Estimated Number of Annual Responses:* 610.

*Total Estimated Number of Annual Burden Hours:* 15,020.

*Abstract:* The Department of Education is requesting a reinstatement with change of the application for grants under the Educational Opportunity Centers (EOC) Program. The Department is requesting a reinstatement with change because the previous EOC application expired in December 2018 and the application will be needed for a Fiscal Year (FY) 2021 competition for new awards. The Department expects an increase in respondents for the FY 2021 competition for new awards. The FY 2021 application incorporates new competitive preference priorities.

Dated: September 10, 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. 2020–20298 Filed 9–14–20; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2020–SCC–0148]**

### Agency Information Collection Activities; Comment Request

**AGENCY:** Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

**DATES:** Interested persons are invited to submit comments on or before November 16, 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–0148. 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 6W208D, Washington, DC 20202–8240.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Tanesha Hembrey, 202–260–1719.

**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:* Office of State Support Progress Check Quarterly Protocol.

*OMB Control Number:* 1810–0733.

*Type of Review:* Extension without change.

*Respondents/Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Annual Responses:* 53.

*Total Estimated Number of Annual Burden Hours:* 636.

*Abstract:* The Office of School Support and Accountability (SSA) administers Title I, Sections 1001–1004 (School Improvement); Title I, Part A (Improving Basic Programs Operated by Local Educational Agencies); Title I, Part B (Enhanced Assessments Grants (EAG), and Grants for State Assessments and Related Activities); Title II, Part A (Supporting Effective Instruction); Title III, Part A (English Language Acquisition, Language Enhancement, and Academic Achievement); and School Improvement Grants (SIG). Quarterly progress checks, phone or in-person conversations every three months of a fiscal year with State directors and coordinators, help ensure that State Educational Agencies (SEAs) are making progress toward increasing student achievement and improving the quality of instruction for all students through regular conversations about the quality of SEA implementation of SSA administered programs. The information shared with the SSA helps inform the selection and delivery of technical assistance to SEAs and aligns structures, processes, and routines so the SSA can regularly monitor the connection between grant administration and intended outcomes. Progress checks also allow the SSA to proactively engage with SEAs to identify any issues ahead of formal monitoring visits, decreasing the need for enforcement actions and minimizing burden for SEAs. ED will collect this data from the 53 grantees that receive the grants listed above to inform its review of grantee implementation, outcomes, oversight, and accountability. In order to allow for a comprehensive program review of SSA grantees, we are requesting a three-year clearance with this form.

Dated: September 10, 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. 2020–20336 Filed 9–14–20; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Notice of Request for Information (RFI) on Engaging States To Advance State Energy Office Priorities

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE).

**ACTION:** Request for information (RFI).

**SUMMARY:** The U.S. Department of Energy (DOE) invites public comment on its Request for Information (RFI) number DE–FOA–0002274 regarding Engaging States to Advance State Energy Office Priorities. The U.S Department of Energy's (DOE), Office of Energy Efficiency and Renewable Energy (EERE), State Energy Program (SEP) seeks information from the public on organizations, including industry, academia, nonprofit organizations, and others, that have the expertise and capacity to support state energy offices (SEOs). The desired outcome of this request is to enhance how DOE SEP delivers specific technical assistance and provides direct support to help states maximize the affordability, reliability, and resiliency of their state-led energy policies and programs.

**DATES:** Responses to the RFI must be received no later than 5:00 p.m. EST on October 15, 2020.

**ADDRESSES:** Interested parties are to submit comments electronically to *State_Energy_OfficeRFI_DOEWIP@ee.doe.gov*. Include Engaging States to Advance State Energy Office Priorities in the subject of the title. Only electronic responses will be accepted. The complete RFI document is located at *https://eere-exchange.energy.gov/*.

**FOR FURTHER INFORMATION CONTACT:** Questions may be addressed to Greg Dierkers at *gregory.dierkers@ee.doe.gov* or 202–287–1921. Further instruction can be found in the RFI document posted on EERE Exchange.

**SUPPLEMENTARY INFORMATION:** The purpose of this RFI is to solicit feedback from industry, academia, nonprofits, consultants, and other organizations that have deep expertise in the energy situation, needs and opportunities in all 56 states and territories and extensive experience working directly with state energy office directors and their senior staff. The State Energy Program is specifically interested in information on such organizations' capacity as well as the ability and experience to provide direct support to all 56 State Energy Offices delegated by their governors with implementation of the State Energy Program. The RFI is available at: *https://eere-exchange.energy.gov/*.

#### Confidential Business Information

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: One copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

#### Signing Authority

This document of the Department of Energy was signed on August 19, 2020, by AnnaMaria Garcia, Director, Weatherization and Intergovernmental Programs Office, Office of Energy Efficiency and Renewable Energy,

pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on September 10, 2020.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

[FR Doc. 2020–20339 Filed 9–14–20; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EF20–8–000]**

### Western Area Power Administration; Notice of Filing

Take notice that on August 31, 2020, Western Area Power Administration submitted tariff filing: 2021 base charge and rates for electric service to be effective 10/1/2020 for Boulder Canyon Project.

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 30, 2020.

Dated: September 3, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20241 Filed 9–14–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER20–2069–000.
*Applicants:* Wheatridge Wind Energy, LLC.
*Description:* Second Amendment to June 16, 2020 Wheatridge Wind Energy, LLC tariff filing.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5212.
*Comments Due:* 5 p.m. ET 9/14/20.

*Docket Numbers:* ER20–2070–000.
*Applicants:* Wheatridge Wind II, LLC.
*Description:* Second Amendment to June 16, 2020 Wheatridge Wind II, LLC tariff filing.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5213.
*Comments Due:* 5 p.m. ET 9/14/20.

*Docket Numbers:* ER20–2108–001.
*Applicants:* Great Bay Solar II, LLC.
*Description:* Tariff Amendment: Deficiency Response (ER20–2108) to be effective 8/18/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5152.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2611–001.
*Applicants:* Southwest Power Pool, Inc.
*Description:* Tariff Amendment: 3723 Southwestern Power Admin/WFEC Inter Agr-Amended Filing to be effective 8/1/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5059.
*Comments Due:* 5 p.m. ET 9/30/20.

*Docket Numbers:* ER20–2816–000.
*Applicants:* PacifiCorp.
*Description:* Supplemental Information in Compliance with September 4, 2020 Order on Emergency Waiver Petition of PacifiCorp.
*Filed Date:* 9/8/20.
*Accession Number:* 20200908–5223.
*Comments Due:* 5 p.m. ET 9/29/20.

*Docket Numbers:* ER20–2837–000.
*Applicants:* Public Service Company of Colorado.
*Description:* § 205(d) Rate Filing: KEPCO_effective 1.1.21 to be effective 1/1/2021.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5000.
*Comments Due:* 5 p.m. ET 9/30/20.

*Docket Numbers:* ER20–2838–000.
*Applicants:* California Independent System Operator Corporation.
*Description:* § 205(d) Rate Filing: 2020–09–09 Transferred Frequency Response Agreement—Tucson Electric Power to be effective 12/1/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5003.
*Comments Due:* 5 p.m. ET 9/30/20.

*Docket Numbers:* ER20–2839–000.
*Applicants:* Inova Energy LLC.
*Description:* Baseline eTariff Filing: Inova Energy LLC Market Based Rate Filing to be effective 11/8/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5005.
*Comments Due:* 5 p.m. ET 9/30/20.

*Docket Numbers:* ER20–2840–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Original ISA No. 5744; Queue No. AF1–324 to be effective 8/10/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5069.
*Comments Due:* 5 p.m. ET 9/30/20.

*Docket Numbers:* ER20–2841–000.
*Applicants:* Southern California Edison Company.
*Description:* § 205(d) Rate Filing: Second Amended LGIA Maverick Solar Maverick Solar 4 EDF Renewables Almasol Gen to be effective 9/10/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5077.
*Comments Due:* 5 p.m. ET 9/30/20.

*Docket Numbers:* ER20–2842–000.
*Applicants:* Thunderhead Wind Energy LLC.

*Description:* Request for Prospective Tariff Waiver, et al. of Thunderhead Wind Energy LLC.

*Filed Date:* 9/9/20.

*Accession Number:* 20200909–5107.

*Comments Due:* 5 p.m. ET 9/30/20.

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: September 9, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20322 Filed 9–14–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP18–260–000]**

### Transcontinental Gas Pipe Line Company, LLC; Notice of Request for Extension of Time

Take notice that on August 31, 2020, Transcontinental Gas Pipe Line Company, LLC (Transco) requested that the Federal Energy Regulatory Commission (Commission) grant an extension of time, until October 23, 2021, to complete abandonment of its North Padre Island (NPI) Lateral from NPI Block 956 to approximately 3.5 miles from shore, Offshore Texas, and its NPI Block ''B'' Platform (Project), as originally authorized in the October 24, 2018 Order Issuing Certificate (October 24 Order).[1] On October 21, 2019, FERC approved Transco's October 17, 2019 request for a waiver of Ordering Paragraph (B) of the Order and granted an extension of time until and including October 23, 2020 to complete abandonment of Project facilities.[2]

On May 19, 2020 FERC approved Transco's May 14, 2020 request for notice to proceed with Project construction activities.[3] On August 21, 2020 Transco provided notice that construction activities commenced for the Project.[4] Transco states that among other factors, offshore weather systems including Hurricane Hanna have caused significant delays for construction start, and Hurricanes Marco and Laura suspended construction activities and caused de-mobilizations from the construction site in the Gulf of Mexico. Weather permitting, the offshore construction window generally runs from May 1st through September 30th of each year allowing for a very limited window to safely complete activities offshore. Transco states that with the offshore construction window closing soon, Transco intends to complete the platform decommissioning and pipeline abandonment this year and anticipates deferring the platform and jacket removal scope to next year.

This notice establishes a 15-calendar day intervention and comment period deadline. Any person wishing to comment on the applicant'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).[5]

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,[6] the Commission will aim to issue an order acting on the request within 45 days.[7] The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension.[8] 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.[9] 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.[10] 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 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.

[1] *Transcontinental Gas Pipe Line Company, LLC,* 165 FERC ¶ 62,047 (2018).

[2] *Transcontinental Gas Pipe Line Company, LLC,* Letter Order Re: Request for Waiver, Docket No. CP18–260–000 (October 21, 2019).

[3] *Transcontinental Gas Pipe Line Company, LLC,* Letter Order Re: Notice to Proceed with Construction, Docket No. CP18–260–000 (May 19, 2020).

[4] *Transcontinental Gas Pipe Line Company, LLC,* Notice of Commencement of Construction, Docket No. CP18–260–000 (August 21, 2020).

[5] 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).

[6] Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 CFR 385.2201(c)(1) (2019).

[7] *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 40 (2020).

[8] Id. at P 40.

[9] 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.

[10] *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 40 (2020).

*Comment Date:* 5:00 p.m. Eastern Time on September 21, 2020.

Dated: September 4, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20238 Filed 9–14–20; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER20–2812–000]**

### Terminus Hydroelectric, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Terminus Hydroelectric, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 24, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: September 4, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20242 Filed 9–14–20; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER20–2839–000]**

### Inova Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Inova Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 29, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: September 9, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20330 Filed 9–14–20; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Numbers:* CP20–519–000.

*Applicants:* Transcontinental Gas Pipe Line Company, LLC.

*Description:* Transcontinental Gas Pipe Line Company, LLC submits an amendment regarding the Southeastern Trail Project under CP20–519–000

Application/Petition/Request | Tariff Filing.

*Filed Date:* 9/1/20.

*Accession Number:* 20200901–5306.

*Comments Due:* 5 p.m. ET 9/11/20.

*Docket Numbers:* RP20–1162–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* § 4(d) Rate Filing: Name Change Cleanup—CenterPoint Energy to Symmetry Energy to be effective 10/2/2020.

*Filed Date:* 9/2/20.

*Accession Number:* 20200902–5095.

*Comments Due:* 5 p.m. ET 9/14/20.

*Docket Numbers:* RP20–1163–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* § 4(d) Rate Filing: Negotiated Rate—City of Lakeland 9235960 to be effective 10/1/2020.

*Filed Date:* 9/2/20.

*Accession Number:* 20200902–5097.

*Comments Due:* 5 p.m. ET 9/14/20.

*Docket Numbers:* RP20–1164–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* § 4(d) Rate Filing: Management Name Change Filing to be effective 10/3/2020.

*Filed Date:* 9/2/20.

*Accession Number:* 20200902–5112.

*Comments Due:* 5 p.m. ET 9/14/20.

*Docket Numbers:* RP20–1165–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* § 4(d) Rate Filing: Expired Negotiated Rate Agreement—10/31/2020 to be effective 11/1/2020.

*Filed Date:* 9/2/20.

*Accession Number:* 20200902–5114.

*Comments Due:* 5 p.m. ET 9/14/20.

*Docket Numbers:* RP20–1166–000.

*Applicants:* SWN Energy Services Company, LLC.

*Description:* Joint Petition for Temporary Waivers of Capacity Release Regulations and Policies, et al. of SWN Energy Services Company, LLC, et al. under RP20–1166 Application/Petition/Request | Waiver of Oil or Gas Regulation.

*Filed Date:* 09/01/20.

*Accession Number:* 20200901–5321.

*Comments Due:* 5 p.m. ET 09/08/20.

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: September 3, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20240 Filed 9–14–20; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER20–2618–000.

*Applicants:* Thordin ApS.

*Description:* Supplement (Revised Transmittal Letter) to August 6, 2020 Thordin ApS tariff filing.

*Filed Date:* 9/3/20.

*Accession Number:* 20200903–5205.

*Comments Due:* 5 p.m. ET 9/24/20.

*Docket Numbers:* ER20–2806–000.

*Applicants:* Lightsource Renewable Energy Development, LLC.

*Description:* Petition for Limited Waiver, et al. of Lightsource Renewable Energy Development, LLC.

*Filed Date:* 9/2/20.

*Accession Number:* 20200902–5279.

*Comments Due:* 5 p.m. ET 9/16/20.

*Docket Numbers:* ER20–2828–000.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* Tariff Cancellation: Notice of Cancellation of W3–002 ISA, SA No. 2782 to be effective 11/7/2020.

*Filed Date:* 9/4/20.

*Accession Number:* 20200904–5150.

*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2829–000.

*Applicants:* Public Service Company of Colorado.

*Description:* § 205(d) Rate Filing: 2020–09–04_OATT Att O–SPS Transmission Template AGIS-Filing to be effective 1/1/2020.

*Filed Date:* 9/4/20.

*Accession Number:* 20200904–5151.

*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2830–000.

*Applicants:* PPM Roaring Brook, LLC.

*Description:* Baseline eTariff Filing: Application for Market-Based Rate Authorization, Request for Related Waivers to be effective 11/4/2020.

*Filed Date:* 9/4/20.

*Accession Number:* 20200904–5154.

*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2831–000.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* Tariff Cancellation: Notice of Cancellation of ISA, No. 2823 to be effective 11/7/2020.

*Filed Date:* 9/4/20.

*Accession Number:* 20200904–5161.

*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2832–000.

*Applicants:* Southern California Edison Company.

*Description:* § 205(d) Rate Filing: Letter Agreement NextEra Desert Center Blythe, LLC SA No. 252 to be effective 9/9/2020.

*Filed Date:* 9/8/20.

*Accession Number:* 20200908–5101.

*Comments Due:* 5 p.m. ET 9/29/20.

*Docket Numbers:* ER20–2833–000.

*Applicants:* Antelope Expansion 3A, LLC.

*Description:* § 205(d) Rate Filing: Antelope Expansion 3A, LLC Certificate of Concurrence to be effective 9/9/2020.

*Filed Date:* 9/8/20.

*Accession Number:* 20200908–5124.

*Comments Due:* 5 p.m. ET 9/29/20.

*Docket Numbers:* ER20–2834–000.

*Applicants:* Antelope Expansion 3B, LLC.

*Description:* § 205(d) Rate Filing: Antelope Expansion 3B, LLC Certificate of Concurrence to be effective 9/9/2020.

*Filed Date:* 9/8/20.

*Accession Number:* 20200908–5129.

*Comments Due:* 5 p.m. ET 9/29/20.

*Docket Numbers:* ER20–2835–000.

*Applicants:* Southern California Edison Company.

*Description:* Tariff Cancellation: Notice of Cancellation SCE Connections Agreement RS No. 495 to be effective 7/30/2016.

*Filed Date:* 9/8/20.

*Accession Number:* 20200908–5132.

*Comments Due:* 5 p.m. ET 9/29/20.

*Docket Numbers:* ER20–2836–000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* § 205(d) Rate Filing: 1168R2 Smoky Hills Wind Farm LGIA to be effective 8/6/2020.

*Filed Date:* 9/8/20.

*Accession Number:* 20200908–5146.

*Comments Due:* 5 p.m. ET 9/29/20.

The filings are accessible in the Commission's eLibrary system by

clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 8, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20246 Filed 9–14–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Numbers:* RP20–1119–001.
*Applicants:* Trailblazer Pipeline Company LLC.
*Description:* Trailblazer Pipeline Company LLC submits tariff filing per 154.205 (b): TPC 2020—09–04 GT&C section 3 R envisions Amendment to be effective 09/25/20.
*Filed Date:* 09/4/20.
*Accession Number:* 20200904–5088.
*Comments Due:* 5 p.m. ET 9/11/20.

*Docket Numbers:* RP20–1172–000.
*Applicants:* Iroquois Gas Transmission System, L.P.
*Description:* § 4(d) Rate Filing: 090920 Negotiated Rates—Freepoint Commodities LLC R–7250–30 to be effective 11/1/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5024.
*Comments Due:* 5 p.m. ET 9/21/20.

*Docket Numbers:* RP20–1173–000.
*Applicants:* Iroquois Gas Transmission System, L.P.
*Description:* § 4(d) Rate Filing: 090920 Negotiated Rates—Freepoint Commodities LLC R–7250–31 to be effective 11/1/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5026.
*Comments Due:* 5 p.m. ET 9/21/20.

*Docket Numbers:* RP20–1174–000.
*Applicants:* Iroquois Gas Transmission System, L.P.
*Description:* § 4(d) Rate Filing: 090920 Negotiated Rates—Freepoint Commodities LLC R–7250–32 to be effective 11/1/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5030.
*Comments Due:* 5 p.m. ET 9/21/20.

*Docket Numbers:* RP20–1175–000.
*Applicants:* Iroquois Gas Transmission System, L.P.
*Description:* § 4(d) Rate Filing: 090920 Negotiated Rates—Freepoint Commodities LLC R–7250–33 to be effective 11/1/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5031.
*Comments Due:* 5 p.m. ET 9/21/20.

*Docket Numbers:* RP20–1176–000.
*Applicants:* Iroquois Gas Transmission System, L.P.
*Description:* § 4(d) Rate Filing: 090920 Negotiated Rates—Freepoint Commodities LLC R–7250–34 to be effective 11/1/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5035.
*Comments Due:* 5 p.m. ET 9/21/20.

*Docket Numbers:* RP20–1177–000.
*Applicants:* Iroquois Gas Transmission System, L.P.
*Description:* § 4(d) Rate Filing: 090920 Negotiated Rates—Freepoint Commodities LLC R–7250–35 to be effective 11/1/2020.
*Filed Date:* 9/9/20.
*Accession Number:* 20200909–5038.
*Comments Due:* 5 p.m. ET 9/21/20.

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: September 9, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20323 Filed 9–14–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EF20–9–000]**

### Western Area Power Administration; Notice of Filing

Take notice that on September 1, 2020, Western Area Power Administration submitted tariff filing: Extension of Pacific Northwest–Pacific Southwest Intertie Project Transmission Service Rates—Rate Order No. WAPA–192 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 October 1, 2020.

Dated: September 3, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20243 Filed 9–14–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Sunshine Act Meeting Notice

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

**AGENCY HOLDING MEETING:** Federal Energy Regulatory Commission.

**DATE AND TIME:** September 17, 2020, 10:00 a.m.

**PLACE:** Open to the public via audio Webcast only.[1]

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** Agenda.

* Note—Items listed on the agenda may be deleted without further notice.

**CONTACT PERSON FOR MORE INFORMATION:** Kimberly D. Bose, Secretary, Telephone (202) 502–8400.

For a recorded message listing items struck from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's website at *http://ferc.capitolconnection.org/* using the eLibrary link.

1070TH—MEETING

[Open meeting; September 17, 2020; 10:00 a.m.]

| Item No. | Docket No. | Company |
|---|---|---|
| | **ADMINISTRATIVE** | |
| A–1 | AD20–1–000 | Agency Administrative Matters. |
| A–2 | AD20–2–000 | Customer Matters, Reliability, Security and Market Operations. |
| A–3 | AD20–27–000 | Recent Changes in Commission Rehearing Practice. |
| | **ELECTRIC** | |
| E–1 | RM18–9–000 | Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators. |
| E–2 | RM20–19–000 | Equipment and Services Produced or Provided by Certain Entities Identified as Risks to National Security. |
| E–3 | EL15–68–005 | Midcontinent Independent System Operator, Inc. |
| | EL15–36–005 | *Otter Tail Power Company* v. *Midcontinent Independent System Operator, Inc.* |
| | ER16–696–006, ER18–2513–001, ER18–2513–003. | Midcontinent Independent System Operator, Inc. |
| E–4 | EL20–15–000 | North Carolina Eastern Municipal Power Agency. |
| E–5 | RM19–16–000, RM19–17–000 | Electric Reliability Organization Proposal to Retire Requirements in Reliability Standards Under the NERC Standards Efficiency Review. |
| E–6 | ER20–2030–000, TS20–5–000 | Altavista Solar, LLC. |
| E–7 | ER20–1755–000 | Green Mountain Power Corporation. |
| E–8 | ER19–2396–001 | Louisville Gas and Electric Company. |
| | ER19–2397–001 | Kentucky Utilities Company. |
| E–9 | EC98–2–003 | Louisville Gas and Electric Company. |
| | ER18–2162–002 | Kentucky Utilities Company. |
| E–10 | ER20–739–002 | ISO New England Inc. |
| E–11 | ER20–609–001 | Ohio Power Company, AEP Ohio Transmission Company, Inc., and PJM Interconnection, L.L.C. |
| E–12 | ER20–431–001 | Ohio Power Company, AEP Ohio Transmission Company, Inc., and PJM Interconnection, L.L.C. |
| E–13 | ER20–543–000, ER20–543–001 | PJM Interconnection, L.L.C. |
| E–14 | ER05–1056–011 | Chehalis Power Generating, L.P. |
| E–15 | ER20–1313–000, ER19–1357–000 | GridLiance High Plains LLC. |
| | ER18–2358–001, (consolidated) | Southwest Power Pool, Inc. |
| E–16 | ER20–1890–000 | California Independent System Operator Corporation. |
| E–17 | ER19–1823–003, ER19–1960–003 | Midcontinent Independent System Operator, Inc. |
| E–18 | ER20–170–002 | Midcontinent Independent System Operator, Inc. |
| E–19 | EL19–38–001 | *City and County of San Francisco* v. *Pacific Gas and Electric Company.* |
| E–20 | EL19–84–000, QF19–1331–001 | Clean Fuel Dane, LLC. |
| E–21 | EL20–36–000 | *Bonneville Power Administration* v. *Avista Corporation.* |
| E–22 | EL20–55–000, QF15–28–001, QF15–29–001. | CF CVEC Owner One LLC. |
| E–23 | EL20–51–000 | Southern California Edison Company. |
| E–24 | ER20–276–002 | Midcontinent Independent System Operator, Inc. |
| E–25 | EL20–30–000 | *Indiana Municipal Power Agency, and City of Lawrenceburg, Indiana* v. *PJM Interconnection, L.L.C., American Electric Power Service Corp., and Lawrenceburg Power, LLC.* |

[1] Join FERC online to listen live at *http://ferc.capitolconnection.org/.*

1070TH—MEETING—Continued

[Open meeting; September 17, 2020; 10:00 a.m.]

| Item No. | Docket No. | Company |
|---|---|---|
| | EL20–56–000 | PJM Interconnection, L.L.C. |
| | **GAS** | |
| G–1 | OMITTED | |
| G–2 | RP20–1105–000 | Aethon United BR LP and Aethon III HV LLC. |
| G–3 | RP20–957–000 | Golden Pass LNG Terminal LLC. |
| G–4 | PR20–56–000, PR20–56–001 | Enstor Katy Storage and Transportation, L.P. |
| G–5 | PR20–61–000, PR20–61–001 | Enable Oklahoma Intrastate Transmission, LLC. |
| G–6 | RP20–481–001 | *BP Energy Company* v. *Natural Gas Pipeline Company of America LLC.* |
| | **HYDRO** | |
| H–1 | P–2197–135 | Cube Yadkin Generation LLC. |
| H–2 | P–1494–453 | Grand River Dam Authority. |
| | **CERTIFICATES** | |
| C–1 | CP20–53–000 | National Fuel Gas Supply Corporation. |
| C–2 | CP20–45–000 | Saltville Gas Storage Company L.L.C. |
| C–3 | OMITTED | |
| C–4 | CP15–17–005 | Sabal Trail Transmission, LLC. |
| C–5 | CP19–484–000 | Kinder Morgan Louisiana Pipeline LLC. |
| C–6 | CP19–488–000 | Columbia Gulf Transmission, LLC. |
| C–7 | CP17–178–001 | Alaska Gasline Development Corporation. |
| C–8 | CP19–14–001 | Mountain Valley Pipeline, LLC. |

Dated: September 10, 2020.

**Kimberly D. Bose,**

*Secretary.*

The public is invited to listen to the meeting live at *http://ferc.capitolconnection.org/*. Anyone with internet access who desires to hear this event can do so by navigating to *www.ferc.gov's* Calendar of Events and locating this event in the Calendar. The event will contain a link to its audio webcast. The Capitol Connection provides technical support for this free audio webcast. It will also offer access to this event via phone bridge for a fee. If you have any questions, visit *http://ferc.capitolconnection.org/* or contact Shirley Al-Jarani at 703–993–3104.

[FR Doc. 2020–20393 Filed 9–11–20; 11:15 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP20–517–000]**

### Trunkline Gas Company, LLC; Notice of Request Under Blanket Authorization

Take notice that on August 28, 2020, Trunkline Gas Company, LLC (Trunkline), 1300 Main Street, Houston, Texas 77002, filed a prior notice application in Docket No. CP20–517–000 pursuant to sections 157.205, 157.208, and 157.210 of the Commission's regulations under the Natural Gas Act (NGA) and Trunkline's blanket certificate issued in Docket No. CP83–84–000. Due to a section of pipe not being abandoned as planned, Trunkline recalculated the north-to-south firm transportation service capacity within its Zones 1B and 1A. Trunkline thus proposes to increase the capacity by 60,000 dekatherms per day (Dth/d) from its Tuscola Compressor Station (CS) in Douglas County, Illinois to its Johnsonville CS in Wayne County, Illinois and to increase the capacity by 50,000 Dth/d from its Johnsonville CS to its Independence CS in Tate County, Mississippi. Trunkline states that there will be no construction activities related to this proposal, all as more fully set forth in the application which is on file with the Commission and open to public 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 Deborah A. Bradbury, Sr. Director, Regulatory Tariffs & Reporting, Trunkline Gas Company, LLC, 1300 Main Street, Houston, Texas 77002, by telephone at (713) 989–7571, by fax at (713) 989–1205, or by email at *debbie.bradbury@energytransfer.com*.

Any person or the Commission's staff may, within 60 days after the 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. Any person filing to intervene, or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file 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 protest. If a protest is filed and not withdrawn within 30 days after the time allowed 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 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 and will be notified of any 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 commenters will not receive copies of all documents filed by other parties or 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: September 3, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20244 Filed 9–14–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Number:* PR20–72–000.

*Applicants:* BBT Mid Louisiana Gas Transmission, LLC.

*Description:* Tariff filing per 284.123(e)/.224: BBT Mid Louisiana Gas Transmission Cancellation of SOC to be effective 9/2/2020 under PR20–72.

*Filed Date:* 9/2/2020.

*Accession Number:* 202009025163.

*Comments/Protests Due:* 5 p.m. ET 9/23/20.

*Docket Numbers:* RP20–1167–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* § 4(d) Rate Filing: Volume No. 2—Table of Contents Clean Up & Nat Fuel SP359400 to be effective 9/1/2020.

*Filed Date:* 9/3/20.

*Accession Number:* 20200903–5091.

*Comments Due:* 5 p.m. ET 9/15/20.

*Docket Numbers:* RP20–1168–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* § 4(d) Rate Filing: Negotiated & Non-Conforming Rate Amd—Eversource to be effective 10/1/2020.

*Filed Date:* 9/3/20.

*Accession Number:* 20200903–5180.

*Comments Due:* 5 p.m. ET 9/15/20.

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: September 4, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20245 Filed 9–14–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 4784–106]**

### Topsham Hydro Partners Limited Partnership (L.P.); Notice of Application Tendered for Filing With the Commission and Establishing Procedural Schedule for Licensing and Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 4784–106.

c. *Date Filed:* August 31, 2020.

d. *Applicant:* Topsham Hydro Partners Limited Partnership (L.P.).

e. *Name of Project:* Pejepscot Hydroelectric Project.

f. *Location:* On the Androscoggin River in Sagadahoc, Cumberland, and Androscoggin Counties in the village of Pejepscot and the town of Topsham, Maine. The project does not affect federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Mr. Tom Uncher, Vice President, Topsham Hydro Partners Limited Partnership, 339B Big Bay Rd, Queensbury, NY 12804, Telephone: 1–518–743–2018, *Thomas.Uncher@brookfieldrenewable.com*.

i. *FERC Contact:* Ryan Hansen at (202) 502–8074 or email at *ryan.hansen@ferc.gov*.

j. This application is not ready for environmental analysis at this time.

k. *Project Description:* The existing Pejepscot Project consists of: (1) A 560-foot-long, 47.5-foot-high rock and gravel-filled, timber crib overflow structure that is topped with a 5-foot-thick reinforced concrete slab; (2) a spillway consisting of five, 96-foot-long by 3-foot-high steel bascule gates; (3) a 225-acre, 3 mile-long reservoir at an elevation of 67.5 feet mean sea level (MSL); (4) a 97-foot-wide, 146-foot-long brick masonry and concrete original powerhouse integral with the dam including an integral intake structure and containing three horizontal Francis turbine-generator units with a combined

rated capacity of approximately 1.58 megawatts (MW); (5) a 60-foot-wide by 115-foot-long concrete with steel frame superstructure newer powerhouse integral with the dam including an integral intake structure and containing a Kaplan turbine and a generator with a rated capacity of approximately 12.3 MW; (6) a vertical lift upstream fish passage facility consisting of a 20-foot-long, 7-foot-wide steel hopper with a sloping bottom and an 8-inch-wide, 8-foot-high V-trap inlet, a 6-foot-wide, 8-foot-high, 110-foot-long metal flume, four attraction pumps with a combined capacity of 160 cubic feet per second (cfs) and a viewing window; (7) a downstream fish passage facility consisting of two 4-foot-wide steel entry weirs with grizzly racks that pass fish through 30-inch-diameter, 185-foot-long and 24-inch-diameter, 60-foot-long outlet pipes, respectively; (8) a tailrace with a bulkhead-like gate that discharges water into the Androscoggin River approximately 25 feet downstream of the powerhouses; (9) two 900-foot-long, 15-kilovolt cable connections to substations located north and south of the powerhouses, respectively; and (10) appurtenant facilities.

The project is operated in a run-of-river mode with an average annual generation of 68.5 megawatt-hours.

l. *Locations of the Application:* A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). A copy is also available for inspection and reproduction at the address in item (h) above.

m. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Procedural Schedule:* The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

| Milestone | Target date |
|---|---|
| Notice of Acceptance/Notice of Ready for Environmental Analysis | October 2020. |
| Filing of recommendations, preliminary terms and conditions, and fishway prescriptions | December 2020. |
| Commission issues Draft EA or EIS | June 2021. |
| Comments on Draft EA or EIS | July 2021. |
| Modified terms and conditions | September 2021. |
| Commission issues Final EA or EIS | December 2021. |

o. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: September 9, 2020.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2020–20309 Filed 9–14–20; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* RP20–1167–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* § 4(d) Rate Filing: Volume No. 2—Table of Contents Clean Up & Nat Fuel SP359400 to be effective 9/1/2020.

*Filed Date:* 9/3/20.

*Accession Number:* 20200903–5091.

*Comments Due:* 5 p.m. ET 9/15/20.

*Docket Numbers:* RP20–1168–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* (doc-less) Motion to Intervene of Eversource Gas Company of Massachusetts under RP20–1168.

*Filed Date:* 9/4/20.

*Accession Number:* 20200904–5100.

*Comments Due:* 5 p.m. ET 9/16/20.

*Docket Numbers:* RP20–1169–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* Tariff Cancellation: Non-Conforming Amendment & Cancellation of Rate Schedule X–54 to be effective 10/5/2020.

*Filed Date:* 9/4/20.

*Accession Number:* 20200904–5048.

*Comments Due:* 5 p.m. ET 9/16/20.

*Docket Numbers:* RP20–1170–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* § 4(d) Rate Filing: Amendment to Negotiated Rate Agreement—Shell Energy North America (US), L.P. to be effective 9/4/2020.

*Filed Date:* 9/4/20.

*Accession Number:* 20200904–5120.

*Comments Due:* 5 p.m. ET 9/16/20.

*Docket Numbers:* RP20–1171–000.

*Applicants:* Applicant information is not available at this time. Atms or FOLA not available now.

*Description:* Joint Petition of Southern Company Services, Inc., et al. for Limited Waivers of Capacity Release Regulations and Tariff Provisions, et al. under RP20–1171.

*Filed Date:* 9/4/20.

*Accession Number:* 20200904–5172.

*Comments Due:* 5 p.m. ET 9/11/20.

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: September 8, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20237 Filed 9–14–20; 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 corporate filings:

*Docket Numbers:* EC20–99–000.
*Applicants:* Dempsey Ridge Wind Farm, LLC, EcoGrove Wind LLC, Red Hills Wind Project, L.L.C., Acciona Wind Energy USA LLC, Tatanka Wind Power, LLC, Nevada Solar One, LLC
*Description:* Joint Application for Authorization Under Section 203 of the Federal Power Act, et al. of Dempsey Ridge Wind Farm, LLC, et al.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5201.
*Comments Due:* 5 p.m. ET 9/24/20.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10–2756–009.
*Applicants:* Griffith Energy LLC.
*Description:* Supplement to May 29, 2020 Notice of Non-Material Change in Status of Griffith Energy LLC.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5090.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–1907–001.
*Applicants:* Minco Wind I, LLC.
*Description:* Tariff Amendment: Minco Wind I, LLC Amendment to Application for MBR Authority to be effective 7/27/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5056.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2813–000.
*Applicants:* Nevada Power Company.
*Description:* § 205(d) Rate Filing: Service Agreement No. 20–00034 LMUD NITSA to be effective 11/2/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5000.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2814–000.
*Applicants:* Sierra Pacific Power Company.
*Description:* § 205(d) Rate Filing: Service Agreement No. 20–00033 LMUD TIA to be effective 11/2/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5002.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2815–000.
*Applicants:* New England Power Company.
*Description:* Notice of Cancellation of Large Generator Interconnection Agreement No. IA–NEP–4, et al. of New England Power Company.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5200.
*Comments Due:* 5 p.m. ET 9/24/20.

*Docket Numbers:* ER20–2817–000.
*Applicants:* Ameren Illinois Company, Midcontinent Independent System Operator, Inc.
*Description:* § 205(d) Rate Filing: 2020–09–04_SA 3554 Ameren IL-Lincoln Land E&P to be effective 11/4/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5046.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2818–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: First Revised ISA, Service Agreement No. 4534; Queue No. AF1–023 to be effective 8/6/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5049.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2819–000.
*Applicants:* Pleinmont Solar 1, LLC.
*Description:* Baseline eTariff Filing: Reactive Power Compensation Filing to be effective 10/1/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5054.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2820–000.
*Applicants:* American Transmission Systems, Incorporated, PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: ATSI submits ECSAs, SA Nos. 5703 and 5704 to be effective 11/4/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5089.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2821–000.
*Applicants:* Niagara Mohawk Power Corporation, New York Independent System Operator, Inc.
*Description:* § 205(d) Rate Filing: 205: EPC Agreement 2563 between NMPC and Atlantic Wind to be effective 8/10/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5109.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2822–000.
*Applicants:* New York Independent System Operator, Inc., Niagara Mohawk Power Corporation.
*Description:* § 205(d) Rate Filing: Joint SGIA among NYISO and NMPC and ELP Stillwater SA no. 2550 to be effective 8/31/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5122.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2823–000.
*Applicants:* Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: MAIT submits three ECSAs, SA Nos. 5659, 5701, and 5702 to be effective 11/4/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5123.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2824–000.
*Applicants:* Southwestern Public Service Company.
*Description:* § 205(d) Rate Filing: AGIS Production Template Update to be effective 1/1/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5124.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2825–000.
*Applicants:* Alabama Power Company.
*Description:* Initial rate filing: DEF Twin Rivers Affected System Upgrade Agreement Filing to be effective 8/4/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5125.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2826–000.
*Applicants:* Georgia Power Company.
*Description:* Initial rate filing: DEF Twin Rivers Affected System Upgrade Agreement Filing to be effective 8/4/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5126.
*Comments Due:* 5 p.m. ET 9/25/20.

*Docket Numbers:* ER20–2827–000.
*Applicants:* Mississippi Power Company.
*Description:* Initial rate filing: DEF Twin Rivers Affected System Upgrade Agreement Filing to be effective 8/4/2020.
*Filed Date:* 9/4/20.
*Accession Number:* 20200904–5127.
*Comments Due:* 5 p.m. ET 9/25/20.

Take notice that the Commission received the following electric securities filings:

*Docket Numbers:* ES20–51–000.
*Applicants:* GridLiance High Plains LLC.
*Description:* Supplement [Exhibits C, D & E] to July 31, 2020 Under Section 204 of the Federal Power Act for Authorization to Issue Securities of GridLiance High Plains LLC.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5208.
*Comments Due:* 5 p.m. ET 9/8/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211

and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified 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: September 4, 2020.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20236 Filed 9–14–20; 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 corporate filings:

*Docket Numbers:* EC20–98–000.
*Applicants:* Cypress Creek Renewables Holdings, LLC.
*Description:* Application for Authorization Under Section 203 of the Federal Power Act, et al. of Cypress Creek Renewables Holdings, LLC.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5125.
*Comments Due:* 5 p.m. ET 9/24/20.

Take notice that the Commission received the following exempt wholesale generator filings:

*Docket Numbers:* EG20–241–000.
*Applicants:* Mohave County Wind Farm LLC.
*Description:* Notice of Self-Certification of Exempt Wholesale Generator Status of Mohave County Wind Farm LLC.
*Filed Date:* 9/2/20.
*Accession Number:* 20200902–5271.
*Comments Due:* 5 p.m. ET 9/23/20.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER19–467–007.
*Applicants:* New York Independent System Operator, Inc.
*Description:* Compliance filing: NYISO filing of errata to 8/12/20 ESR compliance filing set effective date to be effective 8/26/2020.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5120.
*Comments Due:* 5 p.m. ET 9/24/20.

*Docket Numbers:* ER20–2399–001.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* Tariff Amendment: Errata to WMPA SA No. 5696, Queue No. AF1–140 in Docket No. ER20–2399 to be effective 6/11/2020.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5178.
*Comments Due:* 5 p.m. ET 9/24/20.

*Docket Numbers:* ER20–2804–000.
*Applicants:* Tri-State Generation and Transmission Association, Inc.
*Description:* § 205(d) Rate Filing: Amendment to Tri-State Rate Schedule No. 52 to be effective 9/3/2020.
*Filed Date:* 9/2/20.
*Accession Number:* 20200902–5258.
*Comments Due:* 5 p.m. ET 9/23/20.

*Docket Numbers:* ER20–2805–000.
*Applicants:* Cimarron Bend Assets, LLC.
*Description:* § 205(d) Rate Filing: Amended and Restated Shared Facilities Agreement to be effective 9/3/2020.
*Filed Date:* 9/2/20.
*Accession Number:* 20200902–5269.
*Comments Due:* 5 p.m. ET 9/23/20.

*Docket Numbers:* ER20–2807–000.
*Applicants:* Tri-State Generation and Transmission Association, Inc.
*Description:* § 205(d) Rate Filing: Amendment to Service Agreement No. 808 to be effective 2/25/2020.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5049.
*Comments Due:* 5 p.m. ET 9/24/20.

*Docket Numbers:* ER20–2809–000.
*Applicants:* NorthWestern Corporation.
*Description:* § 205(d) Rate Filing: Tariff Revisions to Facilitate Entry into the Western Energy Imbalance Market to be effective 11/4/2020.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5157.
*Comments Due:* 5 p.m. ET 9/24/20.

*Docket Numbers:* ER20–2810–000.
*Applicants:* Millican Solar Energy LLC.
*Description:* § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/3/2020.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5172.
*Comments Due:* 5 p.m. ET 9/24/20.

*Docket Numbers:* ER20–2811–000.
*Applicants:* Prineville Solar Energy LLC.
*Description:* § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/3/2020.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5174.
*Comments Due:* 5 p.m. ET 9/24/20.

*Docket Numbers:* ER20–2812–000.
*Applicants:* Terminus Hydroelectric, LLC.
*Description:* Baseline eTariff Filing: Market-Based Rate Application to be effective 11/3/2020.
*Filed Date:* 9/3/20.
*Accession Number:* 20200903–5177.
*Comments Due:* 5 p.m. ET 9/24/20.

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.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2020–20239 Filed 9–14–20; 8:45 am]

**BILLING CODE 6717–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–0859; FRS 17060]**

### 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) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. 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. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid 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 Office of Management and Budget (OMB) control number.

**DATES:** Written PRA comments should be submitted on or before November 16, 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 contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov*.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0859.

*Title:* Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act of 1934, as amended.

*Form Number:* Not Applicable.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit entities and State, Local, or Tribal Governments.

*Number of Respondents and Responses:* 24 respondents; 24 responses.

*Estimated Time per Response:* 63–125 hours.

*Frequency of Response:* On occasion reporting requirement.

*Obligation to Respond:* Voluntary. Statutory authority for this information collection is contained in 47 U.S.C. 253 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 1,698 hours.

*Total Annual Cost:* No Cost.

*Privacy Act Impact Assessment:* No impact(s).

*Nature and Extent of Confidentiality:* The Commission is not requesting that respondents submit confidential information. Any respondent that submits information to the Commission that they believe is confidential may request confidential treatment of such information under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* The Commission will submit this expiring information collection to the OMB after this 60-day comment period in order to obtain the full three-year clearance from them. The Commission is requesting an extension (with no change in the reporting requirement). There is no reduction in the estimated number of respondents/responses and the annual burden hours. Although very few petitions for preemption under section 253 have been filed in the past few years, there is reason to believe that the current estimate is more likely to reflect future developments than a reduction in the number of estimated filings. The Commission published a Public Notice in November 1998 which established suggested guidelines for the filing of petitions for preemption pursuant to section 253 of the Communications Act of 1934, as amended, as well as suggested guidelines for the filing of comments opposing such requests for preemption. The Commission will use this information to resolve petitions for preemption of state or local statutes, regulations, or other state or local legal requirements that are alleged to prohibit or have the effect of prohibiting any entity from providing a telecommunications service. Section 253 of the Communications Act of 1934, as amended, which was added by the Telecommunications Act of 1996, requires the Commission, with certain important exceptions, to preempt (to the extent necessary) the enforcement of any state or local statute or regulation, or other state or local legal requirement that prohibits or has the effect of prohibiting any entity from providing any interstate or intrastate telecommunications service. The Commission's consideration of preemption under section 253 typically begins with the filing of a petition by an aggrieved party. The Commission typically places such petitions on public notice and requests comment by interested parties. The Commission's decision is based on the public record, generally composed of the petition and comments. The Commission has considered a number of preemption items since the passage of the Telecommunications Act of 1996, and believes it is in the public interest to inform the public of the information necessary for full consideration of the issues likely to be involved in section 253 preemption proceedings. In order to render a timely and informed decision, the Commission expects petitioners and commenters to provide it with relevant information sufficient to describe the legal regime involved in the controversy and to provide the factual information necessary for a decision.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2020–20102 Filed 9–14–20; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm*. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than September 30, 2020.

*A. Federal Reserve Bank of Kansas City* (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *The Stein Bank Stock Trust, Kevin and Gari-Ann Stein, as co-trustees, all of Spearville, Kansas;* to become members of the Stein Family Control Group, a group acting in concert, to acquire voting shares of Spearville Bancshares, Inc., and thereby indirectly acquire voting shares of First National Bank of Spearville, both of Spearville, Kansas.

Board of Governors of the Federal Reserve System, September 10, 2020.

**Yao-Chin Chao,**

*Assistant Secretary of the Board.*

[FR Doc. 2020–20331 Filed 9–14–20; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Meeting of the Community Preventive Services Task Force (CPSTF)

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Notice of meeting.

**SUMMARY:** The Centers for Disease Control and Prevention within the Department of Health and Human Services announces the next meeting of the Community Preventive Services Task Force (CPSTF) on October 21–22, 2020.

**DATES:** The meeting will be held on Wednesday, October 21, 2020, from 8:30 a.m. to 6:00 p.m. EDT, and Thursday, October 22, 2020, from 8:30 a.m. to 5:00 p.m. EDT.

**ADDRESSES:** The meeting will be held via web conference.

**FOR FURTHER INFORMATION CONTACT:** Onslow Smith, Office of the Associate Director for Policy and Strategy; Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–E–69, Atlanta, GA 30329, phone: (404) 498–6778, email: *CPSTF@cdc.gov*.

**SUPPLEMENTARY INFORMATION:**

*Meeting Accessibility:* The CPSTF meeting will be held virtually via web conference.

CDC will send web conference information to registrants upon receipt of their registration. All meeting attendees must register by October 16, 2020 to receive the web conference information for the October meeting. CDC will email web conference information from the *CPSTF@cdc.gov* mailbox.

To register for the meeting, individuals should send an email to *CPSTF@cdc.gov* and include the following information: Name, title, organization name, organization address, phone, and email.

*Public Comment:* Individuals who would like to make public comments for the October meeting must state their desire to do so with their registration and provide their name and organizational affiliation and the topic to be addressed (if known). The requestor will receive instructions for the public comment process for this virtual meeting after the request is received. A public comment period follows the CPSTF's discussion of each systematic review and will be limited, up to three minutes per person. Public comments will become part of the meeting summary.

*Background on the CPSTF:* The CPSTF is an independent, nonfederal panel whose members are appointed by the CDC Director. CPSTF members represent a broad range of research, practice, and policy expertise in prevention, wellness, health promotion, and public health. The CPSTF was convened in 1996 by the Department of Health and Human Services (HHS) to identify community preventive programs, services, and policies that increase healthy longevity, save lives and dollars, and improve Americans' quality of life. CDC is mandated to provide ongoing administrative, research, and technical support for the operations of the CPSTF. During its meetings, the CPSTF considers the findings of systematic reviews on existing research and practice-based evidence and issues recommendations. CPSTF recommendations are not mandates for compliance or spending. Instead, they provide information about evidence-based options that decision makers and stakeholders can consider when they are determining what best meets the specific needs, preferences, available resources, and constraints of their jurisdictions and constituents. The CPSTF's recommendations, along with the systematic reviews of the evidence on which they are based, are compiled in the *The Community Guide*.

*Matters proposed for discussion:* The agenda will consist of deliberation on systematic reviews of literature and is open to the public. Topics will include Heart Disease and Stroke, Obesity, and Asthma. Information regarding the start and end times for each meeting, and any updates to agenda topics, will be available on the Community Guide website (*www.thecommunityguide.org*) closer to the dates of each meeting.

The meeting agenda is subject to change without notice.

Dated: September 10, 2020.

**Sandra Cashman,**

*Executive Secretary, Centers for Disease Control and Prevention.*

[FR Doc. 2020–20285 Filed 9–14–20; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–P–0015A]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**DATES:** Comments must be received by November 16, 2020.

**ADDRESSES:** When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov*. Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: CMS–P–0015A, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html*.

2. Call the Reports Clearance Office at (410) 786–1326.

**FOR FURTHER INFORMATION CONTACT:** William N. Parham at (410) 786–4669.

**SUPPLEMENTARY INFORMATION:**

**Contents**

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–P–0015A Medicare Current Beneficiary Survey

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

**Information Collection**

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicare Current Beneficiary Survey; *Use:* CMS is the largest single payer of health care in the United States. The agency plays a direct or indirect role in administering health insurance coverage for more than 120 million people across the Medicare, Medicaid, CHIP, and Exchange populations. A critical aim for CMS is to be an effective steward, major force, and trustworthy partner in supporting innovative approaches to improving quality, accessibility, and affordability in healthcare. CMS also aims to put patients first in the delivery of their health care needs.

The Medicare Current Beneficiary Survey (MCBS) is the most comprehensive and complete survey available on the Medicare population and is essential in capturing data not otherwise collected through our operations. The MCBS is a nationally-representative, longitudinal survey of Medicare beneficiaries that we sponsor and is directed by the Office of Enterprise Data and Analytics (OEDA). The survey is usually conducted in-person but can also be conducted by phone. It captures beneficiary information whether aged or disabled, living in the community or facility, or serviced by managed care or fee-for-service. Data produced as part of the MCBS are enhanced with our administrative data (*e.g.,* fee-for-service claims, prescription drug event data, enrollment, etc.) to provide users with more accurate and complete estimates of total health care costs and utilization. The MCBS has been continuously fielded for more than 28 years, encompassing over 1 million interviews and more than 100,000 survey participants. Respondents participate in up to 11 interviews over a four-year period. This gives a comprehensive picture of health care costs and utilization over a period of time.

The MCBS continues to provide unique insight into the Medicare program and helps CMS and our external stakeholders better understand and evaluate the impact of existing programs and significant new policy initiatives. In the past, MCBS data have been used to assess potential changes to the Medicare program. For example, the MCBS was instrumental in supporting the development and implementation of the Medicare prescription drug benefit by providing a means to evaluate prescription drug costs and out-of-pocket burden for these drugs to Medicare beneficiaries. Beginning in 2021, this proposed revision to the clearance will add a few new measures to existing questionnaire sections and will add a new COVID–19 Questionnaire section previously approved by OMB on August 7, 2020 under Emergency Clearance 0938–1379. The revisions will result in an increase in respondent burden due to the addition of the new items. *Form Number:* CMS–P–0015A (OMB control number: 0938–0568); *Frequency:* Occasionally; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 13,656; *Total Annual Responses:* 35,998; *Total Annual Hours:* 53,176. (For policy questions regarding this collection contact William Long at 410–786–7927.)

Dated: September 9, 2020.

**William N. Parham, III,**

*Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2020–20273 Filed 9–14–20; 8:45 am]

**BILLING CODE 4120–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Assessing Models of Coordinated Services for Low-Income Children and Their Families (AMCS) (0970–0535)

**AGENCY:** Office of Planning, Research, and Evaluation; Administration for Children and Families; Health and Human Services (HHS).

**ACTION:** Request for public comment.

**SUMMARY:** The Office of Planning, Research, and Evaluation (OPRE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is requesting an extension to continue collecting data for the study, Assessing Models of Coordinated Services for Low-Income Children and Their Families (AMCS). Data collection has been delayed due to the COVID–19 pandemic and will not be complete by the current expiration date of October 31, 2020. There are no changes proposed to the current instruments.

**DATES:** *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

**SUPPLEMENTARY INFORMATION:**

*Description:* Through AMCS, ACF seeks to learn more about how states and communities coordinate early care and education, family economic security, and/or other health and human

services to most efficiently and effectively serve the needs of low-income children and their families. ACF aims to understand strategies used to support partnerships, including the federal barriers to agency collaboration. In support of achieving these goals, the study team is conducting ''virtual site visits'' with six programs that offer coordinated services. The study team will gather information through interviews with program staff members, such as agency leaders or frontline staff, and focus groups with parents.

Data collection activities will include up to six program ''virtual site visits.'' ''Virtual site visits'' include semi-structured interviews with up to 30 total staff at each site and focus groups with 8–10 parents at each site. Semi-structured interviews with program and partner staff will obtain in-depth information about the goals and objectives of programs, the services provided, how the coordinated services are implemented, how staffing is managed, data use, and any facilitators and barriers to coordination. Focus groups with parents participating in the program will provide the opportunity to learn about how parents perceive the program; how it meets their needs; what benefits they gain from the program; and how they enroll, participate, and progress through the program.

*Respondents:* Lead program and partner program staff members working in six programs across the United States that coordinate early care and education services with family economic security services and/or other health and human services, as well as parents receiving services from these programs. Staff respondents will be selected with the goal of having staff represent each level of the organization. Parents who have participated in the program for at least 6 months and who receive early childhood services and at least one other program service will be invited to participate in focus groups.

ANNUAL BURDEN ESTIMATES

| Instrument | Total/annual number of respondents | Number of responses per respondent | Average burden hours per response | Annual burden hours |
|---|---|---|---|---|
| Master Virtual Site Visit Interview Protocol | 180 | 1 | 2 | 360 |
| Parent Virtual Focus Group Protocol | 60 | 1 | 1 | 60 |

*Estimated Total Annual Burden Hours:* 420.

**Authority:** 42 U.S.C. 9858(a)(5).

**John M. Sweet, Jr.,**

*ACF/OPRE Certifying Officer.*

[FR Doc. 2020–20266 Filed 9–14–20; 8:45 am]

BILLING CODE 4184–23–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; 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** of September 2, 2020. The document announced the availability of 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 meeting. The document was published with the incorrect product name for one of the post-marketing pediatric-focused safety reviews listed under Center for Biologics Evaluation and Research. This document corrects that error.

**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.

**SUPPLEMENTARY INFORMATION:**

#### Correction

In the **Federal Register** of September 2, 2020 (85 FR 54580), appearing on page 54580 in FR Doc. 2020–19835, the following correction is made:

On page 54581, in the first column, under Center for Biologics Evaluation and Research, ''9. QPAN H5N1 Vaccine (Influenza A (H5N1) virus monovalent vaccine, adjuvanted)'' is corrected to read ''9. Influenza A (H5N1) Virus Monovalent Vaccine, Adjuvanted.''

Dated: September 9, 2020.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*

[FR Doc. 2020–20329 Filed 9–14–20; 8:45 am]

BILLING CODE 4164–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2020–N–0026]**

### Issuance of Priority Review Voucher; Rare Pediatric Disease Product

**AGENCY:** Food and Drug Administration, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the issuance of a priority review voucher to the sponsor of a rare pediatric disease product application. The Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended by the Food and Drug Administration Safety and Innovation Act (FDASIA), authorizes FDA to award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA is required to publish notice of the award of the priority review voucher. FDA has determined that TRIKAFTA (elexacaftor/tezacaftor/ivacaftor), manufactured by Vertex Pharmaceutical, Inc., meets the criteria for a priority review voucher.

**FOR FURTHER INFORMATION CONTACT:** Althea Cuff, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–4061, Fax: 301–796–9856, email: *althea.cuff@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** FDA is announcing the issuance of a priority review voucher to the sponsor of an approved rare pediatric disease product application. Under section 529 of the FD&C Act (21 U.S.C. 360ff), which was added by FDASIA, FDA will award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA has determined that TRIKAFTA (elexacaftor/tezacaftor/ivacaftor),

manufactured by Vertex Pharmaceutical, Inc., meets the criteria for a priority review voucher.

TRIKAFTA (elexacaftor/tezacaftor/ivacaftor) is indicated for the treatment of patients with cystic fibrosis aged 12 years and older who have at least one F508del mutation in the cystic fibrosis transmembrane conductance regulator gene.

For further information about the Rare Pediatric Disease Priority Review Voucher Program and for a link to the full text of section 529 of the FD&C Act, go to *https://www.fda.gov/ForIndustry/DevelopingProductsforRareDiseasesConditions/RarePediatricDiseasePriorityVoucherProgram/default.htm*. For further information about TRIKAFTA (elexacaftor/tezacaftor/ivacaftor), go to the ''Drugs@FDA'' website at *https://www.accessdata.fda.gov/scripts/cder/daf/*.

Dated: September 9, 2020.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*

[FR Doc. 2020–20320 Filed 9–14–20; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2018–D–2936]**

### Recognition and Withdrawal of Voluntary Consensus Standards; Guidance for Industry and Food and Drug Administration Staff; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Recognition and Withdrawal of Voluntary Consensus Standards; Guidance for Industry and Food and Drug Administration Staff.'' This guidance identifies the principles FDA uses for recognizing a standard, and it explains the extent of recognition and other supplementary information. It provides information on how you may request recognition as well as circumstances under which FDA may withdraw recognition. This guidance also responds to a provision of the 21st Century Cures Act (Cures Act) by updating published guidance on these topics.

**DATES:** The announcement of the guidance is published in the **Federal Register** on September 15, 2020.

**ADDRESSES:** You may submit either electronic or written comments on Agency guidances at any time as follows:

*Electronic Submissions*

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov*.

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

*Written/Paper Submissions*

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

*Instructions:* All submissions received must include the Docket No. FDA–2018–D–2936 for ''Recognition and Withdrawal of Voluntary Consensus Standards; Guidance for Industry and Food and Drug Administration Staff.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov*. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf*.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Recognition and Withdrawal of Voluntary Consensus Standards; Guidance for Industry and Food and Drug Administration Staff'' to the Office of Policy, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

**FOR FURTHER INFORMATION CONTACT:** Scott Colburn, Center for Devices and

Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5606, Silver Spring, MD 20993–0002, 301–796–6287 or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240–402–7911.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA's standards recognition program furthers the aim of international harmonization because the same standards (or international equivalents) are relied upon by sponsors to meet other countries' regulatory requirements when appropriate. This guidance describes the procedures that FDA follows and the actions FDA may take to recognize and withdraw recognition from voluntary consensus standards. This guidance provides further clarity and explanation about the regulatory framework, policies, and practices when evaluating requests for recognition. This guidance also responds to section 3053 of the Cures Act by updating published guidance on these topics (Pub. L. 114–255).

FDA generally considers for recognition voluntary consensus standards, which are created by standards development organizations that follow a consensus process. A document issued by the Office of Management and Budget (OMB) entitled ''Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,'' commonly called OMB Circular A–119, defines the attributes or elements of a consensus process (Ref. 1). This guidance explains those elements and how they pertain to FDA's consideration of a standard for recognition.

The guidance describes the process leading up to and including recognition. We list common purposes to recognize voluntary consensus standards as well as the essential information that FDA will provide in the supplemental information sheet for the recognition of a standard. This guidance also discusses when FDA may withdraw recognition.

Any interested party may also request that FDA recognize a specific voluntary consensus standard. This guidance recommends the information that should be included in a request for recognition of a standard, and it summarizes the actions we may take to act on such a request.

A notice of availability of the draft guidance appeared in the **Federal Register** of September 14, 2018 (83 FR 46740). FDA considered comments received and revised the guidance as appropriate in response to the comments, including specifying that FDA will provide the rationale for complete and partial recognition and describing considerations for determining the timing of a transition period between versions of standards. This guidance supersedes the guidance ''CDRH Standard Operating Procedures for the Identification and Evaluation of Candidate Consensus Standards for Recognition,'' issued on September 17, 2007.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Recognition and Withdrawal of Voluntary Consensus Standards; Guidance for Industry and Food and Drug Administration Staff.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

## II. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*. This guidance document is also available at *https://www.regulations.gov* or *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances*. Persons unable to download an electronic copy of ''Recognition and Withdrawal of Voluntary Consensus Standards; Guidance for Industry and Food and Drug Administration Staff'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 616 and full title to identify the guidance you are requesting.

## III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in the following FDA guidance have been approved by OMB control number 0910–0120.

Dated: September 3, 2020.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2020–20308 Filed 9–14–20; 8:45 am]

BILLING CODE 4164–01–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2020–N–1861]**

### Generic Drug User Fees; Stakeholder Meetings on Generic Drug User Fee Amendments of 2017 Reauthorization; Request for Notification of Stakeholder Intention To Participate

**AGENCY:** Food and Drug Administration, Health and Human Services (HHS).

**ACTION:** Notice; request for notification of participation.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is issuing this notice to request that public stakeholders, including patient and consumer advocacy groups, healthcare professionals, and scientific and academic experts notify FDA of their intent to participate in periodic consultation meetings on the reauthorization of the Generic Drug User Fee Amendments of 2017 (GDUFA). At the end of September 2022, new legislation will be required for FDA to continue collecting generic drug user fees for subsequent fiscal years for the generic drug program. The Federal Food, Drug, and Cosmetic Act (FD&C Act) requires that FDA consult with a range of stakeholders in developing recommendations for the next GDUFA program. The FD&C Act also requires that FDA hold continued discussions with patient and consumer advocacy groups at least monthly during FDA's negotiations with the regulated industry. The purpose of this request for notification is to ensure continuity and progress in these monthly discussions by establishing consistent stakeholder representation.

**DATES:** Submit notification of intention to participate in these series of meetings by October 8, 2020. Stakeholder meetings will be held monthly, and it is anticipated that they will commence in October 2020.

**ADDRESSES:** The meetings will take place virtually and will be held by webcast only. Submit notification of intention to participate in monthly stakeholder meetings by email to *GenericDrugPolicy@fda.hhs.gov*. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

**FOR FURTHER INFORMATION CONTACT:** Dat Doan, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 3334, Silver Spring, MD 20993, 240–402–8926, *Dat.Doan@fda.hhs.gov;* or Tiana Barnes, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6196, Silver Spring, MD 20993, 301–796–2882, *Tiana.Barnes@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA is requesting that public stakeholders, including patient and consumer advocacy groups, healthcare professionals, and scientific and academic experts, notify the Agency of their intent to participate in periodic stakeholder consultation meetings on the reauthorization of GDUFA. GDUFA authorizes FDA to collect user fees from the regulated industry for the current program (GDUFA II). At the end of September 2022, new legislation will be required for FDA to continue collecting user fees for subsequent fiscal years for the generic drug program. Without new legislation, FDA will no longer be able to collect user fees for future fiscal years to fund human generic drug activities. Section 744C(f) (21 U.S.C. 379j–43(f)) of the FD&C Act requires that FDA consult with a range of stakeholders in developing recommendations for the next GDUFA program, including representatives from patient and consumer groups, healthcare professionals, and scientific and academic experts. FDA initiated this process by holding a public meeting on July 21, 2020, at which stakeholders and other members of the public were given an opportunity to present their views on reauthorization (85 FR 38378). The FD&C Act further requires that FDA continue meeting with these stakeholders at least once every month during negotiations with the regulated industry to continue discussions of stakeholder views on the reauthorization. It is anticipated that these monthly stakeholder consultation meetings will commence in October 2020.

FDA is issuing this **Federal Register** notice to request that stakeholder representatives from patient and consumer groups, healthcare professional associations, as well as scientific and academic experts notify FDA of their intent to participate in periodic stakeholder consultation meetings on GDUFA reauthorization. FDA believes that consistent stakeholder representation at these meetings will be important to ensure progress in these discussions. If you wish to participate in the stakeholder consultation meetings, please designate one or more representatives from your organization who will commit to attending these meetings and preparing for the discussions as needed. Stakeholders who identify themselves through this notice will be included in all stakeholder discussions while FDA negotiates with the regulated industry. Stakeholders who decide to participate in these monthly meetings at a later time may still participate in remaining monthly meetings by notifying FDA (see **ADDRESSES**). These stakeholder discussions will satisfy the consultation requirement in section 744C(f)(3) (21 U.S.C. 379j–43(f)(3)) of the FD&C Act.

## II. Notification of Intent To Participate in Periodic Stakeholder Consultation Meetings

If you intend to participate in continued periodic stakeholder consultation meetings regarding GDUFA reauthorization, please provide notification by email to *GenericDrugPolicy@fda.hhs.gov* by October 8, 2020. Your email should contain complete contact information, including name, title, affiliation, address, email address, phone number, and notice of any special accommodations required because of disability. Stakeholders will receive confirmation and additional information about the first meeting after FDA receives this notification. Information concerning GDUFA, including the text of the law, the GDUFA II Commitment Letter, key **Federal Register** documents, GDUFA-related guidances, performance reports, and financial reports may be found on the FDA website at *https://www.fda.gov/gdufa*.

Dated: September 10, 2020.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*

[FR Doc. 2020–20334 Filed 9–14–20; 8:45 am]

**BILLING CODE 4164–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket Nos. FDA–2013–N–0618, FDA–2010–N–0601, FDA–2010–N–0598, FDA–2013–N–1155, FDA–2010–N–0118, FDA–2020–N–0145, FDA–2010–N–0597, FDA–2014–N–0086, FDA–2016–N–2836, FDA–2019–N–5841, and FDA–2019–N–5973]**

### Agency Information Collection Activities; Announcement of Office of Management and Budget Approvals

**AGENCY:** Food and Drug Administration, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is publishing a list of information collections that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

**FOR FURTHER INFORMATION CONTACT:** Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** The following is a list of FDA information collections recently approved by OMB under section 3507 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The OMB control number and expiration date of OMB approval for each information collection are shown in table 1. Copies of the supporting statements for the information collections are available on the internet at *http://www.reginfo.gov/public/do/PRAMain*. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB

| Title of collection | OMB control No. | Date approval expires |
|---|---|---|
| Reporting and Recordkeeping for Electronic Products—General Requirements | 0910–0025 | 8/31/2023 |
| Current Good Manufacturing Practice Regulations for Medicated Feed | 0910–0152 | 8/31/2023 |
| Good Manufacturing Practice Regulations for Type A Medicated Articles, 21 CFR Part 226 | 0910–0154 | 8/31/2023 |
| Food Labeling Regulations | 0910–0381 | 8/31/2023 |
| Prior Notice of Imported Food Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 | 0910–0520 | 8/31/2020 |

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB—Continued

| Title of collection | OMB control No. | Date approval expires |
|---|---|---|
| Animal Drug User Fee Program | 0910–0540 | 8/31/2023 |
| Index of Legally Marketed Unapproved New Animal Drugs for Minor Species | 0910–0620 | 8/31/2023 |
| Potential Tobacco Product Violations Reporting Form | 0910–0716 | 8/31/2023 |
| Donor Risk Assessment Questionnaire for the FDA/National Heart, Lung, and Blood Institute—Sponsored Transfusion-Transmissible Infections Monitoring System—Risk Factor Elicitation | 0910–0841 | 8/31/2023 |
| Generic Clearance for Qualitative Data to Support Social and Behavioral Research for Food, Dietary Supplements, Cosmetics, and Animal Food and Feed | 0910–0891 | 8/31/2023 |
| Health Care Providers Understanding of Opioid Analgesic Abuse-Deterrent Formulations: Phase 2 and 3 Surveys | 0910–0892 | 8/31/2023 |

Dated: September 9, 2020.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*

[FR Doc. 2020–20332 Filed 9–14–20; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Proposed Collection: Public Comment Request Information Collection Request Title: Standardized Work Plan Form for Use With Applications to the Bureau of Health Workforce Research and Training Grants and Cooperative Agreements OMB No. 0906–0049—Revision

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this ICR should be received no later than November 16, 2020.

**ADDRESSES:** Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at (301) 443–1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the information request collection title for reference.

*Information Collection Request Title:* Standardized Work Plan Form for Use with Applications to the Bureau of Health Workforce Research and Training Grants and Cooperative Agreements, OMB No. 0906–0049—Revision

*Abstract:* HRSA's Bureau of Health Workforce requires applicants of training and research grants and cooperative agreements to submit work plans via the Standardized Work Plan (SWP) form.

The information in the SWP describes the timeframes and progress required during the grant period of performance to address each of the needs detailed in the Purpose and Need section of the application, as required in the Notice of Funding Opportunity announcement.

Applicants use the SWP form when they submit their proposals, and award recipients and Project Officers use the SWP information to assist in monitoring progress once HRSA makes the awards. HRSA proposes a revision to the SWP to include a Quarterly Progress Update (QPU) for award recipients to provide information to HRSA on a quarterly basis on each activity listed in the SWP.

*Need and Proposed Use of the Information:* The information collected by the SWP form standardizes and streamlines the data used by HRSA in reviewing applications and monitoring awardees. The form asks applicants to provide a description of the activities or steps the applicant will take to achieve each of the objectives proposed during the entire period of performance. The current standardized format and data submission by applicants increases efficiency in reviewing, awarding, and monitoring each project.

This revision to the information collection will incorporate an additional form for participants, the Quarterly Progress Update (QPU). The QPU will be completed via HRSA's Electronic Handbook (EHB) and will prompt recipients to report on the progress of activities that were submitted using the SWP in the original application. The QPU will automatically populate activities from the recipient's SWP form on a quarterly basis. For each activity listed in the submitted SWP for any particular quarter within the project period, recipients will select and submit a single selection response for each activity status from a pull-down menu with five options: Activity is on Schedule, Activity is Complete, Timing is off track, Activity will be missed if action is not taken, and Activity cannot be achieved. The information provided will be utilized by the program staff to regularly assess overall progress of program requirements and analyze data in order to monitor award recipient compliance and track progress against proposed targets and goals. The information gathered will allow for an improved and more efficient method for identifying whether projects' goals are being advanced or achieved, as set forth in 45 CFR 75.342. Program staff will also use information provided over the period of performance to see emerging trends and to assess whether an award recipient requires technical assistance to address challenges that the award recipient may be experiencing with the implementation of the project. Seeking OMB approval comports with the regulatory requirement imposed by 45 CFR 75.206(a), Paperwork clearances.

*Likely Respondents:* Respondents are recipients of HRSA BHW's research and training grants and cooperative agreements.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose

of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

| Form name | Number of respondents | Number of responses per respondent | Total responses | Average burden per response (in hours) | Total annual burden hours |
|---|---|---|---|---|---|
| Standardized Work Plan | 1,000 | 1 | 1,000 | 1.00 | 1,000 |
| Quarterly Progress Update Form | 1,000 | 4 | 4,000 | .10 | 400 |
| Total | [1] 1,000 | | 5,000 | | 1,400 |

[1] The 1,000 Standardized Work Plan respondents reflects the number of new grant applications submitted annually. The 1,000 Quarterly Progress Update respondents reflects the current volume of funded, active grants.

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**Maria G. Button,**

*Director, Executive Secretariat.*

[FR Doc. 2020–20234 Filed 9–14–20; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Exploiting Omics Assays to Investigate Molecular Regulation of Persistent HIV in Individuals with Substance Use Disorder (R61/R33 Clinical Trial Optional).

*Date:* October 28, 2020.

*Time:* 1:00 p.m. to 3:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Gerald L. McLaughlin, Ph.D., Scientific Review Officer, Office of Extramural Policy and Review, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, 3 WFN 9th Floor, MSC 6021, Bethesda, MD 20892, (301) 827–5819, *gm145a@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: September 9, 2020.

**Tyeshia M. Roberson,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–20287 Filed 9–14–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Healthcare Delivery and Methodologies Integrated Review Group; Biomedical Computing and Health Informatics Study Section.

*Date:* October 15–16, 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:* Chittari V. Shivakumar, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301–408–9098, *chittari.shivakumar@nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Psychosocial Risk and Disease Prevention.

*Date:* October 15, 2020.

*Time:* 9:30 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:* Weijia Ni, Ph.D., Chief/Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3100, MSC 7808, Bethesda, MD 20892, (301) 594–3292, *niw@csr.nih.gov*.

*Name of Committee:* Risk, Prevention and Health Behavior Integrated Review Group; Psychosocial Risk and Disease Prevention Study Section.

*Date:* October 15–16, 2020.

*Time:* 9:30 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:* Ahlishia J'Nae Shipley, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 3222, MSC 7816, Bethesda, MD 20892, 301–480–8976, *shipleyaj@mail.nih.gov*.

*Name of Committee:* Oncology 2—Translational Clinical Integrated Review Group; Cancer Immunopathology and Immunotherapy Study Section.

*Date:* October 19–20, 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:* Zhang-Zhi Hu, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6186, MSC 7804, Bethesda, MD 20892, (301) 594–2414, *huzhuang@csr.nih.gov*.

*Name of Committee:* Risk, Prevention and Health Behavior Integrated Review Group; Addiction Risks and Mechanisms Study Section.

*Date:* October 19–20, 2020.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Kristen Prentice, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3112, MSC 7808, Bethesda, MD 20892, (301) 496–0726, *prenticekj@mail.nih.gov*.

*Name of Committee:* Oncology 1—Basic Translational Integrated Review Group; Cancer Etiology Study Section.

*Date:* October 19–20, 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:* Ola Mae Zack Howard, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Dr., Room 4192, MSC 7806, Bethesda, MD 20892, 301–451–4467, *howardz@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: September 9, 2020.

**Ronald J. Livingston, Jr.,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–20261 Filed 9–14–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Kidney Technology Development Research Education Program Applications.

*Date:* October 16, 2020.

*Time:* 12:00 p.m. to 3:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Video Meeting).

*Contact Person:* Ryan G. Morris, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7015, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–4721, *ryan.morris@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: September 9, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–20263 Filed 9–14–20; 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:* Biobehavioral and Behavioral Processes Integrated Review Group; Biobehavioral Regulation, Learning and Ethology Study Section.

*Date:* October 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:* Unja Hayes, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 827–6830, *unja.hayes@nih.gov*.

*Name of Committee:* Biobehavioral and Behavioral Processes Integrated Review Group; Child Psychopathology and Developmental Disabilities Study Section.

*Date:* October 8–9, 2020.

*Time:* 10:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Katherine Colona Morasch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3170, Bethesda, MD 20892, *katherine.morasch@nih.gov*.

*Name of Committee:* Brain Disorders and Clinical Neuroscience Integrated Review Group; Diseases and Pathophysiology of the Visual System Study Section.

*Date:* October 14–15, 2020.

*Time:* 8:30 a.m. to 7:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Afia Sultana, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4189, Bethesda, MD 20892, (301) 827–7083, *sultanaa@mail.nih.gov*.

*Name of Committee:* Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group Integrative Nutrition and Metabolic Processes Study Section.

*Date:* October 15–16, 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:* Gregory S Shelness, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6156, Bethesda, MD 20892–7892, (301) 755–4335, *greg.shelness@nih.gov*.

*Name of Committee:* Genes, Genomes, and Genetics Integrated Review Group; Genetic Variation and Evolution Study Section.

*Date:* October 15–16, 2020.

*Time:* 9:00 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:* Guoqin Yu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1276, *guoqin.yu@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: September 10, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–20307 Filed 9–14–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Cancer Institute; Notice of Meetings

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of meetings of the President's Cancer Panel.

The meetings will be held as virtual meetings and are open to the public. Individuals who plan to view the virtual meetings and need special assistance or other reasonable accommodations to view the meetings should notify the Contact Person listed below in advance of the meetings. The meetings can be accessed by clicking on the following link: *https://nci.rev.vbrick.com/#/webcasts/presidentscancerpanel*.

*Name of Committee:* President's Cancer Panel.

*Date:* October 26, 2020.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* Improving Resilience and Equity in Cancer Screening: Lessons from COVID–19 and Beyond (Day 1—Lung Cancer).

*Place:* National Cancer Institute, 31 Center Drive, Building 31, Room 11A48, Rockville, MD 20850 (Virtual Meeting).

*Access to Meeting: https://nci.rev.vbrick.com/#/webcasts/presidentscancerpanel*.

*Contact Person:* Maureen R. Johnson, Ph.D., Executive Secretary, President's Cancer Panel, Special Assistant to the Director, National Cancer Institute, NIH, 31 Center Drive, Room 11A48 MSC 2590, Bethesda, MD 20892, 240–781–3327, *johnsonr@mail.nih.gov*.

*Name of Committee:* President's Cancer Panel.

*Date:* October 28, 2020.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* Improving Resilience and Equity in Cancer Screening: Lessons from COVID–19 and Beyond (Day 2—Lung Cancer).

*Place:* National Cancer Institute, 31 Center Drive, Building 31, Room 11A48, Bethesda, MD 20892 (Virtual Meeting).

*Access to Meeting: https://nci.rev.vbrick.com/#/webcasts/presidentscancerpanel*.

*Contact Person:* Maureen R. Johnson, Ph.D., Executive Secretary, President's Cancer Panel, Special Assistant to the Director, National Cancer Institute, NIH, 31 Center Drive, Room 11A48 MSC 2590, Bethesda, MD 20892, 240–781–3327, *johnsonr@mail.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/pcp/index.htm,* where agendas and any additional information for the meetings will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: September 9, 2020.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–20297 Filed 9–14–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Eye Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Eye Institute Special Emphasis Panel; NEI Institutional Training Grant Applications.

*Date:* October 21, 2020.

*Time:* 10:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Eye Institute, National Institute of Health, 6700B Rockledge Drive, Suite 3400, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Jennifer C. Schiltz, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, National Eye Institute, National Institutes of Health, 6700B Rockledge Drive, Suite 3400, Bethesda, MD 20817, 240–276–5864, *jennifer.schiltz@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: September 9, 2020.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–20286 Filed 9–14–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel; NIMH Research Education Applications (R25).

*Date:* October 26, 2020.
*Time:* 12:00 p.m. to 5:00 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.
*Contact Person:* Rebecca Steiner Garcia, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6149, MSC 9608, Bethesda, MD 20892–9608, 301–443–4525, *steinerr@mail.nih.gov*.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel; NIMH Pilot Effectiveness Trials for Treatment, Preventive, and Services Interventions (R34).
*Date:* October 29, 2020.
*Time:* 10:30 a.m. to 5:00 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).
*Contact Person:* Marcy Ellen Burstein, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6143, MSC 9606, Bethesda, MD 20892–9606, 301–443–9699, *bursteinme@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: September 9, 2020.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–20288 Filed 9–14–20; 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:* Biobehavioral and Behavioral Processes Integrated Review Group; Motor Function, Speech and Rehabilitation 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:* Biao Tian, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3166, MSC 7848, Bethesda, MD 20892, (301) 402–4411, *tianbi@csr.nih.gov*.

*Name of Committee:* Healthcare Delivery and Methodologies Integrated Review Group; Community-Level Health Promotion 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:* Helena Eryam Dagadu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1266, *dagaduhe@csr.nih.gov*.

*Name of Committee:* Brain Disorders and Clinical Neuroscience Integrated Review Group; Neural Basis of Psychopathology, Addictions and Sleep Disorders Study Section.
*Date:* October 8–9, 2020.
*Time:* 9:00 a.m. to 6:30 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
*Contact Person:* Wei-Qin Zhao, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181, MSC 7846, Bethesda, MD 20892–7846, (301) 827–7238, *zhaow@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Ocular Surface, Cornea, Anterior Segment Glaucoma and Refractive Error.
*Date:* October 8–9, 2020.
*Time:* 9:30 a.m. to 6:00 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
*Contact Person:* Julius Cinque, MS, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, *cinquej@csr.nih.gov*.

*Name of Committee:* Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Bioengineering, Technology and Surgical Sciences Study Section.
*Date:* October 15–16, 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:* Khalid Masood, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5120, MSC 7854, Bethesda, MD 20892, (301) 435–2392, *masoodk@csr.nih.gov*.

*Name of Committee:* Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Neuroendocrinology, Neuroimmunology, Rhythms and Sleep Study Section.
*Date:* October 15–16, 2020.
*Time:* 8:00 a.m. to 4:30 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
*Contact Person:* Michael Selmanoff, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5164, MSC 7844, Bethesda, MD 20892, (301) 435–1119, *mselmanoff@csr.nih.gov*.

*Name of Committee:* Brain Disorders and Clinical Neuroscience Integrated Review Group; Clinical Neuroimmunology and Brain Tumors Study Section.
*Date:* October 15–16, 2020.
*Time:* 8:30 a.m. to 6:00 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
*Contact Person:* Aleksey Gregory Kazantsev, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5201, Bethesda, MD 20817, (301) 435–1042, *aleksey.kazantsev@nih.gov*.

*Name of Committee:* Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function C Study Section.
*Date:* October 15–16, 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:* William A Greenberg, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4168, MSC 7806, Bethesda, MD 20892, (301) 435–1726, *greenbergwa@csr.nih.gov*.

*Name of Committee:* Cell Biology Integrated Review Group; Cellular Mechanisms in Aging and Development Study Section.
*Date:* October 15–16, 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:* John Burch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of

Health, 6701 Rockledge Drive, Room 3213, MSC 7808, Bethesda, MD 20892, (301) 408–9519, *burchjb@csr.nih.gov*.

*Name of Committee:* Cell Biology Integrated Review Group; Intercellular Interactions Study Section.
*Date:* October 15, 2020.
*Time:* 9:00 a.m. to 6:00 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
*Contact Person:* Thomas Y. Cho, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 402–4179, *thomas.cho@nih.gov*.

*Name of Committee:* Infectious Diseases and Microbiology Integrated Review Group; Pathogenic Eukaryotes Study Section.
*Date:* October 15–16, 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:* Tera Bounds, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, (301) 435–2306, *boundst@csr.nih.gov*.

*Name of Committee:* Vascular and Hematology Integrated Review Group; Atherosclerosis and Inflammation of the Cardiovascular System Study Section.
*Date:* October 15–16, 2020.
*Time:* 9:00 a.m. to 4:00 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
*Contact Person:* Natalia Komissarova, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, (301) 435–1206, *komissar@mail.nih.gov*.

*Name of Committee:* Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Imaging Guided Interventions and Surgery Study Section.
*Date:* October 15–16, 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:* Ileana Hancu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5116, Bethesda, MD 20817, (301) 402–3911, *ileana.hancu@nih.gov*.

*Name of Committee:* Bioengineering Sciences & Technologies Integrated Review Group; Nanotechnology Study Section.
*Date:* October 15–16, 2020.
*Time:* 9:00 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:* Joseph Thomas Peterson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, (301) 408–9694, *petersonjt@csr.nih.gov*.

*Name of Committee:* Immunology Integrated Review Group; Cellular and Molecular Immunology—A Study Section.
*Date:* October 15–16, 2020.
*Time:* 9:30 a.m. to 2:00 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
*Contact Person:* David B Winter, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4204, MSC 7812, Bethesda, MD 20892, (301) 435–1152, *dwinter@mail.nih.gov*.

*Name of Committee:* Oncology 2—Translational Clinical Integrated Review Group; Mechanisms of Cancer Therapeutics—1 Study Section.
*Date:* October 15–16, 2020.
*Time:* 9:30 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:* Lambratu Rahman Sesay, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, (301) 905–8294, *rahman-sesay@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Emerging Technologies in Neuroscience.
*Date:* October 15, 2020.
*Time:* 9:30 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:* Cibu Paul Thomas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, Bethesda, MD 20894, (301) 402–4341, *cibu.thomas@nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR Panel: Cellular and Molecular Biology of Complex Brain Disorders.
*Date:* October 15–16, 2020.
*Time:* 10:00 a.m. to 6:00 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
*Contact Person:* Adem Can, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 4190, MSC 7850, Bethesda, MD 20892, (301) 435–1042, *cana2@csr.nih.gov*.

*Name of Committee:* Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Clinical and Integrative Diabetes and Obesity Study Section.
*Date:* October 15–16, 2020.
*Time:* 10:00 a.m. to 6:30 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 21045 (Virtual Meeting).
*Contact Person:* Hui Chen, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1044, *chenhui@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 9, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–20260 Filed 9–14–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Mental Health Initial Review Group; Mental Health Services Research Committee.
*Date:* October 8–9, 2020.
*Time:* 1:00 p.m. to 3:00 p.m.
*Agenda:* To review and evaluate grant applications.
*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).
*Contact Person:* Aileen Schulte, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH,, Neuroscience Center, 6001 Executive Blvd., Room 6136, MSC 9606,

Bethesda, MD 20852, 301–443–1225, *aschulte@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: September 9, 2020.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–20289 Filed 9–14–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Diabetes, Endocrinology and Metabolic Diseases B Subcommittee DDK–B Subcommittee.

*Date:* October 21–23, 2020.

*Time:* 10:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Two Democracy Plaza, 6707 Democracy Blvd., Bethesda, MD 20892 (Video Meeting).

*Contact Person:* Charlene J. Repique, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7347, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7791, *charlene.repique@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: September 9, 2020.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2020–20262 Filed 9–14–20; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF THE INTERIOR

**[RR049000000, 200R0680R1, RR.17549897.2020000.01]**

### Notice of Intent To Negotiate a Contract Between the Central Utah Water Conservancy District and Department of the Interior for Prepayment of Costs Allocated to Municipal and Industrial Water From the Bonneville Unit of the Central Utah Project, Utah County, Utah

**AGENCY:** Interior.

**ACTION:** Notice of intent.

**SUMMARY:** The Central Utah Water Conservancy District intends to prepay a portion of the municipal and industrial repayment obligation associated with the Utah Lake Drainage Basin Water Delivery System, a component of the Bonneville Unit of the Central Utah Project.

**DATES:** A public meeting to negotiate an amendatory repayment contract will be held on Wednesday, September 23, 2020, from 3:00 p.m. to 4:00 p.m. at the Central Utah Water Conservancy District Office in Orem, Utah.

**ADDRESSES:** The public meeting will be held at the Central Utah Water Conservancy District Office, 1426 East 750 North, Suite 400, Orem, Utah 84097.

**FOR FURTHER INFORMATION CONTACT:** Additional information on matters related to this **Federal Register** notice can be obtained by contacting Mr. Lee Baxter, Senior Program Coordinator, Central Utah Project Completion Act Office, Department of the Interior, 302 East Lakeview Parkway, Provo, Utah 84606; via telephone at (801) 379–1174; or by email at *lbaxter@usbr.gov*.

**SUPPLEMENTARY INFORMATION:**

Public Law 102–575, Central Utah Project Completion Act, Section 210, as amended through Public Law 104–286, stipulates that ''the Secretary shall allow for prepayment of the repayment contract between the United States and the Central Utah Water Conservancy District (District) dated December 28, 1965, and supplemented on November 26, 1985, or any additional or supplemental repayment contract providing for repayment of municipal and industrial water delivery facilities of the Central Utah Project for which repayment is provided pursuant to such contract, under terms and conditions similar to those contained in the supplemental contract that provided for the prepayment of the Jordan Aqueduct dated October 28, 1993. The prepayment may be provided in several installments to reflect substantial completion of the delivery facilities being prepaid and may not be adjusted on the basis of the type of prepayment financing utilized by the District.''

In accordance with Public Law 102–575, the District intends to prepay a portion of the municipal and industrial repayment obligation associated with the Utah Lake Drainage Basin Water Delivery System, a component of the Bonneville Unit of the Central Utah Project. The terms of the prepayment are to be publicly negotiated between the District and the Department of the Interior.

**Reed R. Murray,**

*Program Director, Central Utah Project Completion Act Office, Department of the Interior.*

[FR Doc. 2020–20324 Filed 9–14–20; 8:45 am]

**BILLING CODE 4332–90–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0030671; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: Michigan State University, East Lansing, MI

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** Michigan State University has completed an inventory of human remains in consultation with the appropriate Indian Tribes or Native Hawaiian organizations and has determined that there is no cultural affiliation between the human remains and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to Michigan State University. If no additional requestors come forward, transfer of control of the human remains to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

**DATES:** Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Michigan State University at the address in this notice by October 15, 2020.

**ADDRESSES:** Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State

University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu*.

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of Michigan State University, East Lansing, MI. The human remains were removed from Barry, Berrien, Branch, Calhoun, and Kalamazoo Counties, MI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

## Consultation

A detailed assessment of the human remains was made by Michigan State University professional staff in consultation with representatives of the Bay Mills Indian Community, Michigan; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Pokagon Band of Potawatomi Indians, Michigan and Indiana; Saginaw Chippewa Indian Tribe of Michigan; and the Sault Ste. Marie Tribe of Chippewa Indians, Michigan; and two non-federally recognized Indian groups, the Burt Lake Band of Ottawa and Chippewa Indians, and the Grand River Band of Ottawa Indians (hereafter referred to as ''The Consulted Tribes and Groups'').

An invitation to consult was extended to the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as the Chippewa-Cree Indians of Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Little Shell Tribe of Chippewa Indians of Montana; Menominee Indian Tribe of Wisconsin; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca (previously listed as Tonawanda Band of Seneca Indians of New York); Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation, hereafter referred to as ''The Invited Tribes.''

## History and Description of the Remains

On an unknown date, human remains representing, at minimum, one individual were removed from a ''Mound near Thornapple River'' in Barry County, MI. The human remains (2004.46.2) were collected and kept as part of the Chapman Collection in Middleville, Michigan. The human remains were then acquired by Kalamazoo resident, Donald Boudeman, who collected Southwest Native American material culture in the first half of the twentieth century. In July 1961, years after her husband's death, Donna Boudeman donated the human remains and parts of Mr. Boudeman's collection to Michigan State University Museum. No known individual was identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed from the west bank of the St. Joseph River, one mile north of Moccasin Bluff in Buchanan, Berrien County, MI. The human remains (6365 CW) were discovered on a farm occupying a former Native American burial ground. Paul Wynn, the property owner, gave the remains to Eugene Davis who, in turn, gave the human remains to the Chamberlain Memorial Museum in Three Oaks, Michigan. (The Chamberlain Memorial Museum was founded in 1916 by Mr. Edward K. Warren.) In September of 1952, Michigan State College Museum (now Michigan State University Museum) acquired the contents of the Chamberlain Memorial Museum from Fred P. Warren, President of the Board of Trustees of the E. K. Warren Foundation. No known individual was identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed from a high bank of Hickory Creek where it meets the St. Joseph River, near St. Joseph, Berrien County, MI. The human remains (6453 CW, 54316) became part of the William Bard Collection, which was acquired by the Chamberlain Memorial Museum in Three Oaks, Michigan. In September of 1952, Michigan State College Museum (now Michigan State University Museum) acquired the contents of the Chamberlain Memorial Museum. No known individual was identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed from an unidentified location in Branch County, MI. The human remains (2004.46.1) were acquired by Kalamazoo resident, Donald Boudeman, who collected Southwest Native American material culture in the first half of the twentieth century. In July of 1961, years after her husband's death, Donna Boudeman donated the human remains and parts of Mr. Boudeman's collection to Michigan State University Museum. No known individual was identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed by an unknown individual from a mound near Duck Lake (20CA16), Calhoun County, MI. The individual transferred the human remains (1645.12.10 A, 1645.12.10 B, 1645.12.10 C, 633 M) to the Chamberlain Memorial Museum in Three Oaks, Michigan. In September of 1952, Michigan State College Museum

(now Michigan State University Museum) acquired the contents of the Chamberlain Memorial Museum. No known individual was identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed from Vicksburg, Kalamazoo County, MI. The human remains (2004.46.74) were acquired by Kalamazoo resident, Donald Boudeman, who collected Southwest Native American material culture in the first half of the twentieth century. In July of 1961, years after her husband's death, Donna Boudeman donated the human remains and parts of Mr. Boudeman's collection to Michigan State University Museum. No known individual was identified. No associated funerary objects are present.

**Determinations Made by Michigan State University**

Officials of Michigan State University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on biological evidence and museum records.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of six individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land from which the Native American human remains were removed is the aboriginal land of the Citizen Potawatomi Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Hannahville Indian Community, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); and the Saginaw Chippewa Indian Tribe of Michigan.
- Treaties, Acts of Congress, or Executive Orders indicate that the land from which the Native American human remains were removed is the aboriginal land of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; and the Turtle Mountain Band of Chippewa Indians of North Dakota.
- According to other authoritative government sources, the land from which the Native American human remains were removed is the aboriginal land of the Miami Tribe of Oklahoma.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains may be to the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; and the Turtle Mountain Band of Chippewa Indians of North Dakota, (hereafter referred to as ''The Affiliated Tribes'').

**Additional Requestors and Disposition**

Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu,* by October 15, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains to The Affiliated Tribes may proceed. If joined to a request from one or more of The Affiliated Tribes, the Grand River Band of Ottawa Indians, a non-federally recognized Indian group, may receive transfer of control of the human remains.

Michigan State University is responsible for notifying The Affiliated Tribes, The Consulted Tribes and Groups, and The Invited Tribes that this notice has been published.

Dated: August 14, 2020.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2020–20292 Filed 9–14–20; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0030672; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: Michigan State University, East Lansing, MI

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** Michigan State University has completed an inventory of human remains in consultation with the appropriate Indian Tribes or Native Hawaiian organizations and has determined that there is no cultural affiliation between the human remains and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to Michigan State University. If no additional requestors come forward, transfer of control of the human remains to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

**DATES:** Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Michigan State University at the address in this notice by October 15, 2020.

**ADDRESSES:** Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu*.

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of Michigan State University, East Lansing, MI. The human remains were removed from Gogebic County, MI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

#### Consultation

A detailed assessment of the human remains was made by Michigan State University professional staff in consultation with representatives of the Bay Mills Indian Community, Michigan; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Pokagon Band of Potawatomi Indians, Michigan and Indiana; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; and two non-federally recognized Indian groups, the Burt Lake Band of Ottawa and Chippewa Indians, and the Grand River Band of Ottawa Indians (hereafter referred to as ''The Consulted Tribes and Groups'').

An invitation to consult was extended to the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Little Shell Tribe of Chippewa Indians of Montana; Menominee Indian Tribe of Wisconsin; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca (previously listed as Tonawanda Band of Seneca Indians of New York); Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation, hereafter referred to as ''The Invited Tribes.''

#### History and Description of the Remains

In April and May of 1990, human remains representing, at minimum, one individual were removed from Wakefield, Gogebic County, MI. On June 25, 1990, Bonnie Elizabeth Demerath discovered the human remains in a bag of topsoil delivered to her from the Wakefield Department of Public Works. The topsoil had removed from atop graves located at Lakeside Cemetery on old US–2 in Wakefield, and had been deposited on the easterly border of the cemetery. Subsequently, the human remains were transferred to Michigan State University's Forensic Anthropology Laboratory, where they were analyzed. No known individual was identified. No associated funerary objects are present.

#### Determinations Made by Michigan State University

Officials of Michigan State University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on biological evidence.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court

of Federal Claims, the land from which the Native American human remains were removed is the aboriginal land of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little Shell Tribe of Chippewa Indians of Montana; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; and the Turtle Mountain Band of Chippewa Indians of North Dakota.

• Treaties, Acts of Congress, or Executive Orders indicate that the land from which the Native American human remains were removed is the aboriginal land of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little Shell Tribe of Chippewa Indians of Montana; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; and the Turtle Mountain Band of Chippewa Indians of North Dakota.

• Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains may be to the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little Shell Tribe of Chippewa Indians of Montana; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; and the Turtle Mountain Band of Chippewa Indians of North Dakota (hereafter referred to as ''The Tribes'').

### Additional Requestors and Disposition

Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu,* by October 15, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains to The Tribes may proceed.

Michigan State University is responsible for notifying The Tribes, The Consulted Tribes and Groups, and The Invited Tribes that this notice has been published.

Dated: August 14, 2020.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2020–20295 Filed 9–14–20; 8:45 am]

BILLING CODE 4312–52–P

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## DEPARTMENT OF THE INTERIOR

## National Park Service

**[NPS–WASO–NAGPRA–NPS0030669; PPWOCRADN0–PCU00RP14.R50000]**

## Notice of Inventory Completion: Michigan State University, East Lansing, MI

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** Michigan State University has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to Michigan State University. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

**DATES:** Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Michigan State University at the address in this notice by October 15, 2020.

**ADDRESSES:** Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu.*

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and

Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of Michigan State University, East Lansing, MI. The human remains and associated funerary objects were removed from Huron-Sanilac, Ingham, Lapeer, Livingston, Saginaw, Sanilac, Shiawassee, St. Clair, and Tuscola Counties, MI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

**Consultation**

A detailed assessment of the human remains and associated funerary objects was made by Michigan State University professional staff in consultation with representatives of the Bay Mills Indian Community, Michigan; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Pokagon Band of Potawatomi Indians, Michigan and Indiana; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; and two non-federally recognized Indian groups, the Burt Lake Band of Ottawa and Chippewa Indians, and the Grand River Band of Ottawa Indians (hereafter referred to as ''The Consulted Tribes and Groups'').

An invitation to consult was extended to the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Little Shell Tribe of Chippewa Indians of Montana; Menominee Indian Tribe of Wisconsin; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca (previously listed as Tonawanda Band of Seneca Indians of New York); Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation (hereafter referred to as ''The Invited Tribes'').

**History and Description of the Remains**

In 1920, human remains representing, at minimum, seven individuals were removed from the shore of Lake Huron in Huron-Sanilac County, MI, after they were discovered eroding out of the north side of a creek that used to run into the Lake. On August 1, 2006, the human remains (FA 039–06, 661–06) became the subject of a complaint filed with the Howard City Police Department. Until the complainant alerted the police, the human remains had been kept in an attic, where they had been placed by the complainant's father. The father, who had removed the human remains, believed the remains were part of a burial ground associated with an American Indian camp located on the south side of the creek. No known individuals were identified. No associated funerary objects are present.

Between 1957–1961, human remains representing, at minimum, two individuals were removed from the Root site (20IN2), Ingham County, MI. The human remains (567.10(A1.10), 567.11(A1.11), 567.13(A1.13), 567.14(A1.14)) and associated funerary objects were originally disturbed by a group of Girl Scouts while playing on a sandy knoll near the Grand River south of Lansing, MI. Michigan State University Museum was alerted to this discovery, and excavated the human remains under the direction of Professor of Anthropology Dr. Moreau S. Maxwell and Director of Michigan State University Museum Rollin Baker. Additional help came from Birt Darling and other members of the Upper Grand Valley Chapter of the Michigan Archeological Society. Dr. Maxwell is documented as having collected the human remains. No known individuals were identified. The 25 associated funerary objects are four lots of unidentified animal bone (A1.13/567.13, A1.14/567.14, 567.10, A1.27/567), three lots of charcoal (A1.13/567.13, A1.14/567.14, A1.11/567.11), one lot of stone flakes and worked stone (567), two lots of pottery sherds (567, 567.10), one tooth (567), one lot of worked bones (567), one unidentified animal bone (567), one unidentified animal bone (A1.13/567.13), one nut shell (567), and 10 unworked rocks (A1.11/567.11).

In 1976, human remains representing, at minimum, one individual were removed from the Scott Mound site (20LP349), Lapeer County, MI. The human remains (4559) were discovered by Glen J. Martin of Davison, MI, on private land owned by a Mr. Scott of Washburn Road. After Mr. Martin had partially excavated the human remains, he contacted Michigan State University Museum Curator of Anthropology Dr. William Lovis who, at the time, was excavating the Childers site. On December 4, 1976, Mr. Martin donated the human remains to Michigan State University Museum. No known individuals were identified. No associated funerary objects are present.

In 1977, human remains representing, at minimum, 29 individuals were removed from the Childers site (20LP98), Lapeer County, MI. The human remains (4589, 4589.4A, 4589.5, 4589.5B) and associated funerary objects were disturbed during the construction of a house basement. On March 24, 1977, Michigan State University Museum conducted a salvage excavation to recover the human remains and associated funerary objects for the Museum. No known individuals were identified. The 122 associated funerary objects are one abrader (4589.0), one bone (white-tailed) (4589.0), five lots of chipped stone

(4589.0), one lot of copper (4589.0), two fire-cracked rocks (4589.0), one lot of fossils (4589.0), one lot of grave fill (4589.0), four lots of sherds (4589.0), one sherd (4589.0), one lot of soil samples (4589.0), one lot of beads (4589.4), one lot of bone (unidentified animal) (4589.4), three bones (unidentified animal) (4589.4), four chipped stones (4589.4), one lot of fire-cracked rock (4589.4), one harpoon (4589.4), six lithics (4589.4), one projectile point (4589.4), one lot of pigment stained sand samples (4589.4), three lots of sherds (4589.4), one pipe bowl fill (4589.41), one awl (turkey) (4589.5), one lot of bones (black bear) (4589.5), one bone (bullfrog) (4589.5), one bone (red shouldered hawk) (4589.5), one bone (unidentified animal) (4589.5), one lot of bones (unidentified animal) (4589.5), one bone (white-tailed deer) (4589.5), one drill tip (4589.5), one lot of fire-cracked rocks (4589.5), seven fire-cracked rocks (4589.5), two lots of flakes and rocks (4589.5), one bone pin or needle (4589.5), one lot of sherds (4589.5), one lot of skull fragments (bear) (4589.5), one lot of slate fragments (4589.5), one lot of ossified tendons (bird) (4589.5), one tool (black bear) (4589.5), one lot of incisor teeth (beaver) (4589.5), one elbow pipe (4589.4.1), one lot of antler drift, one lot of bones (black bear), one lot of bones (deer), one lot of bones (gar), two lots of bones (unidentified animal), one lot of lithics, one lot of slate pieces, one lot of incisor teeth (beaver), one adze, one antler (white-tailed deer), one antler pressure flaker, three axe preforms, one biface tip, one bone (black bear), one bone (canis species), one bone (grebe radius), one bone (grebe ulna), one bone (large mammal), two bones (turkey), one bone (wapiti), one bone (white-tailed deer), one bone (wild turkey), two celts, five discs, one end scraper, one quartzite flake, six flakes, one gorget preform, six lithics, one point, one triangular bone projectile point, three notched projectile points, one vessel, and one whetstone.

On November 22, 1986, human remains representing, at minimum, three individuals were removed from an unidentified location in Lapeer County, MI. The Michigan State Police were alerted, assigned the discovery a case number (38–2792–86), and transferred the human remains to Michigan State University, where they were analyzed by Anthropology Professor Dr. Norman Sauer. No known individuals were identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, two individuals were removed from an unidentified location in Lapeer County, MI. The Michigan State Police transferred the human remains (3513–73) to Michigan State University's Forensic Anthropology Laboratory, where they were analyzed. No known individuals were identified. No associated funerary objects are present.

On June 21, 1962, human remains representing, at minimum, one individual were removed from the Horizon Hills Lot 17 site (no. 2221; 20LV371) in Green Oak Township, Livingston County, MI. The human remains (2221) were brought to the Michigan State Police Crime Lab. On July 13, 1962, the Crime Lab's Detective Sgt. Arthur Kivela transferred the human remains to Michigan State University Museum. No known individual was identified. No associated funerary objects are present.

Between August 14, 1991 and October 10, 1991, human remains representing, at minimum, eight individuals were removed from the Casassa site (20SA1021), Saginaw County, MI. The human remains were excavated by Great Lakes Research of Williamston, Michigan (later reorganized as Great Lakes Research Associates, Inc.) as part of a pipeline project undertaken by Great Lakes Gas Transmission Ltd. Upon discovery of the human remains, the Michigan State Police and the Saginaw County coroner were contacted. After obtaining disinterment permits from the Saginaw County Department of Public Health, the remains were transferred to Michigan State University, where they were analyzed by Anthropology Professor Dr. Norman Sauer. No known individuals were identified. No associated funerary objects are present.

In October/November 1966, human remains representing, at minimum, four individuals were removed from the Mount Lion site (20SA202), Saginaw County, MI. The human remains (3277.1), which had been discovered during field plowing, were collected by Donald W. Foster with the permission of the landowner. On November 30, 1966, the human remains and associated funerary object were brought to Donald R. Hagge, M.D., of Northville, MI, for analysis, and in October of 1968, Mr. Foster donated the human remains and funerary object to Michigan State University Museum. No known individuals were identified. The one associated funerary object is a mountain lion skull (3277).

In the 1980s, human remains representing, at minimum, two individuals were removed from the Frazer-Tyra site (20SA9), also known as the Watson Caches, Armstrong Cache, Frazer I and II Caches, in Saginaw County, MI. The human remains (6888–01, 6888–02, 6888–03, 6888–04, 6888–05) and associated funerary objects were discovered during road construction by the landowner (possibly Mr. Frazer), who alerted Michigan State Police (either Bridgeport or Saginaw Post). The State Police, in turn, contacted Michigan State Archaeologist John Halsey, who confirmed that the human remains were ancient. Although the State Police claimed that they collected all the human remains from the site, Mr. Halsey directed consultant James Payne to excavate the site with a group of volunteers. In 1988, the human remains and funerary objects were transferred to Michigan State University. No known individuals were identified. The 34 associated funerary objects are one axe head and handle (6888–01), one blue tube bead (6888–01), one gun flint spall (6888–01), one lead ball (6888–01), six nails or spikes (6888–01), one brooch fragment (6888–02), one bead (6888–03), one painted sherd (6888–03), one stoneware sherd (6888–04), one lot of bone (unidentified animal) (6888–05), 14 flakes (6888–05), one nail or spike (6888–05), one projectile point ear (6888–05), one historic sherd (6888–05), one lot of sherds (6888–05), and one wood fragment (6888–05).

During the fall and winter of 1994, human remains representing, at minimum, nine individuals were removed from the McLaughlin site (20SL2), Sanilac County, MI. The human remains were disturbed during construction of a house basement. The property owner, Frederick Mclaughlin, the police, and a team from the Office of the State Archaeologist collected the partially preserved human remains. Only one individual was excavated in situ; the other individuals were represented by bone fragments scattered around the worksite. The human remains were brought to Michigan State University for analysis by Anthropology Professor Dr. Norman Sauer. On April 26, 2019, the human remains were found in Michigan State University's Forensic Anthropology Laboratory. In November 2019, the State Archaeologist confirmed Michigan State University's possession of the remains. No known individuals were identified. No associated funerary objects are present.

In 1965, human remains representing, at minimum, three individuals were removed from the Jarrard site (20SE125), Antrim Township, Section 16, Shiawassee County, MI. At an unknown date, the human remains and associated funerary objects were transferred to Michigan State University by Frank Mortimer. The associated funerary objects went to the Michigan State

University Museum, and the human remains went to Michigan State University's Forensic Anthropology Laboratory. No known individuals were identified. The 34 associated funerary objects (3911) are one lot of bones (unidentified animal), one lot of flakes, two balls, one biface perform tip, one burin, seven chips, one concretion, one retouched flake, four utilized flakes, four worked flakes, one hammerstone, one point base, one scraper, two end scrapers, one shell, one sherd, one piece of worked granite, one piece of worked quartz, and two worked stones.

Sometime prior to October 4, 2017, human remains representing, at minimum, one individual were removed from Port Huron, St. Clair County, MI, and transferred to Michigan State University. On October 4, 2017, the human remains (F.3.72, C72–4625) were found in Michigan State University's Forensic Anthropology Laboratory. No known individual was identified. No associated funerary objects are present.

On November 13, 1978, human remains representing, at minimum, one individual were removed from Cass City, Tuscola County, MI. The human remains were discovered by property owner James Tuckey while digging and setting a water line near his house. Mr. Tuckey contacted the Cass City Police, which transferred them to Michigan State University's Forensic Anthropology Laboratory, where they were analyzed. No known individual was identified. No associated funerary objects are present.

**Determinations Made by Michigan State University**

Officials of Michigan State University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on archeological context, biological evidence, museum and lab records.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 73 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 216 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Saginaw Chippewa Indian Tribe of Michigan.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land (Livingston County) from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Citizen Potawatomi Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Hannahville Indian Community, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Pokagon Band of Potawatomi Indians, Michigan and Indiana; and the Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas).
- Treaties, Acts of Congress, or Executive Orders indicate that the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as the Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation.
- According to other authoritative government sources, the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Miami Tribe of Oklahoma; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; and the Sac & Fox Tribe of the Mississippi in Iowa.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains and associated funerary objects may be to the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi

Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation (hereafter referred to as ''The Tribes'').

**Additional Requestors and Disposition**

Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu,* by October 15, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to The Tribes may proceed.

Michigan State University is responsible for notifying The Tribes, The Consulted Tribes and Groups, and The Invited Tribes that this notice has been published.

Dated: August 14, 2020.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2020–20293 Filed 9–14–20; 8:45 am]

**BILLING CODE 4312–52–P**

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## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0030674; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: Michigan State University, East Lansing, MI

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** Michigan State University has completed an inventory of human remains, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations and has determined that there is no cultural affiliation between the human remains and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to Michigan State University. If no additional requestors come forward, transfer of control of the human remains to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

**DATES:** Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Michigan State University at the address in this notice by October 15, 2020.

**ADDRESSES:** Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu.*

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of Michigan State University, East Lansing, MI. The human remains were removed from Mackinac County, MI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

**Consultation**

A detailed assessment of the human remains was made by Michigan State University professional staff in consultation with representatives of the Bay Mills Indian Community, Michigan; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Pokagon Band of Potawatomi Indians, Michigan and Indiana; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; and two non-federally recognized Indian groups, the Burt Lake Band of Ottawa and Chippewa Indians, and the Grand River Band of Ottawa Indians (hereafter referred to as ''The Consulted Tribes and Groups'').

An invitation to consult was extended to the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Little Shell Tribe of Chippewa Indians of Montana; Menominee Indian Tribe of Wisconsin; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca (previously listed as Tonawanda Band of Seneca Indians of New York); Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte

Nation, hereafter referred to as ''The Invited Tribes.''

**History and Description of the Remains**

On an unknown date, human remains representing, at minimum, two individuals were removed from Bois Blanc, Mackinac County, MI. No known individuals were identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed from an unidentified location in Mackinac County, MI. The human remains were acquired by the Michigan State Police Negaunee Post (F.1.79, 50–994–79). On October 11, 1979, the Police transferred the human remains to Michigan State University, where they were analyzed by Anthropology Professor Dr. Norman Sauer. No known individuals were identified. No associated funerary objects are present.

**Determinations Made by Michigan State University**

Officials of Michigan State University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on biological evidence.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of three individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land from which the Native American human remains were removed is the aboriginal land of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Ottawa Tribe of Oklahoma; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; and the Turtle Mountain Band of Chippewa Indians of North Dakota.
- Treaties, Acts of Congress, or Executive Orders indicate that the land from which the Native American human remains were removed is the aboriginal land of Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains may be to the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as the Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as the Prairie

Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation (hereafter referred to as ''The Tribes'').

**Additional Requestors and Disposition**

Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu,* by October 15, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains objects to The Tribes may proceed. If joined to a request from one or more of The Tribes, the Burt Lake Band of Ottawa and Chippewa Indians, a non-federally recognized Indian group, may receive transfer of control of the human remains.

Michigan State University is responsible for notifying The Consulted Tribes and Groups, The Invited Tribes, and The Tribes that this notice has been published.

Dated: August 14, 2020.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2020–20294 Filed 9–14–20; 8:45 am]

**BILLING CODE 4312–52–P**

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## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0030673; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: Michigan State University, East Lansing, MI

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** Michigan State University has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to Michigan State University. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

**DATES:** Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Michigan State University at the address in this notice by October 15, 2020.

**ADDRESSES:** Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu.*

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of Michigan State University, East Lansing, MI. The human remains and associated funerary objects were removed from unknown locations in Michigan.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

**Consultation**

A detailed assessment of the human remains and associated funerary objects was made by Michigan State University professional staff in consultation with representatives of the Bay Mills Indian Community, Michigan; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Pokagon Band of Potawatomi Indians, Michigan and Indiana; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; and two non-federally recognized Indian groups, the Burt Lake Band of Ottawa and Chippewa Indians, and the Grand River Band of Ottawa Indians (hereafter referred to as ''The Consulted Tribes and Groups'').

An invitation to consult was extended to the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Menominee Indian Tribe of Wisconsin; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Ottawa

Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca (previously listed as the Tonawanda Band of Seneca Indians of New York); Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation, hereafter referred to as ''The Invited Tribes.''

**History and Description of the Remains**

On an unknown date, human remains representing, at minimum, six individuals were removed from the Wildner Site in Michigan (the county location is presently unknown). The human remains were discovered by an unknown individual in a bundle burial that had become exposed as a result of plowing. On an unknown date, the human remains and associated funerary objects were transferred to Michigan State University. No known individuals were identified. The two associated funerary objects are one ground stone and one lot of lithic tools and debitage.

On an unknown date, human remains representing, at minimum, one individual were removed from an unknown location in Michigan. The human remains (2004.45.255) were acquired by Kalamazoo resident Donald Boudeman, who collected Southwest Native American material culture in the first half of the twentieth century. In July of 1961, years after her husband's death, Donna Boudeman donated the human remains (and parts of Mr. Boudeman's collection) to Michigan State University Museum. No known individual was identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed from an unknown site in Michigan. On an unknown date, the human remains (F.1.0) were transferred to Michigan State University, and on October 4, 2017, they were found in Michigan State University Forensic Anthropology Laboratory. No known individual was identified. No associated funerary objects are present.

In 1971, human remains representing, at minimum, one individual were removed from an unknown site in Michigan. The human remains (F.3.71) were transferred to Michigan State University's Forensic Anthropology Laboratory. No known individual was identified. No associated funerary objects are present.

Sometime prior to June 4, 2008, human remains representing, at minimum, one individual were removed from an unknown location in Michigan. On June 4, 2008, Michigan State Police transferred the human remains (FA 019–08) to Michigan State University's Forensic Anthropology Laboratory. No known individual was identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed from an unknown site in Michigan. On an unknown date, the human remains (FA 058–83) were transferred to Michigan State University, and on October 4, 2017, they were found in Michigan State University's Forensic Anthropology Laboratory. No known individual was identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed from an unknown site in Michigan. On an unknown date, the human remains (7471) were transferred to Michigan State University, and in July of 2019, they were found in Michigan State University's Forensic Anthropology Laboratory. No known individual was identified. No associated funerary objects are present.

**Determinations Made by Michigan State University**

Officials of Michigan State University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on biological evidence, museum records, and geographic location.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 12 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the two objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand River Band of Ottawa Indians; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as the Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; and the Turtle Mountain Band of Chippewa Indians of North Dakota.
- Treaties, Acts of Congress, or Executive Orders indicate that the land

from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Menominee Indian Tribe of Wisconsin; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca (previously listed as Tonawanda Band of Seneca Indians of New York); Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation.

- According to other authoritative government sources, the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; and the Sac & Fox Tribe of the Mississippi in Iowa.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains and associated funerary objects may be to the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Menominee Indian Tribe of Wisconsin; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca (previously listed as Tonawanda Band of Seneca Indians of New York); Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation (hereafter referred to as ''The Tribes'').

### Additional Requestors and Disposition

Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W. Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu,* by October 15, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to The Tribes may proceed.

Michigan State University is responsible for notifying The Tribes, The Consulted Tribes and Groups, and The Invited Tribes that this notice has been published.

Dated: August 14, 2020.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2020–20296 Filed 9–14–20; 8:45 am]

BILLING CODE 4312–52–P

## DEPARTMENT OF THE INTERIOR

## National Park Service

**[NPS–WASO–NAGPRA–NPS0030670; PPWOCRADN0–PCU00RP14.R50000]**

## Notice of Inventory Completion: Michigan State University, East Lansing, MI

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** Michigan State University has completed an inventory of human remains, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations and has determined that there is no cultural affiliation between the human remains and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to Michigan State University. If no additional requestors come forward, transfer of control of the human remains to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

**DATES:** Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Michigan State University at the address in this notice by October 15, 2020.

**ADDRESSES:** Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu*.

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of Michigan State University, East Lansing, MI. The human remains were removed from Lenawee County, MI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

## Consultation

A detailed assessment of the human remains was made by Michigan State University professional staff in consultation with representatives of the Bay Mills Indian Community, Michigan; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Pokagon Band of Potawatomi Indians, Michigan and Indiana; Saginaw Chippewa Indian Tribe of Michigan; and the Sault Ste. Marie Tribe of Chippewa Indians, Michigan; and two non-federally recognized Indian groups, the Burt Lake Band of Ottawa and Chippewa Indians, and the Grand River Band of Ottawa Indians (hereafter referred to as ''The Consulted Tribes and Groups'').

An invitation to consult was extended to the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Little Shell Tribe of Chippewa Indians of Montana; Menominee Indian Tribe of Wisconsin; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca (previously listed as Tonawanda Band of Seneca Indians of New York); Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation, hereafter referred to as ''The Invited Tribes.''

## History and Description of the Remains

On an unknown date, human remains representing, at minimum, one individual were removed from the Lenawee (1998) site, Lenawee County, MI, by the Lenawee County Sheriff's Department. The human remains were never assigned a case number. On June 16, 1998, the Sheriff's Department transferred the human remains to Michigan State University's Forensic Anthropology Laboratory, where they were analyzed. No known individual was identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, one individual were removed from an unidentified site in Lenawee County, MI, by the Lenawee County Sheriff's Department (F.2.71, 3101–71). On June 15, 1971, the human remains were transferred to Michigan State University, where they were analyzed by Anthropology Professor Dr. Norman Sauer. No known individual was identified. No associated funerary objects are present.

## Determinations Made by Michigan State University

Officials of Michigan State University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on biological evidence.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land from which the Native American human remains were removed is the aboriginal land of the Citizen Potawatomi Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Hannahville Indian Community, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi,

Michigan (previously listed as Huron Potawatomi, Inc.); Pokagon Band of Potawatomi Indians, Michigan and Indiana; and the Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas).

• Treaties, Acts of Congress, or Executive Orders indicate that the land from which the Native American human remains were removed is the aboriginal land of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation.

• According to other authoritative government sources, the land from which the Native American human remains were removed is the aboriginal land of the Miami Tribe of Oklahoma.

• Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains may be to the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation (hereafter referred to as ''The Tribes'').

**Additional Requestors and Disposition**

Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu,* by October 15, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains to The Tribes may proceed.

Michigan State University is responsible for notifying The Tribes, The Consulted Tribes and Groups, and The Invited Tribes that this notice has been published.

Dated: August 14, 2020.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2020–20290 Filed 9–14–20; 8:45 am]

BILLING CODE 4312–52–P

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0030675; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: Michigan State University, East Lansing, MI

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** Michigan State University has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to Michigan State University. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

**DATES:** Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Michigan State University at the address in this notice by October 15, 2020.

**ADDRESSES:** Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East

Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu*.

**SUPPLEMENTARY INFORMATION:** Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of Michigan State University, East Lansing, MI. The human remains and associated funerary objects were removed from Emmet County, and from Emmet or Cheboygan County, MI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

## Consultation

A detailed assessment of the human remains was made by Michigan State University professional staff in consultation with representatives of the Bay Mills Indian Community, Michigan; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Pokagon Band of Potawatomi Indians, Michigan and Indiana; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; and two non-federally recognized Indian groups, the Burt Lake Band of Ottawa and Chippewa Indians, and the Grand River Band of Ottawa Indians (hereafter referred to as ''The Consulted Tribes and Groups'').

An invitation to consult was extended to the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Little Shell Tribe of Chippewa Indians of Montana; Menominee Indian Tribe of Wisconsin; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Seneca Nation of Indians (previously listed as Seneca Nation of New York); Seneca-Cayuga Nation (previously listed as Seneca-Cayuga Tribe of Oklahoma); Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca (previously listed as Tonawanda Band of Seneca Indians of New York); Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation (hereafter referred to as ''The Invited Tribes'').

## History and Description of the Remains

On an unknown date, human remains representing, at minimum, one individual were removed from an unidentified location in Emmet County, MI. Sometime prior to January 26, 1984, the Lakehead Pipe Line Company of Superior, WI, transferred the human remains (F.5.0) to the Petoskey Michigan State Patrol. Subsequently, both the human remains and associated funerary objects were transferred to Michigan State University, where they were analyzed by Anthropology Professor Dr. Norman Sauer. No known individual was identified. The one associated funerary object is an assemblage of glass beads, silver brooches, silver earrings, coffin wood, a copper/silver bracelet, possible leather, and possible non-human hair.

On September 26, 2017, human remains representing, at minimum, one individual were removed from an unidentified location in Emmet County, MI. The human remains (FA 045–17, Gaylord Case #73–4245–17) were discovered in a wooded area on private property, and were collected by the Grayling Crime Lab. On September 29, 2017, the Michigan State Police, Gaylord Post, transferred the human remains to Michigan State University's Forensic Anthropology Laboratory, where they were analyzed by Anthropology Professor Dr. Joseph Hefner. No known individual was identified. No associated funerary objects are present.

On an unknown date, human remains representing, at minimum, two individuals were removed from Mackinaw City in Emmet or Cheboygan County, MI. No known individuals were identified. No associated funerary objects are present.

## Determinations Made by Michigan State University

Officials of Michigan State University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on archeological context and biological evidence.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of four individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the one object described in this notice is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land (Emmet County) from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana);

Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Keweenaw Bay Indian Community, Michigan; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Ottawa Tribe of Oklahoma; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; and the Turtle Mountain Band of Chippewa Indians of North Dakota.

• Treaties, Acts of Congress, or Executive Orders indicate that the land (Emmet or Cheboygan County) from which the Native American human remains and associated funerary objects were removed is the aboriginal land of Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as the Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation.

• According to other authoritative government sources, the land (Cheboygan County) from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Miami Tribe of Oklahoma; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; and the Sac & Fox Tribe of the Mississippi in Iowa.

• Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains and associated funerary objects may be to the Absentee-Shawnee Tribe of Indians of Oklahoma; Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Bay Mills Indian Community, Michigan; Chippewa Cree Indians of the Rocky Boy's Reservation, Montana (previously listed as Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana); Citizen Potawatomi Nation, Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Grand Traverse Band of Ottawa and Chippewa Indians, Michigan; Hannahville Indian Community, Michigan; Keweenaw Bay Indian Community, Michigan; Kickapoo Traditional Tribe of Texas; Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas; Kickapoo Tribe of Oklahoma; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan; Little River Band of Ottawa Indians, Michigan; Little Shell Tribe of Chippewa Indians of Montana; Little Traverse Bay Bands of Odawa Indians, Michigan; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Miami Tribe of Oklahoma; Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band); Nottawaseppi Huron Band of the Potawatomi, Michigan (previously listed as Huron Potawatomi, Inc.); Ottawa Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation (previously listed as Prairie Band of Potawatomi Nation, Kansas); Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Red Lake Band of Chippewa Indians, Minnesota; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Sac & Fox Tribe of the Mississippi in Iowa; Saginaw Chippewa Indian Tribe of Michigan; Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Shawnee Tribe; Sokaogon Chippewa Community, Wisconsin; St. Croix Chippewa Indians of Wisconsin; Stockbridge Munsee Community, Wisconsin; Turtle Mountain Band of Chippewa Indians of North Dakota; and the Wyandotte Nation (hereafter referred to as ''The Tribes'').

**Additional Requestors and Disposition**

Representatives of any Indian Tribes or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Judith Stoddart, Associate Provost for University Collections and Arts Initiatives, Michigan State University, 466 W Circle Drive, East Lansing, MI 48824–1044, telephone (517) 432–2524, email *stoddart@msu.edu,* by October 15, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to The Tribes may proceed. If joined to a request from one or more of The Tribes, the Burt Lake Band of Ottawa and Chippewa Indians, a non-federally recognized Indian group, may receive transfer of control of the human remains. Michigan State University is

responsible for notifying The Tribes, The Consulted Tribes and Groups, and The Invited Tribes that this notice has been published.

Dated: August 14, 2020.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2020–20291 Filed 9–14–20; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

**[RR83550000, 201R5065C6, RX.59389832.1009676; OMB Control Number 1006–0006]**

### Agency Information Collection Activities; Certification Summary Form, Reporting Summary Form for Acreage Limitation

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of information collection; request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Reclamation, are proposing to renew an information collection.

**DATES:** Interested persons are invited to submit comments on or before November 16, 2020.

**ADDRESSES:** Send your comments on this information collection request (ICR) by mail to Stephanie McPhee, Bureau of Reclamation, Office of Policy and Programs, 84–55000, P.O. Box 25007, Denver, CO 80225–0007; or by email to *smcphee@usbr.gov*. Please reference Office of Management and Budget (OMB) Control Number 1006–0006 in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact Stephanie McPhee by email at *smcphee@usbr.gov,* or by telephone at (303) 445–2897.

**SUPPLEMENTARY INFORMATION:** In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

*Abstract.* This information collection is required under the Reclamation Reform Act of 1982 (RRA), Acreage Limitation Rules and Regulations, 43 CFR part 426, and Information Requirements for Certain Farm Operations In Excess of 960 Acres and the Eligibility of Certain Formerly Excess Land, 43 CFR part 428. The forms in this information collection are to be used by district offices to summarize individual landholder (direct or indirect landowner or lessee) and farm operator certification and reporting forms. This information allows us to establish water user compliance with Federal reclamation law.

*Title of Collection:* Certification Summary Form, Reporting Summary Form for Acreage Limitation, 43 CFR part 426 and 43 CFR part 428.

*OMB Control Number:* 1006–0006.

*Form Numbers:* Form 7–21SUMM–C and Form 7–21SUMM–R.

*Type of Review:* Extension of a currently approved collection.

*Respondents/Affected Public:* Contracting entities that are subject to the acreage limitation provisions of Federal reclamation law.

*Total Estimated Number of Annual Respondents:* 177.

*Total Estimated Number of Annual Responses:* 221.

*Estimated Completion Time per Respondent:* See table below.

*Total Estimated Number of Annual Burden Hours:* 8,840 hours.

*Respondent's Obligation:* Mandatory.

*Frequency of Collection:* Annually.

*Total Estimated Annual Nonhour Burden Cost:* None.

| Form No. | Burden estimate per form (in hours) | Number of respondents | Annual number of responses | Annual burden on respondents (in hours) |
|---|---|---|---|---|
| 7–21SUMM–C and associated tabulation sheets | 40 | 169 | 211 | 8,440 |
| 7–21SUMM–R and associated tabulation sheets | 40 | 8 | 10 | 400 |
| Totals | | 177 | 221 | 8,840 |

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

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**Chris Beardsley,**

*Director, Policy and Programs.*

[FR Doc. 2020–20248 Filed 9–14–20; 8:45 am]

**BILLING CODE 4332–90–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

**[RR83550000, 201R5065C6, RX.59389832.1009676; OMB Control Number 1006–0005]**

### Agency Information Collection Activities; Individual Landholder's and Farm Operator's Certification and Reporting Forms for Acreage Limitation

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of information collection; request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Reclamation, are proposing to renew an information collection.

**DATES:** Interested persons are invited to submit comments on or before November 16, 2020.

**ADDRESSES:** Send your comments on this information collection request (ICR) by mail to Stephanie McPhee, Bureau of Reclamation, Office of Policy and Programs, 84–55000, P.O. Box 25007, Denver, CO 80225–0007; or by email to *smcphee@usbr.gov*. Please reference Office of Management and Budget (OMB) Control Number 1006–0005 in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact Stephanie McPhee by email at *smcphee@usbr.gov,* or by telephone at (303) 445–2897.

**SUPPLEMENTARY INFORMATION:** In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

*Abstract:* This information collection is required under the Reclamation Reform Act of 1982 (RRA), Acreage Limitation Rules and Regulations, 43 CFR part 426, and Information Requirements for Certain Farm Operations In Excess of 960 Acres and the Eligibility of Certain Formerly Excess Land, 43 CFR part 428. This information collection requires certain landholders (direct or indirect landowners or lessees) and farm operators to complete forms demonstrating their compliance with the acreage limitation provisions of Federal reclamation law. The forms in this information collection are submitted to districts that use the information to establish each landholder's status with respect to landownership limitations, full-cost pricing thresholds, lease requirements, and other provisions of Federal reclamation law. In addition, forms are submitted by certain farm operators to provide information concerning the services they provide and the nature of their farm operating arrangements. All landholders whose entire westwide landholdings total 40 acres or less are exempt from the requirement to submit RRA forms. Landholders who are ''qualified recipients'' have RRA forms submittal thresholds of 80 acres or 240 acres depending on the district's RRA forms submittal threshold category where the land is held. Only farm operators who provide multiple services to more than 960 acres held in trusts or by legal entities are required to submit forms.

*Title of Collection:* Individual Landholder's and Farm Operator's Certification and Reporting Forms for Acreage Limitation, 43 CFR part 426 and 43 CFR part 428.

*OMB Control Number:* 1006–0005.

*Form Numbers:* Form 7–2180, Form 7–2180EZ, Form 7–2181, Form 7–2184, Form 7–2190, Form 7–2190EZ, Form 7–2191, Form 7–2194, Form 7–21TRUST, Form 7–21PE, Form 7–21PE–IND, Form 7–21FARMOP, Form 7–21VERIFY, Form 7–21FC, Form 7–21XS, Form 7–21XSINAQ, Form 7–21CONT–I, Form 7–21CONT–L, Form 7–21CONT–O, and Form 7–21INFO.

*Type of Review:* Extension of a currently approved collection.

*Respondents/Affected Public:* Landholders and farm operators of certain lands in our projects, whose landholdings exceed specified RRA forms submittal thresholds.

*Total Estimated Number of Annual Respondents:* 13,960.

*Total Estimated Number of Annual Responses:* 14,239.

*Estimated Completion Time per Response:* See table below.

*Total Estimated Number of Annual Burden Hours:* 10,437 hours.

*Respondent's Obligation:* Mandatory.

*Frequency of Collection:* Annually.

*Total Estimated Annual Nonhour Burden Cost:* None.

| Form No. | Burden estimate per form (in minutes) | Number of respondents | Annual number of responses | Annual burden on respondents (in hours) |
|---|---|---|---|---|
| Form 7–2180 | 60 | 3,595 | 3,667 | 3,667 |
| Form 7–2180EZ | 45 | 373 | 380 | 285 |
| Form 7–2181 | 78 | 1,050 | 1,071 | 1,392 |
| Form 7–2184 | 45 | 32 | 33 | 25 |
| Form 7–2190 | 60 | 1,601 | 1,633 | 1,633 |
| Form 7–2190EZ | 45 | 96 | 98 | 74 |
| Form 7–2191 | 78 | 777 | 793 | 1,031 |
| Form 7–2194 | 45 | 4 | 4 | 3 |
| Form 7–21PE | 75 | 135 | 138 | 173 |
| Form 7–21PE–IND | 12 | 4 | 4 | 1 |
| Form 7–21TRUST | 60 | 694 | 708 | 708 |
| Form 7–21VERIFY | 12 | 5,069 | 5,170 | 1,034 |
| Form 7–21FC | 30 | 214 | 218 | 109 |
| Form 7–21XS | 30 | 144 | 147 | 74 |
| Form 7–21FARMOP | 78 | 172 | 175 | 228 |
| Totals | | 13,960 | 14,239 | 10,437 |

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

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**Chris Beardsley,**

*Director, Policy and Programs.*

[FR Doc. 2020–20247 Filed 9–14–20; 8:45 am]

**BILLING CODE 4332–90–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

**[RR83550000, 201R5065C6, RX.59389832.1009676; OMB Control Number 1006–0023]**

### Agency Information Collection Activities; Forms To Determine Compliance by Certain Landholders

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of information collection; request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Reclamation (Reclamation), are proposing to renew an information collection.

**DATES:** Interested persons are invited to submit comments on or before November 16, 2020.

**ADDRESSES:** Send your comments on this information collection request (ICR) by mail to Stephanie McPhee, Bureau of Reclamation, Office of Policy and Programs, 84–55000, P.O. Box 25007, Denver, CO 80225–0007; or by email to *smcphee@usbr.gov*. Please reference Office of Management and Budget (OMB) Control Number 1006–0023 in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact Stephanie McPhee by email at *smcphee@usbr.gov,* or by telephone at (303) 445–2897.

**SUPPLEMENTARY INFORMATION:** In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

*Abstract.*

*Identification of limited recipients*—Some entities that receive Reclamation irrigation water may believe that they are under the Reclamation Reform Act of 1982 (RRA) forms submittal threshold and, consequently, may not submit the appropriate RRA form(s). However, some of these entities may in fact have a different RRA forms submittal threshold than what they believe it to be due to the number of natural persons benefiting from each entity and the location of the land held by each entity. In addition, some entities that are exempt from the requirement to submit RRA forms due to the size of their landholdings (directly and indirectly owned and leased land) may in fact be receiving Reclamation irrigation water for which the full-cost rate must be paid because the start of Reclamation

irrigation water deliveries occurred after October 1, 1981 [43 CFR 426.6(b)(2)]. The information obtained through completion of the Limited Recipient Identification Sheet (Form 7–2536) allows us to establish entities' compliance with Federal reclamation law. The Limited Recipient Identification Sheet is disbursed at our discretion.

*Trust review*—In order to administer section 214 of the RRA and 43 CFR 426.7, we are required to review and approve all trusts. Land held in trust generally will be attributed to the beneficiaries of the trust rather than the trustee if the criteria specified in the RRA and 43 CFR 426.7 are met. We may extend the option to complete and submit for our review the Trust Information Sheet (Form 7–2537) instead of actual trust documents when we become aware of trusts with a relatively small landholding (40 acres or less in districts subject to the prior law provisions of Federal reclamation law, 240 acres or less in districts subject to the discretionary provisions of Federal reclamation law). If we find nothing on the completed Trust Information Sheet that would warrant the further review of a particular trust, that trustee will not be burdened with submitting trust documents to us for in-depth review. The Trust Information Sheet is disbursed at our discretion.

*Acreage limitation provisions applicable to public entities*—Land farmed by a public entity can be considered exempt from the application of the acreage limitation provisions provided the public entity meets certain criteria pertaining to the revenue generated through the entity's farming activities (43 CFR 426.10 and the Act of July 7, 1970, Pub. L. 91–310). We are required to ascertain whether public entities that receive Reclamation irrigation water meet such revenue criteria regardless of how much land the public entities hold (directly or indirectly own or lease) [43 CFR 426.10(a)]. In order to minimize the burden on public entities, standard RRA forms are submitted by a public entity only when the public entity holds more than 40 acres subject to the acreage limitation provisions westwide, which makes it difficult to apply the revenue criteria as required to those public entities that hold less than 40 acres. When we become aware of such public entities, we request those public entities complete and submit for our review the Public Entity Information Sheet (Form 7–2565), which allows us to establish compliance with Federal reclamation law for those public entities that hold 40 acres or less and, thus, do not submit a standard RRA form because they are below the RRA forms submittal threshold. In addition, for those public entities that do not meet the exemption criteria, we must determine the proper rate to charge for Reclamation irrigation water deliveries. The Public Entity Information Sheet is disbursed at our discretion.

*Acreage limitation provisions applicable to religious or charitable organizations*—Some religious or charitable organizations that receive Reclamation irrigation water may believe that they are under the RRA forms submittal threshold and, consequently, may not submit the appropriate RRA form(s). However, some of these organizations may in fact have a different RRA forms submittal threshold than what they believe it to be depending on whether these organizations meet all of the required criteria for full special application of the acreage limitations provisions to religious or charitable organizations [43 CFR 426.9(b)]. In addition, some organizations that (1) do not meet the criteria to be treated as a religious or charitable organization under the acreage limitation provisions, and (2) are exempt from the requirement to submit RRA forms due to the size of their landholdings (directly and indirectly owned and leased land), may in fact be receiving Reclamation irrigation water for which the full-cost rate must be paid because the start of Reclamation irrigation water deliveries occurred after October 1, 1981 [43 CFR 426.6(b)(2)]. The Religious or Charitable Organization Identification Sheet (Form 7–2578) allows us to establish certain religious or charitable organizations' compliance with Federal reclamation law. The Religious or Charitable Organization Identification Sheet is disbursed at our discretion.

*Title of Collection:* Forms to Determine Compliance by Certain Landholders, 43 CFR part 426.

*OMB Control Number:* 1006–0023.

*Form Numbers:* Form 7–2536, Form 7–2537, Form 7–2565, and Form 7–2578.

*Type of Review:* Extension of a currently approved collection.

*Respondents/Affected Public:* Entity landholders, trusts, public entities, and religious or charitable organizations identified by Reclamation that are subject to the acreage limitation provisions of Federal reclamation law.

*Total Estimated Number of Annual Respondents:* 500.

*Total Estimated Number of Annual Responses:* 500.

*Estimated Completion Time per Response:* See table below.

*Total Estimated Number of Annual Burden Hours:* 72 hours.

*Respondent's Obligation:* Mandatory.

*Frequency of Collection:* Generally, these forms will be submitted only once per identified entity, trust, public entity, or religious or charitable organization. Each year, we expect new responses in accordance with the following numbers.

*Total Estimated Annual Nonhour Burden Cost:* None.

| Form No. | Burden estimate per form (in minutes) | Number of respondents | Annual number of responses | Annual burden on respondents (in hours) |
|---|---|---|---|---|
| Limited Recipient Identification Sheet | 5 | 175 | 175 | 15 |
| Trust Information Sheet | 5 | 150 | 150 | 13 |
| Public Entity Information Sheet | 15 | 100 | 100 | 25 |
| Religious or Charitable Identification Sheet | 15 | 75 | 75 | 19 |
| Totals | | 500 | 500 | 72 |

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

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

**Chris Beardsley,**

*Director, Policy and Programs.*

[FR Doc. 2020–20249 Filed 9–14–20; 8:45 am]

**BILLING CODE 4332–90–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–936 (Remand)]**

## Certain Footwear Products; Commission Determination To Affirm in Part and Reverse in Part a Remand Initial Determination; Issuance of a General Exclusion Order and Cease and Desist Orders; Termination of the Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to affirm in part and reverse in part a remand initial determination (''RID'') of the presiding administrative law judge (''ALJ'') in the above-captioned investigation. The Commission has issued a general exclusion order (''GEO'') directed to footwear products that infringe U.S. Trademark Registration No. 4,398,753 (''the '753 trademark''), and cease and desist orders (''CDOs'') directed to two respondents found in default. The investigation is terminated in its entirety.

**FOR FURTHER INFORMATION CONTACT:** Cathy Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone 202–205–2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*. For help accessing EDIS, please email *EDIS3Help@usitc.gov*. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on November 17, 2014, based on a complaint filed on behalf of Converse Inc. (''Converse'' or ''Complainant'') of North Andover, Massachusetts. 79 FR 68482–83 (Nov. 17, 2014). The complaint alleges, *inter alia,* violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain footwear products by reason of infringement of U.S. Trademark Registration Nos. 3,258,103 (''the '103 trademark'') and 1,588,960 (''the '960 trademark''), and the '753 trademark, registered on September 10, 2013, and the common law trademark rights for the same mark (the ''CMT''). *See id.* The Commission's notice of investigation names numerous respondents including Skechers U.S.A., Inc. (''Skechers'') of Manhattan Beach, California, and Highline United LLC d/b/a Ash Footwear USA (''Highline''), now of Hyde Park, Massachusetts. *Id.* New Balance Athletic Shoe, Inc. (''New Balance'') of Boston, Massachusetts, was subsequently added to the investigation as a respondent-intervenor. 80 FR 9748 (Feb. 24, 2015). Only Skechers, Highline, and New Balance remain active in the investigation (collectively, the ''Active Respondents''). The following five respondents were found in default: Dioniso SRL (''Dioniso'') of Perugia, Italy; Shenzhen Foreversun Industrial Co., Ltd. (a/k/a Shenzhen Foreversun Shoes Co., Ltd.) (''Foreversun'') of Shenzhen, China; Fujian Xinya I&E Trading Co. Ltd. of Jinjiang, China; Zhejiang Ouhai International Trade Co. Ltd. (''Ouhai'') of Wenzhou, China; and Wenzhou Cereals Oils & Foodstuffs Foreign Trade Co. Ltd. of Wenzhou, China (collectively, the ''Defaulting Respondents''). Every other respondent was terminated from the investigation or settled with Converse. The Office of Unfair Import Investigations (''OUII'') is also a party to the investigation. 79 FR at 68483.

On June 23, 2016, the Commission found a violation of section 337 with respect to the '103 trademark and the '960 trademark and issued a GEO directed against infringing footwear products. 81 FR 42377–79 (June 29, 2016). The Commission found no violation of section 337 with respect to the '753 trademark because it determined the '753 trademark and the common law trademark rights in the CMT were invalid based on a lack of secondary meaning. *Id.* at 42379.

Thereafter, Converse appealed the Commission's finding of no violation of section 337 with respect to the '753 trademark and its alleged common law trademark rights in the CMT. The Federal Circuit vacated the Commission's finding and remanded the investigation to the Commission in *Converse, Inc.* v. *International Trade Commission,* 909 F.3d 1110 (Fed. Cir. 2018). On April 9, 2019, the Commission, in turn, remanded the matter to the ALJ who adjudicated the original investigation to make findings and issue an RID with respect to the CMT in accordance with the Federal Circuit decision.

On July 31, 2019, Converse, the Active Respondents, and OUII each filed an initial brief regarding the issues on remand. On August 9, 2019, Converse and the Active Respondents each filed a reply brief.

On October 9, 2019, the ALJ issued his RID finding no violation of section 337 by the Active Respondents. Specifically, the RID found that Converse had not established secondary meaning of the CMT prior to each Active Respondents' alleged first use and, therefore, Converse possessed no valid common law trademark rights in the CMT. The RID also found that the Active Respondents' accused products do not infringe even if the CMT were found to have acquired secondary meaning, except for one Skechers product found to infringe. The RID further found the Defaulting Respondents' accused products infringe the '753 trademark.

On October 22, 2019, Converse, the Active Respondents, and OUII each filed a petition for review of the RID. On October 30, 2019, each of these parties filed responses to the other petitions for review.

On February 7, 2020, the Commission determined to review the RID in part. 85 FR 8322 (Feb. 13, 2020). Specifically, the Commission determined to review the RID's infringement, validity, and injury analyses with respect to the common law trademark rights in the CMT and the RID's validity and infringement analyses with respect to the '753 trademark. *Id.* The Commission also requested additional briefing from the parties on the issues under review and on the issues of remedy, the public interest, and bonding. *Id.* at 8322–23. Converse, the Active Respondents, and OUII filed timely initial and reply written submissions.

Having reviewed the record in this investigation, including the RID and the parties' written submissions, the Commission has determined to affirm in part and reverse in part the RID's findings under review. Specifically, the Commission reverses the RID's finding that the CMT had not acquired

secondary meaning prior to each Active Respondents' alleged first use of the mark. The Commission has determined that there has been no violation by the Active Respondents because, although Converse has established that its CMT had acquired secondary meaning prior to each of those Respondents' alleged first uses of the mark (which predate registration of the '753 trademark), Converse has failed to show either a likelihood of confusion or injury to its domestic industry, or both, with respect to those Respondents' accused products. The Commission has also determined that it may assess the validity of the '753 trademark and affirms with modifications the RID's finding that the '753 trademark has not been proven invalid. The Commission further determines that Converse has proven a violation of section 337 by substantial, reliable, and probative evidence with respect to Defaulting Respondents Foreversun and Dioniso (whose infringements postdate registration of the '753 trademark), but not with respect to Defaulting Respondents Xinya, Wenzhou, and Ouhai. Accordingly, the Commission has determined that there is a violation of section 337 with respect to the '753 trademark.

Having found a violation of section 337 as to the '753 trademark, the Commission has determined that the appropriate form of relief is: (1) A GEO prohibiting the unlicensed entry of footwear products that infringe the '753 trademark; and (2) CDOs prohibiting Defaulting Respondents Dioniso and Foreversun from further importing, selling, and distributing infringing products in the United States. The Commission further determined that the public interest factors enumerated in section 337(d)(1) and (f)(1) do not preclude issuance of the remedial orders. Finally, the Commission determined that a bond in the amount of 100 percent of the entered value (per pair) of the infringing products is required to permit temporary importation during the period of Presidential review (19 U.S.C. 1337(j)). The Commission has also issued an opinion explaining the basis for the Commission's action. The Commission's orders and opinion were delivered to the President and to the United States Trade Representative on the day of their issuance. The investigation is hereby terminated.

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 complete service for any party 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).

The Commission vote for this determination took place on September 9, 2020.

The authority for the Commission's determination 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.

By order of the Commission.

Issued: September 9, 2020.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2020–20278 Filed 9–14–20; 8:45 am]

**BILLING CODE 7020–02–P**

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## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–1118]**

## Certain Movable Barrier Operator Systems and Components Thereof; Notice of a Commission Determination To Review a Remand Initial Determination; Request for Written Submissions

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission (the ''Commission'') has determined to: Review a Remand Initial Determination (''Remand ID'') finding that the complainant The Chamberlain Group, Inc. (''CGI'') has satisfied the economic prong of the domestic industry requirement with respect to U.S. Patent No. 7,755,223 (''the '223 patent''); and request supplemental briefing on remedy, the public interest, and bonding for the limited purpose of updating submissions submitted in March 2020.

**FOR FURTHER INFORMATION CONTACT:** Carl P. Bretscher, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2382. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket system (''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:** The Commission instituted this investigation on June 11, 2018, based on a complaint, as supplemented, filed by CGI of Oak Brook, Illinois. 83 FR 27020–21 (June 11, 2018). The complaint alleges a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''Section 337''), in the importation, sale for importation, or sale in the United States after importation of certain movable barrier operator (''MBO'') systems that purportedly infringe one or more of the asserted claims of the '223 patent and U.S. Patent Nos. 8,587,404 (''the '404 patent'') and 6,741,052 (''the '052 patent''). *Id.* The Commission's notice of investigation named Nortek Security & Control, LLC of Carlsbad, CA; Nortek, Inc. of Providence, RI; and GTO Access Systems, LLC of Tallahassee, FL (collectively, ''Nortek'') as respondents. *Id.* The Office of Unfair Import Investigations was not named as a party to this investigation. *See id.*

The Commission subsequently terminated the investigation with respect to certain patent claims withdrawn by CGI. *See* Order No. 16 (Feb. 5, 2019), *unreviewed by* Comm'n Notice (March 6, 2019); Order No. 27 (June 7, 2019), *unreviewed by* Comm'n Notice (June 27, 2019); Order No. 31 (July 30, 2019), *unreviewed by* Comm'n Notice (Aug. 19, 2019); Order No. 32 (Sept. 27, 2019), *unreviewed by* Comm'n Notice (Oct. 17, 2019).

On June 5, 2019, the presiding administrative law judge (''ALJ'') issued a Markman order (Order No. 25) construing the claim terms in dispute.

On December 12, 2018, CGI filed a motion for summary determination that it satisfied the economic prong of the domestic industry requirement. Nortek opposed the motion. On June 6, 2019, the ALJ issued a notice advising the parties that the motion would be granted and a formal written order would be issued later. Order No. 26 (June 6, 2019).

The ALJ held an evidentiary hearing on the issues in dispute on June 10–14, 2019.

On November 25, 2019, ALJ issued Order No. 38, finding no issue of material fact that CGI's investments in labor and capital relating to its domestic industry products were ''significant''

and that CGI has satisfied the economic prong of the domestic industry requirement pursuant to Section 337(a)(3)(B) (19 U.S.C. 1337(a)(3)(B)). Order No. 38 (Nov. 25, 2019). Order No. 38 also finds that genuine issues of material fact precluded entry of summary determination with respect to CGI's investments in plant and equipment, under Section 337(a)(3)(A) (19 U.S.C. 1337(a)(3)(A)). *Id.*

On the same date, the ALJ issued a final initial determination (''Final ID''), finding no violation of Section 337 because the asserted claims of the '223 and '404 patents, if valid, are not infringed and the asserted claim of the '052 patent is invalid, even if infringed. Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond (Nov. 25, 2019).

On February 19, 2020, the Commission issued a notice of its determination to review Order No. 38 and to partially review the Final ID with respect to certain issues relating to each of the three asserted patents. 85 FR 10723–26 (Feb. 25, 2020). The Commission also directed the parties to brief its questions on violation and requested briefing from the parties, the public, and any interested government entities concerning remedy, the public interest, and bonding. *Id.*

On April 22, 2020, the Commission issued a determination finding no violation with respect to the '404 or '052 patents. Comm'n Notice at 3 (April 22, 2020). The Commission also vacated Order No. 38 and remanded the economic prong issue with respect to the '223 patent. *Id.;* Order Vacating and Remanding Order No. 38 (April 22, 2020) (''Remand Order'').

On May 15, 2020, the ALJ issued Order No. 39, seeking additional information from the parties in light of the Commission's Remand Order. Order No. 39 (May 15, 2020). On July 10, 2020, the ALJ issued the subject Remand ID, finding that CGI has made significant investments, both quantitatively and qualitatively, in plant and equipment and labor and capital, pursuant to Section 337(a)(3)(A) and (B) (19 U.S.C. 1337(a)(3)(A)–(B)), respectively. Remand Initial Determination (July 10, 2020). The Remand ID concludes that CGI has satisfied the economic prong of the domestic industry requirement in relation to the '223 patent. *Id.*

On July 20, 2020, Nortek filed a petition for review of the RID. CGI filed its opposition to Nortek's petition for review on July 27, 2020.

Having reviewed the Remand ID, the parties' submissions, and the record in this investigation, the Commission has determined to review the Remand ID and requests the parties to brief the following questions:

(1) With respect to CGI's garage door opener (''GDO'') products that purportedly practice the '223 patent ('' '223 DI products''), provide the percentage of CGI's sales of its '223 DI products in the United States compared to its total, worldwide sales of such products. Explain whether this percentage substantially differs from the percentage of CGI's sales of all GDO products in the United States compared to its worldwide sales of all GDO products or the percentage of CGI's sales of all products in the United States compared to its worldwide sales of all products, as provided by CGI. If so, explain whether using the percentage of CGI's sales of '223 DI products in the United States, compared to its total worldwide sales of such products, would materially affect calculation of its relevant domestic industry investments or foreign investments in plant and equipment or labor and capital, and how this may affect the economic prong analysis.

(2) Explain whether CGI's calculations of its foreign expenditures for plant and equipment or labor and capital relating to its '223 DI products include its foreign manufacturing expenditures. If not, please indicate what information is in the record regarding its foreign manufacturing expenses, and provide, if possible, calculations comparing domestic expenditures to total expenditures (that include the foreign manufacturing expenses). Based on these calculations, discuss how including CGI's foreign manufacturing expenditures affects assessment of the significance of its relevant domestic industry investments in either plant and equipment or labor and capital.

(3) When were the calculations and analyses that the Commission has requested in questions (1) and (2) performed? Who performed them?

(4) Did Nortek previously present any calculations or analyses using CGI's worldwide sales?

(5) Please provide further detail (as available in the record) regarding the activities performed at CGI's Technical Support Center in Tucson. Explain, with reference to relevant Commission precedent, the extent to which the Commission should consider such expenses in its assessment of the economic prong. Also explain whether these activities are the sort that a mere importer would need to carry out in the United States (as opposed to in another country).

(6) Please discuss the similarities and differences between the allocation methodologies Chamberlain used in this investigation and allocation methodology used in the 1016 investigation, *Certain Access Control Systems and Components Thereof,* Inv. No. 337–TA–1016.

(7) In the 1016 investigation, did the presiding ALJ or the Commission require Chamberlain to evaluate its worldwide sales or foreign manufacturing when it was concluded that Chamberlain satisfied the economic prong? *See generally* 1016 Initial Determination at 222–293 (Oct. 23, 2017); Comm'n Notice (Dec. 22, 2017). Apart from the 1057 and 1097 investigations that the parties have already addressed, please briefly identify any Commission precedent requiring a complainant to present its manufacturing investment data.

(8) Please discuss whether, in an investigation in which the DI products are manufactured outside the United States, it is consistent with the statute, legislative history, and court and Commission precedent not to consider foreign manufacturing expenses in determining the significance of domestic industry investments and expenditures.

(9) Chamberlain has argued that the '223 DI products overlap with the products analyzed in the 1016 investigation. *See* Chamberlain Submission on Remand at 25 (June 1, 2020). Please discuss the extent of the overlap in the DI products in the 1016 investigation and the present investigation.

(10) Given that the parties responded to the Commission's request for briefing on remedy, the public interest, and bonding five months ago, the parties should revise their submissions on these subjects for the limited purpose of updating them in light of the last five months. The parties should include a discussion as to whether limiting the scope of the violation (if any) and covered products to the '233 patent and excluding the '404 and '052 patents would impact the determination of remedy (*e.g.,* by affecting the scope of Nortek's domestic inventory), the public interest, bonding, or any other issues on review. The parties, in preparing their supplemental submissions, should follow the instructions provided by the Commission in its earlier notice of partial review of the Final ID. *See* 85 FR at 10724–26 (Feb. 19, 2020).

The parties are requested to brief only the discrete issues identified above, with reference to the applicable law and evidentiary record. The parties are not to brief any other issues on review, which have already been adequately presented in the parties' previous

filings. In addition, parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such initial submissions should include views on the recommended determination by the ALJ on the issues of remedy and bonding.

The parties' written submissions and proposed remedial orders must be filed no later than the close of business on September 23, 2020. Reply submissions must be filed no later than the close of business on September 30, 2020. Opening submissions are limited to 30 pages. Reply submissions are limited to 25 pages. Third-party submissions should be filed no later than the close of business on September 30, 2020, and may not include 10 pages, not including any attachments. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (Mar. 19, 2020). Submissions should refer to the investigation number (''Inv. No. 337–TA–1118'') in a prominent place on the cover page and/or first page. (*See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination 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).

The Commission voted to approve these determinations on September 9, 2020.

By order of the Commission.

Issued: September 9, 2020.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2020–20279 Filed 9–14–20; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

On September 9, 2020, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the District of Colorado in the lawsuit entitled *United States of America* v. *Pioneer Natural Resources Company and Pioneer Natural Resources USA, Inc.,* Civil Action No.1:17–CV–00168–WJM–NYM.

The lawsuit was commenced in January 2017, when the United States, on behalf of the United States Environmental Protection Agency (''EPA''), filed a complaint against Pioneer Natural Resources Company and Pioneer Natural Resources USA, Inc. (''Settling Defendants'') seeking reimbursement of response costs incurred under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9607(a), for response actions at or in connection with the release or threatened release of hazardous substances at Operable Unit 1 (''OU1'') of the Nelson Tunnel/Commodore Waste Rock Pile Superfund Site (''Site''). The United States also sought a declaration of Settling Defendants' liability, pursuant to Section 113(g) of CERCLA for all future response costs to be incurred by the United States in connection with the OU1 Site. A remedial action at Operable Unit 2 (''OU2'') of the Site is also ongoing. The filed Complaint was for OU1 response costs only.

In September 2017, Pioneer filed a counterclaim against the United States alleging that the United States is liable under Sections 107 and 113 of CERCLA, 42 U.S.C. 9607 and 9613, as both an owner of OU1 at the time that hazardous substances were disposed of at OU1 and a current owner of OU1. Settling Defendants in their counterclaims sought a judgment against the United States for the United States' equitable share of costs incurred and that may, in the future, be incurred as a result of the release or threatened release of hazardous substances at the OU1 Site.

The proposed Consent Decree will resolve all CERCLA claims and counterclaims alleged in this action. In addition, the proposed Consent Decree will resolve CERCLA claims relating to OU2, as detailed below.

The proposed Consent Decree requires Settling Defendants to pay $5,775,000 for past and future response costs incurred by the United States in connection with OU1 and OU2 at the Site. In return, the United States provides a covenant not to sue and contribution protection to Settling Defendants for past and future response costs in connection with the Site as a whole, which includes OU1 and OU2. These covenants extend only to Settling Defendants and are conditioned upon the satisfactory performance by Settling Defendants of their obligations under the proposed Consent Decree.

The proposed Consent Decree also requires Settling Federal Agencies, the United States, on behalf of the United States Department of Interior and the United States Department of Agriculture, on behalf of the United States Forest Service (''USFS''), to pay EPA $425,000 for past and future response costs incurred in connection with OU1 at the Site and past response costs incurred in connection with OU2 at the Site. Future response costs to be incurred by EPA and the USFS in connection with the CERCLA response action(s) at OU2 will be resolved through a memorandum of understanding or interagency agreement between the USFS and EPA. In return for the payment from Settling Federal Agencies, EPA provides a covenant to not take administrative action against Settling Federal Agencies to recover past and future response costs in connection with OU1 at the Site and past response costs in connection with OU2 at the Site. These covenants only extend to Settling Federal Agencies and are also conditioned upon the satisfactory performance by Settling

Federal Agencies of their obligations under the proposed Consent Decree.

Under the terms of the proposed Consent Decree, Settling Defendants further covenant not to sue and agree not to assert any claims or causes of action against the United States for past and future response costs incurred in connection with the Site. Settling Federal Agencies also agree not to assert any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund with respect to past and future response costs incurred in connection with OU1 at the Site and past response costs incurred in connection with OU2 at the Site.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Pioneer Natural Resources Company and Pioneer Natural Resources USA, Inc.,* D.J. Ref. No. 90–11–3–10841/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

| *To submit comments:* | *Send them to:* |
|---|---|
| By email ..... | *pubcomment-ees.enrd@usdoj.gov.* |
| By mail ..... | Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611. |

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees*. We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $9.25 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the exhibits and signature pages, the cost is $6.50

**Jeffrey Sands,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2020–20333 Filed 9–14–20; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Overpayment Detection and Recovery Activities

**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 15, 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:** Form ETA–227 is a quarterly data collection concerned with identifying fraud. Data cells describe fraud identified through tools (State and National Directories of New Hires) and break out fraud cases in the Federal-State Extended Benefits program. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 5, 2020 (85 FR 6579).

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:* Overpayment Detection and Recovery Activities.

*OMB Control Number:* 1205–0187.

*Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Respondents:* 53.

*Total Estimated Number of Responses:* 212.

*Total Estimated Annual Time Burden:* 2,968 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. 2020–20303 Filed 9–14–20; 8:45 am]

**BILLING CODE 4510–FW–P**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

**[Docket No. OSHA–2018–0005]**

### Whistleblower Stakeholder Meeting

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Notice of public meeting.

**SUMMARY:** The Occupational Safety and Health Administration (OSHA) is announcing a public meeting to solicit comments and suggestions from stakeholders on issues facing the agency in the administration of the whistleblower laws it enforces.

**DATES:** The public meeting will be held on October 13, 2020, from 1:00 p.m. to 4:00 p.m., ET via telephone. Persons

interested in attending the meeting must register by October 6, 2020. In addition, comments relating to the ''Scope of Meeting'' section of this document must be submitted in written or electronic form by October 6, 2020.

**ADDRESSES:**

*Electronically:* You may submit materials, including attachments, electronically at *http://www.regulations.gov,* which is the Federal eRulemaking portal. Follow the on-line instructions for submissions. All comments should be identified with Docket No. OSHA–2018–0005.

*Mail, hand delivery, express mail, messenger, or courier service:* When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA–2018–0005, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. *Please note:* While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID–19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service.

*Registration to Attend and/or to Participate in the Telephonic Meeting:* If you wish to attend the public meeting, make an oral presentation at the meeting, or participate in the meeting, you must register using this link: *https://www.eventbrite.com/e/whistleblower-stakeholder-meeting-tickets-118496465117* by close of business on October 6, 2020. Actual times provided for presentation will depend on the number of requests, but no more than 10 minutes per participant will be allowed. There is no fee to register for the public meeting. After reviewing the requests to present, OSHA will contact each participant prior to the meeting to inform them of the speaking order.

**FOR FURTHER INFORMATION CONTACT:**

*For press inquiries:* Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov*.

*For general information:* Mr. Anthony Rosa, Deputy Director, OSHA Directorate of Whistleblower Protection Programs, U.S. Department of Labor; telephone: (202) 693–2199; email: *osha.dwpp@dol.gov*.

**SUPPLEMENTARY INFORMATION:**

## A. Scope of Meeting

OSHA is interested in obtaining information from the public on key issues facing the agency's whistleblower program. This meeting is the sixth in a series of meetings requesting public input on this program. The agency is seeking suggestions on how it can improve the program. Please note that the agency does not have the authority to change the statutory language and requirements of the laws it enforces. In particular, the agency invites input on the following:

1. How can OSHA deliver better whistleblower customer service?
2. What kind of assistance can OSHA provide to help explain the agency's whistleblower laws to employees and employers?
3. Are there particular whistleblowing issues in the healthcare, retail, and grocery industries that OSHA should be aware of?

## B. Request for Comments

Regardless of attendance at the public meeting, interested persons may submit written or electronic comments (see **ADDRESSES**). Submit a single copy of electronic comments or two paper copies of any mailed comments. To permit time for interested persons to submit data, information, or views on the issues in the ''Scope of Meeting'' section of this notice, please submit comments by October 6, 2020, and include Docket No. OSHA–2018–0005.

## C. Access to the Public Record

Electronic copies of this **Federal Register** notice are available at: *http://www.regulations.gov*. This notice, as well as news releases and other relevant information, also are available on the Directorate of Whistleblower Protection Programs' web page at: *http://www.whistleblowers.gov*.

## Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary for Occupational Safety and Health, authorized the preparation of this notice under the authority granted by Secretary's Order 08–2020 (May 15, 2020).

Signed at Washington, DC, on September 9, 2020.

**Loren Sweatt,**

*Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2020–20305 Filed 9–14–20; 8:45 am]

BILLING CODE 4510–26–P

# MILLENNIUM CHALLENGE CORPORATION

**[MCC FR 20–06]**

## Report on Countries That Are Candidates for Millennium Challenge Account Eligibility in Fiscal Year 2021 and Countries That Would Be Candidates But for Legal Prohibitions

**AGENCY:** Millennium Challenge Corporation.

**ACTION:** Notice.

**SUMMARY:** The Millennium Challenge Act of 2003 requires the Millennium Challenge Corporation to publish a report that identifies countries that are ''candidate countries'' for Millennium Challenge Account assistance during FY 2021. The report is set forth in full below.

**Authority:** Section 608(a) of the Millennium Challenge Act of 2003, as amended, 22 U.S.C. 7701, 7707(a) (the Act).

Dated: September 9, 2020.

**Jeanne M. Hauch,**

*VP/General Counsel and Corporate Secretary.*

## Report on Countries That Are Candidates for Millennium Challenge Compact Eligibility for Fiscal Year 2021 and Countries That Would Be Candidates But for Legal Prohibitions

*Summary*

This report to Congress is provided in accordance with section 608(a) of the Millennium Challenge Act of 2003, as amended, 22 U.S.C. 7701, 7707(a) (the Act).

The Act authorizes the provision of assistance for global development through the Millennium Challenge Corporation (MCC) for countries that enter into a Millennium Challenge Compact with the United States to support policies and programs that advance the progress of such countries to achieve lasting economic growth and poverty reduction. The Act requires MCC to take a number of steps in selecting countries with which MCC will seek to enter into a compact, including determining the countries that will be eligible countries for fiscal year (FY) 2021 based on (a) a country's demonstrated commitment to (i) just and democratic governance, (ii) economic freedom, and (iii) investments in its people; and (b) the opportunity to reduce poverty and generate economic growth in the country, and (c) the availability of funds to MCC. These steps include the submission to the congressional committees specified in the Act and publication in the **Federal Register** of reports on the following:

- The countries that are ''candidate countries'' for FY 2021 based on their per capita income levels and their eligibility to receive assistance under U.S. law and countries that would be candidate countries but for specified legal prohibitions on assistance (section 608(a) of the Act);
- The criteria and methodology that the MCC Board of Directors (Board) will use to measure and evaluate the relative policy performance of the ''candidate countries'' consistent with the requirements of subsections (a) and (b) of section 607 of the Act in order to determine ''eligible countries'' from among the ''candidate countries'' (section 608(b) of the Act); and
- The list of countries determined by the Board to be ''eligible countries'' for FY 2021, identification of such countries with which the Board will seek to enter into compacts, and a justification for such eligibility determination and selection for compact negotiation (section 608(d) of the Act).

This report is the first of three required reports listed above.

**Candidate Countries for FY 2021**

The Act requires the identification of all countries that are candidate countries for FY 2021 and the identification of all countries that would be candidate countries but for specified legal prohibitions on assistance. Under sections 606(a) and (b) of the Act, candidate countries must qualify as low income or lower middle income countries as defined in the Act.

Specifically, a country will be a candidate country in the low income category for FY 2021 if it

- has a per capita income that is not greater than the World Bank's lower middle income country threshold for such fiscal year ($4,045 gross national income per capita for FY 2021);
- is among the 75 countries identified by the World Bank as having the lowest per capita income; and
- is not ineligible to receive United States economic assistance under part I of the Foreign Assistance Act of 1961, as amended (the Foreign Assistance Act), by reason of the application of the Foreign Assistance Act or any other provision of law.

A country will be a candidate country in the lower middle income category for FY 2021 if it

- has a per capita income that is not greater than the World Bank's lower middle income country threshold for such fiscal year ($4,045 gross national income per capita for FY 2021);
- is not among the 75 countries identified by the World Bank as having the lowest per capita income; and
- is not ineligible to receive United States economic assistance under part I of the Foreign Assistance Act by reason of the application of the Foreign Assistance Act or any other provision of law.

Under section 606(c) of the Act as applied for FY 2021, a country with per capita income changes from FY 2020 to FY 2021 such that the country would be reclassified from the low income category to the lower middle income category or vice versa will retain its income status in its former category for FY 2021 and two subsequent fiscal years (FY 2022 and FY 2023). A country that has transitioned to the upper middle income category does not qualify as a candidate country.

Pursuant to section 606(d) of the Act, the Board identified the following countries as candidate countries under the Act for FY 2021. In so doing, the Board referred to the prohibitions on assistance to countries for FY 2020 under the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2020 (Div. J., Pub. L. 116–94) (FY 2020 SFOAA).

**Candidate Countries: Low Income Category**

1. Angola
2. Bangladesh
3. Benin
4. Bhutan
5. Bolivia
6. Burkina Faso
7. Cabo Verde
8. Cameroon
9. Central African Republic
10. Chad
11. Côte d'Ivoire
12. Democratic Republic of the Congo
13. Djibouti
14. Egypt
15. Eswatini
16. Ethiopia
17. Gambia, The
18. Ghana
19. Guinea
20. Guinea-Bissau
21. Haiti
22. Honduras
23. India
24. Kenya
25. Kiribati
26. Kyrgyz Republic
27. Laos
28. Liberia
29. Madagascar
30. Malawi
31. Mali
32. Mauritania
33. Micronesia, Federated States of
34. Moldova
35. Mongolia
36. Morocco
37. Mozambique
38. Nepal
39. Niger
40. Nigeria
41. Pakistan
42. Philippines
43. Republic of the Congo
44. Rwanda
45. São Tomé and Principe
46. Senegal
47. Sierra Leone
48. Solomon Islands
49. Somalia
50. Tajikistan
51. Tanzania
52. Timor-Leste
53. Togo
54. Uganda
55. Ukraine
56. Uzbekistan
57. Vanuatu
58. Vietnam
59. Yemen
60. Zambia

**Candidate Countries: Lower Middle Income Category**

1. El Salvador
2. Sri Lanka [1]
3. Tunisia

**Countries That Would Be Candidate Countries But for Legal Provisions That Prohibit Assistance**

Countries that would be considered candidate countries for FY 2021 but are ineligible to receive United States economic assistance under part I of the Foreign Assistance Act by reason of the application of any provision of the Foreign Assistance Act or any other provision of law are listed below. This list is based on legal prohibitions against economic assistance that apply as of July 19, 2020.

**Prohibited Countries: Low Income Category**

- *Afghanistan* is ineligible to receive foreign assistance due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 *et seq.*).
- *Burma* is ineligible to receive foreign assistance, including due to concerns relative to its record on human rights.
- *Burundi* is ineligible to receive foreign assistance due to its status as a

[1] Section 7044(e) of the FY 2020 SFOAA provides that, subject to exceptions for certain categories of assistance, funds appropriated by the SFOAA for assistance for the central Government of Sri Lanka may be made available only if the Secretary of State makes certain certifications regarding actions taken by the Government of Sri Lanka and reports to the Committees on Appropriations. If this certification is not issued, Sri Lanka will not be a candidate country for FY 2021.

Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 *et seq.*).

▪ *Cambodia* is ineligible to receive foreign assistance pursuant to section 7043(b)(2)(A) of the FY 2020 SFOAA, which restricts assistance to the Government of Cambodia unless the Secretary of State certifies that the Government of Cambodia is taking effective steps to strengthen regional security and stability and respect the rights and responsibilities enshrined in the Constitution of the Kingdom of Cambodia.

▪ *Comoros* is ineligible to receive foreign assistance due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 *et seq.*).

▪ *Eritrea* is ineligible to receive foreign assistance, including due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 *et seq.*).

▪ *Lesotho* is ineligible to receive foreign assistance due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 *et seq.*).

▪ *Nicaragua* is ineligible to receive foreign assistance due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 *et seq.*).

▪ *North Korea* is ineligible to receive foreign assistance, including pursuant to section 7007 of the FY 2020 SFOAA, which prohibits direct assistance to the government of North Korea.

▪ *Papua New Guinea* is ineligible to receive foreign assistance due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 *et seq.*).

▪ *South Sudan* is ineligible to receive foreign assistance, including pursuant to section 7042(h) of the FY 2020 SFOAA, which prohibits (with limited exceptions) assistance to the central government of South Sudan.

▪ *Sudan* is ineligible to receive foreign assistance, including pursuant to section 7042(i) of the FY 2020 SFOAA, which prohibits (with limited exceptions) assistance to the government of Sudan.

▪ *Syria* is ineligible to receive foreign assistance, including pursuant to section 7007 of the FY 2020 SFOAA, which prohibits direct assistance to the government of Syria.

▪ *Zimbabwe* is ineligible to receive foreign assistance, including pursuant to section 7042(j)(2) of the FY 2020 SFOAA, which prohibits (with limited exceptions) assistance for the central government of Zimbabwe unless the Secretary of State certifies and reports to Congress that the rule of law has been restored, including respect for ownership and title to property, and freedoms of expression, association, and assembly.

**Prohibited Countries: Lower Middle Income Category**

▪ *Algeria* is ineligible to receive foreign assistance due to its status as a Tier 3 country under the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 *et seq.*).

Countries identified above as candidate countries, as well as countries that would be considered candidate countries but for the applicability of legal provisions that prohibit U.S. economic assistance, may be the subject of future statutory restrictions or determinations, or changed country circumstances, that affect their legal eligibility for assistance under part I of the Foreign Assistance Act by reason of application of the Foreign Assistance Act or any other provision of law for FY 2021.

[FR Doc. 2020–20250 Filed 9–14–20; 8:45 am]

BILLING CODE 9211–03–P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice: (20–072)]**

## NASA Advisory Council; STEM Engagement Committee; Meeting

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Science, Technology, Engineering and Mathematics (STEM) Engagement Committee of the NASA Advisory Council (NAC). This Committee reports to the NAC.

**DATES:** Thursday, October 1, 2020, 11:00 a.m.–4:00 p.m., Eastern Time.

**ADDRESSES:** Virtual meeting by dial-in teleconference and WebEx only.

**FOR FURTHER INFORMATION CONTACT:** Dr. Beverly Girten, Designated Federal Officer, NAC STEM Engagement Committee, NASA Headquarters, Washington, DC 20546, (202) 358–0212, or *beverly.e.girten@nasa.gov*.

**SUPPLEMENTARY INFORMATION:** This meeting will be held virtually and will be available telephonically and by WebEx only. You must use a touch tone phone to participate in this meeting. Any interested person may dial the toll free access number 844–467–6272 or toll access number 720–259–6462, and then the numeric participant passcode: 423307 followed by the # sign. NOTE: If dialing in, please ''mute'' your telephone. To join via WebEx, use link: *https://nasaenterprise.webex.com/nasaenterprise/onstage/g.php?MTID=e61bb5ede39ff001b74ffe7c0113072ca*. The meeting number is 199 338 2435 and the password is 3pgDmf7PS@7 (password is case sensitive). The agenda for the meeting will include the following:

—Opening Remarks by Chair
—STEM Engagement Update
—NASA Minority University Research and Education Project
—Diversity and Performance and Evaluation Update
—Findings and Recommendations to the NASA Advisory Council
—Other Related Topics

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

**Patricia Rausch,**

*Advisory Committee Management Officer, National Aeronautics and Space Administration.*

[FR Doc. 2020–20230 Filed 9–14–20; 8:45 am]

BILLING CODE 7510–13–P

## NATIONAL CREDIT UNION ADMINISTRATION

## Sunshine Act: Notice of Agency Meeting

**TIME AND DATE:** 10:00 a.m., Thursday, September 17, 2020.

*Recess:* 12:00 p.m.

12:15 p.m., Thursday, September 17, 2020.

**PLACE:** Due to the COVID–19 Pandemic, the meeting will be open to the public via live webcast only. Visit the agency's homepage (*www.ncua.gov*) and access the provided webcast link.

**STATUS:** Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

**MATTERS TO BE CONSIDERED:**

**Portions Open to the Public**

1. Board Briefing, Share Insurance Fund Quarterly Report.
2. Board Briefing, Modern Examination and Risk Identification Tool (MERIT) Update.
3. Customer Identification Program Exemption.
4. NCUA Rules and Regulations, Real Estate Appraisals.

**Portions Closed to the Public**

1. Supervisory Matter. Closed pursuant to Exemption (8).

**CONTACT PERSON FOR MORE INFORMATION:** Gerard Poliquin, Secretary of the Board, Telephone: 703–518–6304.

**Gerard Poliquin,**

*Secretary of the Board.*

[FR Doc. 2020–20355 Filed 9–11–20; 11:15 am]

**BILLING CODE 7535–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2020–0001]**

### Sunshine Act Meetings

**TIME AND DATE:** Weeks of September 14, 21, 28, October 5, 12, 19, 2020.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public.

**Week of September 14, 2020**

*Tuesday, September 15, 2020*

9:55 a.m. Affirmation Session (Public Meeting) (Tentative), Direct Final Rule: Reactor Vessel Material Surveillance Program (RIN 3150–AK07; NRC 2017 0151) (Tentative), (Contact: Denise McGovern: 301–415–0681)

*Additional Information:* By a vote of 5–0 on September 10, 2020, the Commission determined pursuant to U.S.C. 552b(e) and '9.107(a) of the Commission's rules that the above referenced Affirmation Session be held with less than one week notice to the public. The meeting is scheduled on September 15, 2020. Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the web address—*https://www.nrc.gov/*.

10:00 a.m. Agency's Response to the COVID–19 Public Health Emergency (Public Meeting), (Contact: Luis Betancourt: 301–415–6146)

*Additional Information:* Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the web address—*https://www.nrc.gov/*.

*Thursday, September 17, 2020*

10:00 a.m. Transformation at the NRC—Milestones and Results (Public Meeting), (Contact: Maria Arribas-Colon: 301–415–6026)

*Additional Information:* Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the web address—*https://www.nrc.gov/*.

**Week of September 21, 2020—Tentative**

There are no meetings scheduled for the week of September 21, 2020.

**Week of September 28, 2020—Tentative**

*Wednesday, September 30, 2020*

9:00 a.m. Strategic Programmatic Overview of the Operating Reactors and New Reactors Business Lines and Results of the Agency Action Review Meeting (Public Meeting), (Contact: Candace de Messieres: 301–415–8395)

*Additional Information:* Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the web address—*https://www.nrc.gov/*.

**Week of October 5, 2020—Tentative**

*Thursday, October 8, 2020*

10:00 a.m. Meeting with the Organization of Agreement States and the Conference of Radiation Control Program Directors (Public Meeting), (Contact: Celimar Valentin-Rodriquez: 301–415–7124)

*Additional Information:* Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the web address—*https://www.nrc.gov/*.

**Week of October 12, 2020—Tentative**

There are no meetings scheduled for the week of October 12, 2020.

**Week of October 19, 2020—Tentative**

*Wednesday, October 21, 2020*

10:00 a.m. Briefing on Human Capital and Equal Employment Opportunity (Public Meeting), (Contact: Randi Neff: 301–287–0583)

*Additional Information:* Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the web address—*https://www.nrc.gov/*.

1:00 p.m. All Employees Meeting with the Commissioners (Public Meeting)

*Additional Information:* Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live by webcast at the web address—*https://www.nrc.gov/*.

**CONTACT PERSON FOR MORE INFORMATION:** For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0681 or via email at *Denise.McGovern@nrc.gov*. The schedule for Commission meetings is subject to change on short notice.

The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html*.

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, (301–415–1969), or by email at *Wendy.Moore@nrc.gov* or *Tyesha.Bush@nrc.gov*.

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: September 10, 2020.

For the Nuclear Regulatory Commission.

**Denise L. McGovern,**

*Policy Coordinator, Office of the Secretary.*

[FR Doc. 2020–20352 Filed 9–11–20; 4:15 pm]

**BILLING CODE 7590–01–P**

## RAILROAD RETIREMENT BOARD

### Proposed Collection; Comment Request

In accordance with the requirement of Section 3506 (c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

*Comments are invited on:* (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the

information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

*1. Title and purpose of information collection:* Supplemental Information on Accident and Insurance; OMB 3220–0036.

Under Section 12(o) of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C 362 (o)), the Railroad Retirement Board (RRB) is entitled to reimbursement of the sickness benefits paid to a railroad employee if the employee receives a sum or damages for the same infirmity for which the benefits are paid. Section 2(f) of the RUIA requires employers to reimburse the RRB for days in which salary, wages, pay for time lost or other remuneration is later determined to be payable. Reimbursements under section 2(f) generally result from the award of pay for time lost or the payment of guaranteed wages. The RUIA prescribes that the amount of benefits paid be deducted and held by the employer in a special fund for reimbursement to the RRB.

The RRB currently utilizes Forms SI–1c, Supplemental Information on Accident and Insurance; SI–5, Report of Payments to Employee Claiming Sickness Benefits Under the RUIA; ID–3s and ID–3s (internet), Request for Lien Information—Report of Settlement; ID–3s–1, Lien Information Under Section 12(o) of the RUIA; ID–3u and ID–3u (internet), Request for Section 2(f) Information; ID–30k, Notice to Request Supplemental Information on Injury or Illness; and ID–30k–1, Notice to Request Supplemental Information on Injury or Illness; to obtain the necessary information from claimants and railroad employers. Completion is required to obtain benefits. One response is requested of each respondent. The RRB proposes no changes to SI–1c, SI–5, ID–3s, ID–3s (internet), ID–3u, ID–3u (internet), and ID–30k. The RRB proposes to remove Form ID–30K–1 from the Information Collection due to less than 10 responses per year.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

| Form No. | Annual responses | Time | Burden (hours) |
|---|---|---|---|
| SI–1c | 1,700 | 5 | 142 |
| SI–5 | 100 | 5 | 8 |
| ID–3s (paper & telephone) | 2,000 | 3 | 100 |
| ID–3s (internet) | 2,000 | 3 | 100 |
| ID–3s–1 (paper & telephone) | 1,200 | 3 | 60 |
| ID–3u (paper & telephone) | 1,000 | 3 | 50 |
| ID–3u (internet) | 800 | 3 | 40 |
| ID–30k | 100 | 5 | 8 |
| Total | 8,900 | | 508 |

*2. Title and purpose of information collection:* Pension Plan Reports; OMB 3220–0089.

Under Section 2(b) of the Railroad Retirement Act (RRA) (45 U.S.C. 231a), the Railroad Retirement Board (RRB) pays supplemental annuities to qualified RRB employee annuitants. A supplemental annuity, which is computed according to Section 3(e) of the RRA, can be paid at age 60 if the employee has at least 30 years of creditable railroad service or at age 65 if the employee has 25–29 years of railroad service. In addition to 25 years of service, a ''current connection'' with the railroad industry is required. Eligibility is further limited to employees who had at least 1 month of rail service before October 1981 and were awarded regular annuities after June 1966. Further, if an employee's 65th birthday was prior to September 2, 1981, he or she must not have worked in rail service after certain closing dates (generally the last day of the month following the month in which age 65 is attained). Under Section 2(h)(2) of the RRA, the amount of the supplemental annuity is reduced if the employee receives monthly pension payments, or a lump-sum pension payment from a private pension from a railroad employer, to the extent the payments are based on contributions from that employer. The employee's own contribution to their pension account does not cause a reduction. A private railroad employer pension is defined in 20 CFR 216.42.

The RRB requires the following information from railroad employers to calculate supplemental annuities: (a) The current status of railroad employer pension plans and whether such plans cause reductions to the supplemental annuity; (b) whether the employee receives monthly payments from a private railroad employer pension, elected to receive a lump sum in lieu of monthly pension payments from such a plan, or was required to receive a lump sum from such a plan due to the plan's small benefit provision; and (c) the amount of the payments attributable to the railroad employer's contributions. The requirement that railroad employers furnish pension information to the RRB is contained in 20 CFR 209.2.

The RRB currently utilizes Form G–88p and G–88p (internet), *Employer's Supplemental Pension Report,* and Form G–88r, *Request for Information About New or Revised Employer Pension Plan,* to obtain the necessary information from railroad employers. One response is requested of each respondent. Completion is mandatory.

The RRB proposes no changes to G–88P and G–88P (internet). The RRB proposes the following minor non-burden impacting changes to Form G–88R:

- Change work unit contact from ''RAC'' to ''SESC'' and
- update the fax number to the current number.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| G–88p | 100 | 8 | 13 |

ESTIMATE OF ANNUAL RESPONDENT BURDEN—Continued

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| G–88p (internet) | 200 | 6 | 20 |
| G–88r | 10 | 8 | 1 |
| Total | 310 | | 34 |

*3. Title and purpose of information collection:* Statement Regarding Contributions and Support; OMB 3220–0099.

Under Section 2 of the Railroad Retirement Act (45 U.S.C. 231a), dependency on an employee for one-half support at the time of the employee's death can affect (1) entitlement to a survivor annuity when the survivor is a parent of the deceased employee; (2) the amount of spouse and survivor annuities; and (3) the Tier II restored amount payable to a widow(er) whose annuity was reduced for receipt of an employee annuity, and who was dependent on the railroad employee in the year prior to the employee's death. One-half support may also negate the public service pension offset in Tier I for a spouse or widow(er). The Railroad Retirement Board (RRB) utilizes Form G–134, Statement Regarding Contributions and Support, to secure information needed to adequately determine if the applicant meets the one-half support requirement. One response is completed by each respondent. Completion is required to obtain benefits. The RRB proposes a minor editorial change to Form G–134 to change the date under Section 1 ''General Instructions''.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| G–134: | | | |
| With Assistance | 75 | 147 | 184 |
| Without assistance | 25 | 180 | 75 |
| Total | 100 | | 259 |

*4. Title and purpose of information collection:* Financial Disclosure Statement; OMB 3220–0127.

Under Section 10 of the Railroad Retirement Act and Section 2(d) of the Railroad Unemployment Insurance Act (45 U.S.C. 231i), the RRB may recover overpayments of annuities, pensions, death benefits, unemployment benefits, and sickness benefits that were made erroneously. An overpayment may be waived if the beneficiary was not at fault in causing the overpayment and recovery would cause financial hardship. The regulations for the recovery and waiver of erroneous payments are contained in 20 CFR 255 and CFR 340.

The RRB utilizes Form DR–423, Financial Disclosure Statement, to obtain information about the overpaid beneficiary's income, debts, and expenses if that person indicates that (s)he cannot make restitution for the overpayment. The information is used to determine if the overpayment should be waived as wholly or partially uncollectible. If waiver is denied, the information is used to determine the size and frequency of installment payments. The beneficiary is made aware of the overpayment by letter and is offered a variety of methods for recovery. One response is requested of each respondent. Completion is voluntary. However, failure to provide the requested information may result in a denial of the waiver request. The RRB proposes no changes to Form DR–423.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| DR–423 | 1,200 | 85 | 1,700 |

*6. Title and purpose of information collection:* Representative Payee Monitoring; OMB 3220–0151.

Under Section 12 of the Railroad Retirement Act (RRA) (45 U.S.C. 231k), the RRB may pay annuity benefits to a representative payee when an employee, spouse, or survivor annuitant is incompetent or a minor. The RRB is responsible for determining if direct payment to an annuitant or a representative payee would best serve the annuitant's best interest. The accountability requirements authorizing the RRB to conduct periodic monitoring of representative payees, including a written accounting of benefit payments received, are prescribed in 20 CFR 266.7. The RRB utilizes the following forms to conduct its representative payee monitoring program.

Form G–99a, *Representative Payee Report,* is used to obtain information needed to determine whether the benefit payments certified to the representative payee have been used for the annuitant's current maintenance and personal needs and whether the representative payee continues to be concerned with the annuitant's welfare. RRB Form G–99c, *Representative Payee Evaluation Report,* is used to obtain more detailed information from a representative payee who fails to complete and return Form G–99a or in situations when the returned Form G–99a indicates the possible misuse of funds by the representative payee. Form G–99c contains specific questions

concerning the representative payee's performance and is used by the RRB to determine whether or not the representative payee should continue in that capacity. The RRB proposes the following changes to Form G–99a:

• Add drop-down box ''Second Request'' at the top of the form to when the RRB needs to follow-up with a Representative Payee who did not response to the initial request.

• Add computer-generated address fields to mail the form to a Representative Payee.

• Slight change to question's 1, 3, and 9 wording to clarify and improve the reliability of responses.

The RRB proposes the following change to Form G–99c:

• Slight change question 9 wording to clarify and improve the reliability of responses.

Form G–106, *Statement of Care and Responsibility to Annuitant* is used in cases where the representative payee does not have custody of the annuitant. Form G–106 is used to solicit information about the representative payee's performance and the annuitant's well-being from the custodian of the annuitant. The form contains specific questions concerning the representative payee's performance, and is used by the RRB to determine whether or not the representative payee should continue in that capacity. Completion of the forms in this collection is required to retain benefits.

The RRB proposes no changes for Form G–106.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| G–99a (legal and all other, excepting parent for child) | 5,300 | 18 | 1,590 |
| G–99c (Parts I and II) | 300 | 24 | 120 |
| G–99c (Parts I, II, and III) | 120 | 31 | 62 |
| G–106 | 500 | 10 | 83 |
| Total | 6,220 | ..... | 1,885 |

*7. Title and purpose of information collection:* Earnings Information Request; OMB 3220–0184.

Under Section 2 of the Railroad Retirement Act (45 U.S.C. 231a), an annuity is not payable, or is reduced for any month(s) in which the beneficiary works for a railroad or earns more than prescribed amounts. The provisions relating to the reduction or non-payment of annuities by reason of work are prescribed in 20 CFR 230.

The RRB utilizes Form G–19–F, *Earnings Information Request,* to obtain earnings information that either had not been previously reported or erroneously reported by a beneficiary. Currently the claimant is asked to enter the date they stopped working, if applicable. If a respondent fails to complete the form, the RRB may be unable to pay them benefits. One response is requested of each respondent. The RRB proposes no changes to the Form G–19–F.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| G–19–F | 900 | 8 | 120 |
| Total | 900 | ..... | 120 |

*8. Title and purpose of information collection:* Job Information Report, OMB 3220–0193.

The Railroad Retirement Board (RRB) occupational disability standards allow the RRB to request job information from railroad employers to determine an applicant's eligibility for an occupational disability.

To determine an occupational disability, the RRB must obtain the employee's work history and establish if the employee is precluded from performing his or her regular railroad occupation. This is accomplished by comparing the restrictions caused by the impairment(s) against the employee's ability to perform his or her job duties.

To collect the information needed to determine the effect of a disability on an employee applicant's ability to work, the RRB utilizes Form G–251, *Vocational Report* (OMB 3220–0141) which is completed by the applicant.

Form G–251A, Railroad Job Information, requests railroad employers to provide information regarding whether the employee has been medically disqualified from their railroad occupation; a summary of the employee's duties; the machinery, tools and equipment used by the employee; the environmental conditions under which the employee performs their duties; all sensory requirements (vision, hearing, speech) needed to perform the employee's duties; the physical actions and amount of time (frequency) allotted for those actions that may be required by the employee to perform their duties during a typical work day; any permanent working accommodations an employer may have made due to the employee's disability; as well as any other relevant information they may choose to include. Completion is voluntary. The RRB proposes no changes to Form G–251A.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| G–251A | 500 | 60 | 500 |

*9. Title and purpose of information collection:* Statement Regarding Contributions and Support of Children; OMB 3220–0195.

Section 2(d)(4) of the Railroad Retirement Act (RRA) (45 U.S.C. 231a), provides, in part, that a child is deemed dependent if the conditions set forth in Section 202(d)(3), (4) and (9) of the Social Security Act are met. Section 202(d)(4) of the Social Security Act, as amended by Public Law 104–121, requires as a condition of dependency, that a child receives one-half of his or her support from the stepparent. This dependency impacts upon the entitlement of a spouse or survivor of an employee whose entitlement is based upon having a stepchild of the employee in care, or on an individual seeking a child's annuity as a stepchild of an employee. Therefore, depending on the employee for at least one-half support is a condition affecting eligibility for increasing an employee or spouse annuity under the social security overall minimum provisions on the basis of the presence of a dependent child, the employee's natural child in limited situations, adopted children, stepchildren, grandchildren, step-grandchildren and equitably adopted children. The regulations outlining child support and dependency requirements are prescribed in 20 CFR 222.50–57.

In order to correctly determine if an applicant is entitled to a child's annuity based on actual dependency, the RRB uses Form G–139, Statement Regarding Contributions and Support of Children, to obtain financial information needed to make a comparison between the amount of support received from the railroad employee and the amount received from other sources. Completion is required to obtain a benefit. One response is required of each respondent. The RRB proposes a minor editorial change to Form G–139 to change the date under Section 1 ''General Instructions''.

ESTIMATE OF ANNUAL RESPONDENT BURDEN

| Form No. | Annual responses | Time (minutes) | Burden (hours) |
|---|---|---|---|
| G–139 | 500 | 60 | 500 |

*Additional Information or Comments:* To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, contact Kennisha Tucker at (312) 469–2591 or *Kennisha.Tucker@rrb.gov*. Comments regarding the information collection should be addressed to Brian Foster, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–1275 or emailed to *Brian.Foster@rrb.gov*. Written comments should be received within 60 days of this notice.

**Brian Foster,**

*Clearance Officer.*

[FR Doc. 2020–20306 Filed 9–14–20; 8:45 am]

**BILLING CODE 7905–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89794; File No. SR–NASDAQ–2020–026]**

## Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt a New Requirement Related to the Qualification of Management for Companies From Restrictive Markets

September 9, 2020.

### I. Introduction

On May 29, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt a new requirement related to the qualification of management for companies whose business is principally administered in a jurisdiction that has secrecy laws, blocking statutes, national security laws, or other laws or regulations restricting access to information by regulators of U.S.-listed companies. The proposed rule change was published for comment in the **Federal Register** on June 12, 2020.[3] On July 20, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On August 21, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.[6] The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act [7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

### II. Exchange's Description of the Proposed Rule Change, as Modified by Amendment No. 1

The Exchange states that it has observed instances where it appears that a company's management lacked familiarity with the requirements to be a Nasdaq-listed public company in the U.S. or was otherwise unprepared for the rigors of operating as a public company.[8] The Exchange further states

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89028 (June 8, 2020), 85 FR 35967 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-nasdaq-2020-026/srnasdaq2020026.htm*.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89342, 85 FR 44951 (July 24, 2020). The Commission designated September 10, 2020 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[6] Amendment No. 1 is available at *https://www.sec.gov/comments/sr-nasdaq-2020-026/srnasdaq2020026.htm*.

[7] 15 U.S.C. 78s(b)(2)(B).

[8] The Exchange states that, under federal securities laws, a company's management is responsible for preparing financial statements and for establishing and maintaining disclosure controls and procedures and internal control over financial reporting. *See* Amendment 1, *supra* note 6, at 4–5 (citing Sections 404(b), 302, and 906 of the Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745 (2002)). In addition, the Exchange states that its listing requirements include quantitative criteria based on the company's financial statements and market information, impose disclosure obligations, and establish minimum corporate governance requirements, and that a listed company's management is responsible for ensuring compliance with these listing requirements on an ongoing basis. *See id.* (citing Nasdaq Listing Rule 5625 (Notification of Noncompliance)).

that the risks arising from these situations are heightened when a company's business is principally administered in a jurisdiction that restricts access to information by regulators of U.S.-listed companies. As a result, the Exchange is now proposing new requirements that it believes will heighten compliance by such companies and enhance investor protection.[9]

First, the Exchange is proposing to adopt a new initial listing standard in Nasdaq Listing Rule 5210(c) to require any Company[10] that principally administers its business in a jurisdiction that Nasdaq determines to have secrecy laws, blocking statutes, national security laws, or other laws or regulations restricting access to information by regulators of U.S.-listed companies in such jurisdiction (a ''Restrictive Market'') to have, and certify that it will continue to have until the third anniversary of its listing date, at least one member of senior management or a director who has relevant past employment experience at a U.S.-listed public company or other experience, training, or background that results in the individual's general familiarity with the regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws.[11] In the absence of such an individual, the proposal would require a Company that principally administers its business in a Restrictive Market (''Restrictive Market Company'') to retain on an ongoing basis an advisor or advisors, acceptable to Nasdaq, that will provide such guidance to the Company.[12] In determining whether a Company's business is principally administered in a Restrictive Market, the proposed rule provides that Nasdaq may consider the geographic locations of the Company's: (a) Principal business segments, operations, or assets; (b) board and shareholders' meetings; (c) headquarters or principal executive offices; (d) senior management and employees; and (e) books and records.[13] The Exchange states that this definition would capture both foreign private issuers based in Restrictive Markets and companies based in the U.S. or another jurisdiction that principally administer their businesses in Restrictive Markets.[14]

In addition, the Exchange is proposing to adopt new Nasdaq Listing Rule 5250(g) to require any Company that was subject to proposed Rule 5210(c) upon initial listing and that continues to be a Restrictive Market Company to have, until the third anniversary of its listing date,[15] at least one member of senior management or a director who has relevant past employment experience at a U.S.-listed public company or other experience, training, or background that results in the individual's general familiarity with the regulatory and reporting requirements applicable to a U.S.-listed public company under Nasdaq rules and federal securities laws or, in the absence of such an individual, to retain on an ongoing basis an advisor or advisors, acceptable to Nasdaq, that will provide such guidance to the Company. The Exchange is also proposing changes to Nasdaq Listing Rule 5810 (Notification of Deficiency by the Listing Qualifications Department) to allow a Restrictive Market Company subject to, but not in compliance with, proposed Rule 5250(g) to submit a plan to regain compliance pursuant to Nasdaq Listing Rule 5810(c)(2)(iii).[16]

The proposed rule changes would apply to Restrictive Market Companies that apply to list on Nasdaq after the date of effectiveness of the proposed rules and would not apply to companies already listed on Nasdaq.[17] Nasdaq states that it believes this is appropriate because currently-listed companies are already subject to Nasdaq's requirements and U.S. securities laws and have gained familiarity with the reporting processes and procedures and disclosure requirements by virtue of being subject to them.[18]

## III. Summary of the Comment Letters Received

One commenter stated that it fully supports the proposed rule change inasmuch as it seems reasonably tailored to help ensure full, complete, and transparent financial and other disclosure from Restrictive Market Companies.[19] Another commenter expressed its support for the proposed requirements relating to management qualifications for Restrictive Market Companies, but recommended that the proposal be revised to apply to all Restrictive Market Companies listed on Nasdaq, rather than just those companies that apply to list on Nasdaq after the date of the proposed rule change's effectiveness.[20] This commenter stated that Nasdaq provided no basis for this distinction between companies and suggested that such distinction may raise issues about whether the proposal unfairly discriminates among companies.[21] In response, Nasdaq amended the proposal to apply the proposed requirements to Restrictive Market Companies only until the third anniversary of their listing date.[22] Nasdaq stated that it believes it is appropriate to impose the proposed requirement only for three years from the date that a Restrictive Market Company lists and that after being subject to Nasdaq's requirements for that period of time, it would potentially be unfair to treat the company differently than other listed companies in the absence of a specific identified concern.[23]

## IV. Proceedings To Determine Whether To Approve or Disapprove SR–NASDAQ–2020–026, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section

[9] *See id.* at 6.

[10] Nasdaq Listing Rule 5005(a)(6) defines ''Company'' as the issuer of a security listed or applying to list on Nasdaq.

[11] The Exchange also proposes to renumber the remaining provisions of Nasdaq Listing Rule 5210.

[12] *See* proposed Rule 5210(c).

[13] *See id.*

[14] *See* Amendment No. 1, *supra* note 6 at 7, n.8. The Exchange further provides the following example: A company's headquarters could be located in Country A, while the majority of its senior management, employees, assets, operations, and books and records are located in Country B, which is a Restrictive Market. In this case, Nasdaq would consider the company's business to be principally administered in Country B, which is a Restrictive Market, and Nasdaq would require the company to meet the criteria set forth in proposed Rule 5210(c). *See id.* at 7.

[15] The Exchange states that it believes three years will provide a sufficient transition period for Restrictive Market Companies because by the third anniversary of a company's listing date, the company will have filed at least two annual reports and gone through the accompanying reporting processes and procedures, and the company's staff will have been subject to federal securities laws and Nasdaq's regulatory and reporting requirements for a sufficient period of time to gain experience with the requirements and how to comply. *See id.* at 8.

[16] The Exchange states that a Restrictive Market Company would be required to disclose that it does not meet the requirement set forth in proposed Rule 5250(g) pursuant to Nasdaq Listing Rule 5810(b) and that, based on its review of the company's compliance plan, Nasdaq Staff generally would be able to allow the company up to 180 days to regain compliance under Nasdaq Listing Rule 5810(c)(2)(B). *See id.*

[17] *See id.* at 9.

[18] *See id.* at 10. Nasdaq further states that, to the extent there are future concerns about a currently-listed company that arise from an apparent unfamiliarity with the requirements to be a U.S.-listed public company, Nasdaq would exercise its regulatory authority and could consider that lack of familiarity when determining whether to allow the company to remain listed. *See id.*

[19] *See* Letter from Annemarie Tierney, Founder and Principal, Liquid Advisors, Inc. (July 2, 2020), at 5.

[20] *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (June 25, 2020), at 6–7.

[21] *See id.* at 7.

[22] *See* Amendment No. 1, *supra* note 6.

[23] *See id.* at 10, n.13.

19(b)(2)(B) of the Act [24] to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[25] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[26]

The Exchange's proposed requirements: (1) Only apply to Restrictive Market Companies that apply to list on Nasdaq after the date of effectiveness of the proposed rules; (2) only apply until the third anniversary of a Restrictive Market Company's listing date; and (3) do not apply to Restrictive Market Companies already listed on Nasdaq, even if such companies have been listed on Nasdaq for less than three years. Accordingly, the Commission believes there are questions as to whether the proposal is consistent with Section 6(b)(5) of the Act and its requirement, among other things, that the rules of a national securities exchange not be designed to permit unfair discrimination.

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.'' [27] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[28] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[29]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal, as modified by Amendment No. 1, is consistent with the Act.

## V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal, as modified by Amendment No. 1, is consistent with Section 6(b)(5) [30] of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act,[31] any request for an opportunity to make an oral presentation.[32]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved by October 6, 2020. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by October 20, 2020. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in Amendment No. 1,[33] in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2020–026 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–026. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–026 and should be submitted by October 6, 2020.

[24] 15 U.S.C. 78s(b)(2)(B).

[25] *Id.*

[26] 15 U.S.C. 78f(b)(5).

[27] 17 CFR 201.700(b)(3).

[28] *See id.*

[29] *See id.*

[30] 15 U.S.C. 78f(b)(5).

[31] 17 CFR 240.19b–4.

[32] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[33] *See supra* note 6.

Rebuttal comments should be submitted by October 20, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–20254 Filed 9–14–20; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89798; File No. SR–NYSE–2020–72]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Price List

September 9, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on August 31, 2020, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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 amend its Price List to extend through September 2020 the waiver of equipment and related service charges and trading license fees for NYSE Trading Floor-based member organizations implemented for April through August 2020. The Exchange proposes to implement the fee changes effective September 1, 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 Exchange proposes to amend its Price List to extend through September 2020 the waiver of equipment and related service charges and trading license fees for NYSE Trading Floor-based member organizations implemented for April through August 2020.

The proposed changes respond to the current volatile market environment that has resulted in unprecedented average daily volumes and the temporary closure of the Trading Floor, which are both related to the ongoing spread of the novel coronavirus (''COVID–19'').

The Exchange proposes to implement the fee changes effective September 1, 2020.

Background

Beginning on March 16, 2020, in order to slow the spread of COVID–19 through social distancing measures, significant limitations were placed on large gatherings throughout the country. As a result, on March 18, 2020, the Exchange determined that beginning March 23, 2020, the physical Trading Floor facilities located at 11 Wall Street in New York City would close and that the Exchange would move, on a temporary basis, to fully electronic trading.[4] Following the temporary closure of the Trading Floor, the Exchange waived certain equipment fees for the booth telephone system on the Trading Floor and associated service charges for the months of April and May.[5]

On May 14, 2020, the Exchange announced that on May 26, 2020 trading operations on the Trading Floor would resume on a limited basis to a subset of Floor brokers, subject to health and safety measures designed to prevent the spread of COVID–19.[6] On June 15, 2020, the Exchange announced that on June 17, 2020, the Trading Floor would reintroduce a subset of DMMs, also subject to health and safety measures designed to prevent the spread of COVID–19.[7] Following this partial reopening of the Trading Floor, the Exchange extended the equipment fee waiver for the months of June, July and August.[8] The Trading Floor continues to operate with reduced headcount and additional health and safety precautions.[9]

Proposed Rule Change

The proposed rule change responds to the unprecedented events surrounding the spread of COVID–19 by extending the waiver of equipment and related service charges and trading license fees for NYSE Trading Floor-based member organizations for September 2020.

As noted, for the months of April, May, June, July and August, the Exchange waived the Annual Telephone Line Charge of $400 per phone number and the $129 fee for a single line phone, jack, and data jack. The Exchange also waived related service charges, as follows: $161.25 to install single jack (voice or data); $107.50 to relocate a jack; $53.75 to remove a jack; $107.50 to install voice or data line; $53.75 to disconnect data line; $53.75 to change a phone line subscriber; and miscellaneous telephone charges billed at $106 per hour in 15 minute increments.[10] These fees were waived for (1) member organizations with at least one trading license, a physical Trading Floor presence, and Floor broker executions accounting for 40% or more of the member organization's combined adding, taking, and auction volumes during March 1 to March 20, 2020, or, beginning in August 2020, if not a member organization during March 1 to March 20, 2020, based on the

[34] 17 CFR 200.30–3(a)(57).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Press Release, dated March 18, 2020, available here: *https://ir.theice.com/press/press-releases/allcategories/2020/03-18-2020-204202110*.

[5] *See* Securities Exchange Act Release No. 88602 (April 8, 2020), 85 FR 20730 (April 14, 2020) (SR–NYSE–2020–27); Securities Exchange Act Release No. 88874 (May 14, 2020), 85 FR 30743 (May 20, 2020) (SR–NYSE–2020–29). *See* footnote 11 of the Price List.

[6] *See* Trader Update, dated May 14, 2020, available here: *https://www.nyse.com/traderupdate/history#110000251588*.

[7] *See* Trader Update, dated June 15, 2020, available here: *https://www.nyse.com/trader-update/history#110000272018*.

[8] *See* Securities Exchange Act Release No. 89050 (June 11, 2020), 85 FR 36637 (June 17, 2020) (SR–NYSE–2020–49); Securities Exchange Act Release No. 89324 (July 15, 2020), 85 FR 44129 (July 21, 2020) (SR–NYSE–2020–59); SR–NYSE–2020–71.

[9] *See* Trader Update, dated June 15, 2020, available here: *https://www.nyse.com/trader-update/history#110000272018*. DMMs continue to support a subset of NYSE-listed securities remotely.

[10] The Service Charges also include an internet Equipment Monthly Hosting Fee that the Exchange did not waive for April, May, June, July and August 2020 and that the Exchange does not propose to waive for September 2020.

member organization's combined adding, taking, and auction volumes during its first month as a member organization on or after May 26, 2020, *i.e.,* the date the Trading Floor re-opened on a limited basis,[11] and (2) member organizations with at least one trading license that are Designated Market Makers with 30 or fewer assigned securities for the billing month of March 2020.

Because the Trading Floor continues to operate with reduced capacity, the Exchange proposes to extend the waiver of these Trading Floor-based fees through September 2020. To effectuate this change, the Exchange proposes to add ''and September'' between ''August'' and ''2020'' in footnote 11 to the Price List.

In order to further reduce costs for member organizations with a Trading Floor presence, the Exchange also waived the April, May, June, July and August 2020 monthly portion of all applicable annual fees for (1) member organizations with at least one trading license, a physical Trading Floor presence and Floor broker executions accounting for 40% or more of the member organization's combined adding, taking, and auction volumes during March 1 to March 20, 2020, or, beginning in August 2020, if not a member organization during March 1 to March 20, 2020, based on the member organization's combined adding, taking, and auction volumes during its first month as a member organization on or after May 26, 2020, and (2) member organizations with at least one trading license that are DMMs with 30 or fewer assigned securities for the billing month of March 2020.[12]

The Exchange proposes to also waive the September 2020 monthly portion of all applicable annual fees for member organizations with at least one trading license, a physical Trading Floor presence and Floor broker executions accounting for 40% or more of the member organization's combined adding, taking, and auction volumes during March 1 to March 20, 2020 or, if not a member organization during March 1 to March 20, 2020, based on the member organization's combined adding, taking, and auction volumes during its first month as a member organization on or after May 26, 2020. The indicated annual trading license fees would also be waived for September 2020 for member organizations with at least one trading license that are DMMs with 30 or fewer assigned securities for the billing month of March 2020. To effectuate this change, the Exchange proposes to add ''and September'' between ''August'' and ''2020'' in footnote 15 of the Price List.

The proposed extension of the fee waivers would reduce monthly costs for member organizations with a Trading Floor presence whose operations were disrupted by the Floor closure, which lasted approximately two months, and remains partially closed. The Exchange believes that extension of the fee waiver would ease the financial burden associated with the ongoing partial Trading Floor closure. The Exchange believes that all member organization that conduct a significant portion of trading on the Trading Floor would benefit from this proposed fee change.

The proposed changes are not otherwise intended to address other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[13] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[14] 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.'' [15]

As the Commission itself recognized, the market for trading services in NMS stocks has become ''more fragmented and competitive.'' [16] Indeed, equity trading is currently dispersed across 14 exchanges,[17] 31 alternative trading systems,[18] and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange has more than 20% market share (whether including or excluding auction volume).[19] Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange's market share of trading in Tape A, B and C securities combined is less than 10%.

The Proposed Change is Reasonable

The proposed extension of the waiver of equipment and related service fees and the applicable monthly trading license fee for Trading Floor-based member organizations is reasonable in light of the partial continued closure of the NYSE Trading Floor. Beginning March 2020, markets worldwide experienced unprecedented declines and volatility because of the ongoing spread of COVID–19 also resulted in the temporary closure of the NYSE Trading Floor. As noted, the Trading Floor was recently partially reopened on a limited basis to a subset of Floor brokers and DMMs, subject to health and safety measures designed to prevent the spread of COVID–19. The proposed change is designed to reduce costs for Floor participants for the month of September 2020 and therefore ease the financial burden faced by member organizations that conduct business on the Trading Floor while it continues to operate with reduced capacity.

[11] Beginning August 2020, member organizations with a physical trading Floor presence that became member organizations on or after April 1, 2020 are eligible for a one-time credit for the member organization's Booth Telephone System charges and all Service Charges except the Internet Equipment Monthly Hosting Fee for the months of April through July 2020 if the member organization meets the other requirements for the waiver described in footnote 11 of the Price List.

[12] *See* notes 5–8, *supra. See* footnote 15 of the Price List. Beginning in August 2020, member organizations with a physical trading Floor presence that became member organizations on or after April 1, 2020 are eligible for a one-time credit for the member organization's indicated annual trading license fee for the months of April through July 2020 if the member organization meets the other requirements for the waiver described in footnote 15 of the Price List.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4) & (5).

[15] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7–10–04) (Final Rule) (''Regulation NMS'').

[16] *See* Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7–05–18) (Transaction Fee Pilot for NMS Stocks Final Rule) (''Transaction Fee Pilot'').

[17] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, available at *http://markets.cboe.com/us/equities/market_share/. See generally https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html.*

[18] *See* FINRA ATS Transparency Data, available at *https://otctransparency.finra.org/otctransparency/AtsIssueData.* A list of alternative trading systems registered with the Commission is available at *https://www.sec.gov/foia/docs/atslist.htm.*

[19] *See* Cboe Global Markets U.S. Equities Market Volume Summary, available at *http://markets.cboe.com/us/equities/market_share/.*

The Proposal is an Equitable Allocation of Fees

The Exchange believes the proposed extension of the waiver of equipment and related service fees and the applicable monthly trading license fee for Trading Floor-based member organizations to September 2020 are an equitable allocation of fees. The proposed waivers apply to all Trading Floor-based firms meeting specific requirements during the period that the Trading Floor remains partially open. The proposed change is equitable as it merely continues the fee waiver granted in April, May, June, July and August 2020, and is designed to reduce monthly costs for Trading Floor-based member organizations that are unable to fully conduct Floor operations while the Trading Floor remains partially open during the ongoing COVID–19 pandemic.

The Proposal is Not Unfairly Discriminatory

The Exchange believes that the proposed continuation of the waiver of equipment and related service fees and the applicable monthly trading license fee for Trading Floor-based member organizations during July 2020 is not unfairly discriminatory because the proposed waivers would benefit all similarly-situated market participants on an equal and non-discriminatory basis. The Exchange is not proposing to waive the Floor-related fees indefinitely, but rather during the period that the Trading Floor is not fully open. The proposed fee change is designed to ease the financial burden on Trading Floor-based member organizations that cannot fully conduct Floor operations.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,[20] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the continued participation of member organizations on the Exchange by providing certainty and fee relief during the unprecedented volatility and market declines caused by the continued spread of COVID–19. 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.'' [21]

*Intramarket Competition.* The proposed continued waiver of equipment and related service fees and the applicable monthly trading license fee for Trading Floor-based member organizations during September 2020 is designed to reduce monthly costs for those Floor participants whose operations continue to be impacted by the spread of COVID–19 despite the fact that the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would provide a degree of certainty and ease the financial burden on Trading Floor-based member organizations impacted by the temporary closing and partial reopening of the Trading Floor. As noted, the proposal would apply to all similarly situated member organizations on the same and equal terms, who would benefit from the changes on the same basis. Accordingly, the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

*Intermarket Competition.* The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. The Exchange believes that the proposed rule change reflects this competitive environment because it permits impacted member organizations to continue to conduct market-making operations on the Exchange and avoid unintended costs of doing business on the Exchange while the Trading Floor is not fully open, which could make the Exchange a less competitive venue on which to trade as compared to other equities markets.

*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) [22] of the Act and subparagraph (f)(2) of Rule 19b–4 [23] 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) [24] of the Act to determine whether the proposed rule change should be approved or disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2020–72 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2020–72. 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,

[20] 15 U.S.C. 78f(b)(8).

[21] Regulation NMS, 70 FR at 37498–99.

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f)(2).

[24] 15 U.S.C. 78s(b)(2)(B).

Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2020–72 and should be submitted on or before October 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–20258 Filed 9–14–20; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89471; File No. SR–CboeBZX–2020–057]**

## Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Options Regulatory Fee

August 4, 2020.

*Correction*

In notice document 2020–17352 appearing on pages 49405–49407 in the issue of August 13, 2020, make the following correction:

On page 49405, in the first column, the File No. in the heading is corrected to read as set forth above.

[FR Doc. C1–2020–17352 Filed 9–14–20; 8:45 am]

**BILLING CODE 1301–00–D**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89793; File No. SR–LCH SA–2020–003]**

## Self-Regulatory Organizations; LCH SA; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Relating to LCH SA's Governance Arrangements

September 9, 2020.

### I. Introduction

On July 23, 2020, Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4,[2] a proposed rule change to adopt certain changes to its governance arrangements, as described below. On July 29, 2020, LCH SA filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as modified by Amendment No. 1 (hereafter the ''proposed rule change''), was published for comment in the **Federal Register** on August 10, 2020.[4] The Commission did not receive comments on the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

### II. Description of the Proposed Rule Change

*A. Background*

LCH Group Holdings Limited (''LCH Group'')[5] is the majority-owner and parent company of LCH SA.[6] London Stock Exchange Group PLC (''LSEG'') is the majority-owner and parent company of LCH Group. LCH Group is also the parent company of LCH Limited, a central counterparty (''CCP'') authorized to offer clearing services in the European Union and registered with the Commodity Futures Trading Commission as a derivatives clearing organization.

In connection with its purchase of approximately 58 percent of LCH Group in 2013, LSEG entered into an agreement (the ''Relationship Agreement'') with LCH Group for the purpose of, among other things: (i) Establishing core operating principles to be applied in managing the business of LCH Group; (ii) protecting minority shareholders of LCH Group by requiring the approval of 80 percent of votes on certain matters; (iii) requiring that the Board of Directors of LCH Group and the Boards of LCH SA and LCH Limited be comprised of a mix of independent non-executive directors, executive directors, User Directors (as defined below), Venue Directors (as defined below), and LSEG representatives; and (iv) requiring LSEG, as a majority shareholder, to consent to certain actions, such as approval of the LCH Group budget.

LCH SA represents that the Relationship Agreement is no longer necessary because certain contractual provisions are provided for in law or regulation and other provisions are historic and no longer relevant. Notably, since 2013, LSEG has added to its shareholdings in LCH Group and now owns approximately 83 percent of LCH Group. Therefore, the minority protection provisions noted above are no longer relevant as LSEG alone could approve such matters by voting its shares. Consequently, LCH SA states that LCH Group and LESG plan to terminate the Relationship Agreement. LCH Group also has determined to simplify its governing arrangements and to eliminate provisions in LCH Group's governance documents that are unnecessary and outdated. LCH SA also represents that LCH Group has also determined to eliminate duplication in decision-making between its Board of Directors and the Boards of LCH SA and LCH Limited by limiting the LCH Group Board to representatives of LSEG and LCH Group only. Further, LCH SA states that LCH Group will amend its Articles of Association accordingly.[7]

In response to the actions of LCH Group, LCH SA has submitted the proposed rule change to amend and simplify LCH SA's governance arrangements to reflect changes in LCH Group's governance arrangements. Specifically, the proposed rule change would (i) amend the Board of Directors of LCH SA (the ''Board'') Terms of Reference (''Board TOR''); (ii) adopt the Terms of Reference of the Nomination Committee of the Board (''Nomination Committee TOR''); (iii) amend the Terms of Reference of the Risk Committee of the Board (''Risk Committee TOR''); (iv) amend the Terms of Reference of the Audit Committee of the Board (''Audit Committee TOR''); and (v) amend the Terms of Reference of the Remuneration Committee of the Board (''Remuneration Committee TOR''). Independent of these amendments related to the changes at LCH Group, the proposed rule change would also adopt the Terms of Reference of the Technology, Security,

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] LCH SA filed Amendment No. 1 to correct the Exhibit 5 to the original filing to reflect a change in Article 13 of the Terms of Reference of the Board of Directors of LCH SA and to correct an erroneous citation in the original filing.

[4] Self-Regulatory Organizations; LCH SA; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Relating to LCH SA's Governance Arrangements, Exchange Act Release No. 89465 (Aug. 4, 2020), 85 FR 48295 (Aug. 10, 2020) (SR–LCH–SA–2020–003) (''Notice'').

[5] This description is substantially excerpted from the Notice, 85 FR 48295. Capitalized terms not otherwise defined herein have the meanings assigned to them in the LCH SA CDSClear Rule Book or the LCH SA governing documents, as applicable.

[6] LCH Group currently owns 88.9 percent of LCH SA; Euronext N.V. owns 11.1 percent of LCH SA. *See* Notice, 85 FR at 48295, n. 4.

[7] *See* Notice, 85 FR at 48296.

and Resilience Committee of the Board (''TSR Committee'' and ''TSR Committee TOR''). Although the proposed rule change would revise LCH SA's governance arrangements to reflect the changes that LCH Group is making to its own governance, LCH SA represents that the proposed rule change would not change the substance of LCH SA's current governance.[8]

*B. Board TOR*

As discussed above, the proposed rule change would amend the Board TOR in light of the planned termination of the Relationship Agreement and the planned amendment of the LCH Group Articles of Association. Specifically, the proposed rule would (i) remove provisions that are now unnecessary in light of the changes discussed above; (ii) establish consent rights for LSEG, similar to those in the Relationship Agreement, and consultation requirements for LCH Group; (iii) update the composition and operation of the Board and the committees of the Board; and (iv) eliminate the inclusion of Venue Directors on the Board.

The proposed rule change would first remove those provisions no longer required as a result of the planned termination of the Relationship Agreement and the planned amendment of the LCH Group Articles of Association. In Article 2, the proposed rule change would remove definitions arising from the Relationship Agreement. The proposed rule change would also remove references to the Relationship Agreement in Article 4 and Article 12.

The proposed rule change would also revise a number of provisions to establish consent rights for LSEG as the indirect majority owner of LCH SA, similar to the rights provided to LSEG in the Relationship Agreement. For example, the proposed rule change would amend Article 3 to provide LSEG a representative on the Board unconditionally.[9] The proposed rule change would also amend Article 12 to require that LSEG consent to the Board's approval of a number of matters, including among other things, LCH SA's annual budget and material changes thereto. Similarly, the proposed rule change would amend Article 13 to give LSEG the right to consent to the settlement of certain litigation and to certain investments in information technology. Finally, the proposed rule change would add new Article 27, which would provide that the Board TOR may be amended by the Board, provided that any changes to LSEG's rights or any changes which would otherwise have a detrimental effect on LSEG's rights pursuant to the Board TOR would be subject to LSEG's consent.

Similar to these consent rights granted to LSEG, the proposed rule change would require that the CEO of LCH SA consult with LCH Group prior to taking certain actions. Under amended Article 13, the CEO would need to consult with, and obtain the approval of, the Board of LCH Group before taking a number of actions, including among other things, entering into any type of joint venture arrangement between LCH SA and any third party.

To facilitate these consent and consultation requirements, the proposed rule change would amend a number of articles to permit LCH SA's sharing of information with LCH Group and LSEG. The proposed rule change would amend Article 13 to require the CEO of LCH SA to provide to LSEG audited accounts for each financial year, along with financial and other information as needed for reporting requirements and budget forecasting. Moreover, Article 14 currently prohibits a director of LCH SA that was nominated by a shareholder of LCH Group (*i.e.,* LSEG) from sharing information with the shareholder of LCH Group that made the nomination without the consent of the majority of the independent of LCH SA. The proposed rule change would amend Article 14 to provide that this general prohibition would not prevent information from being shared with LSEG, in its capacity as an indirect shareholder of LCH SA, for legal, accounting, tax regulatory, or disclosure purposes. In addition, under new Article 26, the Board must in certain cases notify LSEG of proposed transactions, and receive LSEG's approval before entering into such transactions, where the transactions trigger certain requirements for LSEG as a listed company in the UK.

Moreover, to allow further coordination and cooperation among LCH SA, LCH Group, and LSEG, the proposed rule change would add new provisions to resolve possible conflicts of interest among the companies. Article 25 currently imposes certain requirements on agreements between LCH SA and related parties, like LCH SA's directors and shareholders. The proposed rule change would amend Article 25 to provide that any contracts and agreements between LCH SA and LSEG or any member of the LSEG Group,[10] will be subject to the prior approval of a committee of the Board consisting solely of the independent non-executive directors of LCH SA and that approval will be given provided that the contract or agreement is on bona fide arm's length terms.

The proposed rule change would also make a number of changes to the composition and operation of the Board in light of these changes. With respect to the composition of the Board, Article 3 currently provides that the Chief Risk Officer of LCH Group, along with the CEO of LCH SA and the CEO of LCH Group, will be the executive directors of the Board. The proposed rule change would amend Article 3 to provide that the Chief Risk Officer of LCH Group may, but is not required to, be one of the three executive directors of the Board. The proposed rule change similarly would remove the requirement that the Chairman of LCH Group be an independent non-executive director of the Board. Finally, the proposed rule change would update a reference in Article 3 to refer to the LCH SA Nomination Committee rather than the LCH Group Nomination Committee. As discussed further below, this change is necessary because LCH Group is disbanding its Nomination Committee.

With respect to the operation of the Board, the proposed rule change would first make a technical correction to Article 6, Quorum. This proposed revision would clarify that the Board may validly deliberate if at least half of the directors are present. LCH SA maintains that this is the intention behind the current language of Article 6 but that, as currently written, the language could be misinterpreted to mean that the Board could not deliberate if more than half of the Directors are present. As discussed above, the proposed rule change would amend Article 12 regarding the powers of the Board to require that LSEG consent to the Board's approval of a number of items. In addition, Article 12(e) assigns to the Board a number of responsibilities related to risk management. These responsibilities include, among other things, the annual adoption of the LCH Group Risk Governance Framework and a number of LCH SA-specific policies, such as the Financial Resource Adequacy Policy. As currently drafted, however, Article 12(e) does not actually require that the Board approve the adoption of the LCH Group

[8] *See* Notice, 85 FR at 48296.

[9] Article 3 currently provides that LSEG is entitled to a representative on the Board ''for so long as LSEG is entitled to exercise or control the exercise of at least 5 percent of the votes able to be cast on all or substantially all matters at general meetings in LCH Group Holdings Limited.''

[10] LSEG Group means London Stock Exchange Group plc and its subsidiaries from time to time other than those entities comprising the LCH Group.

Risk Governance Framework or the LCH SA-specific policies. The proposed rule change would clarify this by amending Article 12(e) to specifically require that the Board annually approve the adoption of the LCH Group Risk Governance Framework and policies. Finally, Article 12(d) currently provides the Board the power to issue a report to the LCH SA shareholders to recommend a dividend, to be decided upon at a general meeting of the shareholders. The proposed rule change would alter this to explicitly require that the Board take into account certain factors prior to issuing the report. LCH SA is making this particular change to incorporate into Article 12(d) provisions from an existing LCH Group dividend policy which already has been adopted by LCH SA.[11]

In line with these changes, the proposed rule change would make a number of changes to Articles 15–20, which pertain to specific committees of the Board. Article 15 introduces the Committees of the Board and explains, in general terms, their duties and responsibilities. The proposed rule change would amend Article 15 to note the addition of the TSR Committee and to change the reference to the LCH Group Nomination Committee to the LCH SA Nomination Committee (as discussed below, LCH Group is disbanding its Nomination Committee).

Article 16 describes in general terms the Audit Committee. The proposed rule change would amend Article 16 to remove the requirement that the Audit Committee TOR be substantially similar to the terms of reference of the Audit Committee of LCH Group. This change is necessary because, as discussed below, LCH Group is disbanding its Audit Committee. Moreover, the proposed rule change would amend Article 16 to recognize that changes in the Audit Committee TOR may be required by LCH SA's regulators (and not LCH Group's regulators) or any applicable law or regulation and to confirm that a Director representing LSEG and a Director representing Euronext would be a part of the Audit Committee.

Article 17 describes in general terms the Risk Committee. The proposed rule change would amend Article 17 to confirm that a Director representing LSEG would be vice-chairman of the Risk Committee.

Article 18 describes in general terms the Nomination Committee. The proposed rule change would amend Article 18 to remove any reference to the LCH Group Nomination Committee and the requirement that, in the event LCH SA establishes its own Nomination Committee, its term of reference must be substantially similar to the terms of reference of the LCH Group Nomination Committee. This change is necessary because, as discussed below, LCH Group is disbanding its Nomination Committee. Moreover, the proposed rule change would amend Article 18 to confirm that a director representing LSEG would be a member of LCH SA's Nomination Committee.

Article 19 describes in general terms the Remuneration Committee. The proposed rule change would amend Article 19 to remove the provision requiring that the Remuneration Committee TOR take into account the remuneration policies and principles of the LCH Group Remuneration Committee. This change is necessary because, as discussed below, LCH Group is disbanding its Remuneration Committee. Moreover, the proposed rule change would amend Article 19 to confirm that a director representing LSEG would be a member of LCH SA's Remuneration Committee.

The proposed rule change would add new Article 20 to describe in general terms the TSR Committee. As discussed further below, the TSR Committee is a new Board committee. New Article 20 would specify that its organization and functions would be set out in the TSR Committee TOR.

The proposed rule would also specify the requirements for review and approval of changes to the terms of reference of the various Board committees. For the Risk Committee TOR, Remuneration Committee TOR, and Audit Committee TOR, the Board must review and approve the terms of reference annually and LSEG must consent to the terms of reference, in respect of its rights under the terms of reference for each of these committees. With respect to the Nomination Committee TOR, the Board must review and approve the terms of reference annually and LSEG must consent to the terms of reference. LSEG's consent right under the Nomination Committee TOR is thus slightly more extensive, because that the LCH Group Nomination Committee Terms of Reference, upon which the Nomination Committee TOR is based, required LSEG consent for any amendment, not just with respect to its rights under the terms of reference.[12] The TSR Committee TOR and changes thereto would not be subject to the consent of LSEG because, as discussed further below, the TSR Committee would review, recommend, and report to the Board regarding technology matters but would not otherwise take action on behalf of the Board.

Finally, the proposed rule change would also make amendments to the inclusion of Venue Directors at LCH SA. Currently, the Board TOR provides that the Board shall include Venue Directors. Venue Directors are directors that (i) are nominated by a shareholder of LCH Group Holdings Limited that is a Venue (meaning an exchange) or (ii) are otherwise connected to such a shareholder by virtue of employment or directorship. As explained in the Notice, LCH SA represents that, with the exception of Euronext, there have been no Venue Directors on the LCH SA Board for some time.[13] Since 2018, there has only been one entity (other than Euronext) that would qualify to nominate a Venue Director and that entity has not been interested in being represented on any LCH board.[14] For that reason, the proposed rule change would remove the requirement for a Venue Director and would also delete the associated definitions in Article 2. With respect to Euronext, it is entitled to propose a director pursuant to certain existing contractual agreements.[15] Thus, the Board TOR, as amended, would provide that Euronext is entitled to propose at least one of the directors to the Board as long as these agreements remain in force.

*C. Nomination Committee TOR*

As noted above, as part of the governance changes at LCH Group, the Board of LCH Group will be disbanding its committees, including its Nomination Committee. The LCH Group Nomination Committee served the functions of a nomination committee for LCH SA. Therefore, in light of the disbanding of the LCH Group Nomination Committee, LCH SA will establish its own Nomination Committee. Thus, the proposed rule change would adopt the Nomination Committee TOR to establish, among other things, the purpose, duties, powers, and procedures of the LCH SA Nomination Committee.

The overall purpose and background of the Nomination Committee, as described in Articles 1 and 2, would be to make recommendations to the Board for nominations of candidates for appointment as directors of the Board. Under Article 2, the Nomination Committee would nominate (i) an independent chairman of the Board (the ''Chairman''); (ii) up to four

[11] *See* Notice, 85 FR at 48297.

[12] *See* Notice, 85 FR at 48298, n.16.

[13] *See* Notice, 85 FR at 48297, n. 13.

[14] *See* Notice, 85 FR at 48297, n. 13.

[15] *See* Notice, 85 FR at 48297, n. 13.

independent directors that meet the standard for independence set out in the Nomination Committee TOR (''Independent Directors''); (iii) up to two directors (''User Directors'') associated with shareholders of LCH Group (other than LSEG) or other exchanges, trading venues, or trading facilities (''User Shareholders''); (iv) the director nominated by LSEG; and (v) the director nominated by Euronext. Moreover, the CEO of LCH Group, the CEO of LCH SA as proposed by the CEO of LCH Group, and the Chief Risk Officer of LCH Group or another executive as proposed by the CEO of LCH Group would serve on the Board (each an ''Executive Director'').

LCH SA maintains that this structure would not change the Board's current proportion of independent directors or number of directors representing members and participants.[16] This structure would, however, eliminate from the Board Venue Directors because, as discussed above, LCH SA has determined there is no reason to continue the inclusion of Venue Directors on the Board.

Article 3 would provide more detail regarding the director nominated by LSEG, including that LSEG has the right to nominate one director to the Board and a replacement should that director retire. Article 4 would provide more detail regarding the director nominated by Euronext, including that Euronext has the right to nominate one director to the Board and a replacement should that director retire. Article 5 would specify that the LCH SA CEO would be responsible for appointing their own management team in consultation with the LCH Group CEO.

Article 6 would set out the duties and powers of the Nomination Committee. Among other duties, the Committee would be required to (i) ensure that recommended candidates understand the responsibilities of Board membership and are able to devote the necessary time to LCH SA matters; (ii) ensure that recommended candidates are respected for their competence and are of good standing in their field of business; (iii) keep itself informed of any changes in law or regulations applicable to the composition of the Board and other matters for which the committee is responsible; and (iv) consult periodically with the nomination committee of LCH Limited to ensure that there is a coordinated process for the appointment of suitable directors to both boards.

Article 7 would set out the procedures that the Nomination Committee would use to recommend candidates to be Chairman and Independent Directors. Moreover, Article 7 would establish the standards that the Nomination Committee would use to determine if a person is fit for appointment as Chairman or an Independent Director, including, among other factors, whether the person is independent in character and judgment. Moreover, in making recommendations with regard to Independent Directors, Article 7 would require that the Nomination Committee take into account that the Independent Directors should reflect: (i) A breadth of industry expertise and experience and product knowledge; (ii) particular expertise and experience in risk management, audit, clearing services and financial services; and (iii) diversity, including gender, age, geographical provenance, and educational and professional background. Finally, an Appendix to Article 7 would provide the procedures the Nomination Committee would use to invite User Shareholders to propose candidates to be User Directors, and the procedures the Nomination Committee would use to approve and select nominees from such candidates. The Appendix would further require that the Nomination Committee receive LSEG's approval prior to recommending a candidate's appointment to the Board as a User Director.

Article 8 would set out the tenure for directors. Under Article 8, each director (other than the Executive Directors and User Directors) would have, in principle, a maximum tenure on the Board of three three-year terms. However, the Nomination Committee would be allowed to nominate an Independent Director for such longer period as is necessary to ensure that not all such Independent Directors' appointments terminate at the same time. All User Directors would have a tenure on the Board of one three-year term, unless otherwise agreed by the Board to ensure that not all such User Directors' appointments terminate at the same time.

The remaining articles of the Nomination Committee TOR would explain the membership and operation of the Nomination Committee. Under Article 9, the Board would appoint members to the Nomination Committee, which would be comprised of four to six directors, including the Chairman, at least two Independent Directors, one User Director and the LSEG Director. The Chairman of the Board, or such other Independent Director as the Independent Directors and LSEG may agree, would be the Chairman of the Nomination Committee. Article 10 would explain who would serve as secretary of the Nomination Committee, and Article 11 would explain the tenure of members of the Nomination Committee. Articles 12 through 16 would explain the conduct of meetings of the Nomination Committee, including notice, timing, location, attendance, quorum, and keeping of minutes. Article 17 would require the Chairman of the Nomination Committee to report to the Board on the discussions, decisions, and recommendations of the Committee and further require that the Nomination Committee furnish to the Board for approval each year a summary of, among other things, its activities and certain of its policies. Article 18 would provide that the Nomination Committee TOR could be amended from time to time with Board approval, subject to LSEG consent (as discussed above). Finally, Article 19 would set out the requirements with respect to confidentiality and conflicts of interest, and Article 20 would cover other miscellaneous matters, such as access to training and resources for members of the Nomination Committee.

*D. Risk Committee TOR*

The proposed rule change would amend the Risk Committee TOR to reflect the changes in the LCH Group governing arrangements but would not make substantive changes to the current Risk Committee TOR. For example, the proposed rule change would amend Article 1 to reference the criteria for independence set out in LCH SA's Nomination Committee TOR rather than in LCH Group's Nomination Committee terms of reference because, as discussed above, LCH Group is disbanding its Nomination Committee. The proposed rule change would also revise Article 16, regarding confidentiality and conflicts of interest, to refer to rights LSEG or its representatives have under the Risk Committee TOR rather than rights LESG had under the Relationship Agreement.

The proposed rule change would also amend Article 1 to remove the provision that authorized LSEG to appoint the Vice Chairman of the committee only for so long as LSEG is entitled to exercise or control the exercise of at least 40 percent of the votes able to be cast on all or substantially all matters at general meetings of LCH SA. LCH SA considers this provision to be unnecessary because, as discussed above, LSEG now indirectly owns more than 40 percent of LCH SA. Under Article 1 as revised, LSEG is entitled to appoint the Vice Chairman provided that the person appointed has the skills

[16] *See* Notice, 85 FR at 48298.

and experience commensurate with such a role.

The proposed rule change would also amend Article 17 to remove references to LCH LLC. Although LCH LLC is registered with the CFTC as a DCO, its registration is currently dormant.[17]

Finally, the proposed rule change would amend Article 20 to specify the provisions which the Board could only amend with LSEG's consent.

*E. Audit Committee TOR*

The proposed rule change would amend the Audit Committee TOR to reflect the changes in the LCH Group governing arrangements but would not make substantive changes to the current Audit Committee TOR. For example, the proposed rule change would amend Article 2 to reference the criteria for independence set out in LCH SA's Nomination Committee TOR rather than in LCH Group's Nomination Committee terms of reference because, as discussed above, LCH Group is disbanding its Nomination Committee.

Moreover, the proposed rule change would amend Article 2 to remove the provision that LSEG is entitled to recommend or approve a director to the Audit Committee so long as it is entitled to exercise or control the exercise of at least 20 percent of the votes able to be cast at general meetings of LCH Group. As discussed above, LSEG now owns more than 20 percent of LCH Group. Thus, LCH SA no longer considers this provision to be necessary. Rather, under Article 2 as amended, LSEG always would be entitled to recommend or approve a director to the Audit Committee. The proposed rule change would also amend Article 2 to require that the LSEG-approved director be present at a meeting to establish quorum.

Similarly, the proposed rule change would amend Article 3 to remove the requirement that LCH SA's Audit Committee coordinate with the Audit Committee of LCH Group. As discussed above, LCH Group is disbanding its Audit Committee. For similar reasons, the proposed rule change would remove the requirement that the Audit Committee respond to any requests from the LCH Group Audit Committee to vary LCH SA's internal audit program of work. Moreover, the proposed rule change would require that the Audit Committee consider the auditor appointed by LSEG in respect of the wider LSEG Group when making recommendations to the Board concerning the appointment, evaluation and termination of the engagement of the external auditors for LCH SA.

The proposed rule change would make other updates to the responsibilities of the Audit Committee. To take into account the new TSR Committee, the proposed rule change would amend Article 3 to require the Audit Committee to coordinate with the TSR Committee. In addition, the proposed rule change would revise references in Article 3 to external ''auditors'' rather than an ''auditor'', to recognize that LCH SA has more than one external auditor. Finally, the proposed rule change would also amend Article 3 to provide that the Committee will review the annual audit plan prepared by LCH SA's Internal Audit department after approval by the LCH SA's CEO and ahead of any submission of the plan to LCH SA's regulator, if requested by the regulator.

The proposed rule change would also make minor amendments to the operation of the Audit Committee in Article 5 and Article 8. In Article 5, the proposed rule change would add language to confirm that the Committee secretary will present all minutes of the proceedings and resolutions of all Committee meetings to the Committee for approval at the next following meeting. The proposed rule change would also delete current Article 8, which provides that the Committee will arrange for periodic reviews of its own performance and, at least annually, arrange for independent internal review of its constitution and these Terms of Reference. Instead, pursuant to the terms of the Board Terms of Reference and LCH SA's representation, the Board, along with LCH SA's executive management, would conduct this review.[18] In place of current Article 8, the proposed rule change would add a new article on amendments to the Audit Committee TOR to specify the provisions which the Board could only amend with LSEG's consent.

*F. Remuneration Committee TOR*

The proposed rule change would amend the Remuneration Committee TOR to reflect the changes in the LCH Group governing arrangements and to make other updates to the process for approving the remuneration of certain executives of LCH SA. For example, the proposed rule change would delete from Article 2 the provision that LSEG is entitled to appoint a representative to the committee only for so long as LSEG is entitled to exercise or control the exercise of at least five percent of the votes able to be cast at general meetings of LCH Group. As discussed above, LSEG now owns more than five percent of LCH Group. Thus, LCH SA no longer considers this provision to be necessary. Under Article 2 as revised, LSEG always will be entitled to appoint a representative to the Remuneration Committee. Similarly, the proposed rule change would revise Article 2 to authorize the LCH Group CEO to attend committee meetings as an observer. Finally, the proposed rule change would Article 12, Confidentiality and Conflicts of Interest, to remove reference to any rights LSEG may have in the Relationship Agreement and refer, instead, to rights LSEG or its representatives have under the Remuneration Committee TOR.

The proposed rule change would also revise the Remuneration Committee TOR to reflect some minor changes in the remuneration process. For example, the proposed rule change would amend Article 1, to provide that LCH SA's remuneration policies would apply to ''Specified Executives'' rather than ''Executive Management.'' LCH SA is making this technical change to confirm that the remuneration policies would apply only to those executives identified in the Remuneration Committee TOR or otherwise specified by the Board and would not apply to other LCH SA executives who otherwise might be deemed to fall within the category of ''Executive Management'' for other purposes. As proposed to be revised, ''Specified Executives'' would mean, with respect to LCH SA, the Board Chairman, the CEO, the Chief Risk Officer, the Chief Compliance Officer, and any other personnel designated by the Board from time to time, including any personnel with an annual remuneration package of more than €1,000,000 or equivalent.

Moreover, the proposed rule change would simplify the process for approval of the remuneration of the CEO or any Specified Executive. Under the process as revised, the Remuneration Committee first would consult with the LCH Group CEO before making a recommendation to the Board for approval, rather than first consulting with the LCH Group CEO *and* the LSEG CEO. Because the LSEG Remuneration Committee must approve the remuneration of the CEO or any Specified Executive as the final step in the process anyway, LCH SA does not believe it is necessary to consult with the Chief Executive Officer of LSEG at the start of the process.[19] The proposed

[17] Notice, 85 FR at 48300, n. 26.

[18] *See* Notice, 85 FR at 48301.

[19] With regard to the remuneration of directors, the proposed rule change would also amend Article 1 to provide that the Remuneration Committee will consult from time to time with the remuneration

rule change would also amend Article 1 to require the Committee to review annually the ongoing appropriateness of any individual's remuneration and to review and recommend for approval by the Board the design of all incentive plans and performance related pay schemes, including performance targets to be used, that are designed by and received from the LSEG remuneration committee.

The proposed rule change would also amend Article 9 to require that minutes be presented to the Remuneration Committee for approval at the next meeting and Article 10 to specify the provisions that the Board could only amend with LSEG's consent.

*G. TSR Committee TOR*

Independent of the changes that LCH SA is making to reflect the changes to the governance of LCH Group, LCH SA has also proposed to create the TSR Committee of the Board and adopt the TSR Committee TOR. As set forth in the TSR Committee TOR, the overall purposes of the TSR Committee would be to represent the interests of the Board in the sound management of technology security and operational resilience, including cyber security and to ensure that technology security and operational resilience strategies, investments and outcomes support the mission, values, and strategic goals of LCH SA. To that end, the TSR Committee would be responsible for, among other things, review of LCH SA's operations and technology strategy and investments in technology in support of that strategy. To carry out its responsibilities, the TSR Committee would have full access to management and employees, as well as systems and records, and would be authorized to obtain independent professional advice. The Chairman of the TSR Committee would report its discussions and findings to the Board, but the TSR Committee would have not executive powers other than making findings and recommendations.

The TSR Committee TOR would also describe the composition and operation of the TSR Committee, including the conduct and attendance of meetings, requirements to establish quorum, and the confidentiality of matters considered by the TSR Committee.

**III. Commission Findings**

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the organization.[20] For the reasons given below, the Commission finds that the proposed rule change is consistent with Sections 17A(b)(3)(C)[21] and 17A(b)(3)(F) of the Act[22] and Rule 17Ad–22(e)(2)(i), (iv), (v), and (vi) thereunder.[23]

*A. Consistency With Section 17A(b)(3)(C) of the Act*

Section 17A(b)(3)(C) of the Act requires that the rules of LCH SA assure a fair representation of its shareholders (or members) and participants in the selection of its directors and administration of its affairs.[24] The Exchange Act does not define fair representation or establish particular standards of representation. The Commission has stated that, ''at a minimum, fair representation requires that the entity responsible for nominating individuals for membership on the board of directors should be obligated by by-law or rule to make nominations with a view toward assuring fair representation of the interests of shareholders and a cross-section of the community of participants.''[25] The Commission believes that the proposed rule change is consistent with the fair representation requirement.

First, as discussed in Part II.B above, the proposed rule change would provide LCH SA's indirect majority shareholder, LSEG, a representative on the Board and would require LSEG's consent prior to the Board's approval of a number of matters, including amendments to the Board TOR that would affect LSEG's rights. Similarly, the proposed rule change would require that the LCH SA CEO consult with, and obtain the approval of, the Board of LCH Group, LCH SA's direct majority shareholder, before taking a number of actions. To facilitate these consent and consultation requirements, the proposed rule change also would amend the Board TOR to permit LCH SA's sharing of information with LCH Group and LSEG and to resolve possible conflicts of interest among the companies. Moreover, with respect to specific committees of the Board, the proposed rule change would ensure some form of representation for LSEG on the Nomination Committee, Risk Committee, Audit Committee, and Remuneration Committee. Similarly, the proposed rule change would require LSEG's consent to changes to the terms of reference of a number of Board committees. With these changes, the Commission believes the proposed rule change should assure a fair representation of LCH SA's shareholders in the selection of its directors and administration of its affairs.

Second, as discussed in Part II.B above, the proposed rule change would remove from the Board TOR the requirement that the Board include a Venue Director. Based on LCH SA's representation, the Commission understands that, with the exception of Euronext, currently only one entity would qualify to nominate a Venue Director and that such entity has not shown an interest in representation on the Board.[26] With respect to Euronext, the proposed rule change would provide that Euronext is entitled to propose at least one of the directors to the Board as long as certain contractual agreements remain in force. Moreover, under the Board TOR and Nomination Committee TOR, as discussed in the Part II.B and Part II.C above, the Board would include up to two directors nominated by User Shareholders. Given the inclusion of representation for Euronext as well as User Shareholders on the Board, the Commission believes the proposed rule change should assure a fair representation of LCH SA's participants in the selection of its directors and administration of its affairs, even with the removal of the requirement for specific representation of Venues other than Euronext.

Taking these reasons together, the Commission finds that the proposed rule change is consistent with 17A(b)(3)(C) of the Act.[27]

*B. Consistency With Section 17A(b)(3)(F) of the Act*

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of LCH SA be designed to assure the safeguarding of securities and funds which are in the custody or control of LCH SA or for which it is responsible.[28]

As discussed above, the proposed rule change would make numerous changes to LCH SA's governance arrangements to clarify and amend those governance arrangements in light of the anticipated termination of the Relationship Agreement and the anticipated changes to LCH Group's governance. The Commission believes that, as a general

committee of LSEG and the remuneration committee of LCH Limited to ensure that there is a coordinated approach to the remuneration of directors on the Board and the board of directors of LCH Limited.

[20] 15 U.S.C. 78s(b)(2)(C).

[21] 15 U.S.C. 78q–1(b)(3)(C).

[22] 15 U.S.C. 78q–1(b)(3)(F).

[23] 17 CFR 240.17Ad–22(e)(2)(i), (iv), (v), (vi).

[24] 15 U.S.C. 78q–1(b)(3)(C).

[25] Exchange Act Release No. 20221 (Sept. 23, 1983), 48 FR 45167, 45172 (Oct. 3, 1983).

[26] *See* Notice, 85 FR at 48297, n. 13.

[27] 15 U.S.C. 78q–1(b)(3)(C).

[28] 15 U.S.C. 78q–1(b)(3)(F).

matter, these changes should help ensure that LCH SA has governance arrangements that support its ability to promptly and accurately offer clearance and settlement services to its clearing members and the markets LCH SA serves, and effectively manage the range of risks that arise in the course of providing such services. Moreover, the Commission believes that the proposed rule change should provide greater accessibility and clarity to LCH SA shareholders and participants to better understand LCH SA's governance arrangements. For both of these reasons, the Commission believes that the proposed rule change is consistent with the prompt and accurate clearance and settlement of securities transactions, and, accordingly, with Section 17A(b)(3)(F) of the Act.[29]

Moreover, as discussed in Part II.B above, the proposed rule change would clarify the wording in Article 12(e) of the Board TOR to specifically require the Board to annually approve the adoption of the LCH Group Risk Governance Framework and a number of LCH SA-specific policies, such as the Financial Resource Adequacy Policy. The Commission believes that Board approval of this framework and policies should help to ensure that they are sufficient and kept up-to-date. Because the LCH Group Risk Governance Framework and other LCH SA-specific policies, such as the Financial Resource Adequacy Policy, should collectively ensure that LCH SA is able to access and secure its securities and funds, the Commission believes that this aspect of the proposed rule change should help to assure the safeguarding of securities and funds which are in the custody or control of LCH SA or for which it is responsible, consistent with Section 17A(b)(3)(F) of the Act.[30]

Taking these reasons together, the Commission finds that the proposed rule change is consistent with 17A(b)(3)(F) of the Act.[31]

*C. Consistency With Rule 17Ad–22(e)(2)(i), (iv), (v), and (vi)*

i. Rule 17Ad–22(e)(2)(i)

Rule 17Ad–22(e)(2)(i) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent.[32]

The Commission believes that the proposed amendments discussed above to reflect planned changes to the LCH Group governance arrangements and the planned termination of the Relationship Agreement would enhance the clarity of LCH SA's governance arrangements. In particular, the Commission believes that removing certain provisions from, and updating references in, the terms of reference of the various Board committees in light of the anticipated changes to the LCH Group governance arrangements and the anticipated termination of the Relationship Agreement, as well as removing the requirements that the terms of reference be substantially similar to those of LCH Group (as discussed in Parts II.B, II.D, II.E, and II.F above), should reduce the possibility for confusion, increasing readability, and promoting consistency. Similarly, in eliminating the requirement that LCH SA's Audit Committee coordinate with the Audit Committee of LCH Group, as discussed in Part II.E above, the proposed rule change should remove a provision that if left unchanged, could cause confusion as LCH Group is disbanding its audit committee.

Similarly, the Commission believes that the changes discussed above regarding the Board would bring clarity to its operation. Specifically, in making a technical correction to Article 6 of the Board TOR to clarify that the Board may validly deliberate if at least half of the directors are present (as discussed in Part II.B above) the proposed rule change should reduce the possibility of confusion regarding when the Board has a quorum.

Finally, the Commission believes that, in adopting and updating the terms of reference for certain committees of the Board, the proposed rule change should clarify the operation of these committees. In specifying, among other things, the conduct of meetings, quorum, powers, and confidentiality of proceedings of the Nomination Committee (as discussed in Part II.G above); how the Audit Committee and Remuneration Committee would keep and approve meeting minutes (as discussed in Part II.E and Part II.F above); and how the Remuneration Committee would approve the remuneration of the LCH SA CEO and Specified Executives (as discussed in Part II.F above) the proposed rule change should provide clarity to how these committees would operate and carry out their responsibilities.

ii. Rule 17Ad–22(e)(2)(iv)

Rule 17Ad–22(e)(2)(iv) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that establish that the board of directors and senior management have appropriate experience and skills to discharge their duties and responsibilities.[33]

The Commission believes the changes with respect to the establishment of the Nomination Committee discussed in Part II.C above should help to ensure consistency with this requirement. Specifically, the Commission believes that, in establishing standards the Nomination Committee would use in nominating candidates for appointment to the Board, the proposed rule change should help to ensure that directors have the experience and skills needed to comply with their responsibilities. Similarly, the Commission believes that, in establishing the procedures that the Nomination Committee would use to recommend candidates to be Chairman, Independent Directors, and User Directors, and the standards that the Nomination Committee would use to determine to select and recommend such candidates, the proposed rule change should help to ensure that the Chairman, Independent Directors, and User Directors have the experience and skills needed to comply with their responsibilities as such. Moreover, in establishing the tenure for directors and allowing the Nomination Committee to nominate Independent Directors and User Directors for a longer period as needed to ensure that not all terms end at the same time, the proposed rule change should help to prevent a sudden loss of experience that could negatively affect the Board's ability to carry out its duties. Finally, in specifying that the Chief Risk Officer of LCH Group may, but is not required to, be one of the three executive directors of the Board and removing the requirement that the Chairman of LCH Group be a non-executive director of the Board, as discussed in Part II.B above, the proposed rule change should clarify the composition of the Board, and therefore the Board's potential experience and responsibilities.

iii. Rule 17Ad–22(e)(2)(v)

Rule 17Ad–22(e)(2)(v) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that specify clear and direct lines of responsibility.[34]

The Commission believes a number of the changes discussed in Part II.B above should establish clear and direct lines of responsibility for the Board. For

[29] 15 U.S.C. 78q–1(b)(3)(F).

[30] 15 U.S.C. 78q–1(b)(3)(F).

[31] 15 U.S.C. 78q–1(b)(3)(F).

[32] 17 CFR 240.17Ad–22(e)(2)(i).

[33] 17 CFR 240.17Ad–22(e)(2)(iv).

[34] 17 CFR 240.17Ad–22(e)(2)(v).

example, in amending the Board TOR to specifically require the Board to annually approve the adoption of the LCH Group Risk Governance Framework and a number of LCH SA-specific policies, the proposed rule change should clarify this responsibility of the Board. Similarly, by amending the Board TOR to require that the Board take into account certain factors from an existing LCH Group policy (which has been adopted by LCH SA) prior to issuing a report to the LCH SA shareholders to recommend a dividend, the proposed rule change should clarify the factors the Board must consider when exercising this responsibility. Finally, in making the Board responsible for reviewing and approving the Nomination Committee TOR, Risk Committee TOR, Remuneration Committee TOR, Audit Committee TOR, and TSR Committee TOR annually, the proposed rule change should clarify the Board's responsibility with respect to these terms of reference.

The Commission likewise believes a number of the changes discussed above should establish clear and direct lines of responsibility for committees of the Board. In adding a reference to the TSR Committee in the Board TOR and adopting the TSR Committee TOR, the proposed rule change would establish the TSR Committee and should clearly assign the TSR Committee certain responsibilities and duties, as discussed in Part II.G above. Similarly, the proposed rule change should clearly assign the Nomination Committee certain responsibilities and duties, as specified in the Nomination Committee TOR discussed in Part II.C above. Finally, the proposed rule change should clarify the Audit Committee's responsibilities by updating references to recognize that LCH SA has more than one external auditor, requiring consideration of the auditor appointed by LSEG in respect of the wider LSEG Group when making recommendations to the Board regarding external auditors for LCH SA, and requiring review of LCH SA's annual audit plan in certain circumstances, as discussed in Part II.E above.

iv. Rule 17Ad–22(e)(2)(vi)

Rule 17Ad–22(e)(2)(vi) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that consider the interests of participants' customers, securities issuers and holders, and other relevant stakeholders of LCH SA.[35]

As discussed above, the proposed rule change would make a number of changes to ensure representation of the interests of LCH Group and LSEG. For example, the proposed rule change would establish in the Board TOR certain representation, consent, and consultation rights similar to what LSEG has in the Relationship Agreement, including representation on the Board and certain Board committees and rights to consent with respect to certain actions of the Board and amendment to the Board TOR, as discussed in Part II.B above. Similarly, with respect to Board committees, as discussed in Part II.C through II.F above, the proposed rule change would grant LSEG representation and the right to consent to certain amendments to the terms of reference. Moreover, the proposed rule change would give the LCH Group CEO the right to attend Remuneration Committee meetings as an observer and would require the CEO of LCH SA to consult with LCH Group prior to taking certain actions, as discussed in Part II.B above. The proposed rule change would also authorize LCH SA's sharing of information with LCH Group and LSEG and would add provisions to resolve possible conflicts of interest among the companies, as discussed in Part II.B above. The Commission believes that all of these changes, taken together, should help to ensure LCH SA's consideration of the interests of LSEG and LCH Group, which as discussed above, are LCH SA's indirect and direct majority shareholders.

Similarly, the Commission believes that, in providing Euronext the right to propose at least one of the director to the Board so long as certain contractual agreements remain in force, as discussed in Part II.B above, the proposed rule change should help to ensure LCH SA's consideration of the interests of Euronext, which as discussed above, is a stakeholder in LCH SA.

For these reasons, the Commission finds that the proposed rule change is consistent with Rule 17Ad–22(e)(2)(i), (iv), (v), and (vi).[36]

## IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Sections 17A(b)(3)(C)[37] and 17A(b)(3)(F) of the Act[38] and Rule 17Ad–22(e)(2)(i), (iv), (v), and (vi) thereunder.[39]

*It is therefore ordered* pursuant to Section 19(b)(2) of the Act[40] that the proposed rule change, as modified by Amendment No. 1 (SR–LCH–SA–2020–003), be, and hereby is, approved.[41]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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[35] 17 CFR 240.17Ad–22(e)(2)(vi).

[36] 17 CFR 240.17Ad–22(e)(2)(i), (iv), (v), (vi).

[37] 15 U.S.C. 78q–1(b)(3)(C).

[38] 15 U.S.C. 78q–1(b)(3)(F).

[39] 17 CFR 240.17Ad–22(e)(2)(i), (iv), (v), (vi).

[40] 15 U.S.C. 78s(b)(2).

[41] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[42] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89795; File No. SR–CboeBZX–2020–003]**

## Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change, as Modified by Amendment No. 3, To List and Trade Shares of the –1x Short VIX Futures ETF Under BZX Rule 14.11(f)(4), Trust Issued Receipts

September 9, 2020.

On January 3, 2020, Cboe BZX Exchange, Inc. (''BZX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the –1x Short VIX Futures ETF, a series of VS Trust, under BZX Rule 14.11(f)(4) (Trust Issued Receipts). The proposed rule change was published for comment in the **Federal Register** on January 23, 2020.[3] On February 25, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On March 24,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 87992 (January 16, 2020), 85 FR 4023. Comments on the proposed rule change are available at: *https://www.sec.gov/comments/sr-cboebzx-2020-003/srcboebzx2020003.htm*.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 88276, 85 FR 12353 (March 2, 2020). The Commission

Continued

2020, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.[6] On April 13, 2020, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment No. 1.[7] On April 22, 2020, the Commission noticed Amendment No. 2 to the proposed rule change and instituted proceedings pursuant to Section 19(b)(2)(B) of the Act[8] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 2.[9] On July 13, 2020, the Commission designated a longer period within which to issue an order approving or disapproving the proposed rule change, as modified by Amendment No. 2.[10] On July 31, 2020, the Exchange filed Amendment No. 3 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment No. 2.[11] On September 4, 2020, the Exchange withdrew the proposed rule change (SR–CboeBZX–2020–003).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–20255 Filed 9–14–20; 8:45 am]

**BILLING CODE 8011–01–P**

designated April 22, 2020 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] Amendment No. 1 is available at: *https://www.sec.gov/comments/sr-cboebzx-2020-003/srcboebzx2020003-6993242-214730.pdf.*

[7] Amendment No. 2 is available at: *https://www.sec.gov/comments/sr-cboebzx-2020-003/srcboebzx2020003-7098109-215773.pdf.*

[8] 15 U.S.C. 78s(b)(2)(B).

[9] *See* Securities Exchange Act Release No. 88726, 85 FR 23581 (April 28, 2020).

[10] *See* Securities Exchange Act Release No. 89304, 85 FR 43622 (July 17, 2020). The Commission designated September 19, 2020, as the date by which the Commission shall either approve or disapprove the proposed rule change.

[11] Amendment No. 3 is available at: *https://www.sec.gov/comments/sr-cboebzx-2020-003/srcboebzx2020003-7570097-222225.pdf.*

[12] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89797; File No. SR–NYSEArca–2020–81]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Arca Equities Fees and Charges

September 9, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 1, 2020, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Equities Fees and Charges (''Fee Schedule'') to (1) eliminate an alternative method to qualify for the Tape B Tier 1 pricing tier, and (2) eliminate the Retail Order Step-Up Tier 1 pricing tier. The Exchange proposes to implement the fee changes effective September 1, 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend the Fee Schedule to (1) eliminate an alternative method to qualify for the Tape B Tier 1 pricing tier, and (2) eliminate the Retail Order Step-Up Tier 1 pricing tier. The Exchange proposes to implement the fee changes effective September 1, 2020.

ETP Holders[3] currently qualify for a Tape B Tier 1 credit of $0.0030[4] per share when, on a daily basis, measured monthly, they directly execute providing volume in Tape B securities that is equal to at least 1.50% of Tape B US consolidated average daily volume (''US CADV'')[5] for the billing month.[6] In February 2020, the Exchange adopted an alternative method for ETP Holders to qualify for the Tape B Tier 1 credit.[7] In March 2020, the Exchange amended the percentage CADV requirement applicable under the alternative method.[8] Pursuant to the alternative method, an ETP Holder could qualify for the Tape B Tier 1 credit if the ETP Holder is affiliated with an OTP Holder or OTP Firm that provides an ADV of electronic posted executions for the account of a market maker in all issues on NYSE Arca Options (excluding mini options) of at least 0.55% of total Customer equity and ETF option ADV as reported by The Options Clearing Corporation (''OCC'') and the ETP Holder directly executes providing volume in Tape B securities during the billing month that is equal to

- at least 1.00% of US Tape B CADV for the billing month of March, April and May 2020

[3] All references to ETP Holders in connection with this proposed fee change include Market Makers.

[4] Under the Basic Rate, ETP Holders receive a credit of $0.0020 per share for Tape B orders that provide liquidity to the Book.

[5] US CADV means United States Consolidated Average Daily Volume for transactions reported to the Consolidated Tape, excluding odd lots through January 31, 2014 (except for purposes of Lead Market Maker pricing), and excludes volume on days when the market closes early and on the date of the annual reconstitution of the Russell Investments Indexes. Transactions that are not reported to the Consolidated Tape are not included in US CADV. *See* Fee Schedule, footnote 3.

[6] *See* Securities Exchange Act Release No. 76084 (October 6, 2015), 80 FR 61529 (October 13, 2015) (SR–NYSEArca–2015–87).

[7] *See* Securities Exchange Act Release No. 88194 (February 13, 2020), 85 FR 9820 (February 20, 2020) (SR–NYSEArca–2020–12).

[8] *See* Securities Exchange Act Release No. 88436 (March 20, 2020), 85 FR 17112 (March 26, 2020) (SR–NYSEArca–2020–21).

• at least 1.15% of US Tape B CADV for the billing month of June, July and August 2020

• at least 1.25% of US Tape B CADV for the billing month of September 2020 and each billing month thereafter.

The Exchange proposes to eliminate the alternative method for ETP Holders to qualify for the Tape B Tier 1 credit and remove it from the Fee Schedule. The Exchange has observed that just one ETP Holder has qualified under the alternative method since it was adopted. Further, since March 2020, no ETP Holder affiliated with an OTP Holder or OTP Firm has qualified for the Tape B Tier 1 credit under the alternative method.[9] Given that the alternative method has not served to meaningfully increase activity on the Exchange or improve the quality of the market, the Exchange has determined to eliminate it from the Fee Schedule. The Exchange is not proposing any other change to Tape B Tier 1 pricing tier.

Additionally, the Exchange proposes to eliminate the Retail Order Step-Up Tier 1 pricing tier.

Currently, to qualify for the Retail Order Step-Up Tier 1 credit, an ETP Holder must execute an average daily volume (ADV) per month of Retail Orders [10] with a time-in-force of Day that add or remove liquidity that is an increase of 0.12% or more of the US CADV above its April 2018 ADV taken as a percentage of US CADV.[11] If an ETP Holder meets the Retail Order Step-Up Tier 1 requirement, such ETP Holder is eligible to earn a credit of $0.0033 per share for Retail Orders that provide displayed liquidity to the Book in Tape A, Tape B and Tape C securities, and is not charged a fee for Retail Orders with a time-in-force of Day that remove liquidity.

The Exchange proposes to eliminate the Retail Order Step-Up Tier 1 pricing tier and remove it from the Fee Schedule because the pricing tier has been underutilized by ETP Holders. The Exchange notes that another current pricing tier, Retail Order Step-Up Tier 3, has a lower requirement and provides a higher credit than Retail Order Step-Up Tier 1.[12] As a result, no ETP Holders have qualified for the credit under the Retail Order Step-Up Tier 1 pricing tier since the Exchange adopted the Retail Order Step-Up Tier 3. Therefore, the Exchange has determined to eliminate the Retail Order Step-Up Tier 1 from the Fee Schedule.

With the proposed elimination of Retail Order Step-Up Tier 1, the Exchange proposes to rename current Retail Order Step-Up Tier 2 as Retail Order Step-Up Tier 1, rename current Retail Order Step-Up Tier 3 as Retail Order Step-Up Tier 2, and rename current Retail Order Step-Up Tier 4 as Retail Order Step-Up Tier 3.

The proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[13] in general, and furthers the objectives of Sections 6(b)(4) and(5) of the Act,[14] 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 believes that the proposed rule change to eliminate the alternative method to qualify for the Tape B Tier 1 pricing tier, and eliminate the Retail Order Step-Up Tier 1 pricing tier is reasonable because each of the pricing tiers that are the subject of this proposed rule change have been underutilized and have generally not incentivized ETP Holders to bring liquidity and increase trading on the Exchange. Since March 2020, no ETP Holder has availed itself of the alternative method to qualify for the Tape B Tier 1 pricing tier. Similarly, no ETP Holder has qualified for Retail Order Step-Up Tier 1 since the Exchange adopted the Retail Order Step-Up Tier 3 in January 2020, which provides a higher credit and has a lesser requirement to qualify. The Exchange does not anticipate any ETP Holder in the near future to qualify for any of the tiers that are the subject of this proposed rule change. The Exchange believes it is reasonable to eliminate requirements and credits, and even entire pricing tiers, when such incentives become underutilized. The Exchange believes eliminating underutilized incentive programs would also simplify the Fee Schedule. The Exchange further believes that removing reference to the pricing tiers that the Exchange proposes to eliminate from the Fee Schedule would also add clarity to the Fee Schedule. The Exchange believes that eliminating requirements and credits, and even entire pricing tiers, from the Fee Schedule when such incentives become ineffective is equitable and not unfairly discriminatory because the requirements, and credits, and even entire pricing tiers, would be eliminated in their entirety and would no longer be available to any ETP Holder.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,[15] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*Intramarket Competition.* The Exchange's proposal to eliminate certain requirements and credits, and pricing tiers in their entirety, will not place any undue burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act given that not a single ETP Holder has qualified for any of the fees and credits under any of the pricing tiers that are the subject of this proposed rule change for a number of months. To the extent the proposed rule change places a burden on competition, any such burden would be outweighed by the fact that none of the pricing tiers proposed for deletion have served their intended purpose of incentivizing ETP Holders to more broadly participate on the Exchange. Moreover, ETP Holders can choose to trade on other venues to the extent they believe that the credits provided are too low or the qualification criteria are not attractive.

*Intermarket Competition.* The Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchanges and off-exchange venues if they deem fee levels

[9] There are currently 53 firms that are both ETP Holders and OTP Holders.

[10] A Retail Order is an agency order that originates from a natural person and is submitted to the Exchange by an ETP Holder, provided that no change is made to the terms of the order to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. *See* Securities Exchange Act Release No. 67540 (July 30, 2012), 77 FR 46539 (August 3, 2012) (SR–NYSEArca–2012–77).

[11] *See* Securities Exchange Act Release No. 83268 (May 17, 2018), 83 FR 23983 (May 23, 2018) (SR–NYSEArca–2018–34).

[12] *See* Securities Exchange Act Release No. 87994 (January 16, 2020), 85 FR 3955 (January 23, 2020) (SR–NYSEArca–2020–05).

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4) and (5).

[15] 15 U.S.C. 78f(b)(8).

at those other venues to be more favorable. Market share statistics provide ample evidence that price competition between exchanges is fierce, with liquidity and market share moving freely from one execution venue to another in reaction to pricing changes. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe this proposed fee change would impose any burden on intermarket competition.

*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–2020–81 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–2020–81. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–81, and should be submitted on or before October 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–20257 Filed 9–14–20; 8:45 am]

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[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. 34–89792; File No. SR–OCC–2020–805]**

## Self-Regulatory Organizations; The Options Clearing Corporation; Notice of No Objection To Advance Notice Concerning Proposed Changes To Enhance OCC's Stock Loan Close-Out Process

September 9, 2020.

**I. Introduction**

On July 14, 2020, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–OCC–2020–805 (''Advance Notice'') pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) [2] under the Securities Exchange Act of 1934 (''Exchange Act'') [3] to require Clearing Members that OCC instructs to buy-in or sell-out securities to execute such transactions and provide OCC notice of such action by the settlement time on the business day after OCC gives the instruction.[4] The Advance Notice was published for public comment in the **Federal Register** on August 14, 2020,[5] and the Commission has received no comments regarding the changes proposed in the Advance Notice.[6] The Commission is hereby providing notice of no objection to the Advance Notice.

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] 15 U.S.C. 78a *et seq.*

[4] *See* Notice of Filing *infra* note 5, at 85 FR 49697.

[5] Securities Exchange Act Release No. 89515 (Aug. 10, 2020), 85 FR 49697 (Aug. 14, 2020) (File No. SR–OCC–2020–805) (''Notice of Filing''). On July 14, 2020, OCC also filed a related proposed rule change (SR–OCC–2020–008) with the Commission pursuant to Section 19(b)(1) of the Exchange Act and Rule 19b–4 thereunder (''Proposed Rule Change''). 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively. In the Proposed Rule Change, which was published in the **Federal Register** on July 30, 2020, OCC seeks approval of proposed changes to its rules necessary to implement the Advance Notice. Securities Exchange Act Release No. 89393 (Jul. 24, 2020), 85 FR 45943 (Jul. 30, 2020) (File No. SR–OCC–2020–008). The comment period for the related Proposed Rule Change filing closed on August 20, 2020.

[6] Since the proposal contained in the Advance Notice was also filed as a proposed rule change, all public comments received on the proposal are considered regardless of whether the comments are submitted on the Proposed Rule Change or the Advance Notice.

## II. Background [7]

OCC serves as the sole clearing agency for standardized U.S. securities options listed on Commission-registered national securities exchanges (''listed options'').[8] OCC also operates two programs under which it clears stock loan transactions (the ''Stock Loan Programs'').[9] As described in more detail below, OCC proposes to align the timeframes for closing out the open stock loan and non-stock loan positions of a defaulting Clearing Member.

In the event of a Clearing Member default, OCC would close out the defaulting Clearing Member's open positions, liquidate collateral, and deposit the proceeds from such a close-out into a Liquidating Settlement Account.[10] Generally, OCC would seek to close out the defaulting Clearing Member's open positions through an auction conducted, before market open, on the day after a default occurs. Under its rules, however, OCC may also seek to close out open positions cleared under its Stock Loan Programs by instructing non-defaulting Clearing Member counterparties to the open position to execute buy-in or sell-out transactions by the end of the business day following the default.[11] In the event that a Clearing Member counterparty fails to execute buy-in or sell-out transactions as instructed, OCC would terminate the relevant stock loan positions based on end of day prices from the business day following the default. Pursuant to the Advance Notice, OCC proposes to change (1) the time by which buy-in or sell-out transactions for defaulted open stock loan positions must be executed and (2) the price at which OCC would terminate positions not closed out through the execution of buy-in or sell-out transactions.

*Current rules.* Under its Rule 2211 and Rule 2211A, OCC may instruct a Clearing Member who is a party to stock loan transactions with a defaulting Clearing Member to execute buy-in or sell-out transactions, as applicable, with respect to each open stock borrow or loan position of the defaulting Clearing Member.[12] Currently, a Clearing Member so instructed is obligated to execute the required transactions and provide notice of such execution to OCC by the close of the business on the day following receipt of such an instruction. If a Clearing Member fails to execute buy-in or sell-out transactions as instructed, OCC may terminate the relevant stock loan transactions. OCC would terminate such transactions based on prices from the end of the day after OCC issued buy-in or sell-out instructions (*i.e.,* the same day by which the Clearing Member was obligated to execute the buy-in or sell-out transactions).

*Proposed change to execution time.* OCC proposes to amend its Rules 2211 and 2211A with regard to the time by which a Clearing Member must execute buy-in or sell-out transactions and provide notice to OCC of such transactions. OCC would continue to require that such transactions be executed by or before the business day following receipt of the instruction to execute such transaction. OCC proposes, however, to move up the time by which the transaction must be executed from the close of business to ''settlement time,'' which OCC's current rules define as 9:00 a.m. Central Time.[13]

OCC considered requiring the execution of buy-in or sell-out transaction by the close of business on the day it instructed a Clearing Member to execute such transactions; however, Clearing Members expressed a preference for setting the deadline at 9:00 a.m. Central Time the following business day because doing so would allow a non-defaulting Clearing Member the opportunity to trade at market opening.[14] Because OCC typically issues buy-in or sell-out instructions on the day of default, the proposed rule would require such transactions to be executed by 9:00 a.m. Central Time on the business day following the default. The required transactions would, therefore, be executed on the same day on which OCC seeks to close out a defaulting Clearing Member's other positions through its auction procedures. OCC believes allowing non-defaulting Clearing Members to trade at market opening on the morning following default would provide additional time to execute the buy-in and sell-out transactions in a manner consistent with OCC's two-day liquidation assumption.[15] The proposed change would provide OCC with authority under its rules to compel execution of buy-in or sell out transactions designed to close out a defaulting Clearing Member's stock loan positions at a point in time closer to OCC's other default management processes (*i.e.,* auctions) than is currently permitted under OCC's rules.

*Proposed change to termination price.* OCC also proposes to amend its Rules 2211 and 2211A with regard to the price on which termination of stock loan positions would be based if a Clearing Member fails to execute buy-in or sell-out transactions within the required timeframes. Under the proposal, OCC would close out such positions based on end-of-day prices from the same day on which OCC instructed the Clearing Member to execute buy-in or sell-out transactions (*i.e.,* the day before the Clearing Member was obligated to execute the buy-in or sell-out transactions).[16] Such a price would be the last settlement price captured in OCC's systems prior to the time by which the non-defaulting Clearing Member was required to execute buy-in or sell-out transactions.[17] OCC believes that using such a price, already available in its system, would be superior to other options because it would allow for an automated process not susceptible to the delays and errors of manually pulling price information.[18]

## III. Commission Findings and Notice of No Objection

Although the Clearing Supervision Act does not specify a standard of review for an advance notice, the stated purpose of the Clearing Supervision Act is instructive: To mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk

[7] Capitalized terms used but not defined herein have the meanings specified in OCC's Rules and By-Laws, available at *https://www.theocc.com/about/publications/bylaws.jsp.*

[8] *See* Securities Exchange Act Release No. 85121 (Feb. 13, 2019), 84 FR 5157 (Feb. 20, 2019) (File No. SR–OCC–2015–02).

[9] OCC's two Stock Loan Programs are the ''Stock Loan/Hedge Program'' and the ''Market Loan Program.'' Under its Stock Loan/Hedge Program, OCC clears transactions initiated directly between Clearing Members on a bilateral basis. Under its Market Loan Program, OCC clears transactions initiated on either a broker-to-broker basis or anonymously through the matching of bids and offers.

[10] *See* OCC Rule 1104; *available at https://www.theocc.com/getmedia/9d3854cd-b782-450f-bcf7-33169b0576ce/occ_rules.pdf. See also* Notice of Filing, 85 FR at 49698.

[11] ''Buy-in'' refers to a non-defaulting lender purchasing replacement stock. ''Sell-out'' refers to a non-defaulting borrower selling the loaned securities in order to recoup its collateral. *See* Notice of Filing, 85 FR at 49697, n. 4.

[12] *See* OCC Rules 2211 and 2211A. Typically, OCC issues such instructions on the day of default. *See* Notice of Filing, 85 FR at 49698.

[13] *See* By-Law Article I, Section 1.S.(16); available at *https://www.theocc.com/getmedia/3309eceb-56cf-48fc-b3b3-498669a24572/occ_bylaws.pdf.*

[14] *See* Notice of Filing, 85 FR at 49698–99.

[15] *See* Notice of Filing, 85 FR at 49699.

[16] For example, OCC might rely on such end-of-day prices if Clearing Members were unable to execute buy-in or sell-out transactions to terminate open stock loan positions during the morning of the business day following the default because of circuit breaker activity. The use of the end-of-day prices from the day of default, as opposed to end-of-day prices following a full day of trading, would provide closer alignment of market conditions for OCC's auction and stock loan terminations than the current rules.

[17] *See* Notice of Filing, 85 FR at 49698.

[18] *See id.*

management standards for SIFMUs and strengthening the liquidity of SIFMUs.[19]

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe regulations containing risk management standards for the payment, clearing, and settlement activities of designated clearing entities engaged in designated activities for which the Commission is the supervisory agency.[20] Section 805(b) of the Clearing Supervision Act provides the following objectives and principles for the Commission's risk management standards prescribed under Section 805(a): [21]

- To promote robust risk management;
- to promote safety and soundness;
- to reduce systemic risks; and
- to support the stability of the broader financial system.

Section 805(c) provides, in addition, that the Commission's risk management standards may address such areas as risk management and default policies and procedures, among other areas.[22]

The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act and Section 17A of the Exchange Act (the ''Clearing Agency Rules'').[23] The Clearing Agency Rules require, among other things, each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for its operations and risk management practices on an ongoing basis.[24] As such, it is appropriate for the Commission to review advance notices against the Clearing Agency Rules and the objectives and principles of these risk management standards as described in Section 805(b) of the Clearing Supervision Act. As discussed below, the Commission believes the changes proposed in the Advance Notice are consistent with the objectives and principles described in Section 805(b) of the Clearing Supervision Act,[25] and in the Clearing Agency Rules, in particular Rule 17Ad–22(e)(13).[26]

*A. Consistency With Section 805(b) of the Clearing Supervision Act*

The Commission believes that the proposal contained in OCC's Advance Notice is consistent with the stated objectives and principles of Section 805(b) of the Clearing Supervision Act. Specifically, as discussed below, the Commission believes that the changes proposed in the Advance Notice are consistent with promoting robust risk management, promoting safety and soundness, reducing systemic risks, and supporting the stability of the broader financial system.[27]

The Commission believes that the proposed changes are consistent with promoting robust risk management, in particular the management of risks arising out of a Clearing Member default, as well as promoting safety and soundness. As a central counterparty and SIFMU,[28] it is imperative that OCC maintain default management processes designed to contain losses. As described above, OCC may, in the event of a Clearing Member default, seek to close out stock loan positions by requiring Clearing Members to execute buy-in or sell-out transactions while closing out non-stock loan positions and liquidating collateral via an auction. Pursuant to the Advance Notice, OCC proposes to more closely align the timeframe within which buy-in and sell-out transactions would occur with the timeframe of a default auction. In the event that such transactions do not occur within the required timeframes, OCC further proposes to terminate such stock loan transactions based on end of day prices from the same day on which OCC instructed the Clearing Member to execute buy-in or sell-out transactions. Such prices would likely represent the last market price received before OCC would auction off the rest of the defaulting Clearing Member's portfolio prior to the market open on the following morning. Aligning the timeframes for closing out stock loan positions and non-stock loan positions and collateral would reduce the potential for significant market movements occurring between the time by which OCC closes out positions and liquidates collateral related to such positions. Avoiding the potential for such market movements would, in turn, increase the likelihood that such collateral would be sufficient to mitigate losses arising out of the close out of stock loan positions. As such, the Commission believes that the proposal would promote robust risk management practices at, and the safety and soundness of, OCC, consistent with Section 805(b) of the Clearing Supervision Act.[29]

The Commission also believes that the changes proposed in the Advance Notice are consistent with reducing systemic risks and promoting the stability of the broader financial system. As noted above, OCC is the sole registered clearing agency for the U.S. listed options markets and a SIFMU. By aligning OCC's default management practices, the Commission believes that the proposed changes would enhance OCC's ability to address events of Clearing Member default, thereby increasing the likelihood that OCC could liquidate a defaulting Clearing Member's portfolio without realizing severe credit losses. Such losses, if realized, could be mutualized through OCC's Clearing Fund, potentially during a period of market stress. While unavoidable under certain circumstances, reducing the probability of loss mutualization during periods of market stress could reduce the transmission of financial risks arising from a Clearing Member default to non-defaulting Clearing Members, their customers, and the broader options market. The Commission believes that the potential to avoid such severe credit losses would, therefore, reduce systemic risk and support the broader financial system. As such, the Commission believes the proposed changes are consistent with reducing systemic risks and promoting the stability of the broader financial system as contemplated in Section 805(b) of the Clearing Supervision Act.[30]

Accordingly, and for the reasons stated above, the Commission believes the changes proposed in the Advance Notice are consistent with Section 805(b) of the Clearing Supervision Act.[31]

*B. Consistency With Rule 17Ad–22(e)(13) Under the Exchange Act*

Rule 17Ad–22(e)(13) under the Exchange Act requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to ensure the covered clearing agency has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meets its obligations.[32]

[19] *See* 12 U.S.C. 5461(b).

[20] 12 U.S.C. 5464(a)(2).

[21] 12 U.S.C. 5464(b).

[22] 12 U.S.C. 5464(c).

[23] 17 CFR 240.17Ad–22. *See* Securities Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220 (Nov. 2, 2012) (S7–08–11). *See also* Covered Clearing Agency Standards, 81 FR 70786. The Commission established an effective date of December 12, 2016 and a compliance date of April 11, 2017 for the Covered Clearing Agency Standards. OCC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5).

[24] 17 CFR 240.17Ad–22.

[25] 12 U.S.C. 5464(b).

[26] 17 CFR 240.17Ad–22(e)(13).

[27] 12 U.S.C. 5464(b).

[28] *See* Financial Stability Oversight Council (''FSOC'') 2012 Annual Report, Appendix A, available at *https://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf.*

[29] 12 U.S.C. 5464(b).

[30] 12 U.S.C. 5464(b).

[31] 12 U.S.C. 5464(b).

[32] 17 CFR 240.17Ad–22(e)(13).

As described above OCC, proposes to use its authority to alter the time when OCC will close out a defaulting Clearing Member's open stock loan positions. The proposed change would move the point in time by which OCC can close out open stock loan positions closer to the point in time by which OCC would seek to close the defaulting Clearing Member's non-stock loan positions and liquidate the defaulting Clearing Member's collateral via an auction. Aligning the timeframes for closing out stock loan positions and non-stock loan positions and collateral would reduce the potential for significant market movements occurring between the time by which OCC closes out positions and liquidates collateral related to such positions. Avoiding the potential for such market movements would, in turn, increase the likelihood that such collateral would be sufficient to mitigate losses arising out of the close out of stock loan positions.

OCC also proposes to terminate stock loan positions not closed out through buy-in or sell-out transactions based on end of day prices from the same day on which OCC instructed the Clearing Member to execute buy-in or sell-out transactions. As described above, such prices would likely represent the last market price received before OCC would auction off the rest of the defaulting Clearing Member's portfolio prior to the market open on the following morning. Similar to the change in the time by which Clearing Members would be instructed to execute buy-in or sell-out transactions, the proposed change in termination price would mitigate losses arising out of the close out of open stock loan positions by reducing the potential for significant market movements between the close out of positions and liquidation of related collateral. Taken together, the Commission believes that proposed changes regarding the close out a defaulting Clearing Member's open stock loan positions would enhance OCC's authority to take timely action to contain losses.

Accordingly, the Commission believes that Advance Notice would be consistent with Rule 17Ad–22(e)(13) under the Exchange Act.[33]

## IV. Conclusion

*It is therefore noticed,* pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act, that the Commission *does not object* to Advance Notice (SR–OCC–2020–805) and that OCC is *authorized* to implement the proposed change as of the date of this notice or the date of an order by the Commission approving proposed rule change SR–OCC–2020–008 whichever is later.

By the Commission.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–20252 Filed 9–14–20; 8:45 am]

**BILLING CODE 8011–01–P**

[33] 17 CFR 240.17Ad–22(e)(13).

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## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 34005; File No. 811–07963]**

## Nysa Series Trust

September 9, 2020.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice.

Notice of an application for deregistration under Section 8(f) of the Investment Company Act of 1940 (''Act'').

**SUMMARY OF APPLICATION:** Applicant seeks an order declaring that it has ceased to be an investment company.

**APPLICANT:** Nysa Series Trust (''Trust'').

**FILING DATE:** The application was filed on September 9, 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 Applicant with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on September 28, 2020, and should be accompanied by proof of service on the Applicant, 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 by emailing the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090; Applicant, Joseph Masella, 507 Plum Street, Suite 120, Syracuse, NY 13204.

**FOR FURTHER INFORMATION CONTACT:** 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.

**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.

### Applicant's Representations

1. Applicant, an open-end management investment company registered under the Act, seeks an order declaring that it has ceased to be an investment company. Applicant consists of a single series, the NYSA Fund (''Fund'').

2. On September 8, 2020, Applicant made a cash distribution of 64.4% of its assets to its shareholders on the basis of net assets. Applicant's board of trustees (''Board''), including a majority of disinterested Board members, determined that it was in the best interests of its shareholders to deregister the Applicant under the Act. The Board also determined that Applicant should remain in existence temporarily for the limited purposes of (i) holding an illiquid asset pending (a) a liquidity event regarding such asset that will provide the Applicant with cash to distribute to shareholders or (b) the Board's determination that such asset has no value; and (ii) continuing as plaintiff in a pending lawsuit. Applicant will maintain a cash reserve of $188,565 to be used for expenses in connection with its dissolution.

### Applicant's Legal Analysis

1. In relevant part, Section 8(f) of the Act provides that ''[w]henever the Commission, on its own motion or upon application, finds that a registered investment company has ceased to be an investment company, it shall so declare by order and upon the taking effect of such order the registration of such company shall cease to be in effect. If necessary for the protection of investors, an order under this subsection may be made upon appropriate conditions.'' Applicant has filed an application for an order under Section 8(f). In support of its request, Applicant states that it has made a cash distribution of 64.4% of its assets to its shareholders on the basis of net assets, and has retained certain illiquid assets and cash temporarily for the limited purposes noted above. Applicant further states that the cash distribution of its assets was made pursuant to a provision in its Declaration of Trust that permits the Trust to redeem shares if the Board determines in its sole discretion that failure to redeem the shares may have materially adverse consequences to all or any of the Trust's shareholders. Applicant states that at a meeting held

on August 28, 2020, the Board unanimously determined that failure to redeem the Fund's shares would likely result in adverse consequences to all of the Fund's shareholders.

**Applicant's Conditions**

Applicant has agreed to the following as conditions to deregistration under the Act:

1. Applicant will continue to maintain its internet website and shall post its semi-annual (unaudited) and annual (audited by the Applicant's independent accountants) financial statements to its website. As of the date of the filing of the application, Applicant has not engaged an independent accounting firm to audit the Applicant. However, the Board and Applicant's management are actively seeking a firm to perform any required audits. The Applicant's financial statements will be prepared in conformity with generally accepted accounting practices in the United States of America and comply with Regulation S–X, as if the Applicant were a registered management investment company, and will be posted to the Applicant's website within 60 days of the period's end. Within 60 days of the period's end, Applicant will send notifications to the shareholders (i) informing them that its financial statements are available online, (ii) providing the internet address where the financial statements can be found and (iii) offering to send them a paper copy, free of charge, upon their request.

2. Applicant will continue to maintain a Board that complies with the fund governance standards under Rule 0–1(a)(7) under the Act as if Applicant were a registered management investment company. The Applicant's Board will continue to meet no less frequently than quarterly. The Board shall continue to approve the selection of the Applicant's independent public accountant in accordance with Rule 32a–4 under the Act as if the Applicant were a registered management investment company. No less frequently than quarterly, the Applicant's Board shall determine the fair value of the illiquid asset in a manner consistent with Section 2(a)(41) of the Act. In the event that the value ascribed to that asset decreases 25% or more with respect to its prior value, such decrease shall be promptly communicated in writing to (i) the shareholders and (ii) staff of the Commission's Division of Investment Management.

3. Applicant shall continue to maintain and implement the policies and procedures required by Rules 17j–1 and 38a–1 under the Act as if it were a registered management investment company.

4. Applicant will comply with the books and records provisions of Section 31 of the Act, and the rules thereunder as set forth in the response to Item 7 of the application. Such books and records shall promptly be made available to the staff of the Commission as requested.

5. Applicant will operate in compliance with Section 17 of the Act as if it were a registered management investment company.

6. Neither (i) the Applicant's investment adviser, (ii) any ''affiliated person'' (as defined in the Act) of the investment adviser, (iii) any affiliated person of the Applicant, nor (iv) any affiliated person of the persons described in clauses (ii) or (iii) will receive any fee or other payment, directly or indirectly, from Applicant; provided, however, that Applicant is permitted to make pro rata liquidation distributions.

For the Commission, by the Division of Investment Management, under delegated authority.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–20268 Filed 9–14–20; 8:45 am]

**BILLING CODE 8011–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89796; File No. SR–IEX–2020–13]**

## Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Correct Two Typographical Errors in IEX Rules 2.220(a)(7) and 11.410(a)

September 9, 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 September 3, 2020, the Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Act,[4] and Rule 19b–4 thereunder,[5] IEX is filing is filing with the Commission a proposed rule change to correct two typographical errors in IEX Rules 2.220(a)(7) and 11.410(a). The Exchange has designated this rule change as ''non-controversial'' under Section 19(b)(3)(A) of the Act [6] and provided the Commission with the notice required by Rule 19b–4(f)(6) thereunder.[7]

The text of the proposed rule change is available at the Exchange's website at *www.iextrading.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 these statement [sic] may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange recently filed a proposed rule change to amend, in part, IEX Rules 2.220(a)(7) and 11.410(a) to include MIAX PEARL LLC (''MIAX PEARL'') in the list of away trading centers to which the Exchange routes and the market data sources the Exchange will use to determine Top of Book [8] quotations, in anticipation of MIAX PEARL's planned launch of equities trading on September 25, 2020 [9] (the ''Original Filing'').[10] The Original Filing introduced identical typographical errors in IEX Rules

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.19b–4.

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4.

[8] *See* IEX Rule 11.410(a)(1).

[9] *See https://www.miaxoptions.com/alerts/2020/07/20/miax-pearl-equities-updated-dom-and-esesm-interface-specifications.*

[10] *See* Securities Exchange Act Release No. 89705 (August 28, 2020) (SR–IEX–2020–12).

2.220(a)(7) and Rule 11.410(a), which the Exchange proposes to correct as described below.

The Original Filing inadvertently listed the Market Identifier Code (''MIC'') for MIAX PEARL's equities exchange as ''MPRL,'' which is the MIC for MIAX PEARL's options exchange. The Exchange proposes to correct these typographical errors by replacing the references to ''MPRL'' in IEX Rules 2.220(a)(7) and Rule 11.410(a) with references to ''EPRL,'' which is the MIC for MIAX PEARL's equities exchange.[11]

2. Statutory Basis

IEX believes that the proposed rule change is consistent with the provisions of Section 6(b)[12] of the Act in general, and furthers the objectives of Section 6(b)(5) of the Act[13] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, IEX believes that the proposed rule change is consistent with Section 6(b)(5) of the Act[14] because by correcting inadvertent typographical errors introduced by the Original Filing, it will eliminate any confusion regarding the away trading centers to which the Exchange routes and the market data sources the Exchange will use to determine Top of Book quotations, without substantively changing such provisions.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather to correct inadvertent typographical errors, thereby eliminating any potential confusion regarding such rule provisions without changing their substance.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

[11] *See supra* note 9.

[12] 15 U.S.C. 78f.

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78f(b)(5).

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[17] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[18] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange believes that waiver of the operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange, without undue delay, to correct a typographical error in an acronym used in a recent proposed rule change filing to avoid any potential confusion before the MIAX PEARL equities platform commences operations. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. Therefore, the Commission hereby waives the operative delay and designates the proposal as operative upon filing.[19]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[20] of the Act to determine whether the proposed rule change should be approved or disapproved.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

**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–IEX–2020–13 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–IEX–2020–13. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the IEX's principal office and on its internet website at *www.iextrading.com*. 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

[20] 15 U.S.C. 78s(b)(2)(B).

publicly. All submissions should refer to File Number SR–IEX–2020–13 and should be submitted on or before October 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–20256 Filed 9–14–20; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–89799; File No. SR–NASDAQ–2020–027]**

## Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Apply Additional Initial Listing Criteria for Companies Primarily Operating in Restrictive Markets

September 9, 2020.

### I. Introduction

On May 29, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to apply additional listing criteria to companies primarily operating in a jurisdiction that has secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by regulators of U.S.-listed companies. The proposed rule change was published for comment in the **Federal Register** on June 12, 2020.[3] On July 21, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5]

The Commission is publishing this order to solicit comments on the proposed rule change from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act [6] to determine whether to approve or disapprove the proposed rule change.

### II. Exchange's Description of the Proposed Rule Change

The Exchange states that in recent years the lack of transparency from certain emerging markets has raised concerns with respect to listed emerging market companies regarding the accuracy of disclosures, accountability, and access to information, particularly when the companies are based in a jurisdiction that has secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by regulators of U.S.-listed companies (''Restrictive Market'').[7] The Exchange further states that such concerns can be compounded when a company lists on the Exchange through an initial public offering (''IPO'') or a business combination with a small offering size or a low public float percentage, as the company may not develop sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly trading, which may result in a security that is illiquid.[8] The Exchange states that such securities may trade infrequently, in a more volatile manner, and with a wider bid-ask spread, all of which may lead to trading at a price that may not reflect true market value.[9] In addition, the Exchange states that less liquid securities may be more susceptible to price manipulation and that, in particular, the risk of price manipulation due to insider trading is more acute with respect to a company that principally administers its business in a Restrictive Market (''Restrictive Market Company'') because regulatory investigations into price manipulation, insider trading, and compliance concerns may be impeded, and, therefore, investor protections and remedies may be limited.[10] As a result, the Exchange states that it believes that Restrictive Market Companies present unique potential risks to U.S. investors.[11]

The Exchange states that it is now proposing rule changes that it believes will help to ensure that Restrictive Market Companies have sufficient investor base and public float to support fair and orderly trading on the Exchange.[12] Specifically, the Exchange proposes to adopt a definition of ''Restrictive Market'' [13] and to apply additional initial listing requirements to a Restrictive Market Company listing on the Exchange in connection with an IPO or a business combination.[14] The Exchange also proposes to prohibit a Restrictive Market Company from listing on the Nasdaq Capital Market in connection with a Direct Listing,[15] but to allow a Restrictive Market Company to list on the Nasdaq Global Select Market or Nasdaq Global Market in connection with a Direct Listing, provided that such company meets all applicable initial listing requirements for such market.

#### *A. Definition of Restrictive Market*

The Exchange proposes to adopt a new definition of Restrictive Market in Listing Rule 5005(a)(37).[16] As proposed, a Restrictive Market would mean a jurisdiction that Nasdaq determines to have secrecy laws, blocking statutes, national security laws or other laws or regulations restricting access to information by regulators of U.S.-listed companies in such jurisdiction.[17] In

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89027 (June 8, 2020), 85 FR 35962 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-nasdaq-2020-027/srnasdaq2020027.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89358 (July 21, 2020), 85 FR 45275 (July 27, 2020). The Commission designated September 10, 2020 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Notice, *supra* note 3, at 35962.

[8] *See id.* at 35962 and 35965.

[9] *See id.* at 35962 and 35965–66.

[10] *See id.* at 35962 and 35966.

[11] *See id.* at 35965.

[12] *See id.*

[13] *See infra* note 17 and accompanying text.

[14] The Exchange states that, currently, it may rely upon its discretionary authority under Nasdaq Listing Rule 5101 to deny initial listing or apply additional or more stringent criteria when it is concerned that a small offering size for an IPO may not reflect the company's initial valuation or may not ensure sufficient liquidity to support trading in the secondary market. Pursuant to Rule 5101, Nasdaq has broad discretionary authority over the initial and continued listing of securities in Nasdaq in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. Nasdaq may use such discretion to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq. *See* Nasdaq Listing Rule 5101.

[15] Nasdaq defines ''Direct Listing'' as the listing of ''companies that have sold common equity securities in private placements, which have not been listed on a national securities exchange or traded in the over-the-counter market pursuant to FINRA Form 211 immediately prior to the initial pricing.'' *See* Nasdaq Listing Rule IM–5315–1.

[16] The Exchange proposes to renumber current paragraphs (a)(37) through (a)(46) of Listing Rule 5005 in connection with the addition of the definition of Restrictive Market. *See* Notice, *supra* note 3, at 35963.

[17] *See id.* at 35962–63; proposed Listing Rule 5005(a)(37).

determining whether a Company's business is principally administered in a Restrictive Market, Nasdaq may consider the geographic locations of the Company's: (i) Principal business segments, operations or assets; (ii) board and shareholders' meetings; (iii) headquarters or principal executive offices; (iv) senior management and employees; and (v) books are records.[18] The Exchange states that it would consider these factors holistically, recognizing that a company's headquarters may not be the office from which it conducts its principal business activities.[19] The Exchange also states that the proposed definition would capture both foreign private issuers based in Restrictive Markets and companies based in the U.S. or another jurisdiction that principally administer their businesses in Restrictive Markets.[20]

*B. Minimum Offering Size or Public Float Percentage Requirement for an IPO*

The Exchange proposes to adopt new Rule 5210(l)(i) to require a Restrictive Market Company listing its Primary Equity Security[21] on Nasdaq in connection with its IPO to offer a minimum amount of securities in a Firm Commitment Offering[22] in the U.S. to Public Holders[23] that (i) will result in gross proceeds to the Company of at least $25 million or (ii) will represent at least 25% of the Company's post-offering Market Value of Listed Securities,[24] whichever is lower. A Restrictive Market Company listing on the Exchange in connection with an IPO that is subject to the proposed rule would also need comply with all other applicable listing requirements.[25]

The Exchange states that it has observed that Restrictive Market Companies listing on Nasdaq in connection with an IPO with an offering size below $25 million or public float ratio below 25% have a high rate of compliance concerns.[26] The Exchange further states that it believes the proposed listing requirement would help ensure that Restrictive Market Companies seeking to list on the Exchange have sufficient investor base and public float to support fair and orderly trading on the Exchange.[27]

*C. Minimum Market Value of Unrestricted Publicly Held Shares Requirement for a Business Combination*

The Exchange proposes to adopt new Rule 5210(l)(ii) to require a Company that is conducting a business combination, as described in Nasdaq Listing Rule 5110(a)[28] or IM–5101–2,[29] with a Restrictive Market Company to have a minimum Market Value of Unrestricted Publicly Held Shares[30] following the business combination equal to the lesser of (i) $25 million or (ii) 25% of post-business combination entity's Market Value of Listed Securities. A Company subject to the proposed rule would also need comply with all other applicable listing requirements.[31]

[18] *See id.* Nasdaq Listing Rule 5005(a)(6) defines ''Company'' as the issuer of a security listed or applying to list on Nasdaq.

[19] *See* Notice, *supra* note 3, at 35963. The Exchange provides the following example. Company X's headquarters are located in Country Y, while the majority of its senior management, employees, assets, operations and books and records are located in Country Z, which is a Restrictive Market. Nasdaq would consider Company X's business to be principally administered in Country Z. *See id.*

[20] *See id.* at 35963, n.5.

[21] Nasdaq Listing Rule 5005(a)(33) defines ''Primary Equity Security'' as ''a Company's first class of Common Stock, Ordinary Shares, Shares or Certificates of Beneficial Interest of Trust, Limited Partnership Interests or American Depositary Receipts (ADR) or Shares (ADS).''

[22] Nasdaq Listing Rule 5005(a)(17) defines ''Firm Commitment Offering'' as ''an offering of securities by participants in a selling syndicate under an agreement that imposes a financial commitment on participants in such syndicate to purchase such securities.''

[23] Nasdaq Listing Rule 5005(a)(36) defines ''Public Holders'' as ''holders of a security that includes both beneficial holders and holders of record, but does not include any holder who is, either directly or indirectly, an Executive Officer, director, or the beneficial holder of more than 10% of the total shares outstanding.''

[24] ''Market Value'' means the consolidated closing bid price multiplied by the measure to be valued. *See* Nasdaq Listing Rule 5000(a)(23). ''Listed Securities'' means securities listed on Nasdaq or another national securities exchange. *See* Nasdaq Listing Rule 5000(a)(22).

[25] The Exchange provides the following examples to illustrate the proposed rule. First, Company X, which principally administers its business in a Restrictive Market, is applying to list on Nasdaq Global Market and has an expected post-offering Market Value of Listed Securities of $75,000,000. Since 25% of $75,000,000 is $18,750,000, which is lower than $25,000,000, pursuant to the requirements of the proposed rule, Company X would be eligible to list based on a Firm Commitment Offering in the U.S. to Public Holders of at least $18,750,000. Company X would also need to comply with the other applicable listing requirements of the Nasdaq Global Market, including a Market Value of Unrestricted Publicly Held Shares of at least $8 million. *See* Nasdaq Listing Rule 5405(b)(1)(C). *See also* Rule 5005(a)(45) (definition of ''Unrestricted Publicly Held Shares''), Rule 5005(a)(46) (definition of ''Unrestricted Securities''), and Rule 5005(a)(37) (definition of ''Restricted Securities''). As another example, Company Y, which also principally administers its business in a Restrictive Market, is applying to list on the Nasdaq Global Select Market and its post-offering Market Value of Listed Securities is expected to be $200,000,000. Since 25% of $200,000,000 is $50,000,000, which is higher than $25,000,000, pursuant to the requirements of the proposed rule, Company Y would be eligible to list based on a Firm Commitment Offering in the U.S. to Public Holders that will result in gross proceeds of at least $25,000,000. Company Y would also need to comply with the other applicable listing requirements of the Nasdaq Global Select Market, including a Market Value of Unrestricted Publicly Held Shares of at least $45 million. *See* Nasdaq Listing Rule 5315(f)(2)(C).

[26] *See* Notice, *supra* note 3, at 35963.

[27] *See id.* at 35963–64.

[28] Nasdaq Listing Rule 5110(a) (Business Combinations with non-Nasdaq Entities Resulting in a Change of Control) sets forth requirements applicable to a Company that engages in a business combination with a non-Nasdaq entity, resulting in a change of control of the Company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq Listing.

[29] Nasdaq Listing Rule IM–5101–2 (Listing of Companies Whose Business Plan is to Complete One or More Acquisitions) sets forth requirements applicable to a Company whose business plan is to complete an IPO and engage in a merger or acquisition with one or more unidentified companies within a specific period of time.

[30] Nasdaq Listing Rule 5005(a)(45) defines ''Unrestricted Publicly Held Shares'' as Publicly Held Shares that are Unrestricted Securities. ''Publicly Held Shares'' means shares not held directly or indirectly by an officer, director or any person who is the beneficial owner of more than 10 percent of the total shares outstanding. *See* Nasdaq Listing Rule 5005(a)(35). ''Unrestricted Securities'' means securities that are not subject to resale restrictions for any reason, including, but not limited to, securities: (i) Acquired directly or indirectly from the issuer or an affiliate of the issuer in unregistered offerings such as private placements or Regulation D offerings; (ii) acquired through an employee stock benefit plan or as compensation for professional services; (iii) acquired in reliance on Regulation S, which cannot be resold within the United States; (iv) subject to a lockup agreement or a similar contractual restriction; or (v) considered ''restricted securities'' under Rule 144. *See* Nasdaq Listing Rules 5005(a)(46) and (37).

[31] The Exchange provides the following examples to illustrate the proposed rule. First, Company A is currently listed on the Nasdaq Capital Market and plans to acquire a company that principally administers its business in a Restrictive Market, in accordance with IM–5101–2. Following the business combination, Company A intends to transfer to the Nasdaq Global Select Market. Company A expects the post-business combination entity to have a Market Value of Listed Securities of $250,000,000. Since 25% of $250,000,000 is $62,500,000, which is higher than $25,000,000, pursuant to the requirements of the proposed rule, to qualify for listing the post-business combination entity must have a minimum Market Value of Unrestricted Publicly Held Shares of at least $25,000,000. The company would also need to comply with the other applicable listing requirements of the Nasdaq Global Select Market, including a Market Value of Unrestricted Publicly Held Shares of at least $45,000,000. *See* Nasdaq Listing Rule 5315(f)(2)(C). As another example, Company B is currently listed on Nasdaq Capital Market and plans to combine with a non-Nasdaq entity that principally administers its business in a Restrictive Market, resulting in a change of control as defined in Rule 5110(a), whereby the non-Nasdaq entity will become the Nasdaq-listed company. Following the change of control, Company B expects the listed company to have a Market Value of Listed Securities of $50,000,000. Since 25% of $50,000,000 is $12,500,000, which is lower than

Continued

The Exchange states that it believes that a business combination, as described in Nasdaq Rule 5110(a) or IM–5101–2, involving a Restrictive Market Company presents similar risks to U.S. investors as an IPO of a Restrictive Market Company and that the proposed listing requirement will help to provide an additional assurance that there are sufficient freely tradable shares and investor interest to support fair and orderly trading on the Exchange when the target company is a Restrictive Market Company.[32]

*D. Direct Listings of Restrictive Market Companies*

The Exchange proposes to adopt new Rule 5210(l)(iii) to provide that a Restrictive Market Company that is listing its Primary Equity Security on Nasdaq in connection with a Direct Listing, as defined in Listing Rule IM–5315–1,[33] would be permitted to list on: (i) The Nasdaq Global Select Market, provided that the Company meets all applicable listing requirements for the Nasdaq Global Select Market and the additional requirements of Listing Rule IM–5315–1, or (ii) the Nasdaq Global Market, provided that the Company meets all applicable listing requirements for the Nasdaq Global Market and the additional requirements of Listing Rule IM–5405–1. On the other hand, proposed Rule 5210(l)(iii) would provide that a Restrictive Market Company would not be permitted to list on the Nasdaq Capital Market in connection with a Direct Listing, notwithstanding the fact that the Company may meet the applicable initial listing requirements for the Nasdaq Capital Market and the additional requirements in Listing Rule IM–5505–1.

The Exchange's rules currently set forth initial listing requirements for companies listing on the Nasdaq Global Select Market, Nasdaq Global Market, and Nasdaq Capital Market,[34] and additional listing requirements for Companies conducting a Direct Listing on such markets.[35] The Exchange states that it believes it is appropriate to permit Restrictive Market Companies to list through a Direct Listing on the Nasdaq Global Select Market or Nasdaq Global Market because such companies would be subject to the additional listing requirements set forth in IM–5315–1 or IM–5405–1, respectively.[36] On the other hand, the Exchange states that it does not believe that the additional requirements for Direct Listing on the Nasdaq Capital Market, set forth in IM–5501–1, are sufficient to overcome concerns regarding sufficient liquidity and investor interest to support fair and orderly trading on the Exchange with respect to Restrictive Market Companies.[37]

## III. Summary of the Comment Letters Received

One commenter stated that it fully supports the proposed rule change inasmuch as it seems reasonably tailored to help ensure full, complete, and transparent financial and other disclosure from Restrictive Market Companies.[38] Another commenter expressed its support for the proposed rule changes to require Restrictive Market Companies to have a minimum offering size or public float percentage for an IPO and minimum market value of publicly held shares for a business combination and agreed that these requirements should help mitigate the risks that Restrictive Market Companies present to U.S. investors.[39] However, this commenter did not support the proposal to allow Restrictive Market Companies to list on Nasdaq Global Select Market or Nasdaq Global Market in connection with a Direct Listing and stated its general opposition to any proposal that would expand the use of direct listings.[40] On the other hand, this commenter agreed with the Exchange that precluding Restrictive Market Companies from listing through a Direct Listing on the Nasdaq Capital Market will help to promote fair and orderly trading on the secondary market.[41]

## IV. Proceedings To Determine Whether To Approve or Disapprove SR–NASDAQ–2020–027 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[42] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[43] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[44]

As discussed above, the Exchange proposes to apply new initial listing requirements to Restrictive Market Companies in connection with an IPO to

$25,000,000, pursuant to the requirements of the proposed rule, the listed company must have a minimum Market Value of Unrestricted Publicly Held Shares following the change of control of at least $12,500,000. The post-business combination company would also need to comply with all other applicable listing requirements of the Nasdaq Capital Market, including a Market Value of Unrestricted Publicly Held Shares of at least $5 million. *See* Nasdaq Listing Rule 5505(b)(3)(C).

[32] *See* Notice, *supra* note 3, at 35964.

[33] *See supra* note 15.

[34] *See* Nasdaq Listing Rules 5315, 5405, and 5505.

[35] *See* Nasdaq Listing Rules IM–5315–1, IM–5405–1, and IM–5501–1.

[36] *See* Notice, *supra* note 3, at 35965.

[37] *See id.* As an example, the Exchange states that the Nasdaq Global Select Market and Nasdaq Global Market require a company to have at least 1,250,000 and 1.1 million Unrestricted Publicly Held Shares, respectively, and a Market Value of Unrestricted Publicly Held Shares of at least $45 million and $8 million, respectively. *See* Nasdaq Listing Rules 5315(e)(2), 5315(f)(2)(c), 5405(a)(2), and 5405(b)(1)(c). In contrast, the Nasdaq Capital Market requires a company to have at least 1 million Unrestricted Publicly Held Shares and a Market Value of Unrestricted Publicly Held Shares of at least $5 million. *See* Nasdaq Listing Rules 5505(a)(2) and 5505(b)(3)(C). *See also* Notice, *supra* note 3, at 35965, n.22.

[38] *See* Letter from Annemarie Tierney, Founder and Principal, Liquid Advisors, Inc. (July 2, 2020), at 5.

[39] *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (June 25, 2020) (''CII Letter''), at 4–5.

[40] *See id.* at 5–6. This commenter cited its letter to the Commission submitted in connection with File Number SR–NYSE–2019–67, which stated that ''the SEC should take real and substantial steps, on an urgent basis, to explore establishing a system of traceable shares before approving a direct listing regime.'' *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (January 16, 2020), at 2–3, *available at https://www.sec.gov/comments/sr-nyse-2019-67/srnyse201967-6660338-203855.pdf.*

[41] *See* CII Letter, *supra* note 39, at 6.

[42] 15 U.S.C. 78s(b)(2)(B).

[43] *Id.*

[44] 15 U.S.C. 78f(b)(5).

require such companies to offer a minimum amount of securities in a Firm Commitment Offering in the U.S. to Public Holders that (i) will result in gross proceeds to the company of at least $25 million or (ii) will represent at least 25% of the company's post-offering Market Value of Listed Securities, whichever is lower.[45] In addition, the Exchange proposes to apply new listing requirements to companies conducting a business combination with a Restrictive Market Company to require such companies to have a minimum Market Value of Unrestricted Publicly Held Shares following the business combination equal to the lesser of (i) $25 million or (ii) 25% of post-business combination entity's Market Value of Listed Securities.[46] In support of the proposed requirements, the Exchange states that it has observed that Restrictive Market Companies listing on Nasdaq in connection with an IPO with an offering size below $25 million or public float ratio below 25% have a high rate of compliance concerns and that business combinations involving Restrictive Market Companies present similar risks to U.S. investors.[47] However, the Exchange does not provide any other data or analysis to support the level at which the proposed thresholds are set. The Commission believes there are questions as to whether the proposed thresholds are set at levels which are not designed to permit unfair discrimination amongst Restrictive Market Company issuers.

In addition, the Exchange's proposal sets forth five factors that the Exchange ''may'' consider when determining whether a Company's business is principally administered in a Restrictive Market and the Exchange states that it will consider these factors ''holistically.''[48] The proposal does not provide how, or if, the Exchange would apply these five factors when making a determination of whether a Company's business is principally administered in a Restrictive Market but, instead, provides the Exchange with broad discretion in determining so. The Commission believes there are questions as to whether such broad discretion when making a determination of whether a Company's business is principally administered in a Restrictive Market is not designed to permit unfair discrimination. Accordingly, the Commission believes there are questions as to whether the proposal is consistent with Section 6(b)(5) of the Act and its requirement, among other things, that the rules of a national securities exchange not be designed to permit unfair discrimination.

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.''[49] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[50] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[51]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal is consistent with the Act.

## V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5)[52] of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act,[53] any request for an opportunity to make an oral presentation.[54]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by October 6, 2020. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by October 20, 2020. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,[55] in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2020–027 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–027. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from

[45] *See supra* Section II.B.

[46] *See supra* Section II.C.

[47] *See supra* notes 26 and 32 and accompanying text.

[48] *See supra* notes 18–19 and accompanying text.

[49] 17 CFR 201.700(b)(3).

[50] *See id.*

[51] *See id.*

[52] 15 U.S.C. 78f(b)(5).

[53] 17 CFR 240.19b–4.

[54] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[55] *See* Notice, *supra* note 3.

comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–027 and should be submitted by October 6, 2020. Rebuttal comments should be submitted by October 20, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[56]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020–20259 Filed 9–14–20; 8:45 am]

**BILLING CODE 8011–01–P**

## SOCIAL SECURITY ADMINISTRATION

**[Docket No: SSA–2020–0048]**

### Agency Information Collection Activities: Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes a revision of an OMB-approved information collection.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov*

(SSA), Social Security Administration, OLCA; Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2020–0048].

SSA submitted the information collection below to OMB for clearance. Your comments regarding this information collection would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than October 15, 2020. Individuals can obtain copies of the OMB clearance package by writing to *OR.Reports.Clearance@ssa.gov*.

*Disability Update Report—20 CFR 404.1589–404.1595 and 416.988–416.996–0960–0511.* As part of our statutory requirements, SSA periodically uses Form SSA–455, the Disability Update Report, to evaluate current Title II disability beneficiaries' and Title XVI disability payment recipients' continued eligibility for disability payments. Specifically, SSA uses the form to determine if: (1) There is enough evidence to warrant referring the respondent for a full medical Continuing Disability Review (CDR); (2) the respondent's impairments are still present and indicative of no medical improvement, precluding the need for a full medical CDR; or (3) the respondent has unresolved work-related issues. SSA mails Form SSA–455 to specific disability recipients, whom we select as possibly qualifying for the full medical CDR process. SSA pre-fills the form with data specific to the disability recipient, except for the sections we ask the recipients to complete. When SSA receives the completed form, we scan it into SSA's system. This allows us to gather the information electronically, and enables SSA to process the returned forms through automated decision logic to decide the proper course of action to take. The respondents are recipients of Title II and Title XVI Social Security disability payments.

Type of Request: Revision of an OMB-approved information collection.

| Modality of completion | Number of respondents | Frequency of response | Average burden per response (minutes) | Estimated total annual burden (hours) | Average theoretical hourly cost amount (dollars)* | Average wait time in field office (minutes) ** | Total annual opportunity cost (dollars) *** |
|---|---|---|---|---|---|---|---|
| SSA–455 ..... | 1,300,000 | 1 | 15 | 325,000 | $10.73 * | 24 ** | $9,066,850 *** |

* We based this figure on average DI payments based on SSA's current FY 2020 data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*).

** We based this figure on the average FY 2020 wait times for field offices, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: September 10, 2020.

**Naomi Sipple,**

*Reports Clearance Officer, Social Security Administration.*

[FR Doc. 2020–20299 Filed 9–14–20; 8:45 am]

**BILLING CODE 4191–02–P**

## DEPARTMENT OF STATE

**[Public Notice 11200]**

### Certification Pursuant to the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2020

By virtue of the authority vested in me as Secretary of State pursuant to section 7041(a)(l) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2020 (Div. G, Pub.L. 1 16–94), I hereby certify that the Government of Egypt is sustaining the strategic relationship with the United States and meeting its obligations under the 1979 Egypt-Israel Peace Treaty.

This determination shall be published in the **Federal Register** and, along with the accompanying Memorandum of Justification, shall be reported to Congress.

Dated: August 17, 2020.

**Michael R. Pompeo,**

*Secretary of State.*

[FR Doc. 2020–20211 Filed 9–14–20; 8:45 am]

**BILLING CODE 4710–31–P**

[56] 17 CFR 200.30–3(a)(57).

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[FAA–2020–0488]**

### Agency Information Collection Activities: Requests for Comments; Clearance of New Approval of Information Collection: Survey of Unmanned-Aircraft-Systems Operators

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

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval a new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 12, 2020. The collection is a survey of unmanned aircraft systems (UAS) operator who are registered with the FAA under part 107 and section 349. The information to be collected will be used to prepare and plan for the integration of UAS into the national airspace system (NAS), as required by Section 376 under the FAA Reauthorizations Act of 2018.

**DATES:** Written comments should be submitted by October 12, 2020.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** William G. Ekins by email at: *William.g.ekins@faa.gov;* phone: 202–267–4735.

**SUPPLEMENTARY INFORMATION:**

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

*OMB Control Number:* 2120–.

*Title:* Survey of Unmanned-Aircraft-Systems Operators.

*Form Numbers:* N/A.

*Type of Review:* new information collection.

*Background:* The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 12, 2020 (2020–10139). The FAA Reauthorizations Act of 2018 explicitly charges the FAA with developing a plan to implement a UAS traffic management (UTM) services. The development of this congressionally mandated plan requires an estimation of current activity by UAS operators and projecting this behavior into the future as economic, technology, and regulatory condition change. Given the lack of available data on the flight behavior of UAS operators, the FAA proposes a survey of UAS operators who have registered with the FAA under Section 349 or Part 107.

Survey consists of a voluntary questionnaire administered online. Registrants within the FAA's UAS registry under Part 107 and Section 349 are invited to complete the online questionnaire via email. The email contains a personalized link to the questionnaire hosted by Survey Monkey. The questionnaire contains:

6 questions on general flight behavior,

4 questions about the number and types of UAS operated,

6 questions for respondents who identity as commercial operators, and

7 questions for respondents who identify as operating for public safety agencies.

Including a social-media preference and self-identifying questions, the questionnaire contains a total 25 question. However, the majority of respondents will only answer the first 12 questions.

The data obtained from the survey will be used to develop national forecasts of UAS activity. Summary data from the proposed survey will be included in the Aviation Forecast published annually by the FAA.

Given this Information Collection Request is for a new survey, three post-survey studies are included in survey design: A request for comments on questions within the questionnaire, post-survey study of non-response bias, and a post-survey study of sampling bias. Each of these follow-up studies have questionnaires as instruments. These studies are used to hone the survey design.

The main questionnaire is expected to place 10,881 hours of burden on the public while the remainder of the post-survey studies require 23,165 hours.

*Respondents:* UAS operators registered with the FAA under Part 107 or Section 349.

*Frequency:* Annually.

*Estimated Average Burden per Response:* 5.3 minutes on average.

*Estimated Total Annual Burden:* 34,026 hours.

Issued in Washington, DC, on September 10, 2020.

**Michael Lukacs,**

*Deputy Division Manager, Office of Aviation Policy and Plans, APO–100, Federal Aviation Administration, Department of Transportation.*

[FR Doc. 2020–20301 Filed 9–14–20; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. FAA–2020–58]**

### Petition for Exemption; Summary of Petition Received; National Air Transportation Association (NATA)

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

**ACTION:** Notice.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number and must be received on or before October 5, 2020.

**ADDRESSES:** Send comments identified by docket number FAA–2020–0693 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* Fax comments to Docket Operations at (202) 493–2251.

*Privacy:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

*Docket:* Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Brenda Robeson (202) 267–4693, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on September 10, 2020.

**Brandon Roberts,**

*Executive Director, Office of Rulemaking.*

## Petition for Exemption

*Docket No.:* FAA–2020–0693.

*Petitioner:* National Air Transportation Association (NATA).

*Section(s) of 14 CFR Affected:* §§ 135.293(a) and (b), 135.297(a) and (c)(2), and 135.299(a)(1).

*Description of Relief Sought:* Petitioner requests, on behalf of its members authorized to operate under part 135, basic operators, single pilot/single pilot-in-command operators, and other similarly situated operators, an interim 180-day exemption from §§ 135.293(a) and (b), 135.297(a) and (c)(2), and 135.299(a)(1) pertaining to who may conduct various tests and check rides. This petition is directly related to the circumstances associated with the COVID–19 pandemic.

[FR Doc. 2020–20319 Filed 9–14–20; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Docket No. FAA–2020–0862]**

## COVID–19 Related Relief Concerning Operations at Chicago O'Hare International Airport, John F. Kennedy International Airport, Los Angeles International Airport, Newark Liberty International Airport, New York LaGuardia Airport, Ronald Reagan Washington National Airport, and San Francisco International Airport for the Winter 2020/2021 Scheduling Season

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

**ACTION:** Notice of proposed extension of limited waiver of the minimum slot usage requirement.

**SUMMARY:** The FAA proposes to extend through March 27, 2021, the coronavirus disease 2019 (COVID–19)-related limited waiver of the minimum slot usage requirement at John F. Kennedy International Airport (JFK), New York LaGuardia Airport (LGA), and Ronald Reagan Washington National Airport (DCA) that the FAA has already made available through October 24, 2020, with additional conditions as described below. The FAA also proposes to extend, through December 31, 2020, its COVID–19-related policy for prioritizing flights canceled at designated International Air Transport Association (IATA) Level 2 airports in the United States, for purposes of establishing a carrier's operational baseline in the initial months of the next corresponding season, also with additional conditions as described below. These IATA Level 2 airports include Chicago O'Hare International Airport (ORD), Newark Liberty International Airport (EWR), Los Angeles International Airport (LAX), and San Francisco International Airport (SFO). This notice affords interested persons an opportunity to submit comments and any relevant information on the FAA's proposal. The FAA anticipates subsequently providing notice of its final decision.

**DATES:** Submit comments on or before September 22, 2020.

**ADDRESSES:** Submit comments and supporting data email to the Slot Administration Office at *7-awa-slotadmin@faa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Bonnie Dragotto, Office of the Chief Counsel, Regulations Division, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–3808; email: *bonnie.dragotto@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Previous Waiver Relief Related to COVID–19

In a notice published in the **Federal Register** on March 16, 2020 (85 FR 15018), the FAA announced certain relief through May 31, 2020, in light of impacts on air travel demand related to the outbreak of the novel coronavirus disease 2019 (COVID–19). As announced in that notice, through May 31, 2020, the FAA waived the minimum usage requirement as to any slot associated with a scheduled nonstop flight between JFK, LGA, or DCA, respectively, and another point that was canceled as a direct result of COVID–19-related impacts.[1] In addition, that notice announced that the FAA would prioritize flights canceled due to COVID–19 at designated IATA Level 2 airports in the United States—including ORD, EWR, LAX, and SFO—through May 31, 2020, for purposes of establishing a carrier's operational baseline in the next corresponding season.[2] In granting this relief, the FAA asserted its expectation that foreign slot coordinators would accommodate U.S. carriers with reciprocal relief. The FAA further stated that it would continue to monitor the situation and might augment the waiver as circumstances warrant.

Subsequently, following a notice of opportunity for interested persons to show cause why the FAA should or should not extend the relief provided due to continuing COVID–19-related impacts on demand for air travel (85 FR 16989; Mar. 25, 2020), the FAA determined to extend the relief through October 24, 2020 (85 FR 21500; Apr. 17, 2020). The FAA explained its intent to provide carriers with maximum flexibility during this unprecedented situation and to support the long-term viability of carrier operations at slot-

[1] Although DCA and LGA are not designated as IATA Level 3 slot-controlled airports given that these airports primarily serve domestic destinations, FAA limits operations at these airports via rules at DCA and an Order at LGA that are equivalent to IATA Level 3. The FAA reiterates that the relief provided in the March 16, 2020, notice (85 FR 15018), the April 17, 2020, notice (85 FR 21500), and this proposal extends to all allocated slots, including slots allocated by exemption.

[2] The FAA notes that a minimum usage requirement does not apply at designated IATA Level 2 airports in the United States. Moreover, established procedures under the IATA Worldwide Slot Guidelines (WSG) allow for the prioritization of such cancelations in subsequent corresponding seasons consistent with the FAA's policy statement.

controlled and IATA Level 2 airports in the United States.[3]

**Current COVID–19 Situation**

Since the FAA's determination in April to extend relief through October 24, 2020, COVID–19 has continued to cause disruption globally and within the United States. The World Health Organization (WHO) reports COVID–19 cases in more than 200 countries, areas, and territories worldwide. For the week ending September 6, 2020, the WHO reported over 1.8 million new COVID–19 cases and 37,000 new deaths, bringing the cumulative total to nearly 27 million confirmed COVID–19 cases and 900,000 deaths.

International travel recommendations from the Centers for Disease Control and Prevention (CDC) categorize nearly 200 countries, areas, and territories worldwide under Level 3: COVID–19 Risk Is High. Although the State Department's Global Health Advisory has been downgraded from Level 4—Do Not Travel for certain destinations, advisories ranging from Level 2—Exercise Increased Caution to Level 3—Reconsider Travel and up to Level 4 remain in effect for many parts of the world due to continuing impacts of COVID–19. The Department of State advises that challenges to any international travel at this time may include mandatory quarantines, travel restrictions, and closed borders. The Department of State notes further that foreign governments may implement restrictions with little notice, even in destinations that were previously low risk. Accordingly, the Department of State warns Americans choosing to travel internationally that their trip may be severely disrupted and it may be difficult to arrange travel back to the United States.

Within the United States, the CDC reported 6,343,562 total cases and 190,262 deaths from COVID–19 as of September 10, 2020, with 256,159 new cases in the prior seven days. A national emergency related to COVID–19 remains in effect pursuant to the President's March 13, 2020 Proclamation. The CDC advises prospective domestic travelers to consider whether their destination has requirements or restrictions for travelers, and notes that State, local, and territorial governments may have travel restrictions in place, including testing requirements, stay-at-home orders, and quarantine requirements upon arrival.

**Written Submissions From Stakeholders**

Since the FAA's determination in April to extend relief through October 24, 2020, the FAA has received numerous written submissions from stakeholders reflecting competing interests and views with respect to further continuation of the relief currently in effect at U.S. slot-controlled and designated IATA Level 2 airports.[4] IATA, Airlines for America (A4A), and multiple U.S. carriers, including American Airlines, Inc., Delta Air Lines, Inc., JetBlue Airways Corporation, and United Airlines, Inc., as well as a coalition of airlines worldwide and the African Airlines Association (AFRAA), have urged the FAA to extend relief through the Winter 2020/2021 scheduling season, which ends on March 27, 2021. By contrast, others including Airports Council International-North America (ACI–NA), the National Air Carrier Association (NACA), Spirit Airlines, Inc., Allegiant Air, LLC, and Travelers United have urged the FAA to deny requests for additional waivers altogether or impose further limitations. Southwest Airlines Co. proposes a middle ground approach—one additional limited extension of the relief previously provided, with a clear cutoff date—as a possible means of balancing competing stakeholder interests.

*Submissions Favoring Relief for the Full Winter 2020/2021 Season*

In a letter dated June 30, 2020, IATA and A4A urged the FAA to extend the relief already provided at slot-controlled airports and IATA Level 2 airports in the United States for the full Winter 2020/2021 season. They noted an anticipated $84.3 billion loss for airlines globally in 2020, and asserted that a full recovery to pre-COVID–19 demand is not expected for at least three years. In support of the requested relief, IATA and A4A pointed to: Historically low levels of bookings, with overall bookings down 82% year-on-year for 2020 compared to the outlook for 2019; consumer demand that continues to fall; challenges associated with using established scheduling practices under current conditions; and the need for schedule flexibility to support sustainable loads. IATA and A4A stated that they expect to continue to see big drops in advance bookings and many last minute bookings (and cancellations) unless and until there is a clear path towards a vaccine and/or treatment for COVID–19 and governments lift existing travel bans and health requirements. Moreover, IATA and A4A asserted that airport capacity is under pressure due to biosecurity measures, leading to reduced capacity and increased connection times. IATA and A4A expect that the requested waiver would provide the flexibility needed for airlines to manage operations in this environment.

In addition, IATA shared with the FAA a position paper concerning a Northern Winter 2020 Slot Waiver. That paper recognizes ''the needs of all stakeholders affected by a slot waiver and the desire to ensure a swift recovery is supported and not hindered.'' In this paper, IATA expresses agreement to the following principles:

- Suspension of the Use-it or Lose-it rule should apply for all Level 3 slot coordinated airports globally, ensuring no airline or airport is treated differently.
- Level 2 facilitators should prioritize flights cancelled, or otherwise not operated as originally intended, for purposes of establishing a carrier's operational baseline in the next corresponding season.
- The waiver should not apply to slots newly allocated from the pool for the Winter 2020/2021 season.
- The waiver should not apply to slots that are held by an airline exiting the airport permanently, beginning in the Winter 2020/2021 period, with no intention to return and no utilization of those slots in the Winter 2020/2021 period in keeping with WASG 8.14. This does not prevent slot transfers and operator utilization where local regulation and legislation allows.
- The waiver should require airlines to hand back slots not intended for utilization as soon as possible, but at the latest two weeks prior to planned operation in order to receive alleviation. Airlines should not hold on to slots they will not utilize but return them to the coordinator at the earliest opportunity for reallocation in keeping with WASG 8.5.2.
- Consideration for alleviation should be given to slots that are returned less than two weeks before operation in the event that government advice prevents a planned flight from operating (for

[3] The FAA is responsible to develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. *See* 49 U.S.C. 40103(b)(1). The FAA manages slot usage requirements under the authority of 14 CFR 93.227 at DCA and under the authority of Orders at LGA and JFK. *See* Operating Limitations at John F. Kennedy International Airport (83 FR 46865; Sep. 17, 2018); Operating Limitations at New York LaGuardia Airport (83 FR 47065; Sep. 18, 2018). The FAA has issued extensions of the JFK and LGA Orders until October 29, 2022, which are pending publication in the **Federal Register**.

[4] Copies of submissions to the DOT and FAA discussed herein concerning the continuation of COVID-related relief at U.S. slot-controlled and designated IATA Level 2 airports, except submissions marked as containing information deemed privileged and confidential, have been placed in the docket associated with this notice.

example, closure of borders or government advice to prevent all but essential travel).[5]

Moreover, A4A submitted an additional petition, by letter dated September 2, 2020, reiterating its request for an extension of the relief already provided at slot-controlled airports and IATA Level 2 airports in the United States for the full Winter 2020/2021 season.

American Airlines requested an extension of the Summer 2020 full season slot usage waiver for the full Winter 2020/2021 IATA slot season, by letter dated June 15, 2020. American asserted that the waiver would provide flexibility that supports airlines as the demand environment recovers slowly. American stated that this flexibility allows airlines to create flight schedules based on rapidly evolving consumer demand rather than on slot usage requirements.

In a letter dated July 6, 2020, Delta stated that COVID–19 is a highly unusual and unpredictable event that will impact Delta operations for the foreseeable future, and asserted that U.S. carriers need flexibility from slot usage requirements as the impact of COVID–19 continues to severely impact air travel. Absent the continuation of relief from the minimum slot usage requirements and relief provided at IATA Level 2 airports, Delta indicated that critical improvements, including service expansion to numerous new destinations from JFK and LGA in recent years, as well as capital investments at JFK and LGA for expansion and redevelopment, would be at risk. Delta noted that for November 2020, it projected operating 50%–60% of its slot portfolio in New York and Washington, DC airports, and that travel year over year across the Delta network was down 85%.

Leaders of twenty-nine airlines around the world, including United Airlines from the United States, sent a letter addressed to responsible slot authorities dated July 14, 2020, requesting a waiver from the minimum slot usage requirements during the Winter 2020/2021 season. The letter asserts that this waiver is ''critical to . . . manage through this crisis, recover, and provide the significant consumer, community, competitive, employment, and economic benefits synonymous with aviation'' and will ''help stabilize a very tenuous operational and commercial environment.'' This coalition further asserted that ''[a]irlines should not have to fly empty planes in order to hold their historical slot rights—it is inefficient and irresponsible.'' In its cover letter to the coalition's submission, United Airlines emphasizes that COVID–19 continues to cause an unprecedented crisis as ''cases are rising around the globe and the industry is nowhere near beginning a durable, economic recovery.''

The AFRAA submitted a letter to the FAA dated August 31, 2020, stating that COVID–19 affected air transport adversely, estimating a loss of about $8.8 billion for African airlines by the end of 2020, and noting that professionals forecast that 2019 activity levels may not return until 2023. AFRAA requests relief until 2022 at JFK, EWR, and ORD on behalf of its members.

In a letter dated September 4, 2020, JetBlue requested a waiver for the Winter 2020/2021 season at JFK, LGA, and DCA, as well as corresponding relief at EWR, on the basis that the ''airline industry continues to suffer from the devastating impact of the COVID–19 global pandemic'' and that ''[d]omestic traffic remains down between 70 and 80 percent.'' The letter states that a waiver would ''allow JetBlue to only fly flights commensurate with demand'' and ultimately resume full slot utilization as soon as practical.

*Submissions Disfavoring Relief for the Full Winter 2020/2021 Season*

By letter dated July 9, 2020, ACI–NA expressed opposition to any additional ''blanket, long-term waiver,'' which ACI–NA asserted would ''encourag[e] the underutilization of valuable public resources,'' be contrary to the public interest, and negatively impact the economic viability of airports and the communities they serve. Cautioning that it would be premature to consider a waiver for the Winter 2020/2021 season prior to August 31, 2020, ACI–NA stated that ''[a]lthough it is very difficult to determine the impact, duration and recovery of the pandemic, [ACI–NA] is seeing evidence of a steady recovery in passenger throughput at [all U.S. slot-controlled and designated IATA Level 2 airports], which is expected to continue in the future.'' ACI–NA contended that a blanket waiver will effectively block carriers that are able to provide service from providing price and service competition the public is willing and able to consume, and noted difficulty reconciling public statements of large carriers acknowledging the need to drastically reduce service while also seeking to ''retain access privileges to the most lucrative and constrained facilities.'' ACI–NA expressed concern that further waiver relief could impair the industry's ability to react to the changed environment brought on by COVID–19. ACI–NA further advocated that, to the degree that slot waivers may be necessary for the Winter 2020/2021 season, ''such relief should only be granted, if at all, closer to the affected season, when the justification can be properly assessed, and only to the extent that these measures are temporary and targeted, matched to the parameters of the crisis and based on evidence related to the specific markets at the particular times.''

By letter dated July 15, 2020, Spirit Airlines expressed opposition to an extension of the previously granted slot usage waiver and relief announced at IATA Level 2 airports in the United States. Spirit predicted that ''legacy incumbent carriers'' will continue to seek further extensions of the waiver in future seasons, as they have publicly acknowledged that a full recovery to pre-COVID demand is not expected for at least three years. Agreeing, in part, with ACI–NA's submission, Spirit further asserted that an extension of the waiver ''would have a pernicious effect on both the short and long-term realignment of the industry following the pandemic and is contrary to the public interest'' and therefore ''public policy should be directed toward enabling the free market to reallocate the use of these slots/authorizations—a public resource—such that passengers receive greater choice among offerings in these key markets.''

In a July 20, 2020, letter, Allegiant Air, through counsel, expressed support for the views expressed by both ACI–NA and Spirit. Opposing an extension of the existing relief provided and stressing the ''primacy of the public interest over slot holders' interests,'' Allegiant argued that ''the existence of a public health crisis does not justify hoarding of public assets . . . by any carrier when others are prepared to utilize at least some of those assets, benefitting the public.''

In a submission on July 21, 2020, NACA, which represents 17 air carriers that operate under 14 CFR part 121, likewise expressed opposition to an extension of the previously granted slot usage waiver at U.S. slot-controlled airports and relief at IATA Level 2 airports in the United States through the full Winter 2020/2021 season. NACA expressed support for the individual letters submitted by NACA members Spirit and Allegiant, as well as the views expressed by ACI–NA. NACA

[5] The FAA notes that the proposal submitted by IATA and A4A references provisions of the new Worldwide Airport Slot Guidelines (WASG) Edition 1, effective June 1, 2020; however, the FAA reiterates that it continues to apply WSG Edition 9 in the United States to the extent there is no conflict with local rules. However, the provisions cited by IATA and A4A were included in WSG Edition 9.

asserted that ''[p]ermitting legacy carriers to reduce operations for at least another six months would effectively allow them to control capacity and raise fares at a critical time when the traveling public needs lower fares.''

In a letter dated August 21, 2020, Travelers United (formerly Consumer Travel Alliance) objected to an extension of slot usage waivers at DCA, LGA, and JFK, arguing that further relief ''will thwart the free competitive market's operation.'' Travelers United stated that since late March of 2020, incumbent slot holders at DCA, LGA, and JFK have reduced their overall flight operations by approximately 60% to 70% versus a year ago. According to Travelers United, whereas ''it will be years before the legacy airlines can resume the service levels present in 2019,'' some low cost carriers and ultra-low cost carriers ''are ready and willing to provide new service at slot-controlled airports if allowed to do so.'' Travelers United asserted that ''[t]he free market should be allowed to reallocate the use of these slots, which are actually owned by the public, to airlines that are willing to provide service for the public.''

Southwest Airlines advocated a ''middle ground approach'' to balance competing stakeholder interests, in a letter dated August 17, 2020. Southwest expressed support for one final extension of the relief already provided, through December 31, 2020, ''to provide airlines with planning certainty for the rest of the year.'' Southwest stated that ''granting usage waivers that would allow slot holders to retain all their slots season after season without providing flights for consumers is not in the public interest.'' Accordingly, Southwest urged that as part of the suggested final extension, the FAA should ''make clear no additional blanket or individual carrier slot usage waivers will be granted'' in connection with COVID–19.

**Discussion of Proposed Relief for Slot Holders at U.S. Slot-Controlled Airports (DCA/JFK/LGA)**

At the present time, COVID–19 continues to present a highly unusual and unpredictable condition that is beyond the control of carriers. Passenger demand has decreased dramatically as a result of COVID–19 even as there are some signs of limited recovery in some markets and restructuring of airline operations. The ultimate duration and severity of COVID–19 impacts on passenger demand in the United States and internationally remain unclear. Even after COVID–19 is contained, impacts on passenger demand are likely to continue for some time. The FAA acknowledges the need for slot holders to have some flexibility in decision-making as the severe impacts of the COVID–19 public health crisis continue. However, the Office of the Secretary of Transportation (OST) and the FAA note that what starts as a highly unusual and unpredictable condition may eventually become foreseeable. Indeed, many airlines may well be on their way to restructuring their operations in response to a new, albeit volatile, environment. As asserted in some stakeholder submissions recounted above, there may come a point in time in which ongoing waivers to preserve pre-COVID slot holdings could impede the ability of airports and airlines to provide services that may benefit the economy. The FAA acknowledges the interests of carriers with limited or no access to constrained airports in the United States and the interests of airports in serving their local community and rebounding from this crisis. Further, the FAA agrees that any additional relief from the minimum slot usage requirements at U.S. slot-controlled airports should be narrowly tailored to afford increased access to carriers that are willing and able to operate at these airports, even if on an ad hoc basis until such time as slots revert to the FAA for reallocation under the governing rules and regulations at each slot-controlled airport.

The FAA therefore proposes to make available to slot holders at DCA, JFK, and LGA a waiver from the minimum slot usage requirements due to continuing COVID–19 impacts through March 27, 2021, subject to each of the following proposed conditions:

(1) All slots not intended to be operated would be required to be returned at least on a monthly basis 4 weeks prior to the start of the month (for example, by November 1, carriers must hand back all December slots not intended to be operated due to COVID–19) to allow other carriers an opportunity to operate these slots on an ad hoc basis without historic precedence;[6]

(2) The waiver would not be made available for net newly-allocated slots eligible for historical precedence, based on allocation decisions made prior to the start of the Winter 2020/2021 scheduling season; and

(3) The waiver would not apply to slots newly transferred on an uneven basis (*i.e.,* via one-way slot transaction/lease) after [DATE 14 DAYS AFTER PUBLICATION OF FINAL DECISION IN THE **FEDERAL REGISTER**] for the duration of the transfer. Slots granted historic precedence for subsequent seasons based on this proposed relief would not be eligible for transfer if the slot holder ceases all operations at the airport.[7]

The FAA would apply each of these conditions in considering whether a slot-holding carrier has justification for a waiver based on the non-use of a slot due to COVID–19 impacts. However, the FAA in coordination with OST, will consider granting exceptions from any or all of these conditions if a government's action (*i.e.,* travel restriction) directly prevents the operation of a flight on a particular route that a carrier otherwise intended to operate. This exception would apply under extraordinary circumstances only in which a carrier is able to demonstrate an inability to operate a particular flight or comply with the conditions of the proposed waiver due to a governmental restriction. Carriers would be expected to provide documentation demonstrating that the carrier made all efforts to operate a flight and that it was unable to determine with reasonable advance notice whether it could do so.

This proposal reflects a delicate balancing of the competing interests of carriers interested in conducting ad hoc operations (including carriers not already operating at the airport) against the interests of incumbent carriers seeking maximum flexibility in making scheduling and operational decisions in an uncertain environment with ongoing COVID–19-related impacts. Further, this proposal reflects a compromise position as between interests of airports, incumbent carriers, and carriers seeking new or increased access with respect to the timeline specified for handback, which is 4–8 weeks before the date the operation would have been conducted.

The FAA believes this approach is appropriate to provide carriers with flexibility during this unprecedented situation and to support the long-term viability of carrier operations at slot-controlled airports while also supporting economic recovery. This proposal balances the interests of carriers that are willing and able to resume operations more quickly, and reduces the potential for a long-term waiver to suppress flight operations for which demand exists. The FAA believes this proposal is largely consistent with many of the principles voiced by IATA in its advocacy for a full season Winter

[6] Under this proposal, carriers will provide a minimum of 4 weeks' notice, and notifications will occur on a monthly basis, by the first of the month. Two additional examples to illustrate the condition include: (1) If a carrier wishes to cancel its entire December schedule, it must provide notification by November 1; (2) if a carrier wishes to cancel its schedules from December 16–20, it must also provide notice by November 1. Note that the usual process for treating slots as used for the Thanksgiving and Winter holiday periods provided by 14 CFR 93.227(l) of the High Density Rule and the JFK and LGA orders will still apply and will not be superseded by this proposal.

[7] The FAA notes that this provision is not intended to apply to continuing long-term transfers that are already part of the operating environment.

2020/2021 waiver. Continuing relief for this additional period subject to the proposed conditions is reasonable to balance the interests of all stakeholders to the greatest extent possible under established slot management rules and regulations in the United States. While the FAA is proposing continued, albeit conditional, relief through the Winter 2020/2021 season, carriers should not assume that further relief on the basis of COVID–19 will be forthcoming beyond the end of the Winter 2020/2021 scheduling season.

If the FAA extends relief at slot-controlled airports to March 27, 2021, the FAA expects that foreign slot coordinators will provide reciprocal relief to U.S. carriers. To date, many coordinators have indicated that they will similarly provide additional relief on a conditional basis. To the extent that U.S. carriers fly to a foreign carrier's home jurisdiction and that home jurisdiction does not offer reciprocal relief to U.S. carriers, the FAA may determine not to grant a waiver to that foreign carrier. A foreign carrier seeking a waiver may wish to ensure that the responsible authority of the foreign carrier's home jurisdiction submits a statement by email to *ScheduleFiling@dot.gov* confirming reciprocal treatment of the slot holdings of U.S. carriers.

**Discussion of Proposed Relief for Operators at U.S. Designated IATA Level 2 Airports (EWR/LAX/ORD/SFO)**

The FAA also proposes to extend through December 31, 2020, with conditions, its COVID–19-related policy for prioritizing flights canceled at designated IATA Level 2 airports in the United States, for purposes of establishing a carrier's operational baseline in that portion of the next corresponding season. The FAA recognizes that some carriers may still be considering schedule plans and assessing demand. An extension of relief through the end of the calendar year would provide time for carriers at IATA Level 2 airports to make schedule decisions, market flights, and plan for aircraft utilization, crew, and facilities for the initial months of the Winter 2020/2021 scheduling season before a return to the standard schedule review and facilitation process.

The FAA has previously approved schedules by carriers for the Winter 2020/2021 scheduling season and carriers could choose to operate as approved, apply this proposed policy through December 31, 2020, or submit new schedule proposals for the season. The application of this policy would be contingent on carriers notifying the FAA of any previously approved Winter 2020/2021 schedules no longer intended to be operated, at least on a monthly basis, four weeks prior to the start of the month (for example, by November 1, carriers must notify the FAA of all approved schedules not intended to be operated in December due to COVID–19), in order to make these times available for use on an ad hoc basis by other carriers. Consistent with the proposal for Level 3 airports, the FAA proposes to consider, in coordination with OST, allowing exceptions to this condition at Level 2 airports under extraordinary circumstances if a government's action (*i.e.,* travel restrictions) directly prevents the operation of a flight on a particular route that the carrier would otherwise intend to operate.

The more limited relief proposed at Level 2 airports as compared to slot-controlled airports reflects that the IATA Level 2 construct differs from the rules and process in place at slot-controlled airports in the United States and at airports globally under the WSG and WASG. The concepts of historic rights, series of slots, or minimum usage requirements do not exist under the Level 2 construct. The voluntary, cooperative nature of Level 2 schedule facilitation is less amenable to a policy that provides priority for flights that are not operated for extended periods of time while potentially denying access to carriers that seek to add service.

Under this proposal, a carrier could receive priority for flights only through December 31, 2020, that were approved but are not operated due to COVID–19-related impacts. For flights after December 31, 2020, priority would be based on approved schedules as operated for the balance of the scheduling season. The FAA would also provide priority consideration in Winter 2021/2022 for flights approved on an ad hoc basis in Winter 2020/2021 if there is sufficient availability within the scheduling limits.

**Invitation for Comment**

The FAA seeks views and information regarding this proposal. Interested persons are invited to submit comments why the FAA should or should not finalize this decision as proposed, and to submit any information relevant to making this decision. Written views and supporting data may be submitted no later than September 22, 2020, by email to the Slot Administration Office at *7-awa-slotadmin@faa.gov*. Information submitted to the FAA may be subject to disclosure under the Freedom of Information Act.

The FAA recognizes that commenters may seek to submit business information that is both customarily and actually treated as confidential. Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments, or any relevant portions thereof, as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under FOIA, and will not place confidential content in the public docket for this notice. Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this notice. The FAA will take the necessary steps to protect properly designated information to the extent allowable by law.

After receiving and reviewing comments, the FAA anticipates subsequently providing notice of its final decision.

Issued in Washington, DC, on September 11, 2020.

**Lorelei Dinges Peter,**

*Assistant Chief Counsel for Regulations.*

[FR Doc. 2020–20434 Filed 9–11–20; 2:00 pm]

**BILLING CODE 4910–13–P**

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## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2020–0121]**

### Request for Comments of a Previously Approved Information Collection: Application for Construction Reserve Fund and Annual Statements

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on June 19, 2020.

**DATES:** Comments must be submitted on or before October 15, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Daniel Ladd, 202–366–1859, Office of Financial Approvals, Maritime Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

*Title:* Application for Construction Reserve Fund (CRF) and Annual Statements.

*OMB Control Number:* 2133–0032.

*Type of Request:* Renewal of a previously approved collection.

*Background:* The Construction Reserve Fund (CRF), authorized by 46 U.S.C. Chapter 533, is a financial assistance program which provides tax deferral benefits to U.S.-flag operators. Eligible parties can defer the gain attributable to the sale or loss of a vessel, provided the proceeds are used to expand or modernize the U.S. merchant fleet. The primary purpose of the CRF is to promote the construction, reconstruction, reconditioning, or acquisition of merchant vessels which are necessary for national defense and to the development of U.S. commerce.

*Respondents:* Citizens who own or operate vessels in the U.S. foreign or domestic commerce who desire tax benefits under the CRF program must respond.

*Affected Public:* Owners or operators of vessels in the domestic or foreign commerce.

*Estimated Number of Respondents:* 17.

*Total Estimated Number of Responses:* 17.

*Frequency of Response:* Annually.

*Estimated time per Respondent:* 9 hours.

*Total Estimated Number of Annual Burden Hours:* 153.

*Public Comments Invited:* Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

**Authority:** The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.93.

Dated: September 10, 2020.

By Order of the Maritime Administrator.

**T. Mitchell Hudson, Jr.**

*Secretary, Maritime Administration.*

[FR Doc. 2020–20313 Filed 9–14–20; 8:45 am]

BILLING CODE 4910–81–P

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2020–0120]**

### Request for Comments of a Previously Approved Information Collection: Determination of Fair and Reasonable Rates for the Carriage of Agricultural Cargoes on U.S. Commercial Vessels

**AGENCY:** Maritime Administration, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on June 19, 2020.

**DATES:** Comments must be submitted on or before October 15, 2020.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Albert Bratton, (202) 366–5769, Office of Financial Approvals, Maritime Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

*Title:* Determination of Fair and Reasonable Rates for the Carriage of Agricultural Cargoes on U.S. Commercial Vessels—46 CFR.

*OMB Control Number:* 2133–0514.

*Type of Request:* Renewal of a Previously Approved Information Collection.

*Background:* This collection of information requires U.S.-flag operators to submit annual vessel operating costs and capital costs data to Maritime Administration officials. The information is used by the Maritime Administration in determining fair and reasonable guideline rates for the carriage of preference cargoes on U.S.-flag vessels. In addition, U.S.-flag vessel operators are required to submit Post Voyage Reports to the Maritime Administration after completion of a cargo preference voyage.

*Respondents:* U.S. citizens who own and operate U.S.-flag vessels.

*Affected Public:* Business or other for profit.

*Total Estimated Number of Responses:* 68.

*Frequency of Collection:* Annually.

*Estimated Time per Respondent:* 1–4 hours.

*Total Estimated Number of Annual Burden Hours:* 176.

*Public Comments Invited:* Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

**Authority:** The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.93.

Dated: September 10, 2020.

By Order of the Maritime Administrator.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2020–20314 Filed 9–14–20; 8:45 am]

BILLING CODE 4910–81–P

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Notice of OFAC Sanctions Actions

**AGENCY:** Office of Foreign Assets Control (OFAC), Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names

of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

**DATES:** See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

**FOR FURTHER INFORMATION CONTACT:** OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480.

**SUPPLEMENTARY INFORMATION:**

**Electronic Availability**

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treas.gov/ofac*).

**Notice of OFAC Action(s)**

On September 10, 2020, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

## Individuals

1. ANDREYEV, Anton Nikolaeyvich (Cyrillic: АНДРЕЕВ, Антон Николаевич), 9 3 Bloshevikov Prospect Apt 35, Saint Petersburg, Russia; DOB 03 Mar 1985; POB Saint Petersburg, Russia; nationality Russia; Email Address antonandreyv@gmail.com; Gender Male; Digital Currency Address - XBT 1Fz29BQp82pE3vXXcsZoMNQ3KSHfMzfMe3; alt. Digital Currency Address - XBT 1AeSq93WDNdLoEJ92sex7T8xQZoYYm8BtS; alt. Digital Currency Address - XBT 1AoxtfiBQ22DvbhqAN9Ctb8sULMRhrdwTr; alt. Digital Currency Address - XBT 18Qj1THHuETfYhuRDZycXJbWwDMGw73Poa; alt. Digital Currency Address - XBT 1MnbhWe5wr7Ut45ReyQsm96PwnM9jD7KaH; alt. Digital Currency Address - XBT 1DYFJ6CuBvrxyoQSuBzVsNcetY9tvdsrag; alt. Digital Currency Address - XBT 15Pt4NwZaUmMUwS2bQbyyncc7mzgWShtv8; alt. Digital Currency Address - XBT 1PhqQpaGCrqSxQ6QDXcv14QCd1U98Zp34E; alt. Digital Currency Address - XBT 13YBQr2Cp1YY3xqq2qngaPb7ca1o4ugeq6; alt. Digital Currency Address - XBT 1KgudqxMfYaGzqAA7MS4DcsqejtMteqhix; alt. Digital Currency Address - XBT 1FRyL9gmFGbzfYDAB4iY9836DJe3KSnjP9; alt. Digital Currency Address - XBT 1DbShx4r8i2XesthoDBf5EkYWz5dsKEusV; Digital Currency Address - ETH 0x8576acc5c05d6ce88f4e49bf65bdf0c62f91353c; Phone Number 79315403678; Digital Currency Address - LTC LWnbjLYUfqeokfbWM4FcU7uk2FP2DSxuWS; alt. Digital Currency Address - LTC LaYUy1DGfVSuSF5KbPhbLrm8kRotqiwUJn; Digital Currency Address - ZEC t1WSKwCDL1QYRRUrCCknEs5tDLhtGVYu9KM; Digital Currency Address - BSV 12sjrrhoFEsedNRhtgwvvRqjFTh8fZTDX9; Passport 4005504207 (Russia) (individual) [CYBER2] [ELECTION-EO13848].

   Designated pursuant to section 1(a)(iii)(C) of Executive Order 13694 of April 1, 2015, "Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities," 80 FR 18077, 3 CFR 13694, as amended by E.O. 13757 of December 28, 2016, "Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities, 82 FR 1, 3 CFR 13757, (E.O. 13694, as amended) for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13694, as amended.

   Also designated pursuant to section 2(a)(iii) of Executive Order 13848 of September 12, 2018, "Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election," 83 FR 46843, 3 CFR, 2018 Comp., p. 869, (E.O. 13848) for being owned or

controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity, whose property or interests in property are blocked pursuant to E.O. 13848.

2. ASLANOVA, Darya Dmitriyevna (Cyrillic: АСЛАНОВА, Дарья Дмитриевна) (a.k.a. TIMOSHENKOVA, Darya Dmitriyevna), Saint Petersburg, Russia; DOB 08 Sep 1985; POB Russia; nationality Russia; Gender Female; Passport 44N2592883 (Russia) (individual) [CYBER2] [ELECTION-EO13848].

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13694, as amended, for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13694, as amended.

   Also designated pursuant to section 2(a)(iii) of E.O. 13848 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity, whose property or interests in property are blocked pursuant to E.O. 13848.

3. LIFSHITS, Artem Mikhaylovich (Cyrillic: ЛИФШИЦ, Артем Михайлович), Primorsky Prospect 159, Saint Petersburg 197374, Russia; DOB 26 Dec 1992; nationality Russia; Email Address mycryptodeals@yandex.ru; alt. Email Address artemlv@hotmail.com; Gender Male; Digital Currency Address - XBT 12udabs2TkX7NXCSj6KpqXfakjE52ZPLhz; alt. Digital Currency Address - XBT 1DT3tenf14cxz9WFNxmYrXFbB6TFiVWA9U; Digital Currency Address - ETH 0x901bb9583b24d97e995513c6778dc6888ab6870e; alt. Digital Currency Address - ETH 0xa7e5d5a720f06526557c513402f2e6b5fa20b00; Phone Number 79110354982; Digital Currency Address - LTC Leo3j36nn1JcsUQruytQhFUdCdCH5YHMR3; Digital Currency Address - DASH Xs3vzQmNvAxRa3Xo8XzQqUb3BMgb9EogF4; Passport 719032284 (individual) [CYBER2] [ELECTION-EO13848].

   Designated pursuant to section 1(a)(iii)(C) E.O. 13694, as amended, for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity whose property and interests in property are blocked pursuant to E.O. 13694.

   Also designated pursuant to section 2(a)(iii) of E.O. 13848 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the INTERNET RESEARCH AGENCY, an entity, whose property or interests in property are blocked pursuant to E.O. 13848.

4. DERKACH, Andrii Leonidovych (Cyrillic: ДЕРКАЧ, Андрій Леонідович) (a.k.a. DERKACH, Andriy; a.k.a. DERKACH, Andriy Leonidovych (Cyrillic: ДЕРКАЧ, Андрей Леонидович)), Mykhailo Hrushevsky APT 9A, B7-1, Kyiv 01021, Ukraine; DOB 19 Aug 1967; POB Dnipropetrovsk, Ukraine; nationality Ukraine; citizen Ukraine; Gender Male;

Passport FB513714 (Ukraine); alt. Passport ET855378 (Ukraine); National ID No. 2470211979 (Ukraine) (individual) [ELECTION-EO13848].

Designated pursuant to section 2(a)(i) E.O. 13848 for having directly or indirectly engaged in, sponsored, concealed, or otherwise been complicit in foreign interference in a United States election.

Dated: September 10, 2020.

**Andrea M. Gacki,**

*Director, Office of Foreign Assets Control, U.S. Department of the Treasury.*

[FR Doc. 2020–20343 Filed 9–14–20; 8:45 am]

**BILLING CODE 4810–AL–P**

## UNIFIED CARRIER REGISTRATION PLAN

### Sunshine Act Meeting Notice; Unified Carrier Registration Plan Board Subcommittee Meeting

**TIME AND DATE:** September 17, 2020, from Noon to 2:00 p.m., Eastern time.

**PLACE:** This meeting will be accessible via conference call and via Zoom Meeting and Screenshare. Any interested person may call (i) 1–929–205–6099 (US Toll) or 1–669–900–6833 (US Toll) or (ii) 1–877–853–5247 (US Toll Free) or 1–888–788–0099 (US Toll Free), Meeting ID: 982 6960 3655, to listen and participate in this meeting. The website to participate via Zoom Meeting and Screenshare is *https://kellen.zoom.us/j/98269603655*.

**STATUS:** This meeting will be open to the public.

**MATTERS TO BE CONSIDERED:** The Unified Carrier Registration Plan Education and Training Subcommittee (the ''Subcommittee'') will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement. The subject matter of this meeting will include:

**Proposed Agenda**

*I. Call to Order—Subcommittee Chair*

The Subcommittee Chair will welcome attendees, call the meeting to order, call roll for the Subcommittee, confirm whether a quorum is present, and facilitate self-introductions.

*II. Verification of Publication of Meeting Notice—UCR Executive Director*

The UCR Executive Director will verify the publication of the meeting notice on the UCR website and distribution to the UCR contact list via email followed by the subsequent publication of the notice in the **Federal Register**.

*III. Review and Approval of Subcommittee Agenda and Setting of Ground Rules—Subcommittee Chair*

For Discussion and Possible Subcommittee Action

The Subcommittee Agenda will be reviewed and the Subcommittee will consider adoption.

Ground Rules

Subcommittee action only to be taken in designated areas on agenda

*IV. Approval of Minutes From August 20, 2020 Meeting—UCR Operations Manager*

For Discussion and Possible Subcommittee Action

Draft minutes from the August 20, 2020 Education and Training Subcommittee meeting via teleconference will be reviewed. The Subcommittee will consider action to approve.

*V. Discuss With the Education and Training Subcommittee the Audit Module Development—Subcommittee Chair*

The Subcommittee will discuss and provide comments on the development of the Audit Module.

*VI. Other Items—Subcommittee Chair*

The Subcommittee Chair will call for any other items the committee members would like to discuss.

*VII. Adjournment—Subcommittee Chair*

The Subcommittee Chair will adjourn the meeting.

The agenda will be available no later than 5:00 p.m. Eastern time, September 10, 2020 at: *https://plan.ucr.gov*.

**CONTACT PERSON FOR MORE INFORMATION:** Elizabeth Leaman, Chair, Unified Carrier Registration Plan Board of Directors, (617) 305–3783, *eleaman@board.ucr.gov*.

**Alex B. Leath,**

*Chief Legal Officer, Unified Carrier Registration Plan.*

[FR Doc. 2020–20423 Filed 9–11–20; 4:15 pm]

**BILLING CODE 4910–YL–P**

# FEDERAL REGISTER

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Part II

## Department of Defense

Department of the Army, Corps of Engineers

33 CFR Chapter II

Proposal To Reissue and Modify Nationwide Permits; Proposed Rule

**DEPARTMENT OF DEFENSE**

**Department of the Army, Corps of Engineers**

**33 CFR Chapter II**

**[Docket Number: COE–2020–0002]**

**RIN 0710–AA84**

## Proposal To Reissue and Modify Nationwide Permits

**AGENCY:** Army Corps of Engineers, DoD.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Nationwide Permits (NWPs) authorize certain activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The U.S. Army Corps of Engineers (Corps) is proposing to reissue its existing NWPs and associated general conditions and definitions, with some modifications. We are also proposing to issue five new NWPs. Two of those proposed new NWPs would authorize certain categories of mariculture activities (*i.e.,* seaweed and finfish mariculture) that are not authorized by NWP 48. We are proposing to divide the current NWP that authorizes utility line activities (NWP 12) into three separate NWPs that address the differences in how different linear projects are constructed, the substances they convey, and the different standards and best management practices that help ensure those NWPs authorize only those activities that have no more than minimal adverse environmental effects. Specifically, we are proposing to modify the current utility line NWP 12 to authorize only oil and natural gas pipeline activities. Two proposed new NWPs would authorize activities associated with the construction, maintenance, repair, and removal of electric utility lines/telecommunication lines and utility lines that convey water, sewage, and other substances. The fifth proposed new NWP would authorize discharges of dredged or fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities. We are proposing these modifications to simplify and clarify the NWPs, reduce burdens on the regulated public, and continue to comply with the statutory requirement that these NWPs authorize only activities with no more than minimal individual and cumulative adverse environmental effects. The Corps is requesting comment on all aspects of these proposed nationwide permits.

**DATES:** Submit comments on or before November 16, 2020.

**ADDRESSES:** You may submit comments, identified by docket number COE–2020–0002 and/or RIN 0710–AA84, by any of the following methods:

*Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

*Email: nationwidepermits2020@usace.army.mil.* Include the docket number, COE–2020–0002, in the subject line of the message.

*Mail:* U.S. Army Corps of Engineers, Attn: CECW–CO–R, 441 G Street NW, Washington, DC 20314–1000.

*Hand Delivery/Courier:* Due to security requirements, we cannot receive comments by hand delivery or courier.

*Instructions:* If submitting comments through the Federal eRulemaking Portal, direct your comments to docket number COE–2020–0002. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through *regulations.gov* or email. The *regulations.gov* website is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through *regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment we recommend that you include your name and other contact information in the body of your comment and with any compact disc you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* For access to the docket to read background documents or comments received, go to *regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson at 202–761–4922 or access the U.S. Army Corps of Engineers Regulatory Home Page at *https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/.*

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IV. Economic Impact

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Authority

Nationwide Permits, Conditions, Further Information, and Definitions

## List of Acronyms

CEQ Council on Environmental Quality
CWA Clean Water Act
DA Department of the Army
EFH Essential Fish Habitat
ESA Endangered Species Act
FWS U.S. Fish and Wildlife Service
GC General Condition
NEPA National Environmental Policy Act
NHPA National Historic Preservation Act
NMFS National Marine Fisheries Service
NPDES National Pollutant Discharge Elimination System
NWP Nationwide Permit
PCN Pre-construction Notification

## List of Proposed Nationwide Permits and General Conditions

*Nationwide Permits (NWPs)*

1. Aids to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys
11. Temporary Recreational Structures
12. Oil or Natural Gas Pipeline Activities
13. Bank Stabilization
14. Linear Transportation Projects
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17. Hydropower Projects
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23. Approved Categorical Exclusions
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## Nationwide Permit General Conditions

1. Navigation
2. Aquatic Life Movements
3. Spawning Areas
4. Migratory Bird Breeding Areas
5. Shellfish Beds
6. Suitable Material
7. Water Supply Intakes
8. Adverse Effects from Impoundments
9. Management of Water Flows
10. Fills Within 100-Year Floodplains
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17. Tribal Rights
18. Endangered Species
19. Migratory Birds and Bald and Golden Eagles
20. Historic Properties
21. Discovery of Previously Unknown Remains and Artifacts
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25. Water Quality
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28. Use of Multiple Nationwide Permits
29. Transfer of Nationwide Permit Verifications
30. Compliance Certification
31. Activities Affecting Structures or Works Built by the United States
32. Pre-Construction Notification

## I. Background

### *A. General*

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that will result in no more than minimal individual and cumulative adverse environmental effects. Nationwide permits were first issued by the Corps in 1977 (42 FR 37122) to authorize categories of activities that have minimal adverse effects on the aquatic environment, and streamline the authorization process for those minor activities. After 1977, NWPs have been issued or reissued in 1982 (47 FR 31794), 1984 (49 FR 39478), 1986 (51 FR 41206), 1991 (56 FR 59110), 1995 (60 FR 38650), 1996 (61 FR 65874), 2000 (65 FR 12818), 2002 (67 FR 2020), 2007 (72 FR 11092), 2012 (77 FR 10184), and 2017 (82 FR 1860).

Section 404(e) of the Clean Water Act provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States for a period of no more than five years after the date of issuance (33 U.S.C. 1344(e)). The Secretary's authority to issue permits has been delegated to the Chief of Engineers and his or her designated representatives. Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in federally jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts (see 33 CFR 330.1(b)). The categories of activities authorized by NWPs must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). Nationwide permits can be issued for a period of no more than 5 years (33 U.S.C. 1344(e)(2)), and the Corps has the authority to modify or revoke the NWPs before they expire. Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(f)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

There are currently 52 NWPs. These NWPs were published in the January 6, 2017, issue of the **Federal Register** (82 FR 1860) and are currently scheduled to expire on March 18, 2022. Under 33 CFR 330.5(b), anyone may, at any time, suggest to Corps Headquarters that they consider new NWPs or conditions for issuance, or changes to existing NWPs. Independent of receiving suggestions to issue new NWPs or modify existing NWPs, Corps Headquarters has the authority to periodically review the NWPs and their conditions and initiate

the process for proposing to modify, reissue, or revoke the NWPs (see 33 CFR 330.5(b) and 330.6(b)). While the Corps generally updates the nationwide permits every five years, there have been three times where the Corps issued or modified NWPs outside of the normal 5-year cycle. The first time occurred on October 5, 1984 (49 FR 39478) when the Corps modified four NWPs and issued one new NWP to comply with the requirements of a settlement agreement. The second time was on July 27, 1995 (60 FR 38650) when the Corps issued a new NWP for single family housing (NWP 29). The third instance occurred on March 9, 2000, (65 FR 12818) when the Corps issued five new NWPs and modified 6 existing NWPs to replace one of its existing NWPs (*i.e.,* NWP 26, which authorized discharges into headwaters and isolated waters).

On March 28, 2017, the President signed Executive Order (E.O.) 13783, which directed heads of federal agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources. On October 25, 2017, the Assistant Secretary of the Army (Civil Works) issued a report in response to E.O. 13783. That report identified nine NWPs that could be modified to reduce regulatory burdens on entities that develop or use domestically produced energy resources. A copy of the report is available in the docket for this proposed rule (docket number COE–2020–0002). Today's proposal includes potential modifications intended to provide additional consistency and clarity in the NWPs, including the NWPs identified in the E.O. 13783 report, and reduce burdens on the regulated public. This notice of proposed rulemaking initiates the rulemaking process to determine whether to modify these nine NWPs in accordance with the report's recommendations, and to modify a number of other NWPs. More information on the actions being proposed pursuant, in part, to E.O. 13783 can be found in Section I.B below.

In addition to revisions being considered in response to E.O. 13783, the Corps is proposing to reissue the remaining NWPs, so that all of the NWPs remain on the same 5-year approval cycle. The Corps is also proposing to issue five new NWPs discussed below.

In FY 2018, the average processing time for an NWP PCN was 45 days and the average processing time for a standard individual permit was 264 days. This difference in burden can incentivize project proponents that would otherwise require an individual permit under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 to reduce the adverse effects of those activities in order to qualify for NWP authorization. This reduction in adverse effects can reduce a project's impact on the Nation's aquatic resources.

The phrase ''minimal adverse environmental effects when performed separately'' refers to the direct and indirect adverse environmental effects caused by a specific activity authorized by an NWP. The phrase ''minimal cumulative adverse effect on the environment'' refers to the collective direct and indirect adverse environmental effects caused by all the activities authorized by a particular NWP during the time period when the NWP is in effect (a period of no more than 5 years) in a specific geographic region. These concepts are defined in paragraph 2 of section D, ''District Engineer's Decision.'' The appropriate geographic area for assessing cumulative effects is determined by the decision-making authority for the general permit (generally, the district engineer).

Some NWPs include pre-construction notification (PCN) requirements. PCNs give the Corps the opportunity to evaluate certain proposed NWP activities on a case-by-case basis to ensure that they will cause no more than minimal adverse environmental effects, individually and cumulatively. Except activities conducted by non-Federal permittees that require PCNs under paragraph (c) of the ''Endangered Species'' and ''Historic Properties'' general conditions (general conditions 18 and 20, respectively), if the Corps district does not respond to the PCN within 45 days of a receipt of a complete PCN the activity is automatically authorized by the NWP (see 33 CFR 330.1(e)(1)).

There are 38 Corps district offices and 8 Corps division offices. The district offices administer the NWP program on a day-to-day basis by reviewing PCNs for proposed NWP activities. The division offices oversee district offices and are managed by division engineers. Division engineers have the authority to modify, suspend, or revoke NWP authorizations on a regional basis to take into account regional differences among aquatic resources and ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects in a region (see 33 CFR 330.5(c)). When a Corps district receives a PCN, the district engineer reviews the PCN and determines whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects, consistent with the criteria in paragraph 2 of section D, ''District Engineer's Decision.'' At this point, the district engineer may add conditions to the NWP authorization to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects consistent with processes and requirements set out in 33 CFR 330.5(d). See Section I.H for more information on the regional conditioning process.

For some NWPs, when submitting a PCN, an applicant may request a waiver for a particular limit specified in the NWP's terms and conditions. If the applicant requests a waiver of an NWP limit and the district engineer determines, after coordinating with the resource agencies under paragraph (d) of NWP general condition 32, that the proposed NWP activity will result in no more than minimal adverse environmental effects, the district engineer may grant such a waiver. Following the conclusion of the district engineer's review of a PCN, he/she prepares an official decision document. This document discusses the district engineer's findings as to whether a proposed NWP activity qualifies for NWP authorization, including compliance with all applicable terms and conditions, and the rationale for any waivers granted, and activity-specific conditions needed to ensure that the NWP activity will have only minimal individual and cumulative adverse environmental effects and will not be contrary to the public interest (see § 330.6(a)(3)(i)).

The case-by-case review of PCNs often results in district engineers adding activity-specific conditions to NWP authorizations to ensure that the adverse environmental effects are no more than minimal. These can include permit conditions such as time-of-year restrictions and use of best management practices or compensatory mitigation requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects are no more than minimal. Any compensatory mitigation required for NWP activities must comply with the Corps' compensatory mitigation regulations at 33 CFR part 332. Review of a PCN may also result in the district engineer asserting discretionary authority to require an individual permit from the Corps for the proposed activity, if he or she determines, based on the information provided in the PCN and other available information, that adverse environmental effects will be

more than minimal, or otherwise determines that ''sufficient concerns for the environment or any other factor of the public interest so requires'' consistent with 33 CFR 330.4(e)(2)).

During their reviews of PCNs, district engineers assess cumulative adverse environmental effects at an appropriate regional scale. The district engineer uses his or her discretion to determine the appropriate regional scale for evaluating cumulative effects. The appropriate regional scale for evaluating cumulative effects may be a waterbody, watershed, county, state, or a Corps district. The appropriate regional scale is dependent, in part, on where the NWP activities are occurring. For example, for NWPs that authorizes structures and/or work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899, the appropriate geographic region for assessing cumulative effects may be a specific navigable waterbody. For NWPs that authorize discharges of dredged or fill material into non-tidal wetlands and streams, the appropriate geographic region for assessing cumulative effects may be a watershed, county, state, or Corps district. The direct individual adverse environmental effects caused by activities authorized by NWPs are evaluated within the project footprint, and the indirect individual adverse environmental effects caused by activities authorized by NWPs are evaluated within the geographic area to which those indirect effects extend. Cumulative effects are the result of the accumulation of direct and indirect effects caused by multiple activities that persist over time in a particular geographic area (MacDonald 2000), such as a watershed or ecoregion (Gosselink and Lee 1989). Therefore, the geographic and temporal scales for cumulative effects analysis are larger than the analysis of the direct and indirect adverse environmental effects caused by specific activities.

When the district engineer reviews a PCN and determines that the proposed activity qualifies for NWP authorization, he or she will issue a written NWP verification to the permittee (see 33 CFR 330.6(a)(3)). If an NWP verification includes multiple authorizations using a single NWP (*e.g.,* linear projects with crossings of separate and distant waters of the United States authorized by NWPs 12 or 14) or non-linear projects authorized with two or more different NWPs (*e.g.,* an NWP 28 for reconfiguring an existing marina plus an NWP 19 for minor dredging within that marina), the district engineer will evaluate the cumulative effects of the applicable NWP authorizations within the geographic area that she or he determines is appropriate for assessing cumulative effects caused by activities authorized by that NWP. As discussed above, the geographic area may be a waterbody, watershed, county, state, Corps district, or other geographic area. Since the required NEPA cumulative effects and 404(b)(1) Guidelines cumulative effects analyses are conducted by Corps Headquarters in its decision documents for the issuance of the NWPs, district engineers do not need to do comprehensive cumulative effects analyses for NWP verifications. For an NWP verification, the district engineer needs only to include a statement in the administrative record stating whether the proposed NWP activity, plus any required mitigation, will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer determines, after considering mitigation, that a proposed NWP activity will result in more than minimal cumulative adverse environmental effects, she or he will exercise discretionary authority and require an individual permit.

There may be activities authorized by NWPs that cross more than one Corps district or a single state. On May 15, 2018, the Director of Civil Works at Corps Headquarters issued a Director's Policy Memorandum titled: ''Designation of a Lead USACE District for Permitting of Non-USACE Projects Crossing Multiple Districts or States.'' [1] This Director's Policy Memorandum identified lead districts for states that have more than one Corps district and established a policy for designating a lead district for activities that require Department of the Army permits that cross district or state boundaries. Under this policy, when the Corps receives an NWP PCN or individual permit application for such activities, a lead Corps district will be designated by the applicable Corps division office(s) using the criteria in the 2018 Director's Policy Memorandum, and that district will be responsible for serving as a single point of contact for each permit applicant, forming a Project Delivery Team comprising representatives of each of the affected districts, ensuring consistent reviews by the affected districts, and taking responsibility for identifying and resolving inconsistencies that may arise during the review. The list of lead districts for states is also used during the regional conditioning process for the NWPs. For that process the lead district is responsible for coordinating the development of the regional conditions and preparing the supplemental documents required by 33 CFR 330.5(c)(1)(iii). The Corps requests comments on whether there are efficiencies that can be adopted to improve the coordination and regional conditioning processes.

*B. Proposed Actions Under E.O. 13783, Promoting Energy Independence and Economic Growth*

Section 2(a) of E.O. 13783 requires federal agencies to review their existing regulations that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear resources. For the Corps, the NWPs authorize activities associated with the development or use of domestically produced energy resources. In response to E.O. 13783, the Corps issued a report that reviewed 12 NWPs that authorize activities associated with the development or use of domestically produced energy resources. That report included recommendations for changes that could be made to nine NWPs to support the objectives of E.O. 13783.

The Corps issued its report on October 25, 2017, and in the November 28, 2017, issue of the **Federal Register** (82 FR 56192) published a notice of availability for that report. Section 2(g) of E.O. 13783 states that agencies should, as soon as practicable and as appropriate and consistent with law, publish for notice and comment proposed rules that would implement the recommendations in their reports. Section 2(g) further states that agencies shall endeavor to coordinate the regulatory reforms identified in their reports with their activities undertaken in compliance with E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs.''

The following is a summary of the recommendations provided in the report the Corps issued in response to E.O. 13783:

- Retain the ½-acre limit for the NWPs identified in the report that currently have that limit (*i.e.,* NWP 12 (utility line activities), NWP 21 (surface coal mining activities), NWP 39 (commercial and institutional developments), NWP 50 (underground coal mining activities), NWP 51 (land-based renewable energy generation projects), and NWP 52 (water-based renewable energy generation pilot projects)).
- Remove the 300 linear foot limit for losses of stream bed and rely on the ½-

[1] This document is available at: *https://usace.contentdm.oclc.org/digital/collection/p16021coll11/id/2757/* (accessed 3/12/2020).

acre limit and PCN requirements to ensure that activities authorized by these NWPs will result in no more than minimal adverse environmental effects. The 300 linear foot limit currently applies to the following NWPs identified in the report: NWP 21 (surface coal mining activities), NWP 39 (commercial and institutional developments), NWP 50 (underground coal mining activities), NWP 51 (land-based renewable energy projects), and NWP 52 (water-based renewable energy pilot projects).

- NWP 3—Maintenance. Modify this NWP to authorize small amounts of riprap to protect those structures and fills, without a PCN requirement.
- NWP 12—Utility Line Activities. Modify this NWP to simplify the pre-construction notification thresholds, by reducing the number of PCN thresholds from 7 to 2.
- NWP 17—Hydropower Projects. Modify this NWP to change the generating capacity threshold in paragraph (a) from 5,000 kW to 10,000 kW to be consistent with the definition of ''small hydroelectric power project'' in 16 U.S.C. 2705(d).
- NWP 21—Surface Coal Mining Activities. Remove the 300 linear foot limit for losses of stream bed. Remove the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps district does not respond to the PCN within 45 days of receipt of a complete PCN.
- NWP 39—Commercial and Institutional Developments. Modify this NWP to remove the 300 linear foot limit for losses of stream bed.
- NWP 49—Coal Remining Activities. Remove the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps district does not respond to the PCN within 45 days of receipt of a complete PCN.
- NWP 50—Underground Coal Mining Activities. Remove the 300 linear foot limit for losses of stream bed. Remove the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps district does not respond to the PCN within 45 days of receipt of a complete PCN.
- NWP 51—Land-Based Renewable Energy Generation Projects. Remove the 300 linear foot limit for losses of stream bed.
- NWP 52—Water-Based Renewable Energy Generation Pilot Projects. Remove the 300 linear foot limit for losses of stream bed.

The Corps is proposing to implement all of the recommendations discussed above. These proposed changes are discussed in greater detail below.

*C. Proposed Actions Under Executive Order 13777, Enforcing the Regulatory Reform Agenda*

On February 24, 2017, the President signed E.O. 13777, ''Enforcing the Regulatory Reform Agenda,'' which required agencies to evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law. The E.O. specified that agencies must attempt to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; or meet other criteria identified in that Executive Order. Pursuant to this E.O., in the July 20, 2017, issue of the **Federal Register** (82 FR 33470) the Corps published a notice seeking public input from state, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations on its existing regulations that may be appropriate for repeal, replacement, or modification. Some of the changes to the NWPs in this proposal are intended to address some of the comments received in response to the July 20, 2017, **Federal Register** notice.

*D. Proposed Actions Under Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth*

On May 7, 2020, the President signed Executive Order 13921 on Promoting American Seafood Competitiveness and Economic Growth. Section 6(b) of the E.O., ''Removing Barriers to Aquaculture Permitting,'' requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works, to ''develop and propose for public comment, as appropriate and consistent with applicable law,'' NWPs authorizing finfish aquaculture activities and seaweed aquaculture activities in marine and coastal waters, including ocean waters beyond the territorial sea within the exclusive economic zone of the United States. Section 6(b) of the E.O. also requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works, to develop and propose for public comment, as appropriate and consistent with applicable law, a proposed NWP authorizing multi-species aquaculture activities in marine and coastal waters, including ocean waters beyond the territorial sea within the exclusive economic zone of the United States. Instead of proposing a new, separate NWP for authorizing structures in coastal waters and federal waters on the outer continental shelf for multi-species aquaculture activities, the Corps is proposing to include provisions allowing additional species to be cultivated with seaweed mariculture activities authorized under proposed new NWP A and finfish mariculture activities authorized under proposed new NWP B. In addition, the Corps is soliciting public comment on whether a separate NWP should be issued to authorize structures or work regulated by the Corps for multi-species mariculture activities.

In this proposed rule, the Corps is proposing to issue two new NWPs: NWP A to authorize seaweed mariculture activities in navigable waters of the United States, including federal waters on the outer continental shelf, and NWP B to authorize finfish mariculture activities in these waters. These proposed new NWPs would authorize structures and work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899. These proposed new NWPs would also authorize seaweed and finfish mariculture structures attached to the seabed on the outer continental shelf. Section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)), extended the Corps' Rivers and Harbors Act of 1899 section 10 permitting authority to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf (see 33 CFR 320.2(b)). On the outer continental shelf, the seaweed and finfish mariculture structures may be anchored to the seabed, and thus require section 10 authorization as devices located on the seabed. Each of these proposed NWPs includes a provision on multi-trophic species mariculture activities in marine and coastal waters, including federal waters on the outer continental shelf. This proposed provision for multi-trophic species mariculture gives flexibility to these

NWPs, to allow mariculture operators to propagate additional species, such as mussels, on their seaweed or finfish mariculture structures. Including this proposed provision in NWPs A and B is an alternative to developing a separate NWP for multi-trophic species mariculture activities, and it would provide NWP authorization that is responsive to the E.O. The Corps recognizes that some mariculture operators may choose to produce seaweeds or finfish exclusively.

Section 6(b) of the E.O. also requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works to ''assess whether to develop'' NWPs for finfish aquaculture activities and seaweed aquaculture activities in other waters of the United States. Section 6(b) also requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works, to assess whether to develop a United States Army Corps of Engineers NWP authorizing multi-species aquaculture activities in other waters of the United States.

In this proposal to issue and reissue NWPs, the Corps is not proposing to issue new NWPs for finfish aquaculture activities, algal aquaculture activities, or multi-species aquaculture activities in other waters of the United States (*i.e.,* waters of the United States that are not subject to the ebb and flow of the tide) Examples of these other waters of the United States include lakes and ponds. The Corps is considering whether to develop one or more NWPs in the future to authorize aquaculture activities in these waters. To assist in our assessment, the Corps invites interested parties to submit comments on whether the Corps should propose new NWPs for freshwater aquaculture activities, including aquaculture for finfish (*e.g.,* catfish) or algae in future revisions to the NWPs. The Corps also invites comments on whether it should propose new NWPs for aquaculture for other freshwater species, such as crawfish. These comments should be submitted to the docket for this proposed rule at *www.regulatons.gov* (docket number COE–2020–0002), or by email to *nationwidepermits2020@usace.army.mil*.

*E. The 2018 Legislative Outline for Rebuilding Infrastructure in America*

On February 12, 2018, the Administration issued its ''Legislative Outline for Rebuilding Infrastructure in America.'' In Part 3 (Infrastructure Permitting Improvement), Principle I.C.1 recommends reforms for eliminating redundancy, duplication, and inconsistency in the application of clean water provisions. One of those reforms would be to make statutory changes to authorize Federal agencies to select and use NWPs without additional review by the Corps. Principle I.C.1 recommends allowing Federal agencies to move forward on NWP projects without submitting PCNs to the Corps. That principle also states that removing PCN requirements for Federal agencies would allow the Corps to focus on projects that do not qualify for NWPs, such as activities that require individual permits that have greater environmental impacts.

Consistent with the recommendation included in the Legislative Outline, the Corps is considering whether it can use its existing authority to create specific procedures or conditions by which Federal agencies that currently require a NWP would not need to submit a PCN, consistent with applicable law. Under such a mechanism, the Corps would retain under its authority for district engineers to modify, suspend, or revoke NWP authorizations (see 33 CFR 330.5(d)), the right to take action to address situations where the Federal agency incorrectly determined that the NWP terms and conditions were met.

The Corps is considering exempting Federal agencies from PCN under the theory that Federal agencies may employ staff who are environmental experts and who already review these projects before submitting PCNs to the Corps to determine whether they meet the criteria for the applicable NWP. These environmental staff are responsible for ensuring that the agencies' proposed activities comply with applicable federal laws, regulations, and policies, as well as relevant Executive Orders. However, the Corps understands that non-Federal permittees that want to use the NWPs often hire consultants to help them secure NWP authorization in compliance with applicable federal laws, regulations, and policies and that these consultants may have similar expertise to staff at Federal agencies. These consultants may provide general services to assist in securing NWP authorizations on behalf of their clients, or they may specialize in complying with specific laws and regulations, such as Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act, and the Essential Fish Habitat provisions of the Magnuson-Stevens Act. Non-federal permittees are not bound to comply with Executive Orders.

Federal agency environmental staff come from a diverse range of education and professional training, as do environmental consultants that work for the various industries and individuals that hire them for their expertise in securing individual permits, NWP verifications, and regional general permit verifications. Some companies that need to secure DA permits for their projects may also have in-house environmental experts whose responsibilities include ensuring compliance with applicable environmental laws. Some permit applicants may attempt to obtain DA permits without hiring a consultant. The Corps is not aware of any studies that have examined whether there are any substantial differences in proficiency between federal agency environmental staff and environmental consultants in achieving environmental compliance and securing DA permits. Such studies would be helpful in deciding whether to modify the NWPs to implement Principle I.C.1. If any commenters are aware of such studies, the Corps would like to receive citations for those studies or copies of the studies themselves, to assist with decision-making for the final NWPs.

Consistent with this legislative principle, we are seeking comment on whether to modify the NWPs that require pre-construction notification to limit the PCN requirement to non-federal permittees. We request that commenters provide their views on whether they support or oppose having different PCN requirements for Federal and non-Federal permittees, with supporting information to explain their views. The NWPs that require PCNs, in addition to the NWPs identified in the E.O. 13783 report discussed above, are:

- NWP 7, Outfall Structures and Associated Intake Structures.
- NWP 8, Oil and Gas Structures on the Outer Continental Shelf.
- NWP 13, Bank Stabilization.
- NWP 18, Minor Discharges.
- NWP 31, Maintenance of Existing Flood Control Facilities.
- NWP 33, Temporary Construction, Access, and Dewatering.
- NWP 34, Cranberry Production Activities.
- NWP 36, Boat Ramps.
- NWP 37, Emergency Watershed Protection and Rehabilitation.
- NWP 38, Cleanup of Hazardous and Toxic Waste.
- NWP 45, Repair of Uplands Damaged by Discrete Events.
- NWP 46, Discharges in Ditches.
- NWP 53, Removal of Low-Head Dams.
- NWP 54, Living Shorelines.

If, after evaluating the comments received in response to this proposed rule, we decide to remove the PCN

requirement for Federal permittees, it may be beneficial to add a definition of ''non-federal permittee'' to Section E, ''Definitions.'' The phrase ''non-federal permittee'' would be added to the ''Notification'' provision of each NWP that requires pre-construction notification within the terms of the NWP. We are seeking comment on the following definition of ''non-federal permittee'':

Non-federal permittee: Any person, organization (other than an agency or instrumentality of the United States federal government), or tribal, state, or local government agency that wants to use an NWP to conduct an activity that requires Department of the Army authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. State transportation agencies to which the Federal Highway Administration (FHWA), Federal Railway Administration (FRA), or Federal Transit Administration (FTA) has assigned its NEPA responsibilities pursuant to 23 U.S.C. 326 and 23 U.S.C. 327, or which are carrying out regulated activities for projects when FHWA, FRA, or FTA is the lead federal agency, are considered, for the purposes of the NWP Program, to be federal permittees with respect to those highway projects for which they have assigned NEPA responsibilities or for which FHWA is the lead federal agency.

This definition of ''non-federal permittee'' would exclude state departments of transportation that have been assigned the responsibility for complying with NEPA under 23 U.S.C. 326 and 327 by the Federal Highways Administration (FHWA), Federal Railway Administration (FRA), or Federal Transit Administration (FTA) with respect to those projects for which they have assigned NEPA responsibilities only. This exclusion would have the effect of allowing those state agencies to be considered to be federal permittees for the purposes of the PCN requirements for the NWPs for specific projects. In some instances FHWA may assign NEPA responsibility to the state for all federal highway projects in the state. In other instances the FHWA may assign NEPA responsibility to the state only for specific federal highway projects. The exclusion of the state agency from the PCN requirements would only apply to federal highway projects in those states for which FHWA has assigned the state NEPA responsibility for all federal highway projects in the state. In addition, with respect to compliance with other non-NEPA environmental statutes (*e.g.,* Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act) the assignment of responsibility for compliance with those non-NEPA environmental statutes is at the discretion of FHWA. In other words, while a state Department of Transportation may have been assigned NEPA responsibility, the FHWA may not have assigned responsibility for ESA section 7 or NHPA section 106 compliance, and the prospective permittee (*i.e.,* the state DOT) would therefore be considered a non-federal permittee with respect to paragraph (c) of general conditions 18 (endangered species) and 20 (historic properties).

If the NWPs are modified so that PCNs are no longer required for federal permittees, district engineers would still retain the authority to review any activity authorized by an NWP to determine whether that activity complies with the terms and conditions of the NWP (see 33 CFR 330.1(d)). In addition, under 33 CFR 326.4, district engineers may take reasonable measures to inspect permitted NWP activities to ensure that those activities comply with the terms and conditions of the NWPs. If federal permittees are no longer required to submit PCNs, district engineers would also still retain their authority to modify, suspend, or revoke NWP authorizations on a case-by-case basis by following the procedures in 33 CFR 330.5(d). District engineers would continue to exercise this discretionary authority to modify NWP authorizations when they find that proposed activities will have more than minimal individual and cumulative adverse environmental effects or otherwise may be contrary to the public interest (33 CFR 330.1(d)). Through their discretionary authority, district engineers may also instruct federal permittees to apply for individual permits if the NWP authorization cannot be modified to reduce or eliminate adverse environmental effects to qualify for NWP authorization.

If the NWPs are modified so that PCNs are no longer required for federal permittees, for the purposes of determining compliance with the requirement that NWPs can only authorize activities that result in no more than minimal individual and cumulative adverse environmental effects, the Corps would take into account the NWP activities undertaken by federal permittees without PCNs in the same manner as it takes into account other activities authorized by NWPs that do not require PCNs. Under 40 CFR 230.7(b)(3) of the 404(b)(1) Guidelines, the Corps is required to predict cumulative effects. This prediction of cumulative effects includes the number of activities expected to be authorized by the NWP during the period it remains in effect. For NWP activities that do not require PCNs, this requires the Corps to estimate the number of times the NWP would be used during the period it remains in effect (usually 5 years). The Corps would also estimate the losses of waters of United States anticipated to occur during the period the NWP remains in effect. While some of the NWP activities conducted by federal permittees may include compensatory mitigation to offset losses of waters and wetlands, that compensatory mitigation would not be incorporated into the NWP authorization through legally-binding permit conditions in accordance with 33 CFR 332.3(k) because the Corps would not be reviewing and approving the compensatory mitigation plan for these non-PCN activities. Therefore, the Corps would not be estimating the amount of compensatory mitigation required for these activities because the Corps would not be imposing those compensatory mitigation requirements. The estimates developed for these non-PCN activities would help inform the Corps during the next NWP reissuance process, and in any interim decisions to modify, suspend, or revoke a particular NWP.

*F. Process for Modifying and Reissuing the NWPs*

The NWPs that were reissued on December 21, 2016, went into effect on March 19, 2017. Those NWPs expire on March 18, 2022. The process for modifying and reissuing the NWPs for the next five-year cycle starts with today's publication of the proposed NWPs in the **Federal Register** for a 60-day comment period and may include a public hearing. Requests for a public hearing must be submitted in writing to the address in the **ADDRESSES** section of this notice. These requests must explain the reason or reasons why a public hearing should be held. If the Corps determines that a public hearing or hearings would assist in making a decision on the proposed NWPs, general conditions, and definitions, a 30-day advance notice will be published in the **Federal Register** to advise interested parties of the date(s) and location(s) for the public hearing(s). Any announcement of public hearings would also be posted as a supporting document in docket number COE–2020–0002 at *www.regulations.gov* as well as the Corps Regulatory Program home page at *http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx.*

Shortly after the publication of this **Federal Register** notice, Corps district offices will issue public notices to solicit comments on proposed Corps regional conditions. In their district

public notices, consistent with 33 CFR 330.5(b)(2)(ii), district engineers may also propose to suspend or revoke some or all of these NWPs if they have issued, or are proposing to issue, regional general permits, programmatic general permits, or section 404 letters of permission for use instead of some or all of these NWPs. The comment period for these district public notices will be 45 days. See Regional Conditioning of Nationwide Permits below for more information on this process.

After the publication of this **Federal Register** notice, Corps district offices will send letters to Clean Water Act Section 401 certifying authorities (*i.e.,* states authorized tribes, and where appropriate, EPA) to request water quality certification (WQC) for those NWPs that may result in a discharge from a point source into waters of the United States. The certifying agencies will have 60 days to act on the certification request, consistent with the ''reasonable period of time'' established in the Corps' regulations for the purposes of Clean Water Act Section 401(a)(1) (see 33 CFR 330.4(c)(6) and 325.2(b)(1)(ii)).

We believe that 60 days is sufficient for certifying agencies to complete their WQC decisions for the proposed NWPs. The Corps' regulations at 33 CFR 330.4(c)(1) states that issuance of water quality certification, or a waiver, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States. Corps districts provide a 60-day period for certifying authorities to act on a certification request for NWPs (including reviewing any regional conditions being proposed by the districts). Under section 401(a)(2), a federal agency must notify the EPA Administrator after it receives a certification and application for a federal permit. The EPA Administrator then has 30 days to determine, at his or her discretion, whether a discharge from a certified project may affect the waters quality of a neighboring jurisdiction.

This process is consistent with current WQC procedures, where certifying authorities conduct their evaluations on a proposed federal permit, so that any necessary WQC conditions can be incorporated into the federal permit before it is issued. It is also consistent with the Clean Water Act Section 401 Certification Rule that was signed by EPA on June 1, 2020, and published in the **Federal Register** on July 13, 2020 (85 FR 42210).

After the publication of this **Federal Register** notice, Corps district offices will send letters with consistency determinations pursuant to the Coastal Zone Management Act to the state agencies responsible for coastal zone management. Each letter will request that the state agency review the Corps district's consistency determination and, if necessary, provide conditions based on specific enforceable coastal zone management policies that would allow the state agency to concur with the Corps district's consistency determination (see 15 CFR 930.31(d)). The state agency will have at least 90 days to review the Corps district's consistency determination unless the state agency and Corps agree to an alternative notification schedule (see 15 CFR 930.36(b)). This review period can be extended if the Corps and the state agency agree to an alternative notification schedule. If the state issues a consistency concurrence with conditions, the division engineer will make those conditions regional conditions for the NWP in that state, unless he or she determines that the conditions do not comply with the provisions of 33 CFR 325.4 (see 33 CFR 330.4(d)(2)). If the division engineer determines the conditions identified by the state do not comply with the provisions of 33 CFR 325.4, project proponents who want to use those NWPs will need to obtain individual CZMA consistency concurrences or presumptions of concurrence.

During the period between the issuance of the final NWPs and their publication in the **Federal Register**, Corps districts will prepare supplemental documents and proposed regional conditions for approval by division engineers before the final NWPs go into effect. The supplemental documents address the environmental considerations related to the use of NWPs in a Corps district, state, or other geographic region. The supplemental documents will certify that the NWPs, with any regional conditions or geographic suspensions or revocations, will authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the environment or any relevant public interest review factor. The Corps' public interest review factors are listed in 33 CFR 320.4(a)(1) and are discussed in more detail in subsequent paragraphs in § 320.4.

*G. Status of Existing Permits*

Activities authorized by the 2017 NWPs currently remain authorized by those NWPs until March 18, 2022. Under 33 CFR 330.6(a)(3)(ii), if the NWP is reissued without modification or the activity complies with any subsequent modification of the NWP authorization, the NWP verification letter (*i.e.,* the written confirmation from the district engineer that the proposed activity is authorized by NWP) should include a statement that the verification will remain valid for a period of time specified in the verification letter. The specified period of time is usually the expiration date of the NWP. In other words, for the 2017 NWPs, if the previously verified activity continues to qualify for NWP authorization after the NWP is reissued or modified, that verification letter continues to be in effect until March 18, 2022, unless the district engineer specified a different expiration date in the NWP verification letter. For most activities authorized by the 2017 NWPs, where the district engineer issued an NWP verification letter, the verification letter identified March 18, 2022, as the expiration date for those NWPs. As long as the verified NWP activities comply with the terms and conditions of the modified and reissued 2020 NWPs, those activities continue to be authorized by the applicable NWP(s) until March 18, 2022, unless the district engineer modifies, suspends, or revokes a specific NWP authorization.

Under 33 CFR 330.6(b), Corps Headquarters may modify, reissue, or revoke the NWPs at any time. Activities that were authorized by the previous set of NWPs which have commenced (*i.e.,* are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised by a division or district engineer on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5(c) or (d). This provision applies to activities that were previously verified by the district engineer as qualifying for NWP authorization, but no longer qualify for NWP authorization under the modified or reissued NWP.

To avoid having two sets of NWPs in effect at the same time and to comply with § 330.6(b), we may change the expiration date of the 2017 NWPs if we issue the final NWPs after we consider the comments received in response to this proposed reissuance and modification of NWPs. We may change the expiration date of the 2017 NWPs so that they expire the day before the 2020 NWPs go into effect. We are soliciting comment on whether to change the expiration date of the 2017 NWPs to the day before the 2020 NWPs go into effect. The actual date will be specified when

we issue the final NWPs because we are uncertain when the final NWPs will be issued and published in the **Federal Register**.

An activity completed under the authorization provided by a 2017 NWP continues to be authorized by that NWP (see 33 CFR 330.6(b)) regardless of whether the Corps finalizes the 2020 NWPs. If we change the expiration date for the 2017 NWPs, project proponents will have time to complete those activities under the terms and conditions of the 2017 NWPs (see 33 CFR 330.6(b)). As discussed above, that amount of time is dependent on whether the activity qualifies for authorization under the reissued or modified NWP. If the activity qualifies for authorization under the reissued or modified NWP, the original NWP verification letter will continue to be valid under March 18, 2022, unless the district engineer identified a different expiration date in that verification letter. If the activity no longer qualifies for NWP authorization under the reissued or modified NWP, the project proponent would have 12 months to complete the authorized activity as long as that activity is under construction or under contract to commence construction before the reissued or modified NWP goes into effect. If the project proponent does not have the activity under construction or under contract to commence construction before the reissued or modified NWP goes into effect, he or she will need to seek another form of DA authorization. After that 12 month period, if those activities no longer qualify for NWP authorization because they do not meet the terms and conditions of the 2020 NWPs (including any regional conditions imposed by division engineers), the project proponent will need to obtain an individual permit, or seek authorization under a regional general permit, if such a general permit is available in the applicable Corps district and can be used to authorize the proposed activity.

*H. Regional Conditioning of Nationwide Permits*

Under Section 404(e) of the Clean Water Act, NWPs can only be issued for those activities that result in no more than minimal individual and cumulative adverse environmental effects. For activities that require authorization under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Corps' regulations at 33 CFR 322.2(f) have a similar requirement. Since it can be difficult for the Corps to draft national NWPs in such a way that they account for regional differences, an important mechanism for ensuring compliance with these requirements is regional conditions imposed by division engineers to address local environmental concerns. Effective regional conditions help protect local aquatic ecosystems and other resources and help ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the aquatic environment and are not contrary to the public interest.

There are two types of regional conditions: (1) Corps regional conditions and (2) water quality certification/Coastal Zone Management Act consistency concurrence regional conditions. Corps regional conditions are added to the NWPs by division engineers in accordance with the procedures at 33 CFR 330.5(c). Water quality certification and Coastal Zone Management Act consistency concurrence regional conditions are also added to the NWPs if an appropriate certifying authority issues a water quality certification or CZMA consistency concurrence with special conditions prior to the effective date of the issued, reissued, or modified NWPs.

Examples of Corps regional conditions include:

- Restricting the types of waters of the United States where the NWPs may be used (*e.g.,* fens, bogs, bottomland hardwood forests, etc.) or prohibiting the use of some or all of the NWPs in those types of waters or in specific watersheds.
- Restricting or prohibiting the use of NWPs in an area covered by a Special Area Management Plan, where regional general permits are issued to authorize activities consistent with that plan that have only minimal adverse environmental effects.
- Revoking certain NWPs in a watershed or other type of geographic area (*e.g.,* a state or county).
- Adding PCN requirements to NWPs to require notification for all activities or lowering PCN thresholds, in certain watersheds or other types of geographic areas, or in certain types of waters of the United States.
- Reducing NWP acreage limits in certain types of waters of the United States (*e.g.,* streams) or specific waterbodies, or in specific watersheds or other types of geographic regions.
- Restricting activities authorized by NWPs to certain times of the year in a particular waterbody, to minimize the adverse effects of those activities on fish or shellfish spawning, wildlife nesting, or other ecologically cyclical events.
- Conditions necessary to facilitate compliance with the ''Endangered Species'' general condition, to appropriately enhance protection of listed species or critical habitat under the Endangered Species Act.
- Conditions necessary to facilitate compliance with the ''Tribal Rights'' general condition, to appropriately enhance protection of tribal trust resources, including natural and cultural resources and Indian lands.
- Conditions necessary for ensuring compliance with the ''Historic Properties'' general condition, to appropriately protect historic properties.
- Conditions necessary to ensure that NWP activities have no more than minimal adverse effects to Essential Fish Habitat.

Corps regional conditions approved by division engineers cannot remove or reduce any of the terms and conditions of the NWPs, including general conditions. Corps regional conditions cannot lessen PCN requirements. In other words, Corps regional conditions can only be more restrictive than the NWP terms and conditions established by Corps Headquarters when it issues or reissues an NWP.

The Corps' regulations for establishing WQC regional conditions for the NWPs are located at 33 CFR 330.4(c)(2). If, prior to the issuance or reissuance of NWPs, a state, authorized tribe, or EPA issues a Clean Water Act section 401 water quality certification with conditions, the division engineer will make those water quality certification conditions regional conditions for the applicable NWPs, unless he or she determines those conditions do not comply with 33 CFR 325.4 (see 33 CFR 330.4(c)(2)). For more information on compliance with Section 401 of the CWA, refer to Section II.G.

If the division engineer determines those water quality certification conditions do not comply with 33 CFR 325.4, then the conditioned water quality certification will be considered denied, and the project proponent will need to request a water quality certification for the proposed discharge from the certifying authority. That certification request must satisfy the requirements of 40 CFR 121.5(b). The certifying authority may issue or deny water quality certification for an individual license or permit for an activity that ''may result in a specific discharge or set of discharges into waters of the United States'' (85 FR 42281). In its final rule, EPA does not define the term ''individual license or permit'' and because 40 CFR part 121 applies to all federal permits subject to Section 401 of the Clean Water Act the term ''individual license or permit'' it is

reasonable to infer that it refers to any type of federal permit that authorizes an activity that results in a discharge from a point source into waters of the United States. Therefore, applying the recently issued amendments to 40 CFR part 121 to the Corps Regulatory Program would mean that an individual permit or license in the section 401 context refers to any DA individual permit or general permit (including an NWP) that authorizes an activity that results in specific discharge into waters of the United States for a specific project.

A similar process applies to a CZMA consistency concurrence issued by a state for the issuance of an NWP (see 33 CFR 330.4(d)(2)). If the division engineer determines those CZMA concurrence conditions do not comply with 33 CFR 325.4, then the conditioned CZMA consistency certification will be considered an objection, and the project proponent will need to request an activity-specific CZMA consistency concurrence from the state (see 15 CFR 930.31(d)) under subpart D of 15 CFR part 930.

Corps regional conditions may be added to NWPs by division engineers after a public notice and comment process and coordination with appropriate federal, state, and local agencies, as well as tribes. After Corps Headquarters publishes in the **Federal Register** the proposal to issue, reissue, or modify NWPs, district engineers issue local public notices to advertise the availability of the proposed rule for comment and to solicit public comment on proposed regional conditions and/or proposed revocations of NWP authorizations for specific geographic areas, classes of activities, or classes of waters (see 33 CFR 330.5(b)(1)(ii)). Comments on proposed regional conditions should be sent to the Corps district that issued the public notice. The process for adding Corps regional conditions to the NWPs is described at 33 CFR 330.5(c). The regulations for the regional conditioning process were promulgated in 1991, with the proposed rule published in the **Federal Register** on April 10, 1991 (56 FR 14598) and the final rule published in the **Federal Register** on November 22, 1991 (56 FR 59110).

As discussed above, regional conditions are an important tool for taking into account regional differences in aquatic resources and their local importance and for ensuring that the NWPs comply with the requirements of Section 404(e) of the Clean Water Act, especially the requirement that activities authorized by NWPs may only result in no more than minimal individual and cumulative adverse environmental effects. Regional conditions are modifications of the NWPs that are made by division engineers. Regional conditions can only further condition or restrict the applicability of an NWP (see 33 CFR 330.1(d)). Under 33 CFR 330.5(c)(1)(i), the first step of the Corps' regional conditioning is for district engineers to issue public notices announcing proposed regional conditions, and solicit public comment on those proposed regional conditions, usually for a 45-day comment period. That public notice also solicits suggestions from interested agencies and the public on additional regional conditions that they believe are necessary to ensure that the NWPs authorize only those activities that have no more than minimal adverse environmental effects. The district public notices are issued shortly after Corps Headquarters publishes the proposed NWPs in the **Federal Register** for a 60-day comment period.

In response to the district's public notice, interested parties may suggest additional Corps regional conditions or changes to Corps regional conditions. Interested parties may also suggest suspension or revocation of NWPs in certain geographic areas, such as specific watersheds or waterbodies. Such comments should include data to support the need for the suggested modifications, suspensions, or revocations of NWPs.

After the public comment period ends for the district public notices, the Corps district evaluates the comments and begins preparing the supplemental documents required by 33 CFR 330.5(c)(1)(iii). Each supplemental document will evaluate the NWP on a regional basis (*e.g.,* by Corps district geographic area of responsibility or by state) and discuss the need for regional conditions for that NWP. Each supplemental document will also include a statement by the division engineer that will certify that the NWP, with approved regional conditions, will authorize only those activities that will have no more than minimal individual and cumulative adverse environmental effects. The supplemental documents may cover a Corps district, especially in cases where the geographic area of responsibility for the Corps district covers an entire state. If more than one Corps district operates in a state, the lead district is responsible for preparing the supplemental documents and coordinating with the other Corps districts. The supplemental documents include an evaluation of public and agency comments, with responses to those comments, to show that the views of potentially affected parties were fully considered (33 CFR 330.5(c)(1)(ii)). The supplemental document also includes a statement of findings demonstrating how substantive comments were considered. After the supplemental documents are drafted by the district, they are sent to the division engineer for review along with the district's recommendations for regional conditions. The division engineer may approve the supplemental documents or request changes to those supplemental documents, including changes to the regional conditions recommended by the district.

After the division engineer approves the regional conditions and signs the supplemental documents, the district issues a public notice announcing the final Corps regional conditions and when those regional conditions go into effect (see 33 CFR 330.5(c)(1)(v)). The district's public notice is posted on its website. Copies of the district's public notice are also sent to interested parties that are on the district's public notice mailing list via email or the U.S. mail. The public notice will also describe, if appropriate, a grandfathering period as specified by 33 CFR 330.6(b) for those who have commenced work under the NWP or are under contract to commence work under the NWP (see 33 CFR 330.5(c)(1)(iv)). A copy of all Corps regional conditions approved by the division engineers for the NWPs are forwarded to Corps Headquarters (see 33 CFR 330.5(c)(3)).

Under the current regulations, Corps Headquarters does not have a role in the development and approval of Corps' regional conditions by division engineers. Corps Headquarters provides templates for the supplemental documents required by § 330.5(c)(1)(iii), to promote consistency in those supplemental documents. If requested by district and division offices, Corps Headquarters also provides advice on appropriate Corps regional conditions for the NWPs. The Corps is a highly decentralized organization, with most of the authority for administering the regulatory program delegated to the 38 district engineers and 8 division engineers (see 33 CFR 320.1(a)(2)). District engineers are responsible for the day-to-day implementation of the Corps' Regulatory Program, including the evaluation of applications for individual permits, evaluating PCNs for proposed NWP activities, evaluating notifications for activities authorized by regional general permits, responding to requests for approved and preliminary jurisdictional determinations, conducting compliance and enforcement actions, and other tasks. Division engineers are responsible for

overseeing implementation of the Regulatory Program by their districts, and making permit decisions referred to them by district engineers under the circumstances identified in 33 CFR 325.9(c). Under that section of the Corps' regulations, a division engineer can refer certain permit applications to the Chief of Engineers for a decision. Other than making permit decisions under the circumstances listed in § 325.9(c), Corps Headquarters is responsible for development of regulations, guidance, and policies.

In response to our July 20, 2017, **Federal Register** notice (82 FR 33470) issued for E.O. 13777, ''Enforcing the Regulatory Reform Agenda,'' we received numerous comments regarding regional conditioning of the NWPs. These comments are summarized below.

Several commenters stated that there should be greater uniformity in regional conditions for the NWPs, to provide consistent availability of NWPs across Corps districts. Most of these commenters implied that the desired consistency should be achieved at a national level to provide the same level of NWP availability across all Corps districts. One commenter acknowledged the need for regional conditions to tailor the NWP program to address local resources, but said that some of the regional conditions are too broad and unnecessarily restrict use of the NWPs. Another commenter indicated that there needs to be more consistency in regional conditions, especially for regional conditions that change NWP PCN requirements.

Since the purpose of regional conditions is to tailor the NWPs to account for regional differences in aquatic resource types, the functions they provide, and their value to the region so that the NWPs in a particular geographic area authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects, requiring consistency among regional conditions at a national level would be contrary to the purpose of regional conditions and would reduce the utility of the NWPs. In other words, the ability to add restrictions to one or more NWPs at a regional level to ensure that those activities result in no more than minimal individual and cumulative adverse environmental effects allows the national terms and conditions to be less restrictive, and thereby potentially appropriate, in other areas of the country. This ability to tailor the NWP program in specific areas of the country allows the NWPs to cover more activities than would be possible if the need for greater restrictions in one part of the country had to be applied to the nation as a whole. We agree that regional conditions should be written clearly and provide only the additional restrictions that are necessary to ensure that NWP activities in that region result only in minimal individual and cumulative adverse environmental effects, consistent with the requirements of Section 404(e) of the Clean Water Act.

Under the Corps' current regulations at 33 CFR 330.5(c), the authority to approve Corps regional conditions is assigned to division engineers. A division engineer can take steps to provide consistency in Corps regional conditions for the districts within his or her division. However, it should also be noted that the eight Corps divisions encompass large geographic regions and there can be substantial differences in aquatic resource types, functions, and values within a Corps division. For example, the Corps' Northwestern Division extends from the northwest coast to the Midwest, with oceanic and estuarine waters along the coasts of Oregon and Washington, to inland wetlands and rivers in Missouri and Nebraska. As another example, the Mississippi Valley Division extends from Louisiana, with its extensive coastal wetlands and bottomland hardwood forests to Minnesota, which has many lakes, bogs, marshes, and swamps. In addition, there are usually also substantial differences in other resources that are subject to regional conditions, to facilitate compliance with other applicable federal laws, such as Section 7 of the Endangered Species Act, the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act, Section 106 of the National Historic Preservation Act, and the Wild and Scenic Rivers Act. The presence and ranges of endangered and threatened species, and the locations of designated critical habitat often vary substantially within a Corps division. Most coastal Corps districts have essential fish habitat in their geographic areas of responsibility, whereas inland districts do not. Therefore, because of the substantial variation of aquatic resources and other resources both nationally and within Corps divisions, consistency in regional conditions necessary to ensure that NWPs only authorize activities that have no more than minimal adverse environmental effects cannot be practicably achieved at a national or division level without reducing the availability of NWPs in other areas.

Several commenters requested that the Corps establish a single, national website where all proposed and final regional conditions for the NWPs could be posted, to facilitate public review of the proposed regional conditions. This national website would help awareness of the final regional conditions and help project proponents plan their NWP activities. A few of these commenters also asked that this national website include proposed and final general WQC and general CZMA consistency concurrences for the NWPs.

In response to these comments, we will be posting copies of the district public notices soliciting input for proposed regional conditions in the *www.regulations.gov* docket for this rulemaking action (docket number COE–2020–0002), under Supporting and Related Material. In addition, when these NWPs are finalized, we will post copies of all district public notices announcing the final regional conditions in the *www.regulations.gov* docket for this rulemaking action, so that copies of all these district public notices are available in a single location. This docket is intended to provide a central location for interested parties to obtain information on the Corps regional conditions being proposed by Corps districts, and for states where there is a lead Corps district to provide consistency in Corps regional conditions within a state. Comments on proposed Corps regional conditions will still have to be sent to the Corps district identified in the public notice, not to Corps Headquarters.

At present, districts manage their own processes for soliciting public comment on their regional conditions. In general, they make solicitations of public comment available on their own website and do not always make the comments they receive publically available. To further improve the transparency on the regional conditioning process, the Corps is considering whether to require the districts to post and solicit public comment on notices proposing regional conditions in separate dockets at *www.regulations.gov*. We solicit public comment on whether to implement this or a similar requirement relating to the regional conditioning process and any factors we should consider.

When a state, authorized tribe, or EPA issues a WQC for the issuance of an NWP and that WQC includes conditions, those conditions become WQC regional conditions if, after recommendation by the district engineer, the division engineer determines that those conditions are acceptable under 33 CFR 330.4(c)(2). When a state issues a general CZMA consistency concurrence with conditions for an NWP, those conditions become CZMA regional conditions if,

after recommendation by the district engineer, the division engineer determines those conditions are acceptable under 33 CFR 330.4(d)(2). The processes for states, approved tribes, and EPA to issue WQCs for the issuance of the NWPs, and for states to issue general CZMA consistency concurrences for the NWPs are separate from the Corps' regional conditioning process under 33 CFR 330.5(c), and are governed by state, tribal, EPA, or Department of Commerce regulations. Individuals who are interested in providing comments specific to WQCs and CZMA consistency determinations for the issuance of NWPs should submit their comments directly to the appropriate state, authorized tribe, or EPA regional office. Because these processes are separate from the Corps' regional conditioning process, the public notices issued by states, authorized tribes, and EPA regions during the WQC and CZMA consistency determination processes will not be included in the national website for proposed and final Corps regional conditions for the NWPs.

When the final WQCs and CZMA consistency concurrences are issued and after the final NWPs are issued, division engineers will review those WQCs and CZMA consistency concurrences in accordance with 33 CFR 330.4(c)(2) and (d)(2), respectively, and determine which conditions are WQC/CZMA regional conditions for the final NWPs. Division engineers will also finalize any Corps regional conditions. After division engineers finalize Corps regional conditions, Corps districts will issue public notices announcing the final regional conditions and the final WQCs and CZMA consistency concurrences for the issuance of the NWPs. We will post copies of the district public notices announcing the final Corps regional conditions and final WQC/CZMA regional conditions in the *regulations.gov* docket (docket number COE–2020–0002), under ''Supporting and Related Material.'' after

A number of commenters said that the only regional conditions that should be approved by division engineers are those permit conditions that are truly necessary to ensure compliance with the statutory requirement that the NWPs may only authorize activities that result in no more than minimal individual and cumulative adverse environmental effects. One commenter said that excessive and unnecessary regional conditions conflict with the goal of the NWP Program to provide timely authorizations while protecting the Nation's aquatic resources. One commenter asserted that Corps Headquarters should provide further guidance on what is appropriate for NWP regional conditions. A few commenters recommended that Corps Headquarters establish a process that requires division engineers to secure Corps Headquarters concurrence before approving NWP regional conditions, and another commenter said that the approving authority for regional conditions should be Headquarters, not the division engineer. A couple of commenters suggested reducing the ability of division and district engineers to exercise discretionary authority to modify, suspend, or revoke the NWPs.

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling the objective of the NWP Program, which is to ''regulate with little, if any, delay or paperwork certain activities having minimal impacts.'' (33 CFR 330.1(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.

If, during implementation of the NWPs, new information arises that warrants new or modified Corps regional conditions to comply with the no more than minimal adverse environmental effects requirement for NWPs, Corps division engineers may approve new or modified regional conditions after following the procedures in 33 CFR 330.5(c). This includes a public notice and comment process. Information on regional conditions and the suspension or revocation of one or more NWPs in a particular area can be obtained from the appropriate district engineer.

Regarding suggestions that the Corps establish a process that requires division engineers to secure Corps Headquarters concurrence before approving NWP regional conditions, implementing such an approach would require conducting rulemaking to amend the NWP regulations at 33 CFR part 330. Those regulations identify the division engineer as the approving authority for regional conditions. While revising those regulations is outside the scope of this action, the Corps is considering whether to update those regulations. Another commenter said that the approving authority for Corps regional conditions can seek the advice of Corps Headquarters on whether to approve Corps regional conditions, but securing concurrence from Corps Headquarters is not required by the current regulations.

With respect to the WQC/CZMA regional conditions, the Corps has to accept the conditions added to a general WQC by the certifying authority (see 40 CFR 121.7(d)) or added to a general CZMA consistency concurrence by the state agency (see 15 CFR 930.31(d)), unless the division engineer determines that any of those conditions do not comply with the provisions of 33 CFR 325.4 (see 33 CFR 330.4(c)(2) and (d)(2), respectively). Section 325.4 addresses conditions for individual permits and general permits. The WQC and CZMA reviews are separate and independent administrative review processes for the NWPs. Public comments on state, tribal, or EPA WQC conditions that could become WQC regional conditions under 33 CFR 330.4(c)(2) should be sent directly to the appropriate certifying agency. Public comments on state CZMA consistency concurrence that could become CZMA regional conditions under 33 CFR 330.4(d)(2) should be sent directly to the state. The public should not send comments on proposed WQC/CZMA conditions to the Corps.

If the state, approved tribe, or EPA region issues a conditioned general WQC for the NWPs, the division engineer will review those conditions and make them WQC regional conditions unless he or she determines that those conditions do not comply with the provisions of 33 CFR 325.4 (see 33 CFR 330.4(c)(2)). If the division engineer determines that any of the WQC conditions do not comply with 33 CFR 325.4, he or she will consider WQC to be denied and any project proponent that wants to use the affected NWPs will need to obtain a WQCs or waiver for an activity that may result in a specific discharge or set of discharges that requires NWP authorization. To request WQC, the project proponent will need to submit a certification request that satisfies the requirements of 40 CFR 121.5(b) to the appropriate certifying authority.

If the state issues a conditioned CZMA consistency concurrence for the NWPs, the division engineer will review those conditions and make them CZMA regional conditions unless she or he

determines that those conditions do not comply with 33 CFR 325.4 (see 33 CFR 330.4(d)(2)). If the division engineer determines that any of the CZMA general consistency concurrence conditions do not comply with 33 CFR 325.4, he or she will consider CZMA consistency concurrence to be denied and project proponents that want to use the affected NWPs will need to obtain individual CZMA consistency concurrences or presumptions of concurrence in accordance with the applicable procedures in subpart D of 15 CFR part 930 (see 15 CFR 930.31(d)).

After the division engineer reviews the final WQCs and general CZMA consistency concurrences issued by the appropriate authorities for the Corps' issuance of the NWPs, as well as compliance with § 325.4 for any conditions added to those final determinations, each Corps district will issue a public notice that announces the availability of WQCs and, if applicable, general CZMA consistency concurrences for the issued NWPs. The public notice will also announce any final WQC/CZMA regional conditions. The final public notices will also announce the final status of water quality certifications and CZMA consistency determinations for the NWPs.

In cases where a Corps district has issued a regional general permit that authorizes similar activities as one or more NWPs, during the regional conditioning process the district will clarify the use of the regional general permit versus the NWP(s). For example, the division engineer may revoke the applicable NWP(s) so that only the regional general permit is available for use to authorize those activities.

Through this proposed rule, the Corps is soliciting comments on whether rulemaking should be done to amend 33 CFR 330.5(c) to clarify and improve the regional conditioning process and what specific revisions the Corps should consider making. For example, are there actions that the Corps should take to improve transparency, clarity, and efficiency of regional conditions and the process by which they are established? Also, should copies of the final WQCs issued by states, tribes and EPA for the issuance of the NWPs, and final general CZMA consistency concurrences issued by states for the issuance of the NWPs also be posted in the *www.regulations.gov* docket for the issuance or reissuance of NWPs, along with the final Corps regional conditions? Are there other process improvements that the Corps should consider in regards to the regional conditioning process?

## II. Summary of Proposal

In this proposed rule, the Corps proposes to reissue the 52 existing NWPs with some modifications and to issue five new NWPs. The new NWPs, if issued, would authorize seaweed mariculture activities, finfish mariculture activities, and electric utility line/telecommunications activities, utility line activities for water and other substances, and discharges associated with water reclamation and reuse facilities.

The proposal to issue two new NWPs for mariculture activities would complement the existing NWP on shellfish mariculture and provide NWP authorization for all three major sectors of mariculture in coastal waters: Shellfish, seaweed, and finfish. The proposed NWP for finfish mariculture activities would apply only to offshore finfish mariculture operations in marine and estuarine waters. The proposed NWP for finfish mariculture activities would not authorize the construction of land-based finfish mariculture facilities such as ponds to produce carp and other finfish.

We are proposing to modify NWP 12, which has authorized various types of utility lines since 1977, to limit that NWP to oil and natural gas pipeline activities, and proposing to issue two new NWPs to authorize electric utility line and telecommunications activities and activities for other types of utility lines that are not covered by either the proposed modifications to NWP 12 or the proposed new NWP for electric utility line and telecommunications activities. For the proposed modification of NWP 12 and for the proposed two new NWPs for other types of utility lines, we are inviting comments on national best management practices that could be added as terms to any of these NWPs to help ensure that a particular type of utility line results in no more than minimal individual and cumulative adverse environmental effects. For example, there may be national best management practices used by the oil or natural gas pipeline industries that could be added to the proposed NWP 12 to address relevant environmental or logistical questions specific to oil or natural gas pipelines, where those pipelines cross waters of the United States. There may be other national best management practices that apply solely to electric utility lines/telecommunications lines that would ensure that electric utility line and telecommunication line crossings of waters of the United States and electric/telecommunication substations constructed in waters of the United States cause no more than minimal adverse environmental effects.

We are proposing to authorize discharges of dredged or fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities. At present, many of these activities are already authorized by NWPs 29, 39, 40, and 42. However, we are proposing the new NWP since having the requirements in a single place may add needed clarity and simplify the application process. We are inviting comment on whether to issue an NWP to authorize discharges of dredged or fill material into waters of the United States for the construction and expansion of water reclamation and reuse facilities. Alternatively, we are inviting comment on whether we should continue to authorize those activities as attendant features of activities authorized by NWPs 29, 39, 40, and 42.

We are proposing to revise the text of some of the NWPs, general conditions, and definitions so that they are clearer and can be more easily understood by the regulated public, government personnel, and interested parties while retaining terms and conditions that help protect the aquatic environment. Making the text of the NWPs clearer and easier to understand will also facilitate compliance with these permits, which will benefit the aquatic environment. The NWP program allows the Corps to authorize activities with only minimal adverse environmental impacts in a timely manner. Thus, the Corps is able to better protect the aquatic environment by focusing its limited resources on more extensive evaluations through the individual permit process, to provide more rigorous evaluation of activities that have the potential for causing more severe adverse environmental effects.

Through the NWPs, the aquatic environment may also receive additional protection through regional conditions imposed by division engineers and activity-specific conditions added to NWPs by district engineers. These regional conditions and activity-specific conditions further minimize adverse environmental effects, because these conditions can only further restrict use of the NWPs. Nationwide permits also allow Corps district engineers to exercise, on a case-by-case basis, discretionary authority to require individual permits for proposed activities that may result in more than minimal individual and cumulative adverse environmental effects. Nationwide permits help protect the aquatic environment because they

provide incentives to permit applicants to reduce impacts to jurisdictional waters and wetlands to meet the restrictive requirements of the NWPs and receive authorization more quickly than they would through the individual permit process. Regional general permits issued by district engineers provide similar environmental protections and incentives to project proponents.

We are proposing to reissue the general conditions, with some modifications. We are soliciting comment on all changes to the nationwide permits, general conditions, and definitions discussed below. Minor grammatical changes, the removal of redundant language, and other small administrative changes are not discussed in the preamble below. Therefore, commenters should carefully read each proposed NWP, general condition, and definition in this notice.

*A. Proposed Removal of the 300 Linear Foot Limit for Losses of Stream Bed*

In accordance with the recommendations in the report we issued in response to E.O. 13783 on ways to streamline the NWPs, we are proposing to remove the 300 linear foot limit for losses of stream bed from the NWPs 21 (Surface Coal Mining Activities), 39 (Commercial and Institutional Developments), 50 (Underground Coal Mining Activities), 51 (Land-Based Renewable Energy Generation Facilities), and 52 (Water-Based Renewable Energy Generation Pilot Projects) and to instead rely on the ½-acre limit and PCN requirements to ensure that activities authorized by these NWPs result in no more than minimal adverse environmental effects. To provide consistency in the NWP Program, we are also proposing to remove the 300 linear foot limit for losses of stream bed from NWPs not mentioned in the report that also have that limit (*i.e.,* NWPs 29 (Residential Developments), 40 (Agricultural Activities), 42 (Recreational Facilities), 43 (Stormwater Management Facilities), and 44 (Mining Activities)) and to similarly rely on the ½-acre limit and PCN requirements. The text of the proposed NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 are provided near the end of this proposed rule document, and the 300 linear foot limit has been removed from the text of these proposed NWPs.

In conjunction with the proposal to remove the 300 linear foot limit for losses of stream bed, we are also proposing to remove the provisions in these NWPs regarding the ability of district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed when the applicant submits a PCN and requests a waiver of that 300 linear foot limit. On April 21, 2020, EPA and the Department of the Army published a final rule to define ''waters of the United States'' entitled the Navigable Waters Protection Rule (85 FR 22250). On June 22, 2020, the Navigable Waters Protection Rule became effective in all states and jurisdictions except for the State of Colorado due to a court-issued stay in that state. The rule revised the definition of ''waters of the United States'' at 33 CFR 328.3 such that ephemeral streams are categorically excluded from jurisdiction under the Clean Water Act. Therefore, there would be no need to request waivers for losses of ephemeral stream bed (regardless of length) since NWP authorization (or any other form of DA authorization) will not be needed to authorize discharges of dredge or fill material into ephemeral streams. See Section II.C, for more discussion on the potential impact of the Navigable Water Protection Rule on the NWPs.

In addition, we are proposing to remove the agency coordination process for seeking input from federal and state agencies on whether the district engineer should grant the waiver of the 300 linear foot limit requested by an applicant for an NWP verification. Removing the waiver provision may reduce costs to permittees by reducing the amount of time the district engineer needs to make her or his decision. For example, the district engineer would not have to wait up to 25 days (see paragraph (d)(3) of the ''pre-construction notification'' general condition (GC 32) to make the decision on whether to issue the NWP verification. Removal of the agency coordination for these activities is also likely to reduce administrative costs to the Corps, by reducing the amount of staff time to send copies of PCNs to the agencies and summarizing and responding to agency comments. Removal of the waiver provision and associated agency coordination would also free up additional time for Corps staff to review other PCNs, other permit applications, and other regulatory actions such as jurisdictional determinations and compliance activities. As mentioned above, under the Navigable Waters Protection Rule, ephemeral streams are not ''waters of the United States.'' Therefore, it should be noted that this would likely reduce the current number of waivers and required interagency coordination process from state and federal agencies, since the current waivers apply only to certain intermittent streams.

Under the current NWPs, the Corps uses a variety of approaches to quantify losses of stream beds and assessing impacts to those stream beds. Losses of stream bed can be quantified in acres or linear feet, and for some NWPs, discharges of dredged or fill material into stream beds may be quantified in cubic yards. For NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, the loss of stream bed, plus any other losses of waters of the United States, cannot exceed ½-acre. Nationwide permits 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 also currently have 300 linear foot limits for losses of stream bed, and the district engineer has the authority to waive the 300 linear foot limit for losses of intermittent stream bed, when, after reviewing the PCN and conducting agency coordination under paragraph (d) of general condition 32, he or she issues a written determination that the NWP activity would result in no more than minimal individual and cumulative adverse environmental effects. The district engineer cannot issue a waiver authorizing the loss of greater than ½-acre of stream bed or other waters of the United States. Therefore, when determining whether to issue a waiver of the 300 linear foot limit for losses of intermittent stream bed, the district engineer must also calculate the acreage of stream bed that would be lost as a result of the proposed NWP activity, to ensure that the loss of stream bed, plus any other losses of waters of the United States, does not exceed ½-acre.

Many of the NWPs have quantitative limits to constrain the quantity of waters of the United States that may be lost as a result of an NWP activity to help ensure that the authorized NWP activity results in no more than minimal individual and cumulative adverse environmental effects. Numeric limits provide predictability and transparency to the regulated public through clear limits for NWP activities. Proposed activities that exceed those limits require authorization by individual permits. The quantitative limits help prospective permittees plan and design regulated activities to qualify for NWP authorization. The numeric limits of NWPs are established at a national level to authorize most activities that are expected to result in adverse environmental effects that are no more than minimal, individually and cumulatively. Division engineers may add regional conditions to an NWP to reduce the quantitative limit or limits to ensure that use of that NWP in a particular geographic region results in

activities that have no more than minimal individual and cumulative adverse environmental effects.

The numeric limits of NWPs may be quantified as acres, linear feet, or cubic yards. The appropriate unit of measure for a quantitative limit for an NWP is dependent on the type of activity being authorized by the NWP and the potential types of direct impacts authorized activities may have on jurisdictional waters and wetlands. For example, some NWP activities have quantitative limits based on acres, because the discharge of dredged or fill material into jurisdictional waters or wetlands is placed in those waters generally converts an aquatic area to dry land (*e.g.,* for constructing a building pad or road, or growing crops). An area-based numeric limit may also be appropriate for NWP activities that raise the bottom elevation of the waterbody (*e.g.,* to construct a boat ramp to safely launch boats). Some NWPs have cubic yard limits, such as NWP 19 for minor dredging activities, because the authorized activity removes a volume of sediment from a waterbody, and the area directly affected by the removal of a volume of material may vary depending on how that activity is conducted. Some NWPs have linear foot limits to constrain the length of the authorized activity along a shoreline or river bank (*e.g.,* the 500 linear foot limit for bank stabilization activities authorized by NWP 13) or the encroachment of structures or fills into navigable waters (*e.g.,* the 30 foot limit from the mean low water line in tidal waters for the construction of living shorelines authorized by NWP 54).

The severity of impacts to stream beds caused by discharges of dredged or fill material authorized by NWPs can be evaluated through the use of rapid assessment tools, such as functional or condition assessments. The Corps' regulations at 33 CFR 332.2 define ''functions'' as ''the physical, chemical, and biological processes that occur in ecosystems.'' A functional assessment evaluates the relative degree to which a stream or other aquatic resource performs various physical, chemical, and biological processes. A condition assessment evaluates the relative ability of a stream or other type of aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region (see the definition of ''condition'' at 33 CFR 332.2). Functional or condition assessments generally use indicators that can be observed through site visits or remote sensing (Stein et al. 2009). Indicators are observable characteristics that correspond to identifiable variable conditions in a wetland, stream, or other aquatic resource type, or the surrounding landscape (Smith et al. 1995). Indicators have to be sensitive to changes in function or condition to provide meaningful results that can be used for management decisions, such as evaluating the severity of impacts to aquatic resources or determining improvements in aquatic resource function or condition for compensatory mitigation credits produced by mitigation banks, in-lieu fee projects, or permittee-responsible mitigation.

For functional assessments, indicators are used to estimate the degree to which a particular function is performed by an aquatic resource relative to reference aquatic resources in the region. Indicators are also used to evaluate aquatic resource condition, which is also assessed relative to reference aquatic resources in the region. The indicators used for functional or condition assessments are generally not dependent on a particular quantitative metric, such as acres or linear feet, since most indicators are physical attributes that can be readily identified through either field visits or remote sensing. These indicators are usually evaluated qualitatively when the rapid assessment tool is being used by Corps district staff or a consultant. Functional or condition assessments can be used by district engineers to assist in determining whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects (see paragraph 2 of Section D, District Engineer's Decision).

Compensatory mitigation may be required to offset losses of waters of the United States authorized by DA permits, including the NWPs. The Corps' regulations at 33 CFR part 332 address compensatory mitigation requirements for DA permits, and how compensatory mitigation credits can be quantified. Section 332.3(f) addresses the amount of compensatory mitigation to be required for DA permits. Section 332.3(f)(1) states that the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. Paragraph (f)(1) of that section also says that when appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation should be required for the individual permit or general permit. If a functional or condition assessment or other suitable metric is not used, § 332.3(f)(1) states that a minimum one-to-one acreage or linear foot compensation ratio must be used. Section 332.3(f) does not require any particular metric to be used for quantifying impacts to stream bed or quantifying compensatory mitigation credits produced by stream compensatory mitigation projects, if a functional or condition assessment is not used to quantify authorized impacts or required compensatory mitigation. In other words, the current rule text provides flexibility to district engineers to determine appropriate metrics for quantifying permitted impacts and compensatory mitigation requirements.

Sections 332.8(o)(1) and (2) of the Corps' compensatory mitigation regulations address units of measure and the use of assessment methods, respectively, for mitigation bank credits and in-lieu fee program credits, and the debits (impacts) those credits are intended to offset. The term ''credit'' is defined at 33 CFR 332.2 as ''a unit of measure (*e.g.,* a functional or areal measure or other suitable metric) representing the accrual or attainment of aquatic functions at a compensatory mitigation site.'' The term ''debit'' is defined at 33 CFR 332.2 as ''a unit of measure (*e.g.,* a functional or areal measure or other suitable metric) representing the loss of aquatic functions at an impact or project site.'' The definition of ''credit'' also states that the ''measure of aquatic functions is based on the resources impacted by the authorized activity.''

Furthermore, § 332.8(o)(1) states that the principal units for credits and debits are acres, linear feet, functional assessment units, or other suitable metrics of particular resource types, and that functional assessment units or other suitable metrics may be linked to acres or linear feet. This section does not require the use of a particular metric or unit of measure for wetland or stream credits or debits. For streams, the preamble to the 2008 mitigation rule states that compensatory mitigation credits can be quantified using linear feet, area, or other appropriate units of measure (73 FR 19633) when functional or condition assessments are not available or are not practicable to use. Regarding the use of assessment tools to calculate credits and debits, section 332.8(o)(2) states that where practicable, an appropriate assessment method or other suitable metric must be used to assess and describe the aquatic resource types that will be restored, established, enhanced and/or preserved by the mitigation bank or in-lieu fee project. Section 332.8(o)(2) does not require the use of a particular assessment method or

metric for wetlands, streams, or any other category of waters.

The quantitative limits for the NWPs and the methods and metrics used to quantify credits and debits for the purposes of compensatory mitigation serve different purposes. The quantitative limits for the NWPs provide a clear ceiling on the impacts authorized by an NWP; impacts that exceed the quantitative limits of the NWPs usually require individual permits. Quantitative limits for the NWPs also provide predictability and transparency to the regulated public, are often used by project proponents to design their activities to quality for NWP authorization. The metrics used to quantify the values of compensatory mitigation credits and debits are used to ensure that the amount of compensatory mitigation credits required by the district engineer are sufficient to replace lost aquatic resource functions (33 CFR 332.3(f)(1)). In circumstances where an appropriate and practicable functional or condition assessment method cannot be used, or is unavailable for use, acres, linear feet, or other suitable metrics may be used to quantify compensatory mitigation credits, as a surrogate representing the accrual of aquatic resource functions at a compensatory mitigation project. The Corps' regulations at 33 CFR part 332 do not identify specific credit or debit metrics that must be used for specific categories of aquatic resources, such as wetlands, streams, or submerged aquatic vegetation beds. There is substantial flexibility in the regulations in determining appropriate metrics for credits or debits for specific categories of aquatic resources.

Functional or condition assessments may be used by district engineers to help determine whether proposed NWP activities will result in no more than minimal individual and cumulative adverse environmental effects (see paragraph 2 of Section D, District Engineer's Decision). However, there are no national assessment tools available that can be used in place of acreage or other quantitative limits for the NWPs. Assessment tools have to be developed on a regional basis because these tools need to be developed for a geographic area that is relatively homogenous in terms of geomorphology, soils, climate, geology, physiography, and other factors that can influence how wetlands, streams, or other categories of waters function (Smith et al. 2013), so that differences in aquatic functions or condition due to human activities rather than regional influences can be ascertained. There are insufficient numbers of regional functional or condition assessments to assist district engineers in determining whether proposed NWP activities will result in no more than minimal individual and cumulative adverse environmental effects. Therefore, the use of functional and condition assessments to help inform the district engineer's decision is on a limited case-by-case basis. For a national level program such as the Corps' NWP Program, quantitative limits such as the ½-acre limit are the only practicable, national-scale option for drawing a clear line between the activities that potentially qualify for NWP authorization and the activities that will require individual permits.

In this section, we present a number of reasons for these proposed changes to NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. Our rationale comprises six categories of considerations: (1) The Corps employs a number of tools in the NWP Program to ensure that NWP activities result only in no more than minimal individual and cumulative adverse environmental effects; (2) using acres or square feet instead of linear feet is a more accurate approach to quantifying losses of stream bed and also serves as a better surrogate for losses of stream functions when a functional assessment method is not available or practical to use; (3) removing the 300 linear foot limit would provide consistency across the numeric limits used by the NWP Program for all categories of non-tidal waters of the United States (*i.e.,* wetlands, streams, ponds, and other non-tidal waters), and (4) it would further the objective of the NWP Program stated in 33 CFR 330.1(b) (*i.e.,* to authorize with little, if any, delay or paperwork certain activities having minimal impacts), by providing equivalent quantitative limits for wetlands, streams, and other types of non-tidal waters, and NWP authorization for losses of stream bed that have no more than minimal individual and cumulative adverse environmental effects. These reasons are discussed in further detail below.

*(1) Several tools are used to comply with the requirements of section 404(e) of the Clean Water Act.* The first reason for our proposed changes is that the Corps employs several tools in the NWP Program to ensure that NWP activities result only in no more than minimal individual and cumulative adverse environmental effects. When Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) was amended in 1977 to add section 404(e), the statutory text did not provide any direction on how general permits, including NWPs, are to achieve compliance with the requirement that general permits will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Therefore, section 404(e) gives the Corps substantial discretion in developing and implementing the NWPs and other general permits to comply with the requirements in that provision of the Clean Water Act. This discretion extends to the tools the Corps uses to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects.

The first NWPs were issued on July 19, 1977 (42 FR 37122), before the Clean Water Act was amended on December 27, 1977, to add section 404(e). During subsequent reissuances of the NWPs, the Corps developed a variety of tools to comply with the statutory requirement that NWPs may authorize only categories of activities that have no more than minimal individual and cumulative adverse environmental effects. Those tools included acreage and other numeric limits on the losses of waters of the United States that could be authorized by NWP, qualitative terms of the NWPs that limit the types of activities authorized by NWP or limit the types of waters in which the NWP could be used to authorize regulated activities, the pre-construction notification process, the requirements of the ''Mitigation'' general condition for the NWPs, the ability of division engineers to modify, suspend, or revoke NWPs on a regional basis (33 CFR 330.5(c)), and the ability of district engineers to modify, suspend, or revoke NWP authorizations for specific activities (33 CFR 330.5(d)).

An example of the numeric limits on losses of waters of the United States authorized by NWPs include the ½-acre limit in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. We are proposing to retain this limit for these NWPs. Another example of a numeric limit is the volume of dredged or fill material that can be discharged into waters of the United States, such as the 25 cubic yard limit in NWP 18. An example of qualitative terms of the NWPs that limit the types of activities authorized by NWP is the term for NWP 10, which authorizes the installation of non-commercial, single-boat mooring buoys. An example of a qualitative term that limits the types of waters in which an NWP may be used to authorize regulated activities is the term in NWP 29 that prohibits the use of that NWP to authorize discharges of dredged or fill

material into non-tidal wetlands adjacent to tidal waters.

The PCN process is a critical tool, because it provides flexibility for district engineers to take into account the activity-specific impacts of the proposed activity and the effects those activities will have on the specific waters and wetlands affected by the NWP activity. It also allows the district engineer to take into account to what degree the waters and wetlands perform functions, such as hydrologic, biogeochemical cycling, and habitat functions, and to what degree those functions will be lost as a result of the regulated activity. If the district engineer reviews the proposed activity, and after considering mitigation proposed by the applicant determines that the proposed activity will have more than minimal adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for that activity unless it can be authorized by a regional general permit. Except for NWP 51, all of the NWPs with the 300 linear foot limit for losses of stream bed require pre-construction notification for all authorized activities. Nationwide permit 51 requires pre-construction notification for losses of greater than 1/10-acre of waters of the United States.

The PCN process was first adopted in the NWP Program in 1982. A form of pre-construction notification was required for NWP 21, which authorized discharges of dredged or fill material into waters of the United States associated with surface coal mining activities (see 47 FR 31833). The project proponent could not proceed with the proposed discharges into waters of the United States until she or he obtained confirmation from the district engineer that the activity was authorized by NWP 21. The 1982 NWP 21 required the prospective permittee to obtain, before commencing the proposed activity, a determination from the district engineer that the proposed activity would have ''minimal individual and cumulative adverse effects on the environment.'' This advance review would ''afford the district engineer the opportunity to insure that the activity needing a Corps permit would have minimal impacts and thus qualify for the nationwide permit.'' (See 47 FR 31799.) None of the other NWPs issued in 1982 had PCN requirements.

With subsequent reissuances of the NWPs, more NWPs required PCNs for some or all proposed activities. The first regulations for notification procedures for the NWP program were added to the Corps' regulations in 1984 (see 49 FR 39484), when the Corps added 33 CFR 330.7 to provide regulatory text for the pre-discharge notification procedures for NWP 7 (outfall structures and associated intake structures), NWP 17 (small hydropower projects), NWP 21 (surface coal mining activities), and NWP 26. (In the 1996 NWPs (see 61 FR 65909), the Corps changed the term ''pre-discharge notification'' to ''pre-construction notification'' because some NWPs require pre-construction notification for structures or work in navigable waters of the United States that require authorization under Section 10 of the Rivers and Harbors Act of 1899.) Nationwide permit 26 was issued in that final rule to authorize discharges of dredged or fill material into: (a) Non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, located above the headwaters, and (b) non-tidal waters and adjacent wetlands that are not part of a tributary system to interstate waters or navigable waters. The notification procedures established in 1982 required the project proponent to wait 20 days for a response from the district or division engineer before proceeding with the proposed activity. The district engineer was required to review all pre-construction notifications, and could refer certain pre-construction notifications to the division engineer for review. The division engineer had the authority to exercise discretionary authority and require an individual permit for a proposed activity.

In the 1986 NWPs, the pre-construction notification requirement continued to apply to NWPs 7, 17, 21, and 26 (see 51 FR 41258). In the 1991 NWPs (56 FR 59110), the Corps amended its NWP regulations at 33 CFR part 330, including the procedures that applied to pre-construction notifications. The Corps also changed its regulations regarding discretionary authority, that is the division and district engineer's authorities to modify, suspend, or revoke NWP authorizations on a regional or activity-specific basis (see 33 CFR 330.1(d), 330.4(e), and 330.5(c) and (d)). The Corps retained the PCN requirements for NWPs 7, 17, 21, and 26. The Corps also added PCN requirements to the following existing and new NWPs: NWP 13 (bank stabilization), NWP 14 (road crossing), NWP 18 (minor discharges), NWP 22 (removal of vessels), NWP 33 (temporary construction, access, and dewatering), NWP 34 (cranberry production activities), NWP 37 (emergency watershed protection and rehabilitation), and NWP 38 (cleanup of hazardous and toxic waste). In the NWP regulations issued in 1991, the PCN review period was increased from 20 days to 30 days (33 CFR 330.1(e)(1), as published in the **Federal Register** on November 22, 1991 (56 FR 59135)).

In the 1996 NWPs, the PCN review period for NWP 26 was increased to 45-days (see paragraph (a)(3) of the 1996 ''Notification'' general condition (61 FR 65920)). The other NWPs that required PCNs for some or all proposed activities retained a 30-day review period for the district engineer's review of PCNs. For the 1996 NWPs, PCNs were required for the following new and existing NWPs: NWP 5 (scientific measuring devices), NWP 7 (outfall structures), NWP 8 (oil and gas structures), NWP 12 (utility line discharges), NWP 13 (bank stabilization), NWP 14 (road crossings), NWP 17 (hydropower projects), NWP 18 (minor discharges), NWP 21 (surface coal mining activities), NWP 22 (removal of vessels), NWP 26 (headwaters and isolated waters discharges), NWP 27 (wetland and riparian restoration and creation activities), NWP 29 (single family housing), NWP 31 (maintenance of existing flood control facilities), NWP 33 (temporary construction, access, and dewatering), NWP 34 (cranberry production activities), NWP 37 (emergency watershed protection and rehabilitation), NWP 38 (cleanup of hazardous and toxic waste), and NWP 40 (farm buildings).

In the 2000 NWPs, the PCN review period in the ''Notification'' general condition was increased to 45-days for all NWPs that required PCNs (see 65 FR 12894). In a final rule published in the **Federal Register** on January 29, 2013 (78 FR 5733), 33 CFR part 330, including § 330.1(e)(1), was amended to change the 30-day PCN review period to 45 days, consistent with the current NWPs and general condition 32 (pre-construction notification).

The 2002 NWPs (67 FR 2020), 2007 NWPs (72 FR 11092), 2012 NWPs (77 FR 10184), and 2017 NWPs (82 FR 1860) retained the 45-day PCN review period. Since the PCN process was added to the NWP program in 1982 and expanded to other new and existing NWPs during subsequent reissuances of the NWPs, it has been successful in helping to ensure that the NWPs comply with the requirements of Section 404(e) of the Clean Water Act, specifically that the NWP can authorize only those activities that result in no more than minimal individual and cumulative environmental effects. As the NWP program has expanded over the past 38 years, the PCN process has provided a mechanism where district engineers are given the opportunity to review certain proposed NWP activities before they

take place, to determine whether the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects. The PCN process also gives the district engineer the opportunity to add activity-specific conditions to the NWP authorization, including mitigation requirements, to comply with the ''no more than minimal individual and cumulative adverse environmental effects'' requirement. When a district engineer reviews a PCN for a proposed activity, and determines that the activity is likely to result in more than minimal adverse environmental effects after considering a mitigation proposal submitted by the applicant (see 33 CFR 330.1(e)(3), he or she may exercise discretionary authority and require an individual permit for the proposed activity. The PCN process provides flexibility in the NWP program by requiring case-specific review of certain proposed activities, and authorizing those activities (with or without special conditions) instead of requiring individual permits. By using NWPs to authorize activities that have no more than minimal adverse effects, the Corps can focus a greater proportion of its finite resources on evaluating individual permit applications.

Under the current and past NWPs, the Corps has authorized tens of thousands of activities each year. Over the years, Corps districts have reviewed hundreds of thousands of NWP PCNs and issued hundreds of thousands of NWP verification letters in response to those PCNs. In litigation that has arisen from time to time challenging NWP verifications issued in response to PCNs, federal courts have generally upheld such verifications as consistent with the Clean Water Act and otherwise applicable law (*e.g.,* Snoqualmie Valley Preservation v. USACE, 683 F.3d 1155 (9th Cir. 2012); *Sierra Club* v. *Bostick*, 787 F.3d 1043 (10th Cir. 2015); *Sierra Club* v. *U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015)). The continued operation of the NWP Program, and its reliance on the PCN process over the past 38 years to ensure that activities authorized by NWPs result in no more than minimal individual and cumulative adverse environmental effects, demonstrates the importance and success of the PCN process as a tool to efficiently authorize activities that require authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

The mitigation requirements in the NWPs are another tool to comply with the requirements of Section 404(e) of the Clean Water Act. During the PCN review process, district engineers will evaluate compliance with the mitigation requirements for the NWPs in the ''Mitigation'' general condition (general condition 23 in this proposal). Paragraph (a) of the ''Mitigation'' general condition requires the NWP activity to be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.,* on site). Under this general condition and 33 CFR 330.1(e)(3), the district engineer may require additional mitigation, including compensatory mitigation, so that the authorized work has no more than minimal individual and cumulative adverse environmental effects.

Regional conditions are another tool to ensure that activities authorized by NWPs result in no more than minimal individual and cumulative adverse environmental effects. Under 33 CFR 330.5(c), division engineers have the authority to assert discretionary authority to modify, suspend, or revoke NWP authorizations for a specific geographic area, class of activity, or class of waters within his or her division, including on a statewide basis. If the 300 linear foot limit for losses of stream bed is removed from these NWPs, division engineers can impose regional conditions to put a smaller acreage limit on losses of stream bed, if such a lower limit is needed to satisfy the requirement that NWPs may authorize only activities that have no more than minimal individual and cumulative adverse environmental effects.

Activity-specific permit conditions may be imposed by district engineers during the review of an NWP PCN to comply with the no more than minimal adverse environmental effects requirements for the NWPs. Under 33 CFR 330.4(e)(2), a district engineer has the authority to exercise discretionary authority for a proposed NWP activity whenever he or she determines that the proposed activity would have more than minimal individual or cumulative adverse effects on the environment or otherwise may be contrary to the public interest. Prior to requiring another form of DA authorization for the proposed activity, the district engineer may provide the applicant with the opportunity to propose mitigation to reduce the adverse environmental effects so that they are no more than minimal. If such mitigation is necessary to qualify for NWP authorization, the district engineer will add conditions to the NWP authorization to require those mitigation measures, which may include compensatory mitigation, to ensure that the NWP activity results in no more than minimal individual and cumulative adverse environmental effects.

We are proposing to replace the 300 linear foot limit for losses of stream bed with a different tool to encourage minimization of losses of stream bed and comply with the requirements of section 404(e) of the Clean Water Act. Since 2007, the NWPs have had a 1/10-acre threshold for requiring wetland compensatory mitigation for NWP activities that require PCNs (see 72 FR 11195). This compensatory mitigation threshold has been an important tool for driving avoidance and minimization of wetland impacts.

The 1/10-acre threshold for requiring wetlands compensatory mitigation has been an effective tool for minimizing wetland losses authorized by NWPs. In the ''Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources'' published by the Corps' Institute of Water Resources in 2015 (Report 2015–R–03), an analysis of the Corps' permit data from 2010 to 2014 demonstrated that a substantial majority of fill impacts authorized by NWPs and other general permits were less than 1/10-acre in size (see Figure 5 of that report). These authorized fill impacts were for wetlands, streams, and other waters. Project proponents likely designed their projects to minimize losses of jurisdictional waters and wetlands to qualify for general permit authorization and avoid the cost of providing compensatory mitigation to offset the authorized losses. We believe that adding a compensatory mitigation requirement for losses of greater than 1/10-acre of stream bed can be equally effective in minimizing losses of stream bed under the NWP authorization process.

More recent (FY 2018) permit data demonstrate that this minimization has continued in the 2017 NWPs. According to Figure 5.1 of the draft Regulatory Impact Analysis, which is provided in the docket for this proposed rule (docket number COE–2020–0002) as supplementary information for this proposed rule, 82 percent of all of the verified NWP impacts involving discharges of dredged or fill material into waters of the United States were less than 1/10-acre.

To apply this mitigation tool to the NWPs, we are proposing to modify paragraph (d) of the ''Mitigation'' general condition to require compensatory mitigation for losses of greater than 1/10-acre of stream bed that

require pre-construction notification. This proposed modification is similar to the wetland compensatory mitigation provision in paragraph (c) of the ''Mitigation'' general condition. Consistent with the current paragraph (c), which we are not proposing to change, the proposed modifications to paragraph (d) would give the district engineer the discretion to waive the requirement to provide compensatory mitigation for losses of greater than 1/10-acre of stream bed if she or he makes a written determination that some other form of mitigation would be more environmentally appropriate. The district engineer may also waive the compensatory mitigation requirement if he or she determines that the adverse environmental effects of the proposed activity are no more than minimal without compensatory mitigation, and issues an activity-specific waiver of the compensatory mitigation requirement. We believe the proposed addition of a 1/10-acre threshold for requiring stream compensatory mitigation will have a similar effect of encouraging minimization of stream bed impacts authorized by NWPs, including NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

*(2) More accurate quantification of losses authorized by NWPs.* Another reason for these proposed changes is that quantifying losses of stream bed in acres to count towards the 1/2-acre limit most accurately represents the amount of stream bed lost as a result of filling or excavation, and the subsequent functions that are expected to be lost. Using linear feet to quantify stream impacts and stream compensatory mitigation credits does not take into account the scale of the stream reach being impacted by an authorized activity or restored for compensatory mitigation (Doyle et al. 2015, Lave 2014). Accurately quantifying the amount of stream bed lost, and the degree to which those functions are lost (*e.g.,* total versus partial loss, permanent versus temporary loss), informs the minimal adverse effects determinations made by district engineers.

Within a watershed, the sizes and channel morphologies (shapes) of river and stream channels throughout the tributary network vary significantly, from the headwaters to where the mouth of the river drains into the ocean, lake, or other body of water. As one moves from the headwaters to stream and river channels further down in the watershed, stream and river channels get progressively larger to accommodate the increasing amount of water that is transported by the tributary network (Leopold 1994). Downing et al. (2012) examined the mean width of streams in various locations in the tributary network, using the Strahler (1957) classification system for stream order. A headwater stream at the top of the stream network is a 1st order stream under the Strahler (1957) classification system. The stream order number increases as tributaries join together further down in the watershed. For example, the Ohio River is an 8th order stream. The largest river in the United States, the Mississippi River, is a 10th order stream.

According to Downing et al. (2012), the mean width of a first order headwater stream is 6.3 feet. The mean width of a third order stream is 25 feet, and the mean width of a fifth order stream is 240 feet. An eighth order stream has a mean width of 1,688 feet and a tenth order stream has a mean width of 3,392 feet. Because of this substantial variation in stream width throughout a tributary network, using linear feet to quantify stream impacts does not accurately reflect the amount of stream bed filled, excavated, or otherwise directly affected by construction activities, dredging activities, and other activities that can physically alter river and stream beds, as well as their banks. If all rivers and streams had relatively uniform width, then linear feet could be an accurate method for quantifying stream bed impacts. For example, if the activities authorized by NWPs or other types of DA permits were limited to headwater streams, then linear feet could be an effective way to quantify stream bed impacts to inform permit decisions by district engineers. However, NWPs and other DA permits authorize activities throughout the stream network, and quantifying those impacts accurately is important for making permit decisions. In this section, we discuss our proposal to quantify losses of stream bed authorized by NWP in acres.

BenDor and others (2009) examined the spatial distribution of stream impacts authorized by DA permits in North Carolina. They found that stream impacts occurred throughout a watershed, but were concentrated in urban and suburban areas where development activities are occurring. In urban and suburban areas, stream impacts are not limited to headwater streams and they observed that the restoration of headwater streams was often used to provide compensatory mitigation to offset impacts to streams of various sizes (BenDor et al. 2009).

Losses of stream bed authorized by NWPs and other DA permits can occur in a proportion of the stream bed (*e.g.,* bank stabilization where the loss of stream bed occurs near the bank while the remainder of the stream bed along the affected stream reach is not filled or excavated). Losses of stream bed authorized by NWPs and other DA permits can also occur to the entire stream bed within the affected stream reach, such as piping and filling the stream to create land to build upon. When the loss of stream bed is quantified using the area of stream bed filled or excavated, the verified impacts reflect whether only a portion of the stream bed was filled or excavated, or whether the entire stream bed along that stream reach was filled or excavated. In contrast, when the loss of stream bed is quantified in linear feet, the verified impacts do not distinguish between partial or complete filling or excavation of the stream bed along the affected stream reach. The uncertainty associated with using linear feet to quantify losses of stream bed makes it more challenging for district engineers to make consistent, transparent, and defensible NWP verification decisions.

In Section D of the 2012 NWPs (see 77 FR 10287), District Engineer's Decision, we added a list of nine factors district engineers should consider when evaluating PCNs to determine whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects. In the 2017 NWPs (see 82 FR 2005), we added a tenth factor for the district engineer to consider when making his or her decision for an NWP PCN. The ten factors in paragraph 2 of Section D, ''District Engineer's Decision,'' for making minimal adverse environmental effects determinations are:

(1) The direct and indirect effects caused by the NWP activity;

(2) the cumulative adverse environmental effects caused by activities authorized by NWP and whether those cumulative adverse environmental effects are no more than minimal;

(3) the environmental setting in the vicinity of the NWP activity;

(4) the type of resource that will be affected by the NWP activity;

(5) the functions provided by the aquatic resources that will be affected by the NWP activity;

(6) the degree or magnitude to which the aquatic resources perform those functions;

(7) the extent that aquatic resource functions will be lost as a result of the NWP activity (*e.g.,* partial or complete loss);

(8) the duration of the adverse effects (temporary or permanent);

(9) the importance of the aquatic resource functions to the region (*e.g.,* watershed or ecoregion); and

(10) mitigation required by the district engineer.

In the ''District Engineer's Decision'' section of the NWPs, we also stated that if an appropriate functional assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination.

Three of the 10 factors in paragraph 2 of the ''District Engineer's Decision'' section relate to the impacts the proposed NWP activity would have on aquatic resource functions: (1) The functions provided by the aquatic resources that will be affected by the NWP activity, (2) the degree or magnitude to which the aquatic resources perform those functions, and (3) the extent that aquatic resource functions will be lost as a result of the NWP activity (*e.g.,* partial or complete loss). To assist in applying these factors, it is important to accurately quantify the proposed impacts, because the amount of aquatic resources affected by the proposed NWP activity is often used as a surrogate for the aquatic resource functions affected by that activity. In the absence of an appropriate functional or condition assessment for streams, the amount of stream bed filled or excavated can be a surrogate for the stream functions lost as a result of the permitted activity. It may not be practicable to apply a functional or condition assessment to a proposed NWP activity (if an appropriate functional or condition assessment is available) within the timeframes of the PCN review process.

Currently, NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 can be used to authorize discharges of dredged or fill material into all non-tidal rivers and streams throughout a watershed. For the reasons discussed in this section, and for effective and more defensible implementation of the NWP program, we believe that stream bed losses authorized by NWPs should be quantified in acres, not linear feet, when a functional or condition assessment is not available or not practicable to use.

Losses of stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 can occur along a couple of continuums: (1) The proportion of the river or stream reach is impacted by the NWP activity (*e.g.,* from a small partial loss along a stream bank to a complete filling or excavation of the river or stream bed) and (2) the range of non-tidal river and stream sizes within a watershed. Quantifying losses of stream bed via linear feet does not provide any ability to differentiate the amount of stream bed lost along these two continuums.

With respect to the first continuum, some activities authorized by NWP may only fill or excavate stream bed next to the stream bank while the remaining stream bed along that stream reach is not filled or excavated. Other activities authorized by NWP may fill or excavate the entire stream bed along the affected stream reach. When only a portion of the stream bed is filled or excavated, the portion of the stream bed that is not filled or excavated can continue performing its physical, chemical, and biological processes. In situations where only a portion of the stream bed is filled, there will likely be only a partial loss of stream functions because the areas of stream bed near the authorized activity that have not been filled will continue to provide some degree of stream functions. For example, a bank stabilization activity along a river bank will fill only a portion of the stream bed up to the ordinary high water mark and the river will continue to flow past the stabilized bank, whereas filling the entire stream bed often results in a complete loss of stream functions. Using linear feet to quantify the impacts of these two different types of impacts does not distinguish between the substantially different effects on stream functions in the two different scenarios, whether those effects are no more than minimal and thus qualify for NWP authorization, or if the effects are more than minimal and require individual permits.

When assessing the impacts of NWP activities on rivers and streams, it is important to consider the relative extent of the filling or excavation of the stream bed. When using linear feet to quantify stream impacts, the filling or excavation of 100 feet of a small headwater stream has the same value as the filling or excavation of 100 feet of a larger stream in the middle of the stream network within watershed (*e.g.,* a 4th order stream under the Strahler (1957) classification method), even though the actual amount of stream bed filled or excavated is substantially larger for the 4th order stream than for the headwater stream. Therefore, quantifying impacts in linear feet does not always accurately represent the actual amount of stream bed filled or excavated because it does not take into account the width of the stream bed filled or excavated. Furthermore, quantifying stream bed losses in linear feet is not an effective surrogate for quantifying the amount of stream functions lost because of a permitted activity. In-stream ecological functions occur over the area of stream bed present within a stream reach.

Regarding the second continuum, within a watershed, streams can vary substantially in size, depending on stream order under the Strahler (1957) classification system. In addition, stream reaches can vary in the functions they provide, depending on their location in the stream network or in the watershed and other factors. Headwater streams, mid-watershed streams, and lowland streams exhibit different structure, functions, and dynamics. Impacts to streams of different stream orders for the same amount of linear foot impact can have substantially different outcomes in terms of the acres or square feet of stream bed actually filled or excavated, and the amount of aquatic resource functions that may be lost as a result of the permitted activity. In general, headwater streams are 1st and 2nd order streams under the Strahler (1957) stream classification system. In their global examination of the abundance and size distribution of streams, Downing et al. (2012) found that the mean widths of 1st and 2nd order streams are 6.2 feet and 8.5 feet, respectively. Moving down a watershed from headwater streams to mid-watershed streams and lowland streams, mean stream width (and the size of the river or stream bed) increases substantially. According to Downing et al. (2012), a 3rd order stream has a mean width of 24.6 feet, a 4th order stream has a mean width of 90.2 feet, and a 5th order stream has a mean width of 238.5 feet.

For example, under the current 300 linear foot limit for losses of stream bed, the quantity of stream bed filled or excavated and the subsequent loss of stream functions is likely to vary substantially by stream order, if all other factors are considered equal. Using the mean stream widths found by Downing et al. (2012), filling or excavating 300 linear feet of a 1st order headwater stream with an average width of 6 feet results in the loss of 1,800 square feet (0.04 acre) of stream bed and the associated functions it provides. For a typical 2nd order stream, which has an average width of 9 feet, filling or excavating 300 linear feet of that stream bed would result in the loss of 2,700 square feet (0.06 acre) of stream bed. Filling or excavating 300 linear feet of a 3rd order stream, which has an average width of 25 feet, would result in a loss of 7,500 square feet of stream bed (0.17 acre). Filling or excavating 300 linear feet of a 4th order mid-watershed stream with an average width of 90 feet results in the loss of 27,000 square feet (0.62 acre) of stream bed. (The latter

example is provided for illustrative purposes even though it could not be authorized by any of these NWPs because the loss of waters of the United States would exceed ½-acre.)

These examples demonstrate the potentially large range of impacts to streams that can occur for a specific number of linear feet of stream bed impacted, compared with the number of square feet of stream bed impacted. In other words, there can be large differences in losses of stream bed that can result from filling or excavating 300 linear feet of stream bed in different stream orders within a stream network within a watershed. To more accurately quantify losses of stream bed authorized by NWPs and associated losses of stream functions, we are proposing to rely on the ½-acre limit and other tools described above to comply with the requirement that the NWPs may only authorize activities that have no more than minimal individual and cumulative adverse environmental effects. Therefore, using an acreage limit for losses of stream bed instead of a linear foot limit will more accurately quantify losses of stream bed, since a linear foot limit does not take into account the width of the stream bed.

In developing this proposal, we have also drawn upon information that has appeared in the scientific literature. A linear foot metric for quantifying stream impacts or stream compensatory mitigation does not properly take into account the scale or size of the affected stream reach (Lave et al. 2010) or act as an effective surrogate for the amount of stream functions performed within that stream reach. In situations where it is not practicable or feasible to assess or measure stream functions (*e.g.,* minor activities authorized by NWPs general permits), using square feet to quantify the ability of a stream to perform ecological functions has a sounder scientific basis than using linear feet (Doyle et al. 2015).

In 33 CFR 332.2, the Corps defines ''functional capacity'' as ''the degree to which an area of aquatic resource performs a specific function.'' In other words, the amount of space occupied by a wetland, stream, or other aquatic resource, plus the degree to which that wetland, stream, or other aquatic resource performs certain functions, determine the amount of functions provided by the wetland, stream, or other aquatic resource. For example, if a wetland or stream performs functions at an 80 percent level, a larger wetland or stream will contribute more functions to the watershed than a smaller wetland or stream. (The larger wetland or stream will have a higher functional capacity than the smaller wetland or stream, if both the larger and smaller wetland or stream perform functions at the same level.) For rivers and streams, a larger amount of stream bed provides more physical space for aquatic habitat, more substrate for biogeochemical cycling functions, and greater capacity for hydrologic functions. Therefore, actual amount of wetland, stream, or other type of aquatic resource impacted as a result of a proposed NWP activity is critical for determining whether that activity will result in no more than minimal individual and cumulative adverse environmental effects. Using linear feet to quantify impacts to streams does not provide an adequate surrogate for the functions lost as a result of a regulated activity because it does not accurately represent the physical space in which the hydrologic, biogeochemical, and habitat functions are being performed by that stream.

*(3) Provide consistency in the numeric limits for these NWPs for all non-tidal waters of the United States.* The proposed removal of the 300 linear foot limit for losses of stream bed would also provide more equivalency in protection for all non-tidal waters of the United States. Currently, under NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 losses of non-tidal wetlands and other non-tidal waters that are not streams are limited to ½-acre. In the 2017 NWPs, losses of stream bed are limited to 300 linear feet, unless the district engineer waives the 300 linear foot limit for losses of intermittent and ephemeral stream bed (as explained above, under the Navigable Waters Protection Rule ephemeral streams are no longer subject to Clean Water Act jurisdiction). Under the 300 linear foot limit, many streams in a stream network are subject to a more stringent quantitative limit than non-tidal wetlands, ponds, or lakes. For example, for a first order headwater stream with an average width of 6.2 feet (Downing et al. 2012), under the 300 linear foot limit 0.043 acre of stream bed can be filled or excavated. As another example, for a third order stream with an average width of 34.6 feet (Downing et al. 2012), under the 300 linear foot limit 0.238 acre of stream bed can be filled or excavated. Therefore, the 300 linear foot limit for losses of stream bed is more restrictive than the ½-acre limit for losses of non-tidal wetlands and other non-tidal waters, and decreases the utility of the NWPs for losses of stream bed that result in no more than minimal individual adverse environmental effects.

The Clean Water Act Section 404(b)(1) Guidelines at 40 CFR 230.1(d) states that from ''a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines.'' Under the 404(b)(1) Guidelines, special aquatic sites include sanctuaries and refuges (40 CFR 230.40), wetlands (§ 230.41), mud flats (§ 230.42), vegetated shallows (§ 230.43), coral reefs (§ 230.44), and riffle and pool complexes (§ 230.45). The 404(b)(1) Guidelines do not rank special aquatic sites in order of importance, or provide differing degrees of protection to the various types of special aquatic sites. The evaluation process is the same for all special aquatic sites, which gives the district engineer or other permitting authority substantial discretion in determining whether a proposed discharge complies with the Guidelines. Other regulations for implementing Section 404 of the Clean Water Act do not grant special status to streams over other types of waters of the United States, such as lakes and ponds.

The 404(b)(1) Guidelines at 40 CFR 230.45 define ''riffle and pool complexes'' as:

> Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a steaming flow, a smooth surface, and a finer substrate. Riffle and pool complexes are particularly valuable habitat for fish and wildlife.

Rivers and streams exhibit a variety of morphologies, and riffle and pool complexes are just one of several morphologies. Montgomery and Buffington (1997) developed a classification system for stream channel reach morphology in mountain watersheds. For alluvial stream channels, they identified five types of channel bed morphologies: Cascade channels, step-pool channels, plane-bed channels, riffle-pool channels, and dune-ripple channels. Streams in mountain drainage basins also occur as colluvial channels and bedrock channels (Montgomery and Buffington 1997). Lowland rivers typically exhibit braided channel morphology (Chalov 2001). Lowland rivers may also have an anastomosing morphology, which consists of multiple river channels separated by islands that have been cut from the floodplain (Knighton and Nanson 1993).

Therefore, riffle and pool complexes are only a subset of the stream channel types typically found in a stream network within a watershed. Riffle and pool complexes occur in perennial stream channels that have bed material that is larger in grain size than coarse sand (Leopold 1994). According to Allan and Castillo (2007), riffle and pool complexes are usually found in unconfined stream channels with moderate to low gradients where the bed material is mostly gravel. Step-pool complexes are usually found in mountain areas where the stream bed material consists of boulders and large rocks, with a channel morphology of nearly vertical steps and short pools (Leopold 1994). Cascade channels, step-pool channels, plane-bed channels, dune-ripple channels, colluvial channels, bedrock channels, braided rivers and streams, and anastomosing rivers are not special aquatic sites under the 404(b)(1) Guidelines, and are not subject to the more restrictive regulations that apply to special aquatic sites such as wetlands and riffle and pool complexes.

Section 230.1(d) of the 404(b)(1) Guidelines states that from a ''national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines.'' Under the current NWPs, project proponents can discharge dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, that cause the loss of up to ½-acre of wetlands. Under the current limits of these NWPs, a project proponent can fill or excavate no more than 300 linear feet of perennial stream bed (which may or may not have riffle and pool complexes), which for headwater streams would usually be substantially less than ½-acre. When taking into account the regulatory approach in the 404(b)(1) Guidelines, and other regulations and policies for implementing Section 404 of the Clean Water Act, there does not seem to be a the legal, regulatory, or policy justification for a more restrictive numeric limit for losses of stream bed compared with other types of waters of the United States.

Headwater streams and rivers and larger streams perform important ecological roles in riverine systems. Examples of the ecological roles of headwater streams include: Storing and transporting water, retaining and transforming nutrients and contaminants, collecting and transforming organic matter that supports the production of aquatic organisms such as invertebrates and fish, influencing water temperature, and providing habitats for various species of fish, amphibians, and invertebrates (Meyer and Wallace 2001). Large rivers and their floodplains support diverse biological communities through the complex and variable habitats that are developed and maintained by these systems (Sparks 1995), as well as populations of those species. Large rivers and their floodplains also provide biological linkages such as migration corridors, as well as conduits for the movement of water, sediment, nutrients, and contaminants (Sparks 1995).

From a functional perspective, streams, including headwater streams and higher order streams, perform the following categories of functions: System dynamics, hydrologic balance, sediment processes, and character, biological support, and chemical processes and pathways (Fischenich 2006). System dynamics includes stream evolution processes, succession of riparian plant communities, and energy management. Hydrologic balance involves surface water storage and surface/subsurface water exchange processes, and hydrodynamics. Sediment processes and character include sediment continuity and the quality and quality of river and stream sediments. Biological support involves biological communities and processes, providing life cycle habitats, and trophic structures and processes. Chemical processes and pathways include water and soil quality as well as nutrient cycling (*e.g.,* nitrogen). These basic stream functions were identified by a committee of scientists, engineers, and practitioners (Fischenich 2006), and apply to streams of all sizes. Headwater streams are linked to larger streams located in downstream tributaries through the transport of water, sediment, nutrients, and organic matter (Gomi et al. 2002).

How these various stream functions manifest themselves in particular stream reaches within the tributary network of a watershed can vary. In headwater streams, hydrologic, biological, and geomorphic processes are strongly influenced by interactions between surrounding lands and the stream channels (Gomi et al. 2002). Much of the water in headwater streams comes from lands adjacent to those streams, whereas most of the water flowing through downstream tributaries (*i.e.,* higher order streams) comes from headwater streams and other lower order streams (NRC 2002). Rivers and larger streams downstream of the headwaters are affected by the water flows from headwater streams, as well as water flows from floodplains and riparian areas, and usually have larger water storage capacities than headwater streams (Gomi et al. 2002). In rivers and larger streams, flooding usually occurs more gradually and for longer durations compared with the more abrupt flooding of headwater streams (NRC 2002). Stream channels that have substantial floodplains perform hydrologic transport and storage functions differently than stream channels that little or no floodplain (Beechie et al. 2013). Headwater streams and rivers and streams downstream of headwaters differ in ecosystem productivity, with gross primary production and macroinvertebrate production increasing significantly as stream and river size increases (Finlay 2011). The greater ecosystem productivity in rivers and larger streams compared to headwater streams may also result in these rivers and larger streams having a higher capacity to support other ecosystems functions, including habitat for larger predators and nutrient uptake (Finlay 2011).

Denitrification in streams is dependent on the area of stream bed where benthic sediment can interact with the nitrogen-laden water flowing in the stream channel (Alexander et al. 2000). Nitrogen loss in streams decreases as the size of the stream channel increases (Alexander et al. 2000), because water depth is usually greater in larger streams and there is less interaction between the water column and the stream sediments where the denitrification processes occur. In forested areas, headwater streams areas receive detritus (*e.g.,* leaf litter, stems) from the surrounding forest and store, transform, and transport the organic matter and nutrients to downstream stream reaches (Meyer and Wallace and 2001) where they are used by organisms that live in those downstream waters. Organic matter transport and storage processes are affected by the structure of stream channels and the interactions between streams and their floodplains or riparian areas (Beechie et al. 2013). Organic matter is an important resource for streams because of its role in stream productivity.

In terms of biological processes, the community structure of aquatic organisms and the structure of food webs of larger, downstream tributaries are different from headwater streams, and they are subject to disturbance regimes that are somewhat dissimilar from those experienced by headwater streams (Gomi et al. 2002). In-stream biological processes are dependent on a number of factors, such as stream flow,

the condition of the riparian area, and the diversity of in-stream habitats (Beechie et al. 2013). Larger streams also provide larger conduits for the movement of aquatic organisms and the transportation of sediment and nutrients (BenDor et al. 2009) through the stream network. In-stream habitat structure also varies from the headwaters to the mouth of the tributary system, from the step-pool stream morphology found in many headwater streams to braided, straight, or meandering lowland river channels (Beechie et al. 2013).

Considering the similarities and differences in functions provided by rivers and streams in various locations throughout the tributary network in a watershed, the relative importance of the various stream orders in a tributary network is subjective. Commenters are invited to provide information on whether there are bases in statute, regulation, science, or policy on placing greater importance or value on headwater streams to support more stringent quantitative limits on losses of stream bed authorized by NWP activities, or whether consistent quantitative limits should apply to all non-tidal waters and wetlands. An additional consideration that factors into a district engineer's decision for a proposed NWP activity is the degree of stream functions being provided by a particular stream reach, which can vary from a fairly high level of functioning to degraded. The degree of functionality is strongly dependent on land uses in the watershed (*e.g.,* Allan 2004) and other factors. For example, as land use intensity in a watershed increases, the ability of streams to remove nitrogen from the water column decreases (Mulholland et al. 2008). The PCN review process takes these factors, and other factors, into account when district engineers decide whether proposed activities qualify for NWP authorization. The various factors considered by district engineers are listed in Section D of the NWPs, in the second paragraph.

The proposed changes to NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 are intended to provide equitable numeric limits for all non-tidal waters and wetlands, in a manner consistent with current laws, regulations, and policies, including the 404(b)(1) Guidelines. The PCN review process would continue to be used to ensure that activities authorized by NWPs would continue to satisfy the requirement that they result in no more than minimal individual and cumulative adverse environmental effects.

We are seeking comment on whether there is a legal, regulatory, policy, or scientific basis for imposing a more restrictive limit on losses of stream bed versus losses of non-tidal wetlands and other non-tidal waters. In addition, we are soliciting comment on whether there is a scientific, policy, regulatory, or legal basis for a more restrictive limit on losses of headwater stream bed versus losses of stream bed for the larger streams that are further down in the stream network of a watershed.

*(4) Further the objective of the NWP Program in authorizing activities that have no more than minimal individual and cumulative adverse environmental effects.* A fourth reason for these proposed modifications is that they would further streamline the NWP authorization process and advance the objective of the NWP Program, which is to authorize, with little, if any, delay or paperwork certain activities having minimal impacts (see 33 CFR 330.1(b)). The proposed removal of the 300 linear foot limit for losses of stream bed from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 would provide NWP authorization for losses of stream bed and other non-tidal waters that are less than ½-acre, rather than requiring individual permits for losses of stream bed that are greater than 300 linear feet in length but less than ½-acre in size. Other tools, such as the ½-acre limit and the PCN process, would be used to ensure that these NWPs only authorize activities that result in no more than minimal individual and cumulative adverse environmental effects. For NWPs 21, 29, 39, 40, 42, 43, 44, 50, and 52, pre-construction notification is required for all authorized activities. For NWP 51, pre-construction notification is required for losses of greater than ⅒-acre of waters of the United States.

Removing the 300 linear foot limit and the waiver provision for losses of stream bed would make NWP authorization available for proposed activities that will result in the loss of ½-acre or less of stream bed and other non-tidal waters, as long as the district engineer determines after reviewing the PCN that the proposed activity would result in no more than minimal individual and cumulative adverse environmental effects. It could reduce the number of standard individual permits currently required to authorize losses of stream bed greater than 300 linear feet that also result in the loss of less than ½-acre of stream bed, in areas where regional general permits are not available to authorize such activities.

In addition, we are also proposing to remove the waiver provision from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. Removal of the waiver provision may reduce costs to permittees, the Corps, and the federal and state agencies that participate in the agency coordination process in paragraph (d) of the ''Pre-Construction Notification'' general condition. In the 2017 versions of NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, district engineers can waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed, if after reviewing the PCN and conducting agency coordination under paragraph (d) of NWP general condition 32, the district engineer determines the individual and cumulative adverse environmental effects of the proposed activity will be no more than minimal. Under the 2020 final rule defining ''waters of the United States,'' intermittent streams are still subject to Clean Water Act jurisdiction, so removal of the 300 linear foot limit for losses of intermittent stream bed and the waiver provision can provide cost savings to both permittes and the Corps. For permittees, removal of the waiver provision would reduce costs due to delays in receiving an NWP verification while the district engineer conducts agency coordination to determine if a waiver should be issued. For the Corps, administrative costs would be reduced because the Corps would no longer have to send copies of PCNs to the federal and state agencies that participate in the agency coordination process. The administrative costs for federal and state agencies would be reduced because they would not have to review PCNs that include requests for waiver of the 300 linear foot limit for losses of intermittent and ephemeral stream bed and write comments to send to the district engineer.

*Request for comment.* We welcome comments and suggestions on the proposal to remove the 300 linear foot limit and to rely on the ½-acre limit, the PCN process, the proposed modification of the ''mitigation'' general condition, and other tools to comply with the statutory and regulatory requirement that activities authorized by NWP must result in no more than minimal individual and cumulative adverse environmental effects. We are also inviting comment on whether there are situations where quantifying losses of stream bed in linear feet more accurately represents the actual amount of stream bed filled or excavated as a result of an NWP activity and would result in more defensible determinations on whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects. Such comments should include information that helps illustrate or explain how and under what circumstance using a linear foot

measure to quantify losses of stream bed is more accurate than using square feet or acres to quantify the amount of authorized impacts.

We are also soliciting comment on the legal, regulatory, policy, or scientific bases for imposing different numeric limits on stream bed losses versus losses of non-tidal wetlands or other types of non-tidal waters. For example, commenters are invited to consider the regulatory approach in the current 404(b)(1) Guidelines, as well as other regulations and policies for implementing Section 404 of the Clean Water Act, to provide their views on whether there are legal, regulatory, and/or policy justifications for a more restrictive numeric limit for losses of stream bed compared with other types of waters of the United States. Commenters are encouraged to provide supporting information in the form of citations to laws, regulations, and policies, and the scientific literature, because substantive information would be valuable in assisting the Corps in preparing the final NWPs.

We are also requesting comment on an alternative hybrid approach to establishing consistent quantitative limits for losses of stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. Under this hybrid approach, losses of stream bed would continue to be quantified in linear feet as long as the activities authorized by these NWPs would result only in the loss of stream bed. There would be linear foot limits for losses of stream bed by stream order identified using the Stahler (1957) method, and the mean stream widths identified by Downing et al. (2012). If a proposed NWP activity would result in the loss of stream bed plus other types of waters of the United States, such as non-tidal wetlands, the losses of waters of the United States would be quantified in acres and subjected to the ½-acre limit. The following table presents the various limits for different stream orders and for other types of non-tidal waters of the United States.

| Aquatic resource category | Mean stream width (Downing et al. 2012) (feet) | Quantitative limit (includes ½-acre equivalent for losses of stream bed) |
|---|---|---|
| Non-tidal wetlands | n/a | ½-acre. |
| Other non-tidal waters (*e.g.,* lakes, ponds, ditches) | n/a | ½-acre. |
| 1st order streams | 6.3 | 3,470 linear feet. |
| 2nd order streams | 8.6 | 2,540 linear feet. |
| 3rd order streams | 24.8 | 880 linear feet. |
| 4th order streams | 90.8 | 240 linear feet. |
| 5th order streams | 240 | 90 linear feet. |
| 6th order streams | 641 | 35 linear feet. |
| A proposed NWP activity that would impact both stream bed and another aquatic resource category (*e.g.,* non-tidal wetlands). | n/a | ½-acre. |

A critical component of effectively applying this hybrid approach is identifying the correct stream order for the stream segment that is proposed to be filled or excavated as a result of the proposed NWP activity. The scale of the map used identify stream segments influences the stream order assigned to those stream segments (Gomi et al. 2002). The addition or exclusion of a small stream segment can substantially alter the stream orders identified for downstream stream segments (Leopold 1994), so complete and accurate mapping would be needed to implement this hybrid approach for quantitative limits for these NWPs. Topographic maps drawn at 1:100,000 or 1:500,000 scales exclude more headwater and other smaller order streams than topographic maps that are drawn at a 1:24,000 scale (Meyer and Wallace 2001, Leopold 1994). Topographic maps drawn at 1:24,000 scale do not show a substantial proportion of perennial headwater streams (Leopold 1994) in the tributary network. In a study of stream mapping in the southeastern United States, only 14 to 20 percent of the stream network was mapped on 1:24,000 scale topographic maps (Hansen 2001). A study in Massachusetts showed that 1:25,000 metric scale topographic maps exclude over 27 percent of stream miles in a watershed (Brooks and Colburn 2011). Brooks and Coburn (2011) concluded that are significant and complex stream networks exist upslope of most mapped stream origins.

In this hybrid approach, the linear foot limits would only apply to losses of stream bed. If a proposed NWP activity would result in a combination of losses of stream bed and other types of waters of the United States, such as non-tidal wetlands, then the ½-acre limit would apply to the combined losses of stream bed and non-tidal wetlands, to keep those losses below ½-acre.The Corps invites public comment on this hybrid approach, and any suggestions on how it could be improved for clarity and consistent application.

*B. Discussion of Additional Proposed Modifications to Existing Nationwide Permits*

NWP 3. *Maintenance.* We are proposing to modify paragraph (a) of this NWP to authorize the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require DA authorization at the time it was constructed. This proposed modification is intended to provide consistency with another NWP that authorizes maintenance activities, NWP 31 (Maintenance of Existing Flood Control Facilities). Nationwide permit 31 authorizes maintenance of existing flood control facilities that were constructed at a time when DA authorization was not required for that construction.

Prior versions of NWP 3 that were issued in 1982 (47 FR 31832) and 1986 (51 FR 41255) authorized the maintenance of any currently serviceable structure or fill that was constructed prior to the requirement for authorization. When NWP 3 was reissued in 1991 (56 FR 59141), this provision was removed without explanation. We are proposing to reinstate this provision in NWP 3 to authorize maintenance of these structures and fills, as long as they are currently serviceable. If they are not currently serviceable, then they would require a different form of DA authorization to reconstruct those structures and fills.

Under the current NWP 3, the repair, rehabilitation, or replacement of any currently serviceable structure or fill that was constructed before the permit requirements under section 404 of the Clean Water Act and/or section 10 of the

Rivers and Harbors Act of 1899 were established requires an individual permit unless the repair, rehabilitation, or replacement activity qualifies for authorization under another NWP or a regional general permit. These structures and fills have been in place for many years, and the other terms of paragraph (a) of this NWP will help ensure that the adverse environmental effects of these repair, rehabilitation, or replacement activities will be no more than minimal. This includes the requirement that the structures or fills be currently serviceable, and that only minor deviations in the configuration of the structure or fill are authorized.

In addition, we are proposing to modify the ''Note'' in NWP 3 to replace the phrase ''previously authorized'' with ''currently serviceable'' to be consistent with our proposal to modify paragraph (a) to authorize the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require DA authorization at the time it was constructed. The currently serviceable structure or fill could have been previously authorized, authorized by 33 CFR 330.3, or did not require Corps authorization at the time it was constructed.

We are also proposing to modify paragraph (a) of this NWP to authorize the placement of new or additional riprap to protect the structure, provided the placement of riprap is the minimum necessary to protect the structure or to ensure the safety of the structure. This provision was last in the 2007 version of NWP 3 (see 72 FR 11181). It was removed from the 2012 NWP 3 (see 84 FR 1984). The placement of riprap to protect the structure or fill, or to comply with current construction codes or safety standards, could be authorized under the current text of NWP 3 as a minor deviation, but we are proposing to provide clarity and regulatory certainty to prospective permittees and other interested parties by adding an explicit provision to paragraph (a). We are proposing to restore, with minor changes to better fit the text into paragraph (a), the provision concerning the placement of riprap to protect the structure or ensure safety that was in the 2007 NWP 3. Adding small amounts of riprap to protect the existing structure should, in most circumstances result in no more than minimal individual and cumulative adverse environmental effects because that riprap will protect the structure from erosive forces that can damage the structure and move pieces of the structure into the waterway where it can adversely affect the waterbody. Adding small amounts of riprap will help improve the safety of the structure, an important consideration under the Corps' public interest review factors at 33 CFR 320.4.

NWP 12. *Oil and Natural Gas Pipeline Activities.* We are proposing to modify this NWP to limit it to oil and natural gas pipeline activities and to issue two new NWPs to authorize electric utility line and telecommunications activities (proposed new NWP C) and other utility line activities that convey other substances, such as potable water, sewage, wastewater, stormwater, brine, or industrial products that are not petrochemicals (proposed new NWP D). Proposed NWPs C and D are discussed further below. We are also proposing to reduce the number of thresholds that trigger the need for a PCN from seven to two. Pre-construction notification will be required for all utility line activities that require authorization under section 10 of the Rivers and Harbors Act of 1899. Pre-construction notification will continue to be required for utility line activities that result in the loss of greater than 1/10-acre of waters of the United States.

We are proposing to modify NWP 12 to authorize only oil and natural gas pipeline activities. We are also proposing to issue two separate and new NWPs to authorize electric utility line and telecommunications activities (proposed new NWP C) and utility lines that convey substances other than oil or natural gas or electricity (proposed new NWP D). The intent of this proposal is to tailor these NWPs to more effectively address potential differences in how the different types of utility lines are constructed, maintained, and removed, and to potentially add industry-specific standards or best management practices that would be appropriate to add as national terms to the applicable NWP to help ensure that the NWP authorizes only those activities that will result in no more than minimal individual and cumulative adverse environmental effects. The ''terms'' of an NWP, as defined at 33 CFR 330.2(h), are ''the limitations and provisions included in the description of the NWP itself.''

The majority of NWP 12 activities are for oil and natural gas pipeline activities. We examined a sample of NWP 12 verifications issued between March 19, 2017, and March 18, 2019, and found that 58 percent of the authorized activities were for oil and gas pipelines. Electric utility line and telecommunications activities accounted for 12 percent of the verified NWP 12 activities during that time period. Other utility line activities, such as water lines, sewer lines, pipes for conveying stormwater, wastewater, and brine, and other types of utility lines comprises the remaining 30 percent of the NWP 12 verifications issued.

Oil and natural gas pipelines can be constructed in-ground or above ground. Oil and natural gas pipelines can vary substantially in length and diameter. The main oil pipelines used to transport crude oil to different regions of the country are typically 8 to 24 inches in diameter, although the largest oil pipeline in the United States is the Trans-Alaska Pipeline System, with a 48-inch diameter.[2] Oil gathering lines can be smaller, usually ranging from 2 to 8 inches in diameter.

Oil and natural gas pipelines, especially interstate transmission lines, can extend for long distances, with numerous crossings of waters of the United States that may be authorized by NWP 12. Oil and natural gas pipelines can run across states, or can be smaller local lines. In the United States, there are approximately 72,000 miles of crude oil pipelines.[3] For natural gas pipelines, there are over 300,000 miles of interstate and intrastate transmission pipelines in the United States, along with 2,100,000 miles of natural gas distribution pipelines.[4]

Natural gas pipelines can range in size from 6 to 48 inches[5] in diameter, with the size being dependent on their intended function. For example, the main transmission pipes for transporting natural gas are typically 16 to 48 inches in diameter, and the pipelines that branch off of the main transmission pipeline are usually 6 and 16 inches in diameter. The majority of interstate natural gas pipelines are between 24 and 36 inches in diameter. Rights of way for natural gas pipelines are generally up to 60 feet in width.[6]

The Corps is proposing to remove electric utility lines and telecommunication lines, as well as utility lines that convey water and other substances, from NWP 12 because of the differences between oil and natural gas pipelines, electric and telecommunication lines, and utility lines that carry water and other substances. Some of these differences are described in the following paragraphs.

Electric utility lines and telecommunication lines vary in size and length, and how they are

[2] *https://pipeline101.org/How-Do-Pipelines-Work* (accessed March 31, 2020).

[3] Ibid.

[4] *https://pipeline101.com/Why-Do-We-Need-Pipelines/Natural-Gas-Pipelines* (accessed April 1, 2020).

[5] *http://naturalgas.org/naturalgas/transport/* (accessed March 31, 2020).

[6] *https://www.nwnatural.com/business/safety/pipelinerightofway* (accessed March 31, 2020).

constructed. Electric utility lines and telecommunication lines can be overhead transmission lines supported by towers or poles, or they can be buried underground. The footprints of the structures that support overhead electric lines, and the impacts of installing those structures, are fairly small, with the ground disturbance generally limited to the immediate vicinity of the structure, Overhead transmission line towers have footings that are usually 5 to 8 feet wide[7] and embedded into the soil surface, and their relatively small size results in small impacts to wetlands and types of other waters. The footings are generally several feet in size. The wooden poles used for overhead electric transmission lines can be up to 27 inches in diameter,[8] and these poles are usually inserted into the soil surface by digging a hole, with some soil disturbance in the vicinity of the installed pole. Electric transmission cables can also be installed in the ground through trenching and backfilling, and through horizontal directional drilling. Electric transmission lines have relatively smaller diameters compared with those of oil or natural gas pipelines and other pipelines. For example, a 500-kV underground electric cable is usually had a diameter of 5.5 to 6 inches.[9] The installation of underground electric lines can more adverse environmental impacts than the construction of overhead electric transmission lines.[10]

In the United States, there are more than 360,000 miles of transmission lines (U.S. Department of Energy 2015, citing the North American Electric Reliability Corporation Electricity Supply and Demand Database at *http://www.nerc.com/page.php?cid=4|38*). From these transmission lines, other electric lines are constructed to transmit the electrical energy to users, such as commercial building and residences.

Utility lines for conveying potable water, water, sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals, are often limited to specific areas, where they serve cities, towns, and other communities, residential developments, commercial developments, These utility lines can be constructed below ground, by trenching and backfilling or by horizontal directional drilling. They can also be constructed above ground in some circumstances. Utility lines for transporting water, sewage, and other substances vary in diameter. Main pipelines for transporting potable water are often 24 inches in diameter, although some of these water lines can be larger (NRC 2006). Water lines used for both transmission and distribution are usually 16 to 20 inches in diameter (NRC 2006). Distribution water lines are typically 4 to 12 inches in diameter (NRC 2006). Sanitary sewer pipelines can range in size from 3 inches to a two feet in diameter.[11] The size of the trench for installing underground water, sewer, and other utility pipelines, as well as the disturbed areas next to the trench, likely varies with the size of the pipeline.

As suggested above, there are likely generally to be differences in the relative amounts of ground disturbance and other related activities, including impacts to wetlands and other waters, for oil and gas pipelines, electric transmission lines, and pipelines carrying water and other substances that suggest that there is potential for adding different terms to each of these three proposed NWPs to include national standards and best management practices to help ensure that each of these NWPs authorizes only those activities that have no more than minimal adverse environmental effects.

For the proposed modification of NWP 12, we are soliciting comments and suggestions for national standards or best management practices for oil and natural gas pipeline activities that would be appropriate to add to this NWP, and within the Corps' legal authority to enforce as terms and conditions of an NWP authorization. Adding such national standards or best management practices may also address concerns expressed regarding Corps regional conditions added to the NWPs by division engineers that are discussed above in the preamble to this proposed rule. To summarize, a number of commenters have expressed concern about potential inconsistency in Corps regional conditions for the NWPs, and adding national standards and best management practices to the text of proposed NWP 12 has potential to provide additional environmental protection and promote consistency, regulatory certainty, transparency and predictability.

For the proposed modifications of NWP 12 and the proposed new NWPs C and D, we are proposing to retain the basic structure of the 2017 NWP 12, since many of the activities authorized by the 2017 NWP 12 could apply to any utility line, regardless of what substances it conveys. That basic structure would provide consistency and be familiar to potential users of the new NWP 12 and new NWPs C and D.

We are proposing to change the title of this NWP to ''Oil or Natural Gas Pipeline Activities'' to reflect the type of substances that can be conveyed by these utility lines. The title of this NWP refers to ''activities'' because the Corps does not regulate oil or natural gas pipelines per se. The Corps only regulates specific activities associated with oil or natural gas pipelines that are regulated under Section 404 of the Clean Water Act (*i.e.,* discharges of dredged or fill material into waters of the United States) and Section 10 of the Rivers and Harbors Act of 1899 (*i.e.,* structures or work in navigable waters of the United States).

We are proposing to modify the second paragraph of this NWP to replace the phrase ''utility lines'' with ''oil or natural gas pipelines'' to address the increased specificity of this NWP to oil or natural gas pipelines. We are also proposing to replace the definition of ''utility line'' with ''oil or natural gas pipeline.'' The proposed definition of ''oil or natural gas pipeline'' reads as follows: ''An 'oil or natural gas pipeline' is defined as any pipe or pipeline for the transportation of any form of oil or natural gas, including petrochemical products, for any purpose.'' Including petrochemical products in the proposed definition is intended to clarify that this NWP covers utility lines that convey chemicals isolated or derived from petroleum or natural gas.

We are proposing to retain the paragraph covering substations constructed in non-tidal waters of the United States because oil or natural gas substations are often necessary for an oil or natural gas pipeline. We are proposing to modify the fifth paragraph of this NWP to authorize foundations for above-ground oil or natural gas pipelines into all waters of the United States. In this paragraph, we are also proposing to remove references to ''towers'' since towers are generally constructed for overhead electric lines. We are proposing to retain the paragraph on access roads, since access roads may be necessary to construct or maintain oil or natural gas pipelines. In paragraph six, we are proposing to change the last sentence to state that oil or natural gas pipelines routed in, over,

[7] *https://www.xcelenergy.com/staticfiles/xe/Corporate/Corporate%20PDFs/OverheadVsUnderground_FactSheet.pdf* (accessed April 1, 2020).

[8] *http://www.ldm.com/docs/dimensiontables_df_sp.pdf* (accessed April 1, 2020).

[9] *https://www.datcllc.com/learn/underground-transmission/* (accessed April 1, 2020).

[10] Ibid and *https://www.xcelenergy.com/staticfiles/xe/Corporate/Corporate%20PDFs/OverheadVsUnderground_FactSheet.pdf* (accessed April 1, 2020).

[11] *https://www.engineeringtoolbox.com/sewer-pipes-capacity-d_478.html* (accessed July 14, 2020).

or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

We are proposing to retain the paragraph that authorizes, to the extent that DA authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. Horizontal directional drilling may be used to construct or replace oil or natural gas pipelines, and if inadvertent returns occur during these activities, this NWP can be used to authorize remediation activities so that they can occur in a timely manner to minimize adverse environmental effects that might be caused by these inadvertent returns. In addition, we are proposing to retain the paragraph that authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the oil or natural gas pipeline activity.

We are proposing to modify this NWP to reduce the number of PCN thresholds, to simplify the notification requirements of this NWP and reduce burdens on the regulated public. The proposed changes to the PCN requirements would retain those PCN thresholds that involve regulated activities that have a more substantive potential result in more than minimal adverse environmental effects and should be reviewed by the district engineer to determine whether those proposed activities qualify for NWP authorization or discretionary authority exercised to require an individual permit. In the paragraphs below, we summarize the history of the PCN requirements for NWP 12. We also discuss our rationales for removing specific PCN thresholds to simplify the PCN requirements for this NWP, and for proposed new NWPs C and D.

Nationwide permit 12 was first issued in 1977 (42 FR 37146, at 33 CFR 323.4–3(a)(1)). The original NWP 12 authorized discharges of dredged or fill material ''placed as backfilling or bedding for utility line crossings provided there is no change in pre-construction bottom contours.'' The 1977 NWP 12 also included a statement that a utility line in navigable waters of the United States would require separate authorization under Section 10 of the Rivers and Harbors Act of 1899. This NWP did not have any PCN requirements. The versions of NWP 12 issued in 1982 (47 FR 31833) and 1986 (51 FR 41255) authorized similar activities and did not have any PCN requirements. The 1991 NWP 12 (56 FR 59141) did not have any PCN requirements and the NWP was reissued with modifications to authorize associated outfall and intake structures. The 1991 NWP 12 excluded activities that drain a water of the United States, such as drainage tile. It also imposed requirements for temporary sidecasting of excavated material into waters of the United States, and for backfilling trenches.

When NWP 12 was reissued in 1996 (61 FR 65874), it was modified to authorize utility lines that required section 10 authorization and four PCN thresholds were added to that NWP. Pre-construction notification was required if the proposed NWP activity met any of these four criteria: (1) Mechanized land-clearing in a forested wetland, (2) a section 10 permit is required for the utility line, (3) the utility line in waters of the United States exceeds 500 feet, or, (4) the utility line is placed within a jurisdictional area (*i.e.,* a water of the United States), and it runs parallel to a streambed that is within that jurisdictional area.

The first PCN threshold was added in 1996 to provide district engineers an opportunity to review utility line activities that involve mechanized land-clearing of forested wetlands to determine whether those activities will result in no more than minimal adverse environmental effects (61 FR 65884) The second PCN threshold was added to ensure the navigable capacity of navigable waters of the United States (*i.e.,* section 10 waters) will not be adversely affected by utility line activities that require section 10 authorization. The third and fourth PCN thresholds were also added to provide the district engineer to review proposed utility lines placed parallel to a stream bed or utility lines in waters of United States that exceed 500 linear feet (61 FR 65884).

In 2000, as part of its effort to replace NWP 26 with new and modified NWPs (see 65 FR 12818), NWP 12 was reissued with modifications to authorize discharges of dredged or fill material into waters of the United States to construct utility line substations, foundations for overhead utility line towers, poles, and anchors, and access roads to construct and maintain utility lines (65 FR 12887). These additional activities may have been authorized by NWP 26, and three PCN thresholds were added to the 2000 NWP 12. Those three new PCN thresholds were: (1) Discharges associated with the construction of utility line substations that result in the loss of greater than 1/10-acre of waters of the United States; (2) permanent access roads constructed above grade in waters of the United States for a distance of more than 500 feet; and (3) permanent access roads constructed in waters of the United States with impervious materials. These additional PCN thresholds were added to give district engineers the opportunity to review the proposed activities and determine whether they qualify for NWP authorization (65 FR 12845). These PCN thresholds were retained when NWP 12 was reissued in 2002 (67 FR 2080).

In the 2007 NWPs, the provision requiring the project proponent to submit a PCN if the proposed NWP 12 activity involves discharges associated with the construction of utility line substations that result in the loss of greater than 1/10-acre of waters of the United States was changed. The modified PCN threshold applies to all discharges of dredged or fill material into waters of the United States authorized by NWP 12 that result in the loss of greater than 1/10-acre of waters of the United States (see 72 FR 11183). These PCN thresholds were retained when NWP 12 was reissued in 2012 (77 FR 10272) and 2017 (82 FR 1986).

To simplify the PCN requirements for this NWP and focus the PCN requirements on activities that have a substantive potential to result in more than minimal adverse environmental effects, we are proposing to remove the following PCN thresholds: (1) Utility line activities involving mechanized land clearing in a forested wetland for the utility line right-of-way; (2) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (3) the utility line is placed within a jurisdictional area (*i.e.,* water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (4) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; and (5) permanent access roads are constructed in waters of the United States with impervious materials. The reduction of the number of PCN thresholds in NWP 12 will reduce burdens on the regulated public, simplify the NWP, and eliminate redundancy. Since these PCN thresholds were adopted, there have been requirements added to NWP 12 that address the adverse environmental impacts that the PCN thresholds were trying to address, and those added requirements apply to all NWP 12 activities, including those activities that do not require PCNs. Those

requirements are discussed below, including the reasons why removing the PCN thresholds will reduce redundancy with the requirements of NWP 12 that minimize adverse environmental effects of authorized activities.

In the paragraphs below, we discuss each of the five PCN thresholds and why we are proposing to remove that PCN threshold to simplify the PCN requirements and reduce redundancy. In the paragraphs that follow, we use the term ''utility line'' because we are proposing the same PCN thresholds for NWPs 12, C, and D.

(i) *The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way.* This PCN threshold was added to NWP 12 in 1996. We are proposing to remove this PCN threshold because mechanized landclearing of forested wetlands in the utility line right of way usually results in temporary impacts to the wetlands and other waters as the trees are removed to clear a right-of-way for the utility line. Even though the trees are removed, the disturbed wetland will develop a new plant community, and because of the maintenance that is normally required for utility line rights-of-way to protect the utility line, the plant community will likely consist primarily of herbaceous plants and shrubs. If mechanized landclearing of forested wetlands in the utility line right-of-way results in the loss of greater than 1/10 acre of wetland, then the proposed activity would require a PCN. There is some soil disturbance during mechanized landclearing activities, but under the requirements of NWP 12 the disturbed soils must be restored to pre-construction elevations (see the ninth paragraph of the 2017 NWP 12). For mechanized landclearing, a section 404 permit is required if that soil disturbance meets the definition of ''discharge of dredged material'' at under 33 CFR 323.2(d).

Despite the removal of the trees, under the current requirements for NWP 12, the affected area should remain a wetland, even though the plant community will be managed so that it does not damage the utility line or adversely affect its operation and use. The cleared forested wetland is likely to develop into an herbaceous wetland or a scrub-shrub wetland, depending on the maintenance requirements for the utility line. Even with such a change in plant community structure, the affected wetlands will continue to provide habitat functions, since the habitat functions of forests differ somewhat from the habitat functions of herbaceous or scrub-shrub wetlands. Despite the change in general plant community structure, the wetland will still perform hydrologic functions (*e.g.,* water storage) and biogeochemical cycling functions (*e.g.,* nitrogen cycling).

In 2007 (see 72 FR 11183), the text of NWP 12 was modified by adding a paragraph that authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity. The NWP also requires temporary fills to be removed in their entirety after construction of the utility line, and the affected areas returned to pre-construction elevations. NWP 12 also currently requires the areas affected by temporary fills to be revegetated, as appropriate. This provision applies to all NWP 12 activities, including those activities that do not require PCNs. This provision was retained in the 2012 NWP 12 (77 FR 10271) and the 2017 NWP 12 (82 FR 1985). The requirement that temporary fills, including temporary fills that are created as a result of mechanized land clearing of a forested wetland in the utility line right of way, must be restored to pre-construction elevations helps ensure that the wetlands in the utility line right-of-way remain wetlands, even if a different category of wetland. Those wetlands will continue to provide hydrologic functions, biogeochemical cycling functions, and habitat functions. For those NWP 12 activities that require PCNs under any of the other PCN thresholds, district engineers can require mitigation for the change in wetland functions that may occur as a result of changing the wetland type from forested to herbaceous or scrub-shrub wetland (see paragraph (i) of the ''mitigation'' general condition (GC 23)).

(ii) *The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet.* This PCN threshold was also added to NWP 12 in 1996 and applies to primarily to underground utility lines (*e.g.,* utility lines installed by trenching and backfilling). This PCN threshold could apply to above-ground utility lines, if the installation of those above-ground utility lines involves discharges of dredged or fill material into waters of the United States. Some above-ground utility lines are constructed with footings that support the utility line a short distance above ground, but not to a height that would be considered an overhead utility line. Above-ground utility lines that involve only structures, with no associated discharge of dredged or fill material into waters of the United States, do not require DA authorization unless they trigger a DA permit requirement under Section 10 of the Rivers and Harbors Act of 1899. If section 10 authorization is required, then a PCN is required for the proposed activity under the first the PCN thresholds we are proposing to retain under proposed NWPs 12, C, and D.

For underground utility lines that are installed by trenching and backfilling, there are a couple of provisions in NWP 12 that will ensure that these activities will result in only temporary impacts to jurisdictional waters and wetlands. The first requirement is the third paragraph of the 2017 NWP 12:

> Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (*e.g.,* backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

This provision requires the restoration of the affected jurisdictional waters and wetland, and prohibits below-ground utility line installations that would drain the wetland or other type of water. Therefore, this requirement helps to ensure that no permanent wetland losses occur as a result of these activities. Various iterations of this provision have been in NWP 12 since 1991.

For underground utility lines that are installed by horizontal directional drilling, there is no ground disturbance except at the entry and exit points for the drilling equipment. If the entry and/or exit points are in jurisdictional waters and wetlands, and the creation of the entry and exit points during construction result in discharges of dredged or fill material into waters of the United States, then a section 404 permit is required. The rest of the utility line will be below any wetlands or other waters that are on the surface, but the installation of the below-ground utility line itself does not trigger a requirement for a section 404 permit because it is below the surface and does not involve a discharge of dredged or fill material. The entry and exit points for the horizontal directional drilled utility line would have to be restored after construction is completed because of the other provisions of NWP 12. Under this PCN threshold, a utility line that is installed by horizontal directional drilling under jurisdictional waters and wetlands for a length of more than 500

linear feet would require a PCN, even though the construction of that utility line does not trigger a permit requirement under Section 404 of the Clean Water Act. This potential scenario is one reason why we are proposing to remove this PCN threshold, especially as horizontal directional drilling is increasing in use to avoid or minimize impacts to aquatic resources and other resources. We are also proposing to remove this PCN threshold for clarity, because there can be varying interpretations of whether a utility line constructed below wetlands or other types of waters via horizontal directional drilling is in waters of the United States.

The other provision of NWP 12 that helps ensure that wetland impacts caused by underground utility lines are temporary, and make this PCN threshold unnecessary is the ninth paragraph of the 2017 NWP 12, which we are proposing to retain in proposed NWPs 12, C, and D:

> This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This provision was added to NWP 12 in 2007, after the PCN threshold was added in 1996. The NWP requires the affected wetlands and waters be restored by removing temporary fills in their entirety and returned to pre-construction elevations. Revegetation of the affected area may also occur, or the affected area can be allowed to revegetate through natural processes, such as plants that germinate and grow from the seed bank present in the soil and plant propagules colonizing the affected area from nearby plant communities.

We are proposing to remove this PCN threshold because of the requirements in the NWP to ensure that these impacts are temporary. We are also proposing to remove this provision to take away any ambiguity that may exist when applying this PCN threshold to utility lines constructed by horizontal directional drilling. We believe the other terms and conditions of this NWP will ensure that utility lines, excluding overhead utility lines, in waters of the United States for a distance of more than 500 linear feet have no more than minimal individual and cumulative adverse environmental effects.

(iii) *The utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area.* We are proposing to remove this PCN threshold for reasons similar to the reasons provided above, that is, the requirements of the third and ninth paragraphs of 2017 NWP 12 to restore these temporary impacts. The third paragraph addresses the requirements for trenching and backfilling underground utility lines to ensure those impacts are temporary and do not result in a loss of waters of the United States. The ninth paragraph also addresses the requirements for restoring temporary fills, so that those fills do not result in losses of jurisdictional waters and wetlands.

There may be utility lines constructed in stream beds, where the stream bed is excavated to create a trench, and after the utility line is placed in the trench, the trench is backfilled. This is a temporary impact, because the stream bed material that is excavated from the stream bed to create the trench is required by the NWP to be used for backfilling the trench. After the trench is backfilled, the stream flows will continue to transport sediment through normal stream fluvial geomorphic processes. Stream beds are dynamic and are constantly shifting, and the flowing water transports sediments of varying sizes downstream. Sediment transport may occur as bed load or suspended load (Leopold 1994). Bed load is sediment (usually larger sediment such as gravel or cobbles) that is transported downstream along the stream bed, and suspended load is sediment (usually fine sediment such as silt) that is transported in the water column.

Likewise, utility lines constructed parallel to a stream bed that are in jurisdictional waters are subject to the requirements in the third and ninth paragraphs of NWP 12 to ensure that the impacts of constructing, maintaining, removing, or replacing those utility lines are temporary and no more than minimal.

Since this PCN threshold is addressed by the requirements to ensure that the impacts of utility line construction, maintenance, removal, or replacement in waters of the United States are temporary, we are proposing to remove this PCN threshold. The requirements in NWP 12 for trenching and backfilling, avoiding constructing french drains, removing temporary fills, and restoring areas affected by temporary fills, will ensure that those activities result in no more than minimal individual and cumulative adverse environmental effects.

(iv) *Permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet.* This PCN threshold is redundant with the requirement to submit a PCN for the loss of greater than 1/10-acre of waters of the United States. Access roads for electric utility lines and telecommunication lines have average widths that range from 12 feet to 20 feet, but may be up to 40 feet wide in some circumstances.[12] Access roads for oil or natural gas pipelines have average widths that range from 12 to 24 feet.[13]

A permanent access road with an average width of 12 feet constructed over 500 feet in jurisdictional wetlands will result in a loss of 0.14 acre of waters of the United States. Since the narrowest access road constructed over 500 linear feet would result in a loss of greater than 1/10 acre, this PCN threshold does not cover any activities that are not already covered by the PCN threshold that requires notification for losses of waters of the United States that exceed 1/10-acre. Therefore, this PCN threshold is redundant with the 1/10-acre PCN threshold and we are proposing to remove it.

(v) *Permanent access roads are constructed in waters of the United States with impervious materials.* This PCN threshold was added to NWP 12 in 2000 (65 FR 12888). The sixth paragraph of the 2017 NWP 12 addresses the requirements for access roads for utility lines, and we are proposing to retain this paragraph (with some minor changes to address differences among the various types of utility lines) in the proposed modifications to NWP 12 and in proposed new NWPs C and D. This paragraph imposing the following requirements for access roads:

> Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for

[12] *https://www.aeptransmission.com/property-owners/access-roads.php* (accessed April 1, 2020).

[13] *https://www.blm.gov/sites/blm.gov/files/Chapter%204%20-%20Construction%20and%20Maintenance.pdf* (accessed April 1, 2020).

access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

Permanent access roads constructed in waters of the United States that will result in the loss of greater than 1/10-acre of waters of the United States require PCNs under the PCN threshold for losses of greater than 1/10-acre. For permanent access roads that would result in the loss of less than 1/10-acre of waters of the United States, the project proponent could choose to use NWP 14 to authorize that road crossing in waters of the United States without having to submit a PCN, as long as the waters of the United States are not wetlands or another type of special aquatic site.

This paragraph requires permittees to construct access roads, including access roads constructed with impervious materials, so that the length of the road minimizes any adverse effects on waters of the United States. These access roads must also be constructed as near as possible to pre-construction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). In addition, access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

These requirements help minimize the adverse environmental effects that access roads constructed with impervious materials may have on waters of the United States. The requirement to construct access roads as near as possible to pre-construction contours and elevations minimizes adverse effects to surface hydrology, and preventing obstructions to water flowing over the soil surface that could impound water. This paragraph also requires the construction of bridges or culverts to help maintain surface flows. These requirements substantially reduce the potential for access roads constructed with impervious materials and causing the loss of less than 1/10-acre of waters of the United States to have more than minimal adverse environmental effects. Therefore, we are proposing to remove this PCN threshold. The requirement that NWPs can authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects can be achieved through the requirements in the text of this NWP, as well as the NWP general conditions.

We are proposing a new PCN threshold for NWP 12 for proposed oil or natural gas pipeline activities that are associated with an overall project that is greater than 250 miles in length, and the purpose of the overall project is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length). For these oil or natural gas pipeline activities, we are proposing to require the prospective permittee to include, in the pre-construction notification, the locations and proposed losses of waters of the United States for all crossings of waters of the United States that require DA authorization, including those crossings that would not require pre-construction notification. We are proposing to add this PCN threshold to provide the district engineer the opportunity to review all crossings of waters of the United States for long-distance oil or natural gas pipelines to ensure that the activities authorized by NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects. We invite public comment on the 250 mile threshold, and whether the threshold should be for a greater or lesser number of miles.

Division engineers continue to have the authority to modify this NWP to lower the PCN thresholds if they believe that lower PCN thresholds are necessary to give district engineers the opportunity to review proposed NWP 12 activities and make activity-specific determinations of NWP eligibility. Lower PCN thresholds established by division engineers may also give district engineers the ability to impose mitigation requirements on these activities if they have the potential to result in more than minimal individual and cumulative adverse environmental effects in a Corps district, watershed, or other geographic region.

Under this proposal, district engineers also retain their authority to modify, suspend, or revoke NWP 12 authorizations under a case-specific basis, in accordance with the procedures in 33 CFR 330.5(d). District engineers can exercise their discretionary authority to add conditions to the NWP 12 authorization to ensure that the authorized activities result in no more than minimal adverse environmental effects.

We are proposing to remove Note 3 that was in the 2017 NWP 12 because that note applied to aerial electric power transmission lines crossing navigable waters of the United States. It would have no applicability to oil or natural gas pipelines crossing navigable waters of the United States. We are also proposing to remove the 2017 NWP's Note 7 because sending a copy of the PCN and NWP verification to the Department of Defense Siting Clearinghouse was intended to give the Siting Clearinghouse an opportunity to evaluate potential effects of overhead electric utility lines and telecommunication lines on military activities.

We are seeking comment on these proposed changes to the PCN thresholds for NWP 12, as well as modifying this NWP to limit it to oil or natural gas pipeline activities. Electric utility line and telecommunications activities in waters of the United States could be authorized by proposed new NWP C. Utility lines that convey potable water, sewage, storm water, wastewater, irrigation water, brine, and other substances that are not oil or natural gas or are not electricity, could be authorized by proposed new NWP D.

NWP 13. *Bank stabilization activities.* We are proposing to add a ''Note'' to this NWP to make prospective permittees aware of the availability of NWP 54 (Living Shorelines) to authorize the construction and maintenance of living shorelines to control shore erosion in coastal waters, including the Great Lakes. As defined in NWP 54, a living shoreline is an approach to bank stabilization that generally has the following characteristics: (1) It has a footprint that is made up mostly of native material; (2) it incorporates vegetation or other living, natural ''soft'' elements alone or in combination with some type of harder shoreline structure (*e.g.,* oyster or mussel reefs or rock sills) for added protection and stability; (3) it should maintain the natural continuity of the land-water interface, and retain or enhance shoreline ecological processes; and (4) it must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures. This note may encourage prospective permittees to consider living shorelines as an alternative to other approaches to bank stabilization in coastal waters. This note is not intended to convey a preference for a particular approach to bank stabilization or a particular approach to project design.

NWP 14. *Linear Transportation Projects.* We are proposing to add ''driveways'' to the list of examples of the types of linear transportation projects authorized by this NWP, to clarify that the construction or expansion of driveways can be authorized by NWP 14. When we modified NWP 14 in 2000 to authorize

some activities that were previously covered by NWP 26, the updated NWP authorized both public linear transportation projects and private linear transportation projects (see 65 FR 12888). When we reissued NWP 14 in 2002, we modified this NWP to remove the distinction between public and private linear transportation projects so that NWP 14 would simply authorize linear transportation projects (see 67 FR 2080–2081).

In 2000 (see 65 FR 12818), the Corps modified six of the NWPs issued in 1996 to replace NWP 26, but we did not reissue the remaining 32 NWPs that were issued in 1996. The 1996 NWPs were published in the **Federal Register** on December 13, 1996, (61 FR 65874), and those NWPs expired on February 11, 2002. The NWPs modified in 2000 were NWP 3 (maintenance), NWP 7 (outfall structures and maintenance), NWP 12 (utility line activities), NWP 14 (linear transportation crossings), NWP 27 (stream and wetland restoration activities), and NWP 40 (agricultural activities), and those NWPs had a new expiration date of June 5, 2005. To keep all of the NWPs on the same 5-year cycle, in 2002 (see 67 FR 2020) the Corps reissued all of the existing NWPs, including the NWPs issued in 2000 to replace NWP 26, with an expiration date of March 19, 2007. The Corps changed the expiration date of NWPs 3, 12, 14, 27, 39, 40, 41, 42, 43, and 44 from June 5, 2005, to March 18, 2002.

Under the current definition of ''single and complete linear project'' (which we are proposing to reissue without change), a linear project ''is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point.'' A driveway can be considered a linear transportation project at a smaller scale because it provides a means for a vehicle to get from a road (a point of origin) to a house, commercial building, or other structure (a terminal point). In past versions of this NWP, driveways were not explicitly identified as examples of linear transportation projects. The parenthetical in the first sentence of this NWP is not an exhaustive list, so we are seeking comment on whether to add driveways to the list of examples to provide clarity to district engineers and the regulated public.

NWP 17. *Hydropower Projects.* We are proposing to modify this NWP to authorize discharges of dredged or fill material into waters of the United States associated with hydropower projects with a generating capacity of less than 10,000 kilowatts (kW), to be consistent with the current definition of ''small hydroelectric power project.'' This NWP currently authorizes hydropower projects having less than 5,000 kW of total generating capacity at existing reservoirs, where the project is licensed by the Federal Energy Regulatory Commission, or a licensing exemption granted by the Federal Energy Regulatory Commission. The Hydropower Regulatory Efficiency Act of 2013 (Pub. L. 113–23) changed the definition of ''small hydroelectric power project'' by raising the generating capacity limit for such projects from 5,000 kW to 10,000 kW. The proposed modification would make NWP 17 consistent with the current threshold for which the Federal Energy Regulatory Commission can issue a license or exemption for small hydroelectric power projects while still ensuring that projects have no more than minimal adverse environmental effects.

This NWP authorizes only discharges of dredged or fill material into waters of the United States to construct hydropower facilities that satisfy criteria (a) or (b) in the first paragraph of the NWP. The Federal Energy Regulatory Commission licenses the construction and operation of hydropower facilities. Section 10 permit requirements for non-federal hydropower development are met through the Commission's licensing process, so separate authorization from the Corps under section 10 of the Rivers and Harbors Act of 1899 is not required.

For hydropower projects, the Corps' regulatory authority is limited to discharges of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act. Discharges of dredged or fill material into waters of the United States may be necessary to install the small hydropower unit into the dam that stores water that is passed through the hydropower unit to generate electricity. The changes to the dam that involve discharges of dredged or fill material may be small, and the district engineer will review the PCN to determine if the proposed discharges will result in no more than minimal individual and cumulative adverse environmental effects.

NWP 19. *Minor Dredging.* We are proposing to modify this NWP to increase the limit for the amount of material dredged from navigable waters of the United States (*i.e.,* waters subject to regulation under section 10 of the Rivers and Harbors Act of 1899) from 25 cubic yards to 50 cubic yards. Currently, this NWP does not authorize minor dredging activities that dredge or degrade through siltation coral reefs, sites that support submerged aquatic vegetation, anadromous fish spawning areas, or wetlands. This NWP also requires the dredged material to be deposited and retained in an area that has no waters of the United States, unless the district engineer approves, through a separate authorization such as an individual permit or regional general permit, the deposition of the dredged material into waters of the United States. With the current terms and conditions, including the current prohibitions against impacting coral reefs, sites that support submerged aquatic vegetation, anadromous fish spawning areas, and wetlands, we believe that with an increase in the cubic yard limit to 50 cubic yards, this NWP will continue to authorize only those dredging activities that have no more than minimal individual and cumulative adverse environmental effects. We would also like to solicit public comment on whether a different cubic yard limit, such as 30 or 100 cubic yards, would be more appropriate for this NWP.

Division engineers have the authority through 33 CFR 330.5(c) to add regional conditions to decrease the cubic yard limit for this NWP. District engineers have the authority to assert discretionary authority to decrease the cubic yard limit on a case-by-case basis, through the modification procedures at 33 CFR 330.5(d). We are soliciting comment on this proposed change in the cubic yard limit for NWP 19.

NWP 21. *Surface Coal Mining Activities.* In addition to proposing to modify this NWP by removing the 300 linear foot limit for losses of stream bed, we are also proposing to remove the requirement for all permittees to obtain written verification before proceeding with the authorized work in waters of the United States. Removal of the requirement to obtain written verification prior to conducting the permitted activity would make this NWP consistent with the other NWPs that require PCNs and are authorized under 33 CFR 330.1(e)(1) if the district engineer does not respond to the PCN within 45 days of receipt of a complete PCN.

Nationwide permit 21 was first issued in 1982 to authorize discharges of dredged or fill material into waters of the United States associated with surface coal mining activities and to avoid duplication with the regulation of surface coal mining activities by the Department of the Interior under the Surface Mining Control and Reclamation Act of 1977 (45 FR 62735). From 1982 to 2012, NWP 21 had no acreage limit. In 2012, a ½-acre limit was added to NWP 21 for new surface coal mining activities (see 77 FR 10274),

but that NWP also included a provision (paragraph (a) of the 2012 NWP 21) that allowed surface coal mining activities that were previously authorized by NWP 21 to have 5 additional years to complete the authorized work. Some surface coal mining activities authorized by NWP 21 impacted large acreages of jurisdictional waters and wetlands. For example, under grandfathering provision in paragraph (a) of the 2012 NWP 21, one surface coal mining activity that was previously authorized under the 2007 NWP 21 and authorized to continue under the 2012 NWP 21 impacted 182 acres of jurisdictional waters and wetlands. Another surface coal mining activity authorized under the grandfathering provision of the 2012 NWP 21 impacted 54 acres of jurisdictional waters and wetlands.

The 1982 NWP 21 included a requirement for the prospective permittee to give the district engineer an opportunity to review the proposed surface coal mining activity. The proposed activity would be authorized by NWP 21 if the district engineer determined that the individual and cumulative adverse effects on the environment from the structures, work, or discharges are minimal (47 FR 31833). This provision was the first pre-construction notification (PCN) requirement for an NWP, and it was also the origin of the requirement to receive written authorization from the district, thus requiring the district engineer to issue a determination that the proposed activity qualified for NWP authorization. In the 2002 reissuance of NWP 21, the NWP was modified to require that the district engineer issue his or her determination in writing (67 FR 2081). This requirement for a written verification was continued in the 2007 NWP 21 (72 FR 11184) and the 2012 NWP 21 (77 FR 10274).

Since the proposed NWP 21 retains the ½-acre limit that is in numerous other NWPs (*e.g.,* NWPs 12, 29, 39, 40, 42, 43, 44, 50, 51, and 52), and it can no longer authorize surface coal mining activities that result in large acreages of impacted waters and wetlands, we are proposing to remove the requirement for written verifications in order to be consistent with the other NWPs that have the ½-acre limit, and eliminate an additional burden on the regulated public that is not present in similar NWPs. The 45-day clock for the district engineer's review of PCNs at 33 CFR 330.1(e)(1), as well as the provision for the NWP authorization to be in effect if the district engineer does not respond to the PCN within that 45-day period, is an important tool to provide predictability to the regulated public and fulfill the objective of the NWP program. That objective is to ''regulate with little, if any, delay or paperwork certain activities having minimal impacts'' (33 CFR 330.1(b)). For those commenters who oppose the removal of the requirement for a written verification from this NWP, we ask that they explain why discharges of dredged or fill material into waters of the United States associated with surface coal mining activities should be treated differently than other NWPs that also have a ½-acre limit and authorize discharges of dredged or fill material into similar types of waters.

In addition, we are proposing to remove the phrase ''as part of an integrated permit processing procedure'' from the first paragraph of this NWP. The Office of Surface Mining Reclamation and Enforcement has responsibility for authorizing surface coal mining activities only in Tennessee and Washington. Even though this provision has been in place since 2007, no integrated permit processing procedures have been developed for coal mining activities in these two states, and it is unlikely that such procedures will developed in the future. Therefore, we are proposing to remove this text from the NWP because it has no applicability. We are soliciting comments on whether integrated permit processing procedures for the activities authorized by this NWP may be developed in the future.

27. *Aquatic Habitat Restoration, Enhancement, and Establishment Activities.* We are proposing to change the second sentence of the second paragraph of this NWP to state that an ecological reference may be based on the characteristics of one or more intact aquatic habitats or riparian areas. The design and evaluation of ecosystem restoration, enhancement, or establishment projects may involve the use of more than one reference site.

In addition, we are proposing to modify this NWP by adding coral restoration or relocation activities to the list of examples of activities authorized by this NWP. In recent years, there has been increased interest in coral restoration or relocation activities, and these activities can result in increases in the ecological functions and services performed by corals and coral reefs in a region. Depending on how those activities are conducted, they may require DA authorization under section 10 of the Rivers and Harbors Act. They may also require DA authorization under section 404 of the Clean Water Act. In the ''Notification'' section of this NWP, we are proposing to add a new paragraph (2) to state that pre-construction notification is required for permittees that propose to conduct coral restoration or relocation activities in accordance with a binding agreement with the NMFS or any of its designated state cooperating agencies.

We are also proposing to add ''releasing sediment from reservoirs to restore downstream habitat.'' Reservoirs may trap sediment, which may subsequently cause losses of sediment downstream of the reservoir and erosion and degradation of downstream habitat. The trapping of sediment by reservoirs also decreases their water storage capacity and the utility of those reservoirs in serving the water needs of the local population. Sediment supplies and transport regimes in rivers and streams are important factors for determining channel morphology and its ability to provide habitat for a variety of aquatic organisms, as well as water quality (Wohl et al. 2015). Effective management of sediment at reservoirs can help rectify the impacts that dams have on sediment transport processes. Sediments may be deliberately passed through reservoirs so that the sediment can be transported downstream to sustain or improve downstream habitats, while maintaining reservoir capacity (Kondolf et al. 2014). Depending on how sediments are passed through reservoirs, these reservoir sediment management activities may trigger a section 404 permit requirement. Regulatory Guidance Letter 05–04 (which was issued on August 19, 2005) discusses the circumstances under which discharges of sediments from or through a dam require DA authorization under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899.

The passing of sediments through a reservoir to restore downstream riverine habitat by sustaining sediment transport processes can result in a net increase in aquatic resource functions and services performed by the affected rivers and streams. In other words, managing reservoir operations by releasing sediment in a controlled manner can help reverse, to some degree, the degradation of riverine habitat caused by the trapping of sediment by the reservoir and erosion of downstream river reaches due to a diminished sediment supply. Therefore, we are soliciting comment on adding ''releasing sediment from reservoirs to restore downstream habitat'' to the list of examples of activities authorized by NWP 27 to provide general permit authorization when those activities result in no more than minimal

individual and cumulative adverse environmental effects.

NWP 39. *Commercial and Institutional Developments.* As discussed above, we are proposing to remove the 300 linear foot limit for losses of stream bed. In the ''Note,'' we are proposing to add the phrase ''by the Corps'' to make it clear that the Corps district, not the permittee, will send a copy of the NWP PCN and NWP verification to the Department of Defense Siting Clearinghouse.

NWP 41. *Reshaping of Existing Drainage and Irrigation Ditches.* We are proposing to modify this NWP by adding irrigation ditches. The current NWP authorizes the reshaping of existing drainage ditches to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage ditch with gentler slopes. These gentler slopes can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. Similar benefits to water quality may occur with irrigation ditches, so we are seeking comment on whether to modify this NWP to include irrigation ditches.

In the 2020 final rule defining waters of the United States, some ditches will continue to be subject to Clean Water Act jurisdiction as tributaries, provided they are waters under 33 CFR 328.3(a)(1) or (2), or were constructed in adjacent wetlands that are waters under § 328.3(a)(4). Therefore, this NWP will continue to have some utility under the 2020 definition of ''waters of the United States.''

NWP 43. *Stormwater Management Facilities.* We are proposing to remove the 300 linear foot limit for losses of stream bed from this NWP and the ability of the district engineer to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. To ensure that this NWP will only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects, we will rely on the ½-acre limit, the PCN review process, and the division and district engineers' authority under 33 CFR 330.5(c) and (d) respectively, to modify, suspend, or revoke NWP authorizations. This proposed modification is intended to provide consistency in NWP limits It is also intended to further streamline the NWP authorization process.

In addition, we are proposing to add the phrase ''such as features needed'' after ''into waters,'' because green infrastructure constructed to reduce inputs of sediments, nutrients, and other pollutants into waters may be done for purposes other than meeting targets established under Total Daily Maximum Loads.

NWP 44. *Mining Activities.* We are proposing to modify paragraph (b) of this NWP to address work (*e.g.,* dredging) in non-tidal navigable waters of United States subject to section 10 of the Rivers and Harbors Act of 1899. Dredging or other work in navigable waters could be used to mine aggregates from these waters, and may not result in a discharge of dredged or fill material. This proposed change would make the work regulated under section 10 subject to the ½-acre limit.

NWP 48. *Commercial Shellfish Mariculture Activities.* We are proposing a few modifications to this NWP. We are proposing to change the title of this NWP from ''Commercial Shellfish Aquaculture Activities'' to ''Commercial Shellfish Mariculture Activities'' to more accurately reflect where these activities are conducted (*i.e.,* coastal waters). We are proposing to remove the ½-acre limit for impacts to submerged aquatic vegetation in project areas that that have not been used for commercial shellfish aquaculture activities during the past 100 years. Since we are proposing to remove that limit, we are also proposing to remove the definition of ''new commercial shellfish aquaculture operation'' that we adopted in 2017. In addition, we are also proposing to remove both PCN thresholds for this NWP, as well as the paragraph that identifies the additional information that permittees must submit with NWP 48 PCNs.

We are proposing to change the title of this NWP to ''Commercial Shellfish Mariculture Activities'' because the NWP only authorizes activities in coastal waters. Mariculture is the cultivation of organisms in marine and estuarine open water environments (NRC 2010). This proposed change would also provide consistency between NWP 48 and the two proposed new NWPs for activities associated with the production of seaweed and finfish in coastal waters and in federal waters on the outer continental shelf. The term ''aquaculture'' refers to a broad spectrum of production of aquatic organisms. In the United States aquaculture activities encompass the production of marine and freshwater finfish, as well as shellfish (bivalve molluscs and crustaceans). Oysters, clams, and mussels are examples of bivalve molluscs. Bivalve Since aquaculture activities in the United States include both water-based and land-based activities, we are proposing the use the term ''mariculture'' in the NWPs 48, A, and B to clarify that these NWPs only authorize activities in marine and estuarine waters.

In response to the October 10, 2019 decision of the United States District Court, Western District of Washington at Seattle in the *Coalition to Protect Puget Sound Habitat* v. *U.S. Army Corps of Engineers et al.* (Case No. C16–0950RSL) and *Center for Food Safety* v. *U.S. Army Corps of Engineers et al.* (Case No. C17–1209RSL), we have made substantial revisions to the draft national decision document for this proposed NWP. The draft revisions are intended to address the concerns identified in the district court's decision. A copy of the draft national decision document is available in the docket at *www.regulations.gov* (COE–2020–0002), and we seek public comment on that draft decision document.

The district court found that the national decision document did not satisfy the requirements of NEPA and the 404(b)(1) Guidelines. The district court said the national decision document should provide a more thorough discussion of the direct and indirect impacts of these activities, and use a broader set of scientific literature to support that discussion. It also said that the national decision document should not focus on only on oyster mariculture, but it should also discuss mariculture for other shellfish species, such as clams and mussels. More specifically, the district court said the national decision document should present a more detailed discussion of the potential impacts of commercial shellfish mariculture activities on aquatic vegetation other than seagrasses, benthic communities, fish, birds, water quality, and substrate characteristics. The district court also stated that the national decision document should include a more rigorous analysis to support a finding that the NWP would authorize only activities with no more than minimal individual and cumulative adverse environmental effects.

We are proposing to remove the ½-acre limit for impacts to submerged aquatic vegetation in project areas that that have not been used for commercial shellfish aquaculture activities during the past 100 years. Shellfish mariculture can have both positive and negative effects on marine and estuarine waters (NRC 2010, Tallis et al. 2009). We are proposing to remove the ½-acre limit because the impacts of commercial shellfish mariculture activities on submerged aquatic vegetation are often temporary, and these activities do not convert aquatic habitat to non-aquatic

habitat or upland (*i.e.,* they do not result in permanent losses of aquatic resources). While bivalve shellfish mariculture activities have impacts on estuaries, those impacts neither result in losses of estuarine habitat nor do they degrade water quality in a manner comparable to other human activities (Dumbauld et al. 2009). In addition, the ½-acre limit for impacts to submerged aquatic vegetation only has limited effect. If a proposed commercial shellfish mariculture activity would result in impacts to more than ½-acre of submerged aquatic vegetation, it can be authorized by an individual permit. After that individual permit expires, it would be considered an existing commercial shellfish mariculture activity that has occurred during the past 100 years and could be authorized by NWP 48.

According to Clewell and Aronson (2013), anthropogenic and natural disturbances to ecosystems can be placed in three categories: (1) Stress with maintenance of ecosystem integrity; (2) moderate disturbance where the ecosystem can recover in time through natural processes; and (3) impairment, which may result in a more severe disturbance that may require human intervention (*e.g.,* restoration) to prevent the ecosystem from changing into an alternative, perhaps less functional ecological state. For commercial shellfish mariculture activities, the impacts generally fall within the first two categories because shellfish mariculture activities do not cause a loss in ecosystem integrity or ecosystem components can recover over time after those impacts occur. In estuaries and coastal waters where commercial shellfish mariculture activities occur, bivalve molluscs such as oysters, mussels, and clams were overharvested over many years (Lotze et al. 2006), substantially changing the ecological structure, functions, and dynamics of coastal and estuarine waters such as the Chesapeake Bay and various estuaries on the west coast. The impacts from the overharvesting of bivalve molluscs in these waters falls under the third category of disturbances identified by Clewell and Aronson (2013). Bivalve shellfish mariculture activities can also be considered restorative actions (NRC 2010), by increasing the numbers of bivalve molluscs in coastal waters where they were depleted through overfishing and recognizing the ecosystem functions and services those bivalve molluscs provide.

Bivalve shellfish mariculture activities can have temporary and permanent impacts on the aquatic environment, including the species that inhabit coastal waters. These impacts are discussed in more detail below. The severity of the impacts, both negative and positive, can vary as a result of scale and location of the shellfish mariculture operation, the species being cultivated, the equipment and techniques used by the grower, and the hydrodynamic and physical characteristics of the mariculture site (NRC 2010). In its 2010 report titled ''Ecosystem Concepts for Sustainable Bivalve Mariculture'' the National Research Council (NRC) recommended that the impacts should be evaluated in a policy context that examines the relative costs and benefits of seafood production for human consumption and altering aquatic ecosystems.

The responses of seagrasses to disturbances caused by bivalve shellfish mariculture activities vary by regional environmental conditions and mariculture practices (Ferriss et al. 2019). Recovery of submerged aquatic vegetation after disturbance may be inhibited by poor habitat quality (*e.g.,* poor water quality, temperature stress) or a lack of seagrass seeds (Orth et al. 2017). Seagrass recovery after disturbance also varies by species because of differences in life history patterns, with some species able to grow and reproduce more quickly than other species (Fonseca et al. 1998). Eelgrass recovery takes longer after mechanical harvesting methods, such as dredging, compared to hand harvesting methods (Ferriss et al. 2019). Seagrasses may be perennial or annuals, and seagrass beds are dynamic and change over time (Fonseca et al. 1998). Reproduction can occur via seeds or rhizomes. Some seagrass beds can persist for years, other beds change with the seasons, and other beds vary in step with the life history of the species. Patchy beds of submersed aquatic vegetation can be as ecologically valuable as large, dense seagrass beds (Fonseca et al. 1998). In a meta-analysis of studies that examined the effects of bivalve shellfish mariculture activities on eelgrass, Ferriss et al. (2019) concluded that the responses of eelgrass to bivalve mariculture are variable and dependent on eelgrass characteristics, how the bivalve molluscs are cultivated and harvested, and the region in which these activities are conducted.

Temporary impacts include temporary structures placed in navigable waters, such as bags, cages, trays, and racks; stakes; and long-lines that are supported by stakes or piles. Temporary impacts also include dredging, and the duration of those impacts can vary depending on the intensity and duration of dredging. Permanent impacts can include permanent structures such as piles that are installed in the waterbody to provide a permanent structure to attach equipment to, and shell or gravel that is discharged into the waterbody to provide suitable substrate for larval bivalve shellfish to attach to and grow. The species cultivated by mariculture activities also affect the aquatic environment and other species, for example by altering water quality through suspension feeding or competition for space. Those impacts can be positive, negative, or neutral, and can vary the techniques used for bivalve shellfish mariculture activities. There is a substantial amount of scientific literature regarding the interactions between bivalve shellfish mariculture activities and submerged aquatic vegetation that has shown that the impacts of these activities on submerged aquatic vegetation are often temporary, some of which is discussed below.

Bivalve mariculture activities can disturb benthic plants and animals, modify biogeochemical processes, change water flows, alter substrate composition, and provide structures with hard habitat that attracts fish and invertebrates, which may include both native and non-native species (NRC 2010). Kellogg et al. (2018) did not find any significant negative impacts on benthic macroinvertebrate communities caused by oyster mariculture activities. Impacts to submerged aquatic vegetation caused by oyster cultivation activities can be reduced through by using cultivation techniques that result in fewer impacts or by reducing oyster planting densities (Tallis et al. 2009). Bivalve shellfish mariculture activities are similar to other food production activities, in that they involve trade-offs with the ecosystems being affected by those activities (Tallis et al. 2009), in order to provide food for people. Standards and best management practices can be implemented by growers to minimize the adverse environmental effects of commercial shellfish mariculture operations (NRC 2010). Standards and best management practices would be more appropriately developed for certain species or regions (Simenstad and Fresh 1995) because these standards and practices can vary in effectiveness for different species or groups of species. Species-specific or regional standards and best management practices may be appropriate as regional conditions approved by division engineers. Such standards and best management practices may added to DA permits as permit conditions if they satisfy the criteria for permit conditions at 33 CFR 325.4(a): That is they are

necessary to satisfy legal requirements, and are directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

As an example, these standards and practices may be identified as a result of consultation under section 7 of the Endangered Species Act as was the case in Washington State when the Corps completed programmatic consultation on aquaculture activities in Washington State with the US Fish and Wildlife Service and the National Marine Fisheries Service in 2016. The comprehensive analysis completed by the Corps in its biological assessment and the Services analyses in their biological opinions, provided much information and each programmatic biological opinion contained numerous conditions to protect listed species and their designated critical habitat. Those conditions are included as special conditions in each verification of NWP 48 provided by the Corps to commercial shellfish growers.

As discussed above, shellfish mariculture activities have both positive and negative environmental effects, including effects on certain species that inhabit coastal waters. The severity of those impacts can vary by the mariculture method and location, as well as the intensity and duration of the operation (NRC 2010). Commercial shellfish mariculture techniques vary, and some species can be grown through a variety of techniques. Bivalve mariculture techniques include on-bottom and off-bottom culture methods, and some shellfish mariculture methods involve dredging whereas others do not. The adverse effects of dredging associated with bivalve shellfish mariculture activities, including harvesting, vary with intensity and duration of the dredging, as well as the type of substrate and which species are present in the area (NRC 2010). Both on-bottom and off-bottom bivalve mariculture techniques may involve the use of bags, racks, cages, and trays. The various bivalve mariculture methods can exhibit substantial differences in impacts to the aquatic environment, and to species that inhabit coastal waters. Commercial shellfish mariculture operations may use chemicals to control fouling organisms (NRC 2010). Operators may also use pesticides to control predators, but the discharge of pesticides into navigable waters is regulated under Section 402 of the Clean Water Act, not section 404.

On-bottom bivalve shellfish mariculture techniques include adding shell, gravel, or other material to create substrate for larval bivalve molluscs to attach to and grow until they are harvested, either by dredging or by hand. The shell, gravel, or other material may be deposited in a manner to create hummocks, or the material may be deposited so that it is relatively flat. On-bottom methods also involve placing cages, racks, and bags on the bottom of the waterbody. When the bivalves are ready to be harvested, the cages, racks, and bags are removed until they are ready to be used for the next growing cycle. In general, dredging is not used with bottom culture that uses cages, racks, and bags (NRC 2010). On-bottom culture using cages, racks, and bags usually does not involve substantial disturbance of the substrate. The placing of shell, gravel, or other material for bottom culture generally has longer lasting impacts compared with those stemming from the use of cages, racks, and bags. The deposited shell or gravel can bury submerged aquatic vegetation and other benthic organisms. Cages, racks, and bags can also cover submerged aquatic vegetation and other benthic organisms, but with a lesser degree of disturbance where recovery can occur more quickly than when dredging is used during mariculture operations. There may also be foot traffic in intertidal areas where bags and racks are used for bottom culture, to maintain those structures and to harvest the bivalve shellfish. The use of cages, bags, and racks can also alter water flow through the site, and well as sediment deposition (NRC 2010). The placement of bags in the intertidal zone may also reduce foraging habitat for shorebirds (NRC 2010), and those adverse effects may cease after the bags are removed. On-bottom culture is used for clam, including geoducks. Geoducks are cultivated in the intertidal zone in plastic tubes covered by a net to keep predators from eating the geoduck (Dumbauld et al. 2009). Geoducks are harvested by jetting water into the substrate and pulling out the geoduck (NRC 2010).

Off-bottom bivalve shellfish mariculture techniques involve the use of floating containers, suspended containers, or lines. These methods are typically used in deeper waters (Dumbauld et al. 2009). The floating or suspended containers may be bags, cages, and racks that are supported in the water column. Off-bottom cultivation methods can shade submerged aquatic vegetation and other benthic organisms but they do not disturb the substrate. The shading impacts will cease after the floating or suspended containers are removed. They can also interfere with navigation. The suspended and floating containers can act as attractants for fish and large crustaceans (*e.g.,* crabs), which may feed on the fouling (epibiotic) organisms that attach to the bags, cages, racks, and lines (NRC 2010). These off-bottom structures may also have positive and negative effects on birds, marine mammals, and marine turtles (NRC 2010), such as attracting prey species that those organisms can feed on or by posing a risk of entanglement and drowning. Long lines can be used to cultivate oysters and mussels, where the long line is supported by stakes, and other lines hang vertically in the water column that hold the seeds of the molluscs to be cultivated so that they can feed and grow (Dumbauld et al. 2009). Long-lines can alter the hydrodynamics in the vicinity of the mariculture operation, and increase sedimentation in the area (NRC 2010). This sedimentation and reduced wave energy may create habitat conditions that favor seagrassses (Ferriss et al. 2019), Turner et al. (2019) found that shellfish mariculture structures substantially reduced currents in the vicinity of the bivalve mariculture activities. After the long-lines are removed, the hydrodynamics and sedimentation is likely to quickly recover. When long-lines are used for bivalve mariculture, harvesting is usually done by hand (Dumbauld et al. 2009).

Structures used for shellfish mariculture activities can provide habitat for a wide variety of organisms, and serve as attractants for fish, mobile crustaceans, birds, and other organisms (*e.g.,* Dumbauld et al. 2015, McKindsey et al. 2011, NRC 2010, D'Amours et al. 2008, Powers et al. 2007). Fouling organisms such as barnacles, tunicates, sponges, and bryozoans may establish and grow on these structures, and provide food for fish and motile crustaceans (Hosack et al. 2006), as well as birds NRC 2010,. They can also provide hiding places to avoid predators. Lines and nets used for commercial shellfish mariculture activities may pose a risk of entanglement for birds, marine mammals, and marine turtles (NRC 2010).

Shellfish mariculture techniques may involve dredging, and the duration and intensity of the impacts of dredging can vary by substrate type (NRC 2010). Submerged aquatic vegetation can recovery after being impacted by dredging for shellfish mariculture activities, and that recovery may take a few years or more (Dumbauld et al. 2009). Eelgrass recovers after manual and mechanical harvesting of cultivated bivalve molluscs, but recovery generally

takes longer when mechanical harvesting techniques are used (Ferriss et al. 2019). Manual harvesting methods include the use of hands, rakes, and hoes, whereas mechanical harvesting methods include the use of dredging, sediment liquefaction, dragging and digging (Ferriss et al. 2019). Commercial shellfish mariculture activities have been occurring in Washington State since the mid-1800s (Washington Sea Grant 2015), and eelgrass continues to persist in the waters of that state. Bivalve shellfish mariculture activities and submerged aquatic vegetation have existed next to each other for hundreds of years (Ferriss et al. 2019), which demonstrates the temporary nature of the impacts of these activities on seagrasses and the resilience of seagrasses to the periodic disturbances caused by these activities. On-bottom bivalve shellfish mariculture techniques that does not involve anti-predator measures generally results in increases in eelgrass growth, decreases in eelgrass density, and neutral effects on eelgrass biomass, reproduction, and structure, and these effects may be caused by competition for space (Ferriss et al. 2019). Off-bottom bivalve shellfish mariculture techniques generally result in negative effects on eelgrass density, reproduction, and percent cover, with neutral effects on eelgrass biomass and growth; the negative effects may be caused by shading from long-lines and suspended bags (Ferriss et al. 2019). Skinner et al. (2014) observed shading effects on eelgrass from suspended oyster bag culture in eastern Canada.

Compared with other techniques, bivalve shellfish mariculture activities that involve dredging can have more substantial impacts on estuaries and the organisms that inhabit those estuaries. Oysters can be harvested by hand or by using machines (Tallis et al. 2009). Mechanical harvesting can include grading, tilling, and dredging the substrate of the waterbody. Floating and bottom culture shellfish mariculture techniques that use lines, cages, bags, rafts, and racks do not require dredging of the substrate (NRC 2010). Recovery of areas disturbed by these floating and bottom culture shellfish mariculture techniques that do not involve dredging can occur rather quickly as long as there is minimal disturbance of the substrate. For example, shading impacts are quickly reversed after the bags, cages, racks, and long-lines are removed from the waterbody.

For commercial shellfish mariculture activities, the impacts of commercial shellfish mariculture activities at a project site can fall into two categories: (1) Pulse disturbances, which are disturbances of relatively short duration caused by individual shellfish mariculture activities after which another ecosystem component (*e.g.,* seagrass) could recover after a period of time, and (2) press disturbances, which are longer duration disturbances (*e.g.,* permanent in-water structures) and have longer lasting effects on ecosystem components (Dumbauld et al. (2009)). In an evaluation of four oyster mariculture activities in the Chesapeake Bay, Kellogg et al. (2018) found few differences in water quality, sediment quality, and macrofauna community structure within the mariculture sites and areas outside the mariculture sites. Small, low density oyster mariculture activities in moderately flushed waters caused only minimal impacts to water quality Turner et al. (2019). If commercial shellfish mariculture activities cease in an estuary inhabited by submerged aquatic vegetation, the submerged aquatic vegetation that was impacted by those commercial shellfish mariculture activities generally recover within a few years (Dumbauld et al. 2009). These situations occur when the grower is letting the bottom of the waterbody go fallow for a period of time or has decided to cease commercial shellfish mariculture operations altogether in that area. After disturbance, recovery of submerged aquatic vegetation may be through asexual reproduction (*i.e.,* the spread of rhizomes) or sexual reproduction (*i.e.,* the production of seeds and subsequent germination) (Wisehart et al. 2007). Both natural and human-induced disturbances, including bivalve shellfish mariculture and harvesting activities, stimulate sexual reproduction of submerged aquatic vegetation (NRC 2010). Tallis et al. (2009) observed that eelgrass exhibited higher growth rates in areas where shellfish were dredged or hand-picked from the bottom than eelgrass inhabiting areas where no bivalve shellfish harvesting was occurring. Therefore, submerged aquatic vegetation has the ability to recover fairly quickly after cultivated bivalve shellfish are removed.

Bivalve shellfish mariculture has been occurring in the United States for more than 100 years (NRC 2010), and submerged aquatic vegetation has continued to persist in waterbodies where there these activities are conducted. Submerged aquatic vegetation beds are dynamic, and often vary from year to year even in waters where water quality is high (Orth et al. 2006), so changes in submerged aquatic vegetation beds may result from anthropogenic and/or natural causes at various temporal and spatial scales. Dumbauld et al. (2009) concluded that eelgrass and shellfish mariculture have co-existed in west coast estuaries for decades. These west coast estuaries had substantial populations of native oysters, and after those native oysters were overharvested, they did not recover (Dumbauld et al. 2009) to historic population sizes. Tallis et al. (2009) concluded that there are trade-offs to be considered when evaluating shellfish mariculture activities and their impacts on submerged aquatic vegetation. When district engineers evaluate permit applications and general permit verification requests for commercial shellfish mariculture activities requiring DA authorization, they should consider the ecological functions and services provided by the cultivated bivalve molluscs and the ecological functions and services provided by submerged aquatic vegetation and other species inhabiting the affected waterbodies. That evaluation can occur during the public interest review for an individual permit or when determining whether to exercise discretionary authority for a proposed general permit activity.

If commercial shellfish mariculture activities occur within estuarine or marine waters inhabited by submerged aquatic vegetation, there will be competition between the shellfish and submerged aquatic vegetation for space, unless the shellfish mariculture activities can avoid areas inhabited by submerged aquatic vegetation. In west coast estuaries, eelgrass co-exist with shellfish on intertidal flats at the low densities practiced for shellfish mariculture (Dumbauld et al. 2009). Tallis et al. (2009) observed that eelgrass density decreased with increasing shellfish mariculture density because of competition for space. Introduced Pacific oysters now occupy areas that were historically extensive beds of native oysters (Dumbauld et al. 2009), so this competition for space has occurred under both natural conditions and mariculture operations. In the Chesapeake Bay, expanding oyster mariculture efforts can compete with submerged aquatic vegetation for space in shallow waters (Orth et al. 2017), but current oyster populations in that waterbody are approximately 1 percent of their historical level (using the early 1800s as a baseline) because of overfishing, habitat loss, and disease (Wilberg 2011). If shellfish mariculture activities cease temporarily (*e.g.,* during fallow periods) or permanently (*e.g.,* by terminating those activities), the submerged aquatic vegetation is likely

to recover unless other stressors (*e.g.,* increased turbidity) prevent submerged aquatic vegetation beds from re-establishing themselves.

The continued persistence of submerged aquatic vegetation in coastal waterbodies in which shellfish mariculture has been conducted for decades indicates that adverse impacts to seagrasses are temporary. In waterbodies inhabited by submerged aquatic vegetation where shellfish mariculture is conducted, seagrass is in dynamic equilibrium with the shellfish mariculture activities (Dumbauld et al. 2009). The amount of time it takes for submerged aquatic vegetation to recover from disturbances caused by shellfish mariculture activities varies by plant species, the extent of the disturbance, the intensity of the disturbance, the seasonal timing of disturbance, and sediment characteristics (NRC 2010). In their review of the effects of shellfish mariculture activities on seagrasses in estuaries on the west coast of the United States, Dumbauld et al. (2009) found that the amount of time it took eelgrass to recover to pre-disturbance levels varied from less than 2 years to more than 5 years. In estuaries on the west coast of the United States, shellfish mariculture activities have been undertaken for over a century and have not been found to cause estuarine waterbodies to change to an alternative state or exhibit a decreased ability to recover from disturbances (Dumbauld et al. 2009).

This NWP authorizes activities under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. Under Section 10 of the Rivers and Harbors Act of 1899, the Corps regulates structures and work in navigable waters of the United States. The Corps' section 10 regulations at 33 CFR 322.2(b) define ''structure'' as including, ''without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.'' The Corps' section 10 regulations at 33 CFR 322.2(c) define ''work'' as including, ''without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.''

Certain commercial bivalve shellfish mariculture activities involve structures regulated under section 10, such as racks, cages, bags, lines, nets, and tubes, when those structures are placed in navigable waters. Dredging activities for commercial shellfish mariculture activities, including dredging for harvesting and bed preparation, are regulated under section 10 as work. Placing fill material in navigable water, including shell or gravel to provide suitable substrate for bivalve shellfish larvae to attach to and grow, is also regulated under section 10 as ''work.'' This is an on-bottom cultivation technique that can involve placing a relatively thin layer of shell, gravel, or other suitable material on the bottom of the waterbody, or placing that fill material to create mounds that reduce the likelihood of sedimentation that could smother bivalve shellfish larvae or older shellfish.

The installation and use of structures such as racks, cages, bags, lines, nets, and tubes, in navigable waters for commercial bivalve shellfish mariculture activities in navigable waters requires DA authorization under Section 10 of the Rivers and Harbors Act of 1899. Those structures may be floating or suspended in navigable waters, placed on the bottom of the waterbody, or installed in the substrate of the waterbody. The placement of mariculture structures in the water column or on the bottom of a waterbody does not result in a discharge of dredged or fill material that is regulated under section 404. While the presence of these structures in a waterbody may alter water movement and cause sediment to fall out of suspension onto the bottom of the waterbody, that sediment deposition is not considered a discharge of dredged or fill material because those sediments were not discharged from a point source. In general, the placement of bivalve shellfish mariculture structures on the bottom of a navigable waterbody, or into the substrate of a navigable waterbody does not result in discharges of dredged or fill material into waters of the United States that are regulated under Section 404 of the Clean Water Act.

This NWP also authorizes discharges of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act, and some commercial bivalve shellfish mariculture activities involve discharges of dredged or fill material into these waters. The term ''discharge of dredged material'' is defined at 33 CFR 323.2(d) and the term ''discharge of fill material'' is defined at 33 CFR 323.2(f). Some commercial shellfish mariculture activities involve mechanical or hydraulic harvesting techniques that may result in discharges of dredged material into jurisdictional waters and wetlands. As discussed above, on-bottom bivalve shellfish mariculture activities may involve placing fill material such as shell or gravel to provide suitable substrate for bivalve shellfish larvae to attach to and grow on the bottom of the waterbody. These fill activities may require section 404 authorization.

The Corps' regulations at 33 CFR 323.2(e) define the term ''fill material'' as ''material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States.'' Examples of fill material regulated under section 404 include, but are not limited to: ''rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States'' (§ 323.2(e)(2)). Fill material does not include trash or garbage (§ 323.2(e)(3)).

The term ''shellfish seeding'' is defined in Section E of the NWPs as the ''placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (*i.e.,* spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.'' This definition was adopted in the NWPs in 2007 (see 72 FR 11197). Other materials may be used for bivalve shellfish seeding such as nets, bags, and ropes. Shellfish seed can be produced in a hatchery. Shellfish seed can also be produced in waterbodies where bivalve larvae can attach to appropriate materials, such as shell pieces, bags, or ropes.

Placing shellfish seed on the bottom of a waterbody is not a ''discharge of fill material'' and thus does not require a section 404 permit. Placing gravel or shell on the bottom of a waterbody to provide suitable substrate for bivalve larvae to attach to is considered to be a ''discharge of fill material'' and would require section 404 authorization. The shellfish themselves, either growing on the bottom of a waterbody or in nets, bags, or on ropes, are not considered to be ''fill material'' and do not require a section 404 permit to be emplaced, remain in place, or to be removed from a waterbody.

We invite comment on the various techniques used for commercial shellfish mariculture activities and which specific permit requirements are triggered by each of those techniques. Commenters are encouraged to provide

information in support of their views on which commercial shellfish mariculture techniques require DA authorization only under Section 10 of the Rivers and Harbors Act of 1899, under Section 404 of the Clean Water Act, or under both permitting authorities.

Neither the Clean Water Act nor the Clean Water Act Section 404(b)(1) Guidelines prohibit discharges of dredged or fill material or other types of impacts to submerged aquatic vegetation. Despite the status of submerged aquatic vegetation in the 404(b)(1) Guidelines as a special aquatic site (*i.e.,* vegetated shallows under 40 CFR 230.43), the Guidelines do not prohibit discharges of dredged or fill material into special aquatic sites as long as a section 404 permit is issued by the Corps of Engineers or other permitting authority (*e.g.,* a state or tribe that has approved by EPA to implement the section 404 permit program under section 404(g) of the Act). For activities authorized by the NWPs, the individual and cumulative adverse environmental effects caused by permitted impacts to submerged aquatic vegetation must be no more than minimal.

Submerged aquatic vegetation can also provide important nursery habitat for finfish and crustaceans (NRC 2010), including species that may be listed as endangered or threatened under the Endangered Species Act (ESA). For some species listed as endangered or threatened under the ESA, emergent and submerged aquatic vegetation has been determined to be a physical or biological feature essential to the conservation of the species. Under the ''Endangered Species'' general condition, if the district engineer determines the proposed NWP 48 activity may affect designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, as appropriate. During the ESA section 7 consultation process, impacts to submerged aquatic vegetation may be addressed through conservation measures (*i.e.,* measures to avoid, minimize, or offset impacts) identified through formal or informal consultation, or as terms and conditions of an incidental take statement in a biological opinion.

If a proposed NWP 48 activity may have adverse effects on essential fish habitat (EFH), which may include areas with submerged aquatic vegetation, the district engineer will initiate EFH consultation with the appropriate office of the National Marine Fisheries Service. Division engineers may add regional conditions to NWPs to require PCNs for proposed activities that have the potential to adversely affect EFH, so that the district engineer can initiate EFH consultation when he or she determines that a specific NWP activity may adversely affect EFH. Essential fish habitat may include submerged aquatic vegetation beds for the fish species in the region. Through this consultation process, the National Marine Fisheries Service may provide the district engineer with EFH Conservation Recommendations. The district engineer has the authority to add certain EFH Conservation Recommendations as permit conditions to the NWP authorization, when he or she determines such conditions are needed to ensure that the NWP activity results in no more than minimal adverse environmental effects.

When proposed NWP 48 activities require PCNs under paragraph (c) of general condition 18, impacts to submerged aquatic vegetation that is a physical or biological feature essential to the conservation of the species will be evaluated through the ESA section 7 process. If a district engineer determines that a proposed NWP 48 activity may adversely affect essential fish habitat, the district engineer will prepare an EFH assessment and initiate EFH consultation with the NMFS. Impacts to submerged aquatic vegetation that is a component of EFH may be addressed through EFH conservation recommendations that are adopted by the district engineer. We believe ESA section 7 consultations, EFH consultations under the Magnuson-Stevens Fishery Conservation and Management Act, and regional conditions imposed by division engineers to restrict or prohibit the use of NWP 48 are appropriate avenues to address impacts to submerged aquatic vegetation that may be caused by activities authorized by NWP 48.

We are proposing to remove the PCN threshold for commercial shellfish mariculture activities that include a species that has never been cultivated in the waterbody. The current PCN threshold addresses native species that have not been commercially cultivated in the waterbody. Shellfish mariculture provides an opportunity to increase populations of native shellfish in coastal waters in cases where those populations declined (NRC 2010) because of overharvesting or other stressors. In addition, NWP 48 currently prohibits: (1) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody, and (2) the cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. These prohibitions will continue to help control one mechanism of intentional introductions of non-native species into coastal waters.

We are also proposing to remove the PCN requirement for any proposed commercial shellfish mariculture activity that occurs in a project area that has not been used for commercial shellfish mariculture activities in the past 100 years. If, in the final NWP, we remove the definition of ''new commercial shellfish aquaculture operation,'' as well as the term that excludes new activities that directly affect more than ½-acre of submerged aquatic vegetation from the authorization provided by NWP 48, then this PCN threshold will no longer be necessary. The proposed removal of this PCN threshold would also be consistent with our view that commercial shellfish mariculture activities typically only have temporary impacts on submerged aquatic vegetation and that cultivated shellfish and submerged aquatic vegetation can sustain a healthy co-existence and provide estuarine and marine ecosystems with a variety of ecological functions and services, including habitat for a number of finfish and invertebrate species. We developed this view after reviewing a number of scientific studies of interactions between submerged aquatic vegetation and shellfish mariculture operations, and a number of those studies are discussed in this preamble.

All NWP 48 activities conducted by non-federal permittees must comply with the requirements of 33 CFR 330.4(f)(2) and paragraph (c) of the ''Endangered Species'' general condition. The proposed removal of the PCN requirement from this NWP does not affect the PCN requirement for non-federal permittees established in § 330.4(f)(2) and paragraph (c) of general condition 18. Section 330.4(f)(2) and paragraph (c) of the ''Endangered Species'' general condition require non-federal permittees to notify the district engineer if any federally-listed endangered or threatened species or designated critical habitat might be affected or is in the vicinity of the project. For a proposed NWP 48 activity that might affect listed species or designated critical habitat, the non-federal applicant is required to submit a PCN to the district engineer. The district engineer will evaluate the PCN and determine whether the proposed activity ''may affect'' listed species or designated critical habitat. If the district engineer makes a ''may affect'' determination, he or she will conduct formal or informal section 7

consultation, unless the proposed activity is covered by an existing regional programmatic section 7 consultation.

In regions where there are substantive concerns that proposed NWP 48 activities have the potential to result in more than minimal individual and cumulative adverse environmental effects, division engineers can impose regional conditions to require PCNs for some or all proposed NWP 48 activities in specified Corps districts.

Section 101(a)(2) of the Clean Water Act states that ''it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.'' [33 U.S.C. 1251(a)(2)] In other words, one of the objectives of the Clean Water Act is to promote water quality that supports the propagation of fish and shellfish. Bivalve molluscs cultivated through commercial shellfish mariculture activities help improve water quality through filter feeding, removing particulates and nutrients from the water column which can improve water clarity and reduce the potential for eutrophication (*e.g.,* NRC 2010). Commercial shellfish mariculture activities can also provide structural habitat that can support populations of fish, large invertebrates such as crabs, and other animals (*e.g.,* Dumbauld et al. 2015, Powers et al. 2007). In addition to producing food, mariculture can provide a variety of other ecosystem services, including other provisioning services, regulating services, habitat or supporting services, and cultural services (Alleway 2019). Agricultural ecosystems can provide a variety of ecological functions and services, in addition to food production (Power 2010), and bivalve shellfish mariculture is an example of an agricultural ecosystem in coastal waters. Depending on how they are structured and managed, agricultural activities may provide ecological services or disservices, and trade-offs need to be considered by decision-makers and other entities (Power 2010), which may consist of growers, regulatory agencies, resource agencies, or other stakeholders.

Submerged aquatic vegetation and bivalve molluscs provide important ecological functions and services to estuarine waters (Dumbauld and McCoy 2015, NRC 2010). Seagrasses provide the following ecosystem functions and services: Habitat for a variety of aquatic organisms, organic carbon production and export, nutrient cycling, sediment stabilization, enhanced biodiversity, and energy exchanges with adjacent habitats (Orth et al. 2017, Orth et al. 2006). Bivalve molluscs provide ecological functions and services such as water turbidity reduction through suspension feeding, biodeposition of organic material with plant nutrients, denitrification, carbon sequestration, providing structural habitat for a variety of fish, crustaceans, and epibiotic organisms, and habitat and shoreline stabilization (NRC 2010), as well as secondary production that contributes to energy exchanges among terrestrial and aquatic organisms. There is substantial overlap between the ecosystem functions and services provided by submerged aquatic vegetation and bivalve shellfish.

Bivalve shellfish mariculture activities can contribute to the restoration of aquatic ecosystems (NRC 2010), because the shellfish produced by these activities can provide ecological functions and services (*e.g.,* water quality, habitat, and food production) that were diminished or eliminated in waterbodies as a result of overfishing historic stocks of bivalve shellfish. Oyster mariculture activities may not provide identical ecological functions and services and functions as natural oyster reefs, but cultivated oysters do provide some of these functions and services without substantial investment of public funds (Kellogg et al. 2018) that may be needed for restoration activities. In the Chesapeake Bay, oyster mariculture activities are a component of watershed management activities (Turner et al. 2019) because of their potential to help improve water quality. In the west coast of the United States, the extent of oyster grounds and oyster biomass is less than one percent of historic levels (Zu Ermgassen et al. 2012). In the Chesapeake Bay, oyster abundance decreased by more than 99 percent since the early 19th century (Wilberg et al. 2011). In a global assessment of seagrass losses over time, Waycott et al. (2009) estimated that the area of coastal waters occupied by seagrasses have declined by nearly 30 percent since the late 19th century. Lotze et al. (2006) estimated that estuarine and coastal waters have lost more than 65 percent of wetland and seagrass habitat, and more than 90 percent of important species, including oysters. Commercial shellfish mariculture can be an alternative means of providing a variety of ecosystem functions and services to coastal waters (NRC 2010), in areas where more traditional restoration approaches may not be practical or sufficient funding cannot be obtained (Alleway 2019). The ecological functions and services performed by cultivated bivalve molluscs can also facilitate the establishment and persistence of submerged aquatic vegetation by improving water clarity and providing nutrients for seagrass growth and reproduction (NRC 2010).

Suspension feeding bivalve shellfish such as oysters and mussels and submerged aquatic vegetation both provide important ecological functions and services for estuarine ecosystems (*e.g.,* NRC 2010). Bivalve shellfish mariculture activities can contribute to the restoration of aquatic ecosystems (NRC 2010), because the shellfish produced by these activities can provide ecological functions and services (*e.g.,* water quality, habitat, and food production) that were diminished or eliminated in waterbodies as a result of overfishing historic stocks of bivalve shellfish. Commercial shellfish mariculture can be an alternative means of providing a variety of ecosystem functions and services to coastal waters, in areas where more traditional restoration approaches may not be practical or sufficient funding cannot be obtained (Alleway 2019).

In waterbodies inhabited by both submerged aquatic vegetation and shellfish, these organisms provide important ecological functions and services to estuarine ecosystems and to the people that live in the vicinity of those estuaries. Both submerged aquatic vegetation and bivalve shellfish are considered ecosystem engineers (Ruesink et al. 2005, Dumbauld et al. 2009) that have substantial impacts on the structure, functions, and dynamics of estuarine and marine ecosystems. While shellfish mariculture activities can disturb submerged aquatic vegetation beds, those activities can also increase production of submerged aquatic vegetation beds by reducing water turbidity, which allows submerged aquatic vegetation to establish and grow in deeper water, and by providing nutrients for their growth (NRC 2010). Bivalve shellfish mariculture activities can perform regulating services such as nutrient cycling, assimilation, and removal; habitat and supporting services including structural habitat for finfish and invertebrates, including fouling organisms that serve as food for other aquatic animals; and cultural services such as individual and community connections with the marine environment, as well as employment opportunities in distressed or geographically isolated communities (Alleway et al. 2019, NRC 2010). Gallardi (2014) found that shellfish

mariculture modifies benthic habitat that supports increased numbers of crustaceans and some fish species.

Bivalve shellfish perform the same physiological functions (*e.g.,* suspension feeding) regardless of whether they are naturally occurring (*i.e.,* occupying estuarine and marine habitats through natural colonization or human seeding activities) or are being cultivated for commercial purposes. In other words, naturally occurring and cultivated shellfish perform virtually the same ecological functions and services and contribute to the overall ecological functions and services provided by the ecosystem or waterbody. Ecosystem services provided by filter-feeding bivalve molluscs include reduction of turbidity, the fertilization of benthic habitats, reducing the adverse effects of eutrophication by consuming phytoplankton and facilitating denitrification, carbon sequestration, providing habitat for other marine and estuarine organisms, and stabilizing habitats and shorelines (NRC 2010). Shell growth that occurs in cultured and naturally occurring oysters, mussels, and other bivalve shellfish sequesters carbon (NRC 2010). Areas used for oyster mariculture generally support a more diverse community of benthic and epibenthic plants and animals than soft substrates that are inhabited primarily by burrowing invertebrates (Simenstad and Fresh 1995, Dumbauld et al. 2009). While seagrasses can provide nursery habitat for a variety of aquatic species, other structured habitats in coastal waters, such as oyster reefs, cobble reefs, and macroalgal beds can also provide nursery habitat for fish and crustaceans (Heck et al. 2003). Powell et al. (2007) found that netting used for on-bottom clam culture can provide nursery habitat for mobile invertebrates and juvenile fish.

Estuarine and marine ecosystems in which shellfish mariculture occur are dynamic, complex ecosystems subject to numerous types of natural and anthropogenic disturbances and are inhabited by a variety of species (*e.g.,* NRC 2010, Simenstad and Fresh 1995). Submerged aquatic vegetation, bivalve molluscs, finfish, and other groups of species are all components of these complex ecosystems. Humans have been altering estuaries for millennia, by overexploitation of resources, habitat modifications, pollution, and other activities (Lotze et al. 2006). Commercial shellfish mariculture activities and seagrasses have coexisted for decades and centuries (Ferriss et al. 2109, Washington Sea Grant 2015). Overfishing of oysters over time is one mechanism that has been a driver for many changes to estuaries, since habitat destruction, pollution, eutrophication, invasive species, disease outbreaks, and climate change generally occurred after overfishing depleted populations of these species (Jackson et al. 2001). For example, in the Chesapeake Bay the oyster population has decreased to a level that 50 times less than the level it was in the early 1900s (Rothschild et al. 1994). Human activities have removed approximately 95 percent of important estuarine species (such as oysters), removed more than 65 percent of submerged aquatic vegetation, degraded water quality, destroyed habitat, and increased the rates of species invasions (Lotze et al. 2006). Submerged aquatic vegetation and wetlands have been lost or degraded from estuaries as a result of reclamation activities, eutrophication, habitat destruction, disease, and removal by people (Lotze et al. 2006). The filter-feeding performed by bivalve molluscs cultivated by mariculture activities can reduce turbidity in the water column to support the growth and persistence of submerged aquatic vegetation that provides nursery habitat for a number of species of fish, molluscs, and crustaceans that are important to commerce (NRC 2010).

Effects of shellfish mariculture on the environment can be positive or negative depending on the specific activity and environmental component being evaluated (Gallardi 2014, NRC 2010). The individual effect of shellfish mariculture activities on the environment can be temporary or permanent, and can vary in intensity. Oysters and other filter-feeding bivalve molluscs produced through mariculture activities may help improve water quality and reduce the effects of eutrophication (Jackson et al. 2001).

When evaluating the cumulative effects of shellfish mariculture activities on estuarine and marine ecosystems, including submerged aquatic vegetation, several investigators have recommending conducting this evaluation at an ecosystem or landscape scale (*e.g.,* NRC 2010, Simenstad and Fresh 1995, Dumbauld et al. 2015), rather than focusing on only the immediate site where the mariculture activities are occurring. Using an ecosystem or landscape scale approach for assessing the cumulative effects of shellfish mariculture activities helps take into account the highly dynamic nature of coastal waters, and the various ecological components of those waters (*e.g.* water quality, seagrasses, finfish species, and invertebrate species) and how they change over time and space as a result of natural and anthropogenic disturbances. A cumulative effects analysis would also provide context on the degree to which commercial shellfish mariculture activities, compared to other human activities such as urban, suburban, and agricultural land uses in coastal watersheds, forestry activities in coastal watersheds, shoreline alteration activities, and point and non-point sources of pollution, that contribute to cumulative effects that alter the structure, functions, and dynamics of coastal waters. An ecosystem or landscape approach for assessing the cumulative effects of shellfish mariculture activities would provide a better understanding of the scale and intensity of the effects of those mariculture activities on the structure functions, and dynamics of coastal waters (NRC 2010), and assist the Corps in determining whether NWP 48 activities are resulting in no more than minimal cumulative adverse environmental effects. Further discussion of cumulative effects analysis is provided below.

The method and location of shellfish mariculture strongly influence what types of impacts will occur and the intensity of those impacts (NRC 2010). A small mariculture operation conducted in a large, well flushed coastal waterbody is likely to have impacts within the normal range of disturbances naturally occurring in that waterbody, but as shellfish mariculture operations get larger, more severe impacts may occur (NRC 2010). Those impacts may include direct competition for resources (*e.g.,* space and food), the consumption of more eggs and larvae of other aquatic species, and the potential for oxygen depletion (anoxia) to occur there is not sufficient flushing to facilitate the removal of the feces produced by the cultivated shellfish (NRC 2010).

For activities authorized by NWPs, the Corps is required to consider the individual impacts caused by each NWP activity, as well as the cumulative impacts of NWP activities. In addition to the environmental impacts caused by individual commercial shellfish mariculture activities, the Corps is required to consider the cumulative effects of those activities. The analysis of individual adverse environmental effects differs from the analysis of cumulative adverse environmental effects. The environmental impacts caused by an individual activity include the direct and indirect effects caused by that activity on particular resources. The direct and indirect environmental effects caused by an individual activity contribute to cumulative effects, if the affected resource(s) do not fully recover

before another activity that is conducted at that location directly and indirectly affects the resource(s).

The environmental effects of proposed activities are evaluated by assessing the direct and indirect effects that those activities have on the current environmental setting (Canter 1996). Under CEQ's NEPA regulations, the current environmental setting is the ''affected environment'' (40 CFR 1502.15). In the FWS's and NMFS's regulations for ESA section 7 consultations for proposed federal actions, the current environmental setting is the ''environmental baseline'' (50 CFR 402.02). The Corps' regulations at 33 CFR parts 320 to 332 do not include a provision that explicitly defines the concept of the current environmental setting, but its NEPA regulations in Appendix B to 33 CFR part 325 refers to CEQ's definition of ''affected environment.'' The Clean Water Act Section 404(b)(1) Guidelines require the permitting authority to determine the ''potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment'' (see 40 CFR 230.11). As a general practice, section 230.11 is applied to the current physical, chemical, and biological components of the aquatic environment since the Guidelines do not indicate that an alternative interpretation should be applied.

The current environmental setting is the product of the cumulative effects of human activities that have occurred over many years, as well as the natural processes that have influenced, and continue to influence, the structure, functions, and dynamics of ecosystems. The current environmental setting can vary substantially in different areas of the country and in different waterbodies. The current environmental setting is dependent in part on the degree to which past and present human activities have altered aquatic and terrestrial resources in a particular geographic area over time. Since humans have altered aquatic and terrestrial environments in numerous, substantial ways for millennia (*e.g.,* Evans and Davis 2018, Ellis 2015), the current environmental setting takes into account how human activities and changing biotic and abiotic conditions have modified aquatic and terrestrial resources. The marine and coastal waters in which commercial shellfish activities occur have been altered by numerous human activities over many years, and the various categories of activities are discussed in more detail below. Consistent with the environmental assessment practices described above, the individual and cumulative adverse environmental effects of commercial shellfish mariculture activities in a particular waterbody should be evaluated in the context of the current environmental setting for that waterbody, including the lands that drain to that waterbody.

In order to effectively understand and manage ecosystems, it is necessary to take into account how people have reshaped aquatic and terrestrial resources over time (Ellis 2015). Effective management of ecosystems is dependent upon understanding how human activities can have direct, indirect, and cumulative effects on those ecosystems. The current state of an ecosystem (*e.g.,* a wetland or an estuary) can range from ''near natural'' (*i.e.,* minimally disturbed) to semi-natural to production systems such as agricultural lands to overexploited (*i.e.,* severely impaired) (van Andel and Aronson 2012). Degradation occurs when an ecosystem is subjected to a prolonged disturbance (Clewell and Aronson 2013), and the degree of degradation can be dependent, in part, on the severity of disturbance. Degradation can also result from multiple disturbances over time: that is cumulative impacts. Other factors that affect an ecosystem's response to a disturbance are resistance and resilience.

For ecosystems, stability is the ability of an ecosystem to return its starting state after one or more disturbances cause a significant change in environmental conditions (van Andel et al. 2012). Resistance is the ability of an ecosystem to exhibit little or no change in structure or function when exposed to a disturbance (van Andel et al. 2012). Resilience is the ability of an ecosystem to regain its structural and functional characteristics in a relatively short amount of time after it has been exposed to a disturbance (van Andel et al. 2012). Human activities can change the resilience of ecosystems (Gunderson 2000). In some situations, resilience can be a positive attribute (*e.g.,* the ability to withstand disturbances), and in other situations, resilience can be a negative attribute (*e.g.,* when it is not possible to restore ecosystem because it has changed too much and is resistant to being restored) (Walker et al. 2004). The concept of ecological resilience presumes the existence of multiple stable states, and the ability of ecosystems to tolerate some degree of disturbance before transitioning to an alternative (different) stable state (Gunderson 2000). Resilience cannot be determined by examining only one scale (*e.g.,* a project site); multiple scales (*e.g.,* site, waterbody, watershed) must be considered because disturbances can occur at various scales (Walker et al. 2004). Diversity of functional groups and species within ecosystems is important for resilience (Folke et al. 2004), and management efforts that focus on single species such as seagrasses might not help sustain or improve resilience of an ecosystem.

Ecosystems can exist in multiple stable states, and the resilience and resistance of an ecosystem will influence whether it will transform into an alternative stable state (Gunderson 2000). A regime shift (*i.e.,* a change from one stable state to an alternative stable state) can occur when human activities reduce the resilience of an ecosystem, or functional groups of species within that ecosystem, or when there are changes in the magnitude, frequency, and duration of disturbances (Folke et al. 2004). Regime shifts can be caused by removal of species, pollution, land use changes, changes in environmental conditions, and altered disturbance regimes (Folke et al. 2004). A regime shift to an alternative stable state can be desirable or undesirable.

An example of a regime change in an estuary is a shift from an estuary with clear waters and benthic communities dominated by seagrasses, to an estuary with turbid waters dominated by phytoplankton that has insufficient light for seagrasses to grow and persist (Folke et al. 2004). Another example of a regime shift is where an increase in nutrients to a wetland (likely from many sources in the area draining to that wetland) causes a wetland's plant community from a diverse plant community dependent on low nutrient levels to a monotypic plant community dominated by an invasive species that can persist under the higher nutrient levels (Gunderson 2000).

Management activities can be undertaken to enhance resilience to reduce the risk of an undesirable regime change (Folke et al. 2000). In the two examples provided above, efforts to reduce nutrient inputs can help reduce the likelihood of a regime change caused by changes in nutrient inputs. The ecological functions and services provided by bivalve molluscs that are grown in coastal waters through commercial shellfish mariculture activities can contribute to the ecological resilience of estuarine and marine systems, for example by removing phytoplankton and nutrients that contribute to eutrophication.

Determining whether an ecosystem altered by human activities is degraded

or in an alternative stable state depends on the perspective of the person making that judgment (Hobbs 2016). That judgment is dependent in part on the ecological functions and services currently being provided by the alternative stable state and the value local stakeholders place on those ecosystem functions and services. In other words, different people may have different views on the ecological state of a particular ecosystem (Hobbs 2016, Walker et al. 2004): Some people may think it is degraded and other people may think it continues to provide important ecological functions and services. It is also important to understand that degradation falls along a continuum, ranging from minimally degraded to severely degraded, since all ecosystems have been directly or indirectly altered by human activities to some degree. Degraded ecosystems can continue to provide important ecological functions and services, although they may be different from what they provided historically.

As discussed above, the current environmental setting consists of ecosystems (*e.g.,* estuaries, wetlands, rivers) that have been altered by various human activities to different degrees over time. The present effects of past actions and the effects of actions occurring at the present time form the current environmental setting against which cumulative effects are evaluated (Clarke Murray et al. 2014, Stakhiv 1998). An important aspect of understanding the current environmental setting is understanding the cumulative effects that have occurred to those ecosystems over time, and to provide a basis of comparison for determining whether a federal agency's proposed action will result in an acceptable or unacceptable addition to cumulative effects.

The terms ''cumulative effects'' and ''cumulative impacts'' has been defined in various ways. For example, the National Research Council (NRC) (1986) defined ''cumulative effects'' as the on-going degradation of ecological systems caused by repeated perturbations or disturbances. MacDonald (2000) defines ''cumulative effects'' as the result of the combined effects of multiple activities that occur in a particular area that persist over time. Cumulative effects are caused by the interaction of multiple activities in a landscape unit, such as a watershed or ecoregion (Gosselink and Lee 1989).

Cumulative effects can accrue in a number of ways. Cumulative effects can occur when there are repetitive disturbances at a single site over time, and the resource is not able to fully recover between each disturbance. Cumulative effects can also occur as a result of multiple activities occurring in a geographic area over time. Cumulative effects can result from additive interactions or synergistic interactions (*i.e.,* the combined effect is greater than the sum of the effects of individual activities) among disturbances (MacDonald 2000). Cumulative effects can also result from antagonistic interactions among disturbances (Crain et al. 2008).

Cumulative effects analysis requires an understanding of how various resources interact with each other within an appropriate landscape unit, such as a watershed (NRC 1986, Bedford and Preston 1988) or a waterbody. Cumulative effects analysis also requires understanding and acknowledgement of the complexity, natural variation, and uncertainty in ecosystems (Clark Murray 2014), as well as acknowledgement of our incomplete understanding of these resources. Different disturbances can have different degrees of influence on the resource being evaluated, and it is often difficult to identify which disturbances the cumulative effects analysis should focus on, and to determine the degree to which a particular type of disturbance contributes to cumulative effects (Halpern and Fujita 2013). Because of the complexity of cumulative effects and the larger geographic and time scales over which cumulative effects occur, it is difficult to identify specific linkages between a potential disturbance and a particular resource, especially for resources that respond to a variety of human activities and other disturbances (Gosselink and Lee 1989). In addition, disturbances that affect ecosystems and specific resources within those ecosystems also change over space and time, making it difficult to identify relevant disturbances and their connections to the resource(s) being evaluated in the cumulative effects analysis, especially if those disturbances occur at distant locations (Halpern and Fujita 2013). An additional challenge for cumulative effects analysis is defining recovery rates for affected resources (MacDonald 2000), since recovery of a resource after a disturbance occurs can reduce contributions to cumulative effects. Recovery rates relate to the resilience of the resource(s) that are the focus of the cumulative effects analysis.

In marine and coastal waters, contributors to cumulative effects include human activities in the ocean, coastal areas, and watersheds that drain to those marine and coastal waters (Korpinen and Andersen 2016). In marine and coastal environments, human activities and other disturbances that affect resources in those waters can come from a variety of sources, including water-based activities (*e.g.,* transportation, fishing, mariculture, power generation, and tourism) and land-based activities (*e.g.,* urban and suburban development, agriculture, non-point source pollution, forestry activities, power generation, and mining activities) (Clark Murray et al. 2014).

Humans have been altering estuarine waters and coastal areas for millennia (Day et al. 2013), but those changes have rapidly accelerated over the past 150 to 300 years (Lotze et al. 2006). Coastal waters are affected by a wide variety of activities that contribute to cumulative effects to estuarine and marine ecosystems. The Millennium Ecosystem Assessment (MEA) (2005) identified five major categories of activities that affect coastal waters and wetlands and the ecological functions and services they provide: Habitat alterations, climate change, invasive species, overharvesting and overexploitation, and pollution (*e.g.,* nitrogen and phosphorous), which are driven indirectly by increases in population and economic development. More specific categories of activities that alter coastal waters and wetlands include activities that alter coastal forests, wetlands, and coral reef habitats for aquaculture; the construction of urban areas, industrial facilities, resorts, and port developments; dredging and reclamation activities; shore protection structures; infrastructure such as causeways and bridges; and various types of fishing activities (MEA 2005). Day et al. (2013) identified the following general categories of human activities that impact estuaries: Physical alterations (*e.g.,* habitat modifications and changes in hydrology and hydrodynamics), increases in inputs of nutrients and organic matter (enrichment), releases of toxins, and changes in biological communities as a result of harvesting activities and intentional and unintentional introductions of new species.

Robb (2014) identified a number of threats to estuaries and estuarine habitats, such as land-based activities in surrounding watersheds, such as development activities, agricultural activities, forestry activities, pollution, freshwater diversions, shoreline stabilization, waterway impairments, and inputs of debris and litter. With respect to activities occurring directly in coastal waters, Robb (2014) identified the following threats: Shoreline development, the construction and operation of port facilities, dredging, marine pollution, aquaculture activities,

resource extraction activities, species introductions, and recreational activities. Adverse effects to coastal waters are caused by habitat modifications, point source pollution, non-point source pollution, changes to hydrology and hydrodynamics, exploitation of coastal resources, introduction of non-native species, global climate change, shoreline erosion, and pathogens and toxins (NRC 1994). Jackson et al. (2001) found that the earliest major human disturbances to coastal waters were overfishing species that live in those waters, followed in time by other human disturbances such as pollution, water quality degradation, physical habitat modifications, species introductions, and climate change. In North America, impacts to coastal waters due to overfishing occurred long before Europeans occupied coastal lands (Rick et al. 2016, Jackson et al. 2001). For estuaries, general drivers of ecosystem degradation are land use, exploitation (including overfishing of bivalve molluscs such as oysters), and human population growth (Jackson et al. 2001).

The geographic scope for a cumulative effects analysis should be determined by the spatial scale of the processes that most strongly influence the resource(s) being evaluated (MacDonald 2000). The temporal scope of a cumulative effects analysis should will encompass the past, present, and reasonably foreseeable future actions that may affect the resource(s) being evaluated (Clarke Murray et al. 2014, MacDonald 2000).

MacDonald (2000) presents a continuum of methods for evaluating cumulative effects, ranging from checklists to detailed models. Cumulative impact maps can be a useful tool for assessing the cumulative effects of human activities on marine ecosystem (Halpern and Fujita 2013). The Council on Environmental Quality (1997) identified several categories of methods for evaluating cumulative effects, including questionnaires, checklists, matrices, models, trends analyses, and the use of geographic information systems. The appropriate method is dependent on available information, the scope of the cumulative effects analysis, the resource(s) of concern and other factors.

Cumulative effects analyses must be, in many cases, qualitative analyses because of a lack of data on the resources being evaluated, the human activities that directly and indirectly affect those resources, and how those resources respond to disturbances caused by various human activities, such as the disturbances and threats to estuarine waters identified above. Data gaps are another important challenge, because information on ecosystem condition and the various stressors that affect ecosystem condition is often lacking or inadequate (Halpern and Fujita 2013). The lack of needed data is particularly relevant for a national action such as the issuance of an NWP, because of the paucity of national quantitative data on the quality and quantity of aquatic resources, the various human activities that can contribute to cumulative effects to those aquatic resources, and the variability in how aquatic resources respond to disturbances caused by different human activities. For a national action, regional variability in aquatic resources and the ecological functions and services they provide presents additional challenges to performing cumulative effects analyses.

A qualitative analysis of cumulative effects is usually necessary because of incomplete understanding of the relevant ecosystem processes and how they are affected by the various stressors and disturbances that occur across space and time and contribute to cumulative effects (MacDonald 2000, Bedford and Preston 1988). Uncertainty is unavoidable in cumulative effects analysis, because of the complexity of the processes and interactions that need to be considered (Reid 1998). Because of the complexity of cumulative effects and the larger geographic and time scales at which they occur (*e.g.,* past, present, and future activities in a waterbody or watershed) it is difficult to identify specific relationships where anthropogenic and natural disturbances affect the resource(s) being evaluated, especially for ecosystem components that respond to a variety of human activities and natural disturbances (Gosselink and Lee 1989). Predicting cumulative effects is difficult because of potential higher order interactions, such as the interactions between various stressors that contribute to cumulative effects, responses of species to a particular stressor may be dependent on context and influenced by other stressors, species may have different tolerances to specific stressors, and interactions among species may cause different stressor responses (Crain et al. 2008).

For the issuance of an NWP, Corps Headquarters prepares a national decision document that evaluates, in general terms, the individual impacts of NWP activities as well the cumulative environmental effects of those activities that are anticipated to occur during the period of up to five years during which an NWP is normally in effect. The analysis in the national decision document occurs at a national level, because the NWP authorizes activities across the country. In the NWP program, a division engineer has discretionary authority to modify, suspend, or revoke an NWP on a regional basis or for a class of waters when he or she determines that proposed NWP activities would result in more than minimal individual and cumulative adverse environmental effects in a particular geographic area or class of waters (33 CFR 330.4(e)(1)). A district engineer has discretionary authority to modify, suspend, or revoke an NWP authorization for a specific activity when she or he determines that the proposed NWP activity may result in more than minimal individual and cumulative adverse environmental effects (33 CFR 330.4(e)(2)).

The national decision document provides a general discussion of the potential impacts of individual NWP activities on the aquatic environment, including specific resource categories such as wetlands, fish and wildlife, and water quality. The national decision document also discusses how the NWP general conditions help avoid and minimize the adverse environmental effects to ensure that NWP activities will result in no more than minimal individual and cumulative adverse environmental effects. The national decision document does not include regional analyses or site-specific analyses because the national decision document is used to decide whether Corps Headquarters should issue the NWP. Regional analyses will be conducted by division engineers when they decide whether to exercise their discretionary authority to modify, suspend, or revoke NWP authorizations on a regional basis. Site-specific analyses are conducted by district engineers when they review pre-construction notifications or voluntary requests for NWP verifications, to determine whether proposed activities are authorized by NWP or whether additional conditions are needed to ensure NWP activities will result in no more than minimal individual and cumulative adverse environmental effects. The cumulative effects analyses conducted in the national decision document for the issuance of an NWP are discussed in more detail in the following paragraphs.

For the issuance of an NWP, in the environmental assessment within the national decision document, the Corps evaluates the ''incremental impact'' the NWP is anticipated to have during the five year period the NWP is expected to be in effect. In the national decision document, the national environmental

baseline is described in the ''affected environment'' section (section 3.0). The affected environment is described using available national-scale information, including national assessments of the quantity and quality of aquatic resources in the United States and land uses within the United States. The environmental baseline is used to evaluate the significance of the effects of the proposed action, and whether an environmental impact statement is required to satisfy NEPA requirements.

There is no requirement in CEQ's NEPA regulations for quantitative analyses of the impacts anticipated to be caused by a federal agency's proposed action. Qualitative analyses may be sufficient to satisfy NEPA requirements for the evaluation of the effects of the proposed action.

For the purposes of the Clean Water Act Section 404(b)(1) Guidelines, EPA defines ''cumulative impacts'' as ''the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material.'' (See 40 CFR 230.11(g)(1).) The Guidelines require the permitting authority to predict cumulative effects in its 404(b)(1) Guidelines analysis for the issuance of a general permit by estimating ''the number of individual discharge activities likely to be regulated under a general permit until its expiration, including repetitions of individual discharge activities at a single location.'' (See 40 CFR 230.7(b)(3).)

When the Corps prepares its 404(b)(1) Guidelines analysis in its national decision document for the issuance of an NWP that authorizes discharges of dredged or fill material into waters of the United States, it estimates the number of times that NWP may be used to authorize discharges of dredged or fill material into waters of the United States. The Corps also estimates the acreages of permitted impacts and compensatory mitigation requirements that may occur while the NWP is in effect (usually for a 5-year period), even though the Guidelines do not require those estimates. The estimated use of the NWP during the 5-year period the NWP is anticipated to be in effect is also considered (as well as other components of the 404(b)(1) Guidelines analysis) when the Corps determines whether the issuance of the NWP and its subsequent use while it is in effect will result in no more than minimal individual and cumulative adverse effects on the aquatic environment.

The 404(b)(1) Guidelines include an adaptability provision that recognizes that the level of documentation for determining compliance with the Guidelines should reflect the significance and complexity of the discharge activity (40 CFR 230.6(b)). That adaptability provision provides the Corps with discretion in terms of the information necessary for the 404(b)(1) Guidelines analysis for an NWP that can only authorize activities that have no more than minimal individual and cumulative adverse environmental effects. For individual activities authorized by NWPs (*i.e.,* when the Corps district issues an NWP verification), the 404(b)(1) Guidelines analysis is not to be repeated (see 40 CFR 230.6(d)).

When assessing cumulative effects under the 404(b)(1) Guidelines, the current environmental setting (*i.e.,* the environmental baseline) is a critical consideration, since it is used to determine the degree to which a particular NWP activity (or the total of NWP activities occurring during the 5-year period the NWP is in effect), is anticipated to add to cumulative effects to the environment. Since the NWPs are issued before any authorized activities can occur, it is by necessity a predictive evaluation. For the purposes of NEPA, the Corps evaluates whether the activities authorized by the NWP during that 5-year period are likely to result in an incremental contribution to cumulative effects that would, or would not, have a significant impact to the quality of the human environment and therefore would not require the preparation of an environmental impact statement. For the issuance of an NWP under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, the Corps evaluates whether the activities authorized by the NWP during the 5-year period it is anticipated to be effect will have only minimal cumulative adverse effects on the current environmental setting.

The ''no more than minimal'' threshold for the NWPs is a subjective threshold that requires the consideration of numerous factors, 10 of which are listed in paragraph 2 of Section D, ''District Engineer's Decision.'' The ''no more than minimal adverse environmental effects'' threshold cannot be quantified, because they are many factors to consider when making such determinations, and few of those factors can be quantified. For example, the environmental setting in the vicinity of the NWP activity cannot be quantified, and is usually understood in a qualitative manner. Considerations when evaluating this factor include, but are not limited to, whether the environmental setting consist of an urban or suburban area; whether the environmental setting is subjected to other land uses, such as agriculture, mining, recreation, or other activities; and whether the environmental setting is in a wilderness area or another area that has not been subjected to a substantial amount of land uses changes for human activities.

Since all ecosystems have been affected by human activities to some degree, in many cases the current environmental setting likely continues to provide some degree of ecological functions and services to local communities, even though it has changed over time, perhaps to a new stable state. The degree or magnitude to which aquatic resources perform ecological functions usually must be assessed through qualitative means, because the actual measurement of ecological functions requires repeated measurements over time to quantify ecosystem processes (Stein et al. 2009). Quantitative measurements of aquatic resource functions and services is usually beyond the resources available to Corps districts and permit applicants. The duration of the adverse effects (temporary or permanent), can be influenced by the resilience and resistance of the aquatic resource disturbances caused by NWP activities. There is also the uncertainty regarding the degree of change to the aquatic environment that will occur as a result of the individual and cumulative adverse environmental effects of NWP activities. For some ecosystems, passing a threshold can result in substantial changes to the ecosystem, and for other ecosystems those changes may be more subtle (Folke et al. 2004).

Uncertainty and unpredictability are inherent and unavoidable when managing ecosystems, as new situations arise and these ecosystems change because of management actions (Gunderson 2000). An adaptive management approach is needed to respond to this uncertainty and unpredictability (Gunderson 2000). The NWP program has tools available to address this uncertainty, such as the ability of division engineers to modify, suspend, or revoke NWP authorizations in a particular waterbody or region (see 33 CFR 330.5(c)) where new information indicates that the individual and cumulative adverse environmental effects caused by NWP activities may be becoming more than minimal.

Regime changes and tipping points are concepts in ecology that address thresholds of changes and the degree of those changes. Regime changes and tipping points generally relate to cumulative impacts because they are usually brought about by disturbances caused by multiple human activities

over time. Regime changes may be expressed as gradual or sudden changes in ecosystem structure, functions, and dynamics. An alternative state brought about by a regime change may be desirable or undesirable, depending on whether the alternative state for an ecosystem continues to provide ecological functions and services (Folke et al. 2004). In ecology, a tipping point is a threshold whereby an ecosystem would abruptly shift from one ecological state to a substantially different ecological state (Moore 2018), with relatively large changes in ecosystem structure, functions, and dynamics. In the context of aquatic resources, examples of tipping points include eutrophication of waterbodies and the formation of dead zones in ocean waters (Moore 2018). Tipping points are difficult to predict (Moore 2018).

The ecological changes that occur after a tipping point or regiment change threshold is crossed can generally be considered relatively severe changes, rather than changes that are more than minimal. Regime changes and tipping points may be more indicative of environmental changes or impacts that are more than minimal. Regime changes and tipping points may not a useful tool for determining whether the individual and cumulative adverse environmental effects of NWP activities are ''no more than minimal'' or ''more than minimal.'' Therefore, the determination of whether NWP activities are resulting in only minimal individual and cumulative adverse environmental effects will have to continue to be made through decisions made through the judgment exercised by district engineers, division engineers, and Corps Headquarters.

We are inviting comment on the proposed changes to this NWP, including the proposed removal of the notification thresholds and the removal of the ½-acre limit for direct effects to submerged aquatic vegetation. Division engineers can impose regional conditions to ensure that activities authorized by this NWP will result in no more than minimal adverse environmental effects. District engineers can add activity-specific permit conditions to this NWP. District engineers can also issue regional general permits to authorize similar activities in their geographic area of responsibility.

NWP 49. *Coal Remining Activities.* We are proposing to modify this NWP by removing the requirement for all permittees to obtain written verification before proceeding with the authorized work in waters of the United States. Removal of the requirement to obtain written authorization from the district engineer prior to conducting the permitted activity would make this NWP consistent with the other NWPs that require PCNs and are authorized under 33 CFR 330.1(e)(1) if the district engineer does not respond to the PCN within 45 days of receipt of a complete PCN. As with all other NWPs that have PCN requirements, 45 days should be a sufficient amount of time for a district engineer to review the PCN and determine whether the proposed activity qualifies for NWP authorization or whether discretionary authority should be exercised and an individual permit required because the proposed activity is unlikely to result in a net increase in aquatic resource functions.

When this NWP was originally issued in 2007 (72 FR 11191), the requirement for the permittee to receive written authorization from the district engineer before commencing the proposed activity was intended to provide consistency with NWP 21, which authorizes surface coal mining activities. The 2007 NWP 21 did not have any acreage limits (72 FR 11184).

In addition, we are proposing to remove the phrase ''as part of an integrated permit processing procedure'' from the first paragraph of this NWP. This provision was included in the NWP when it was first issued in 2007 (see 72 FR 11191). The Office of Surface Mining Reclamation and Enforcement within the Department of the Interior has responsibility for authorizing surface coal mining activities only in Tennessee and Washington. Even though this provision has been in place since 2007, no integrated permit processing procedures have been developed for coal mining activities in these two states, and it is unlikely that such procedures will developed in the future. Therefore, we are proposing to remove this text from the NWP because it has no applicability. We invite public comment on whether integrated permit processing procedures for the activities authorized by this NWP may be developed in the future.

NWP 50. *Underground Coal Mining Activities.* In addition to proposing to modify this NWP by removing the 300 linear foot limit for losses of stream bed, we are also proposing to remove the requirement for all permittees to obtain written verification before proceeding with the authorized work in waters of the United States. Removal of the requirement to obtain written verification prior to conducting the permitted activity would make this NWP consistent with the other NWPs that require PCNs and are authorized under 33 CFR 330.1(e)(1) if the district engineer does not respond to the PCN within 45 days of receipt of a complete PCN. As with the other NWPs that have a ½-acre limit and require pre-construction notification, 45 days should be a sufficient amount of time for a district engineer to review the PCN and determine whether the proposed activity qualifies for NWP authorization or whether discretionary authority should be exercised and an individual permit required because the district engineer determines the proposed activity may result in more than minimal individual and cumulative adverse environmental effects.

When this NWP was originally issued in 2007 (72 FR 11191), it did not have an acreage limit. The 2007 NWP 50 had a requirement for the permittee to receive written authorization from the district engineer before commencing the proposed activity. This provision was intended to provide consistency with NWP 21, which authorizes surface coal mining activities.

The ½-acre limit was added to NWP 50 in 2012 (see 77 FR 10281), so that it would be consistent with numerous other NWPs (*e.g.,* NWPs 12, 21, 29, 39, 40, 42, 43, 44, 51, and 52). We are proposing to remove the requirement for written verifications to be consistent with the other NWPs that have the ½-acre limit, and eliminate an additional burden on the regulated public that is not present in similar NWPs. The 45-day clock for the district engineer's review of PCNs at 33 CFR 330.1(e)(1), as well as the provision for the NWP authorization to be in effect if the district engineer does not respond to the PCN within that 45-day period, is an important tool to provide predictability to the regulated public and fulfill the objective of the NWP program. That objective is to ''regulate with little, if any, delay or paperwork certain activities having minimal impacts'' (33 CFR 330.1(b)). For those commenters who oppose the removal of the requirement for a written verification from this NWP, we ask that they explain why discharges of dredged or fill material into waters of the United States associated with surface coal mining activities should be treated differently than other NWPs that also have a ½-acre limit and authorize discharges of dredged or fill material into similar types of waters.

In addition, we are proposing to remove the phrase ''as part of an integrated permit processing procedure'' from the first paragraph of this NWP. The Office of Surface Mining Reclamation and Enforcement only has responsibility for authorizing surface coal mining activities in Tennessee and Washington. Even though this provision

has been in place since 2007, no integrated permit processing procedures have been developed for coal mining activities in these two states, and it is unlikely that such procedures will developed in the future. Therefore, we are proposing to remove this text from the NWP because it has no applicability. We are soliciting comments on whether integrated permit processing procedures for the activities authorized by this NWP may be developed in the future.

We are also proposing to remove the ''Note'' from this NWP because coal preparation and processing activities should be included in the single and complete NWP 50 activity, and any losses of waters of the United States caused by those activities should be counted towards the ½-acre limit rather than being separately authorized by NWP 21.

NWP 51. *Land-Based Renewable Energy Generation Facilities.* In Note 1, we are proposing to change the reference to NWP 12 NWP C, since we are proposing to issue a new NWP for electric utility line and telecommunications activities (*i.e.,* proposed new NWP C).

In Note 3, we are proposing to add the phrase ''by the Corps'' to make it clear that the Corps district, not the permittee, will send a copy of the NWP PCN and NWP verification to the Department of Defense Siting Clearinghouse.

NWP 52. *Water-Based Renewable Energy Generation Pilot Projects.* In Note 5, we are proposing to add the phrase ''by the Corps'' to make it clear that the Corps district, not the permittee, will send a copy of the NWP PCN and NWP verification to the Department of Defense Siting Clearinghouse.

*C. Discussion of Proposed New Nationwide Permits*

The Corps has heard from stakeholders that there may be aquaculture activities relating to growing seaweed and finfish that meet the statutory conditions of general permits but are not covered by NWP 48. After evaluating the issue, we believe that separate NWPs should be proposed for these activities. In addition, E.O. 13921 directed the Corps to develop, and propose for public comment, NWPs that authorize seaweed mariculture activities and finfish mariculture activities in marine and coastal waters, including federal waters on the outer continental shelf. We are also proposing to refer the aquaculture activities as mariculture activities to make it clear that the proposed NWPs would not authorize land-based finfish, shellfish, or seaweed farming activities. If the proposed NWPs are issued, then there would be NWP authorization available for the three main mariculture sectors: Shellfish, seaweed, and finfish. These three NWPs would support industries that have potential to become a growing share in food production to satisfy human nutritional needs, while decreasing dependence on wild stocks of finfish, shellfish, and seaweeds to serve those needs (Lester et al. 2018, Duarte et al. 2009).

We are also seeking public comment on whether the Corps should issue a single NWP that authorizes both finfish and seaweed mariculture activities, as well as integrated multi-trophic mariculture activities.

A. *Seaweed Mariculture Activities.* We are proposing to issue a new NWP to authorize structures and work in marine waters, including structures anchored to the seabed in federal waters over the outer continental shelf, for seaweed mariculture activities. We are also proposing to include in the terms of this NWP multi-trophic mariculture activities, if the mariculture operator wants to cultivate other species, such as bivalve shellfish, with the seaweed. Multi-species mariculture activities are an ecosystem-based approach to mariculture, with the objective of providing environmental benefits by recycling waste nutrients from fish and other species through assimilation by species of commercial value that consume those nutrients (*e.g.,* seaweed, bivalve molluscs) (*e.g.,* Troell et al. 2009, Soto et al. 2009). Stand-alone commercial shellfish mariculture activities can be authorized by NWP 48, but NWP 48 does not authorize seaweed mariculture activities. Seaweed mariculture activities currently require individual permits, except in Corps districts that have issued regional general permits that authorize seaweed mariculture activities.

Seaweed mariculture provisioning services include the production of food, medicines, texturizing agents, agar, and biofuel, and may also have positive effects on other fisheries, by providing habitat and nutrients (Alleway 2019). Seaweed produced through mariculture can be used to produce complex materials, pharmaceuticals, food ingredients, feed, and biofuels (Hasselström et al. 2018). Seaweeds such as red algae provide ingredients to produce processed food, including thickening agents such as agar and carrageenan (Waters et al. 2019). Seaweed mariculture can also benefit marine waters by improving water quality through uptake and metabolism of nitrogen and phosphorous and by providing habitat for fish and other aquatic organisms (Hasselström et al. 2018). Seaweeds can also be used to produce feed for finfish mariculture activities (Diana 2009). In addition, kelp and other seaweed have the potential to create nursery grounds for young fish and crustaceans and provide shelter from predation.

In waters that are declining in their ability to perform various ecological functions and services, including water quality, because of climate change and other factors, shellfish, finfish, and seaweed mariculture can restore or maintain ecological functions or services (Alleway 2019). Spatial planning can be used to site mariculture activities so that they can potentially optimize (maximize) the beneficial ecological services provided (Alleway 2019).

Seaweed mariculture activities are usually conducted through the use of floating racks or long-lines supported by stakes or floats. The floating racks or long-lines support kelps and other types of seaweed while they grow in the water column. Seaweed mariculture activities typically do not involve discharges of dredged or fill material into waters of the United States and normally do not require authorization under section 404 of the Clean Water Act. Therefore, we are proposing to issue this new NWP under the authority of section 10 of the Rivers and Harbors Act of 1899. We are seeking comment on whether seaweed mariculture activities may involve activities that may result in a discharge of dredged or fill material into waters of the United States, and thus require authorization under Section 404 of the Clean Water Act.

We are proposing to issue this NWP to authorize seaweed mariculture activities in the territorial seas (3 nautical miles from the coast) and in federal waters beyond the territorial seas that overlie the outer continental shelf. In coastal waters subject to Section 10 of the Rivers and Harbors Act of 1899, the Corps regulates obstructions in navigable waters of the United States. Under section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)), the authority of the Corps under Section 10 of the Rivers and Harbors Act of 1899 to prevent obstructions to navigation in navigable waters of the United States was extended to the seaward limit of the outer continental shelf for artificial islands, installations, and other devices located on the seabed. Therefore, under section 4(f) of the Outer Continental Shelf Lands Act of 1953, as amended, a section 10 permit is required for seaweed mariculture structures on the

outer continental shelf that are anchored to the seabed. In recent years, there has been increased interest in conducting mariculture activities in federal waters on the outer continental shelf where there are fewer pollution sources and to avoid controversies concerning conflicting uses of coastal waters (NRC 2010), such as objections from waterfront property owners regarding aesthetic impacts, impacts on coastal navigation, and impacts on nearshore fishing activities.

We are proposing to add terms to this NWP to prevent conflicts with other uses of ocean waters, and to satisfy the requirement that NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. We are proposing to require that structures in an anchorage area established by the U.S. Coast Guard comply with the requirements in 33 CFR 322.5(l)(2). We are also proposing to prohibit structures in established danger zones or restricted areas designated by the Corps in 33 CFR part 334, federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas. These proposed terms are similar to the terms we established for NWP 52, which was first issued in 2012 to authorize water-based renewable energy generation pilot projects, because there may be similar concerns regarding conflicting uses of these marine waters. We are also proposing to require PCNs for all activities authorized by this NWP to give district engineers the opportunity to review each proposed activity to determine whether any of these potential conflicts may arise and exercise discretionary authority if necessary.

Seaweed mariculture activities in federal waters on the outer continental shelf may require authorizations from other federal agencies. For example, seaweed mariculture operator may be required to obtain from the Department of the Interior's Bureau of Ocean Energy Management a Right of Use and Easement (RUE) if the proposed seaweed mariculture activity will utilize or tether to existing oil and gas facilities on the outer continental shelf. Consultation with the Department of Interior's Bureau of Safety and Environmental Enforcement may also be required for proposed seaweed mariculture activities on the outer continental shelf. Seaweed mariculture operators that propose to establish a private aid to navigation to mark the location of the seaweed mariculture activity and ensure safe navigation in the vicinity of that activity may need to obtain authorization from the appropriate U.S. Coast Guard District.

We are proposing to require PCNs for all activities authorized by this NWP to allow district engineers to review each proposed activity, including potential adverse effects on navigation. We are also proposing to require PCNs to include the following information in addition to the information required by paragraph (b) of the ''Pre-Construction Notification'' general condition:

(1) A map showing the locations and dimensions of the structure(s);

(2) the name(s) of the species that will be cultivated during the period this NWP is in effect; and

(3) general water depths in the project area(s) (a detailed survey is not required).

Items (1) and (3) will assist district engineers in evaluating potential impacts to navigation. The prospective permittee needs to submit only one PCN per structure or group of structures to be used for the seaweed mariculture operation during the effective period of this NWP. The PCN should also describe all species and culture activities the operator expects to undertake during the effective period of this NWP. If an operator intends to undertake unanticipated changes to the seaweed mariculture operation during the effective period of this NWP, and those changes require DA authorization, the operator must contact the district engineer to request a modification of the NWP verification.

District engineers will review PCNs for proposed seaweed mariculture activities to evaluate effects on the aquatic environment, navigation, and other public interest review factors. Section D of the NWPs describes the district engineer's evaluation process for PCNs, including determining whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. Division engineers can add regional conditions to this NWP to address specific environmental concerns and other public interest review factors at a regional level. District engineers can add activity-specific conditions to NWP verifications to ensure that a particular seaweed mariculture activity will result in no more than minimal individual and cumulative adverse environmental effects.

Seaweed mariculture activities may alter estuarine and marine habitats utilized by endangered or threatened species. Some of these habitats may have been determined to be designated critical habitat for listed species. If a proposed seaweed mariculture activity might affect listed species or critical habitat, then the project proponent is required to identify in the PCN which listed species might be affected by the proposed activity. The district engineer will evaluate the effects to listed species caused by the seaweed mariculture activity and determine if ESA section 7 consultation is required. If the district engineer reviews the PCN and determines that the proposed seaweed mariculture activity will adversely affect essential fish habitat, he or she will conduct EFH consultation with the National Marine Fisheries Service.

In this proposed new NWP, we are also soliciting comment on whether to include the production of other species, including shellfish such as mussels or oysters, along with seaweed species as part of a multispecies mariculture activity. For example, both kelp and mussels may be grown from lines hanging from the same floating rack.

We are seeking comments on this proposed new NWP, including its terms and conditions. The proposed terms and conditions of this NWP, as well as the terms and conditions of the other NWPs we are proposing to issue or reissue, are provided at the end of this proposed rule document. In response to a PCN, the district engineer may impose activity-specific conditions on an NWP verification to ensure that the adverse environmental effects of the authorized activity are no more than minimal or exercise discretionary authority to require exercise discretionary authority to require an individual permit for the proposed activity.

B. *Finfish Mariculture Activities.* We are proposing to issue a new NWP to authorize structures and work in marine and estuarine waters for finfish mariculture activities, including structures anchored to the seabed in waters overlying the outer continental shelf. This NWP would not authorize land-based finfish mariculture activities, such as the construction of ponds or other facilities to produce finfish such as catfish, carp, or tilapia. To make it clear that this NWP is limited to finfish mariculture activities in marine waters, and does not authorize land-based finfish aquaculture activities, we are proposing to use the term ''mariculture'' in this NWP. Mariculture is the cultivation of organisms in marine and estuarine open water environments (NRC 2010). In addition, this proposed NWP also would not authorize the construction of land-based fish hatchery facilities or other attendant features. If the construction of such land-based

facilities or attendant features requires DA authorization, those activities may qualify for authorization under NWP 39, which authorizes commercial and institutional developments.

According to the Food and Agriculture Organization (FAO) of the United Nations, in the United States finfish production accounts for 65 percent of total aquaculture.[14] The predominant marine finfish species currently being cultivated in the United States are Atlantic salmon and white sturgeon. There are preliminary efforts at using mariculture to produce other finfish species, such as Atlantic cod, longfin yellowtail, sixfinger threadfin, and cobia. The FAO identified other species might be produced in the future through commercial finfish aquaculture efforts, including yellowfin tuna, sablefish, yellowtail amberjack, red drum, California flounder, summer flounder, and Florida pompano. In freshwater systems, channel catfish is the primary finfish species being cultivated. Other freshwater finfish species that are currently cultivated in the United States include cyprinids, rainbow trout, hybrid striped bass, and tilapia. This proposed new NWP would not authorize the cultivation of freshwater finfish species. Freshwater finfish aquaculture activities are often conducted in land-based facilities, the construction of which can have substantial impacts on wetlands and streams. Corps districts can develop regional general permits for such activities.

In this NWP, we are also proposing to authorize multi-trophic mariculture activities, if the mariculture operator wants to cultivate other species, such as molluscan shellfish or seaweed, with the finfish. Multi-species mariculture activities are an ecosystem-based approach to mariculture, with the objective of providing environmental benefits by recycling waste nutrients from the cultivated finfish and other fish in the vicinity other species, when other species of commercial value that consume those waste nutrients (*e.g.,* seaweed, bivalve molluscs) (*e.g.,* Price and Morris 2013, Troell et al. 2009, Soto et al. 2009).

Finfish mariculture activities in marine and estuarine waters are becoming a more important mechanism for producing finfish as source of protein to satisfy human nutritional needs (FAO 2018, Gentry et al. 2017). We are proposing to issue this NWP to authorize finfish mariculture activities in marine and estuarine coastal waters out to the limit of the territorial seas (3 nautical miles from the baseline) and in ocean waters beyond the territorial seas that overlie the outer continental shelf. In coastal waters, under section 10 of the Rivers and Harbors Act of 1899 the Corps regulates obstructions in navigable waters of the United States. For finfish mariculture activities, this can include cages and net pens. Under section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)), the authority of the Corps to prevent obstructions to navigation in navigable waters of the United States was extended to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf. Department of the Army authorization is required under Section 10 of the Rivers and Harbors Act of 1899 for finfish mariculture structures on the outer continental shelf that are anchored to the seabed. Project proponents may propose mariculture activities in federal waters on the outer continental shelf to avoid nearshore pollution and conflicting uses of coastal waters, including objections from waterfront property owners based on aesthetic impacts (NRC 2010).

In addition to producing food, marine mariculture can provide a variety of ecosystem services, including other provisioning services, regulating services, habitat or supporting services, and cultural services (Alleway 2019). The specific ecosystem services provided are dependent on the functional characteristics of the species being cultivated, the characteristics of the surrounding environment, design of the mariculture operation, and how those operations occur (Alleway 2019). Finfish mariculture operations can be sited, designed, and implemented to avoid or minimize certain adverse environmental effects (Price and Morris 2013). Mariculture structures may attract fish and invertebrates, including fouling species (which may be prey species), and may act as small reserves or protected areas, when fishing and other activities are prohibited in the areas being used for finfish mariculture (Alleway 2019).

The impacts of mariculture activities on the environment are strongly influenced by how they are operated, including which species are being produced, stocking density, how the fish are being fed, and location (Gentry et al. 2017). Spatial planning for mariculture activities in federal waters over the outer continental shelf can be an important tool for siting these facilities to manage impacts on the aquatic environment (Gentry et al. 2017). One potential benefit of mariculture is that it can help reduce the amount of land needed to produce food to support increasing human populations, by increasing the share of food produced in the ocean (Froehlich et al. 2018).

We are proposing to add terms to this NWP to prevent conflicts with other uses of ocean waters and ensure that the NWP authorizes only those activities that will result in no more than minimal individual and cumulative adverse environmental effects. We are proposing to require that structures in an anchorage area established by the U.S. Coast Guard comply with the requirements in 33 CFR 322.5(l)(2). We are also proposing to prohibit structures in established danger zones or restricted areas designated by the Corps in 33 CFR part 334, federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas. These proposed terms are similar to the terms we established for NWP 52, which was first issued in 2012 to authorize water-based renewable energy generation pilot projects, because there may be similar concerns regarding conflicting uses of these marine waters. We are also proposing to require PCNs for all activities authorized by this NWP to give district engineers the opportunity to review each proposed activity to determine whether any of these potential conflicts may arise and exercise discretionary authority if necessary.

Finfish mariculture activities may require authorization under Section 402 of the Clean Water Act for discharges of pollutants into navigable waters. These discharges may involve animal wastes, feeds, or chemicals. For purposes of the Clean Water Act (CWA), off-shore federal waters begin 3 miles from shore for all states. Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (NPDES) and authorizes EPA (or states authorized by EPA) to issue NPDES permits for point source discharges of pollutants into waters of the U.S., including the territorial seas. Only EPA issues NPDES for discharges into off-shore federal waters. The EPA's NPDES permit regulations also include specific provisions that apply to offshore mariculture activities. EPA regulations use the term ''concentrated aquatic production facility'' to describe offshore mariculture. A concentrated aquatic animal production facility is a ''hatchery, fish farm, or other facility'' which is designated by EPA in

[14] *http://www.fao.org/fishery/countrysector/naso_usa/en#tcN70085* (accessed 3/16/2020).

accordance with 40 CFR 122.24 or that meets the criteria in Appendix C to 40 CFR part 122. The EPA or authorized states may issue NPDES permits on an individual basis (*i.e.,* for a single facility) or as a general permit that covers multiple operations with similar types of discharges, which may be within a specified geographic area. The process for a finfish mariculture operator to obtain an NPDES permit from the EPA or approved state is separate from the Corps' NWP authorization process.

Finfish mariculture activities in federal waters on the outer continental shelf may require authorizations from other federal agencies. For example, the finfish mariculture operator may be required to obtain from the Bureau of Ocean Energy Management a Right of Use and Easement (RUE) if the proposed finfish mariculture activity will utilize or tether to existing oil and gas facilities on the outer continental shelf. Consultation with the Department of Interior's Bureau of Safety and Environmental Enforcement may also be required for proposed finfish mariculture activities on the outer continental shelf. Finfish mariculture operators that want to establish a private aid to navigation to mark the location of the finfish mariculture activity and ensure safe navigation in the vicinity of that activity may need to obtain authorization from the appropriate U.S. Coast Guard District.

Finfish mariculture activities may alter estuarine and marine habitats utilized by endangered or threatened species. Some of these habitats may have been determined to be designated critical habitat for listed species. If a proposed finfish mariculture activity might affect listed species or critical habitat, then the project proponent is required to identify in the PCN which listed species might be affected by the proposed activity. The district engineer will evaluate the effects to listed species caused by the finfish mariculture activity and determine if ESA section 7 consultation is required. If the district engineer reviews the PCN and determines that the proposed finfish mariculture activity will adversely affect essential fish habitat, he or she will conduct EFH consultation with the National Marine Fisheries Service.

We are proposing to require PCNs for all activities authorized by this NWP to allow district engineers to review each proposed activity. We are also proposing to require PCNs to include the following information in addition to the information required by paragraph (b) of the ''Pre-Construction Notification'' general condition:

(1) A map showing the locations and dimensions of the structure(s);

(2) the name(s) of the species that will be cultivated during the period this NWP is in effect; and

(3) general water depths in the project area(s) (a detailed survey is not required).

Items (1) and (3) will assist district engineers in evaluating potential impacts to navigation. The prospective permittee needs to submit only one PCN per structure or group of structures to be used for the finfish mariculture operation during the effective period of this NWP. The PCN should also describe all species and culture activities the operator expects to undertake during the effective period of this NWP. If an operator intends to undertake unanticipated changes to the finfish mariculture operation during the effective period of this NWP, and those changes require DA authorization, the operator must contact the district engineer to request a modification of the NWP verification.

District engineers will review PCNs for proposed finfish mariculture activities to evaluate effects on the aquatic environment, navigation, and other public interest review factors. District engineers will also review PCNs to evaluate potential effects on anchorage areas established by the U.S. Coast Guard, danger zones or restricted areas designated by the Corps through the procedures in 33 CFR part 334, federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard, or EPA- or Corps-designated open water dredged material disposal areas. Section D of the NWPs describes the district engineer's evaluation process for PCNs, including determining whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. Division engineers can add regional conditions to this NWP to address specific environmental concerns and other public interest review factors at a regional level.

We are inviting comments on this proposed new NWP, including its terms and conditions. The proposed terms and conditions of this NWP, as well as the terms and conditions of the other NWPs we are proposing to issue or reissue, are provided at the end of this proposed rule document. In response to a PCN, the district engineer may impose activity-specific conditions on an NWP verification to ensure that the adverse environmental effects of the authorized activity are no more than minimal or exercise discretionary authority to require exercise discretionary authority to require an individual permit for the proposed activity.

C. *Electric Utility Line and Telecommunications Activities.* In the section of this preamble discussing the proposed changes to NWP 12, we discuss our proposal to modify NWP 12 to authorize oil or natural gas pipeline activities and to issue two new NWPs to authorize electric utility line and telecommunications activities (proposed new NWP C) and other utility lines that convey substances not covered by proposed NWPs 12 and C, such as potable water, sewage, wastewater, stormwater, brine, and industrial products that are not petrochemical products (proposed new NWP D). To the extent that the scale of electrical energy generation from renewable energy sources (*e.g.,* land-based renewable energy generation facilities authorized by NWP 51 that use solar and wind energy to generate electricity) increases, there will also be a need for additional electric transmission facilities to convey the electricity from the generation facilities to the end users.[15] The electric utility line and telecommunications activities in waters of the United States that would be authorized by proposed new NWP C could be used to authorize activities associated with these new electric production facilities.

We are proposing to issue a new NWP to authorize only electric utility line and telecommunications activities. The intent of this proposal is to tailor this NWP to more effectively address the potential adverse environmental effects that may be caused by these activities, and possibly add various national standards and best management practices that could be incorporated into the text of the NWP to help ensure that these activities result in only minimal individual and cumulative adverse environmental effects.

For this proposed NWP, we are soliciting comments and suggestions for national standards or best management practices for electric utility line and telecommunications activities that would be appropriate to add to this NWP, and within the Corps' legal authority to enforce as terms and conditions of an NWP authorization. Adding such national standards or best management practices may also address concerns expressed regarding Corps regional conditions added to the NWPs by division engineers that are discussed above in the preamble to this proposed

[15] U.S. Department of Energy, National Renewable Energy Laboratory, *https://www.nrel.gov/analysis/transmission-infrastructure.html* (accessed April 3, 2020).

rule. Concerns about inconsistency in Corps regional conditions for an NWP can be addressed by adding more terms and conditions to the NWPs to ensure the NWP authorizes only those activities that result in no more than minimal adverse environmental effects.

For proposed new NWP C, we are proposing to retain the basic structure of the 2017 NWP 12, since many of the activities authorized by the 2017 NWP 12 could apply to electric utility line and telecommunications activities. That basic structure would provide consistency and be familiar to potential users of the modified NWP 12 and proposed new NWPs C and D.

We are proposing to name this NWP to ''Electric Utility Line and Telecommunications Activities'' because these utility lines convey electricity. The electric utility lines and telecommunication lines covered by this NWP include metal wires and fiber optic cables. The title of this proposed new NWP refers to ''activities'' because the Corps does not regulate electric utility lines and telecommunication lines per se. The Corps only regulates specific activities associated with electric utility line and telecommunication line construction, maintenance, repair, and removal activities that are regulated under Section 404 of the Clean Water Act (*i.e.,* discharges of dredged or fill material into waters of the United States) and Section 10 of the Rivers and Harbors Act of 1899 (*i.e.,* structures or work in navigable waters of the United States). We are proposing to define the term ''electric utility line and telecommunication line'' as ''any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.''

This proposed NWP authorizes substations constructed in non-tidal waters of the United States because electric utility line and telecommunications substations are often necessary for an electric utility line or a telecommunication line. This proposed NWP also authorizes foundations for overhead electric utility line and telecommunication line towers, poles, and anchors because those features are necessary for most above-ground electric utility lines and telecommunications lines. The proposed NWP also authorizes access roads, with similar text as the access roads provision in NWP 12.

We are proposing to include a paragraph that authorizes, to the extent that DA authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing electric utility lines and telecommunications lines. Horizontal directional drilling may be used to construct or replace electric utility lines and telecommunications lines, and if inadvertent returns occur during these activities, this NWP can be used to authorize remediation activities so that they can occur in a timely manner to minimize adverse environmental effects that might be caused by these inadvertent returns. In addition, we are proposing to include a paragraph, similar to the paragraph in NWP 12 that authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the electric utility line or telecommunications activity.

With respect to the PCN requirements for this proposed NWP, we are proposing to require PCNs for proposed electric utility line and telecommunications activities that: (1) Require a section 10 permit; or (2) that include discharge of dredged or fill material that will result in the loss of greater than 1/10-acre of waters of the United States.

In Note 7, we are proposing to add the phrase ''by the Corps'' to make it clear that the Corps district, not the permittee, will send a copy of the NWP PCN and NWP verification to the Department of Defense Siting Clearinghouse.

We are soliciting comments on this proposed new NWP. We are also seeking comments and suggestions for national standards and best management practices that may be added to the text of this NWP to help ensure that this NWP authorizes only those electric utility line and telecommunications activities that will cause no more than minimal individual and cumulative adverse environmental effects.

D. *Utility Line Activities for Water and Other Substances.* In conjunction with the proposal to modify NWP 12 to limit it to oil and natural gas pipeline activities, we are proposing to issue a new NWP to authorize utility line activities that convey water and other substances that are not covered by NWP 12 or the new proposed NWP C for electric utility line and telecommunications activities. This proposed new NWP would authorize utility lines that carry substances that are not oil, natural gas, petrochemicals, or electricity, such as potable water, sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals.

As discussed above in the sections of the preamble on proposed NWP 12 and proposed new NWP C, the intent of this proposal is to tailor these NWPs to more effectively address potential differences in how the different types of utility lines are constructed, maintained, repaired, and removed. We are proposing to add, if appropriate after considering the comments received in response to this proposed rule, industry-specific standards or best management practices that could serve as national terms in the text of the NWP to help ensure that it authorizes only those activities that will result in no more than minimal individual and cumulative adverse environmental effects. The ''terms'' of an NWP, as defined at 33 CFR 330.2(h), are ''the limitations and provisions included in the description of the NWP itself.''

For this proposed new NWP, we are soliciting comments and suggestions for national standards or best management practices for utility lines that convey water (including potable water), sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals. To be incorporated into the text of this NWP those standards would have to be within the Corps' legal authority to enforce as terms and conditions of an NWP authorization. Adding such national standards or best management practices may also reduce the need for Corps regional conditions, approved by division engineers, and promote consistency in the use of this NWP.

For this proposed new NWP, we have retained the basic structure of the 2017 NWP 12. Much of the text in this NWP is similar to the text of the 2017 NWP 12 since many of the activities authorized by this NWP apply to any utility line, regardless of what substances it conveys. Maintaining the basic structure from the 2017 NWP 12 may help provide consistency and be familiar to potential users of the new NWP. We are also including the proposed modifications to NWP 12 and the terms of the proposed new NWP C for electric utility line and telecommunications activities.

We are proposing to give this NWP the following title: ''Utility line activities for water and other substances.'' We are proposing to define ''utility line,'' for the purposes of this NWP, as ''any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, that is not oil or natural gas.'' The title of this NWP refers to

''activities'' because the Corps does not regulate utility lines, including water and sewer lines and industrial pipelines, per se. The Corps only regulates specific activities associated with construction, maintenance, repair, and removal of these types of utility lines that are regulated under Section 404 of the Clean Water Act (*i.e.,* discharges of dredged or fill material into waters of the United States) and Section 10 of the Rivers and Harbors Act of 1899 (*i.e.,* structures or work in navigable waters of the United States).

In this NWP, we are proposing to include text from NWP 12 concerning trench excavation, temporary sidecasting, and backfilling, since these types of activities generally apply to all types of underground utility lines. The proposed paragraph for utility line substations would have the ½-acre limit for losses of non-tidal waters of the United States, and the prohibition against activities that result in the loss of non-tidal wetlands adjacent to tidal waters. We are also proposing to include the paragraph from NWP 12 that covers substations constructed in non-tidal waters of the United States because water lines, sewer lines, and other types of pipelines often require substations for their operation. These can include pumping stations or lifting stations. Pumping stations are used to move water and other substances through the utility line. Lift stations are used to move wastewater from lower elevations to higher elevations, and are needed in areas where the elevation of the source of the wastewater is not sufficient for gravity flow to occur, or when gravity conveyance requires greater excavation depths and high construction costs.[16]

We are proposing to include a paragraph authorizing foundations for above-ground utility lines that is similar to the paragraph that was in the 2017 NWP 12. The proposed paragraph would read as follows: ''This NWP authorizes the construction or maintenance of foundations for above-ground utility lines in all waters of the United States, provided the foundations are the minimum size necessary.'' We are proposing to include the authorization of access roads, since access roads may be necessary to construct or maintain these utility lines. This proposed new NWP would also authorize utility lines routed in, over, or under section 10 waters without a discharge of dredged or fill material, but still require a section 10 permit.

We are proposing to include the paragraph from the 2017 NWP 12 that authorizes, to the extent that DA authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. Horizontal directional drilling may be used to construct or replace utility lines, and if inadvertent returns occur during these activities, this NWP can be used to authorize remediation activities so that they can occur in a timely manner to minimize adverse environmental effects that might be caused by these inadvertent returns. In addition, we are proposing to retain the paragraph that authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity.

Regarding pre-construction notification requirements for this proposed new NWP, we are proposing to require PCNs for proposed utility line activities that: (1) Require a section 10 permit; or (2) that include discharge of dredged or fill material that will result in the loss of greater than 1/10-acre of waters of the United States.

We are proposing not to include Notes 3 and 7 from the 2017 NWP 12 in this new NWP. Note 3 addressed the applicable minimum clearances for aerial electric power transmission lines crossing navigable waters of the United States. Those minimum clearances do not apply to utility lines that convey water and other substances. Note 7 stated that a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities. Since electric utility lines and telecommunications lines are the types of utility lines that the Department of Defense Siting Clearinghouse wants to review to determine whether there are potential effects on military activities, we are proposing to not include that note because the proposed NWP does not authorize electric utility lines or telecommunications lines.

We are inviting comments on this proposed new NWP. We are also seeking comments and suggestions for national standards and best management practices that may be added to the text of this NWP to help ensure that this NWP authorizes only those utility line activities that will cause no more than minimal individual and cumulative adverse environmental effects.

E. *Water Reclamation and Reuse Facilities.* We are proposing to issue a new NWP to authorize discharges of dredged or fill material into waters of the United States associated with the construction, expansion, and maintenance of water reclamation and reuse facilities, including vegetated areas enhanced to improve water infiltration and constructed wetlands to improve water quality. While some construction, expansion, and maintenance activities for water reclamation and reuse facilities may occur in uplands, or in waters and wetlands that are not subject to Clean Water Act jurisdiction, the construction, expansion, or maintenance of some water reclamation and reuse facilities, including engineered infrastructure (*e.g.,* constructed features to collect and treat onsite-available waters) and ecological infrastructure (*e.g.,* enhancement of vegetated areas to improve water infiltration or constructed wetlands to remove pollutants), may require DA authorization under Section 404 of the Clean Water Act because the construction, expansion, or maintenance of these facilities may involve discharges of dredged or fill material into waters of the United States.

Safe and reliable water supplies for human consumption, agriculture, business, industry, recreation, and healthy ecosystems are critical to our nation's communities and economy. Water reuse can improve the security, sustainability, and resilience of our nation's water resources. Increasing pressures on water resources has led to greater water scarcity and a growing demand for sufficient quantities of high-quality water. Many communities have initiated or are developing centralized systems for planned water reuse, including recycling of stormwater runoff and wastewater. Likewise, they are increasingly interested in decentralized systems that collect and treat onsite-available waters, such as greywater and rainwater for non-potable applications. Three general types of water reuse include: Non-potable water reuse, indirect potable water reuse, and direct potable water reuse.

There are two main categories of water reuse: Non-potable reuse and potable water reuse. For non-potable water reuse, water is captured, treated, and used for non-drinking purposes, such as toilet flushing, clothes washing, and irrigation. For indirect potable water reuse, water is treated with an environmental buffer and used for drinking water. For example, stormwater or wastewater is first

[16] *https://www3.epa.gov/npdes/pubs/sewers-lift_station.pdf* (accessed April 2, 2020).

directed to a municipal wastewater treatment plant for treatment. Once treated, it is then directed to an environmental buffer, such as a lake, river, or a groundwater aquifer that is used as a source drinking water. The water is then treated at a drinking water treatment plant and directed into the drinking water distribution system. With direct potable water reuse, water is treated and used for drinking water without an environmental buffer. For direct potable water reuse, stormwater or wastewater is directed to a municipal wastewater treatment plant and/or an advanced wastewater treatment facility for treatment. Once treated, it is then directed to a drinking water treatment plant for further treatment or sent directly to a drinking water distribution system.

Municipal water reuse can help provide substantial increases in the amount of available water resources in the United States (NRC 2012), by reusing water that was previously discharged to marine or estuarine waters as wastewater. It also has potential applicability in inland areas of the United States. Water reclamation and reuse facilities may consist of engineered processes, or a combination of engineered features and ecological features (*e.g.,* environmental buffers, constructed wetlands) (NRC 2012).

Central to all water reuse applications (non-potable and potable) is the requirement that any source water for potential reuse must meet all applicable ''fit for purpose specifications'' established by EPA or states. These specifications ensure that the quality of the reused water is demonstrated to meet relevant and applicable public health, environmental and other end use quality and quantity criteria. The Corps does not have any authority to enforce any ''fit for purpose specifications'' developed by EPA or states. In addition, the Corps does not have the authority to regulate discharges of water from municipal wastewater treatment plants into lakes, rivers, environmental buffers, or groundwater because such water discharges are not ''discharges of dredged material'' (defined at 33 CFR 323.2(d)) or ''discharges of fill material'' (defined at 33 CFR 323.2(f)) and are not subject to regulation under Section 404 of the Clean Water Act. These discharges may be regulated by EPA or approved states under Section 402 of the Clean Water Act.

Discharges of water from water reuse or reclamation facilities that involve underground injection may be subject to the Underground Injection Control program permit requirements under the Safe Drinking Water Act. Injection well requirements and their permitting authorities vary by geographic location and by the type of activities performed. The owner and operator of an injection well is responsible for determining and fulfilling all applicable requirements prior to commencing construction and injection operations. Additional information on the UIC program and a list of permitting authorities can be found at: *https://www.epa.gov/uic*. The Corps does not have any authority to regulate the operation of an injection well because that operation does not involve discharges of dredged or fill material into waters of the United States, so these activities are not addressed in the text of proposed new NWP E.

Because some water reclamation and reuse facilities may require engineered and ecological infrastructure that is constructed in waters of the United States through discharges of dredged or fill material, and thus require Clean Water Act Section 404 authorization, we are proposing to issue a new NWP. However, it should be noted that there are existing NWPs that can be used to authorize discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of water reclamation and reuse facilities. Therefore, as discussed in more detail below, an alternative to issuing a new NWP to authorize discharges of dredged or fill material into waters of the United States for water reclamation and reuse facilities may be to provide clarification on which existing NWPs can be used to authorize discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of water reclamation and reuse facilities.

Under the current NWPs, certain activities that do not cause the loss of greater than ½-acre of waters of the United States associated with the construction, expansion, or maintenance of water reclamation and reuse facilities can be authorized by NWPs 29, 39, 40, and 42. For example, NWP 39 authorizes discharges of dredged or fill material into waters of the United States for the construction or expansion of commercial and institutional developments, including attendant features that are necessary for the use and maintenance of those commercial and institutional buildings. (An attendant feature is a feature that serves the development or other primary activity, such as supporting infrastructure or an amenity.) The text of NWP 39 provides the following examples of attendant features that could be authorized: Roads, parking lots, garages, yards, utility lines, storm water management facilities, wastewater treatment facilities, and recreation facilities such as playgrounds and playing fields. Since the text of NWP 39 does not provide an exclusive list of examples of attendant features, attendant features for a commercial or institutional building may also include water reclamation and reuse facilities.

Certain other existing NWPs can currently be used to authorize discharges of dredged or fill material into waters of the United States for development activities or other activities that may include the construction, expansion, or maintenance of water reclamation and reuse facilities. These NWPs include those relating to residential developments (NWP 29), agricultural activities (NWP 40), and recreational facilities (NWP 42). Utility lines for water reclamation and reuse facilities may be authorized by the proposed modifications of NWP 12 or by proposed new NWPs C or D, depending on the specific characteristics of the utility lines.

The Corps is concerned that the current treatment of these water reclamation and reuse activities under the NWP program may not be obvious or may be confusing to the public. Accordingly, we are seeking comment on whether to issue a new NWP which would explicitly authorize discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of water reclamation and reuse facilities or, alternatively, to make it clear (whether within those four permits are elsewhere) that water reclamation and reuse facilities may be attendant features under these NWPs and not create a new NWP. In particular, we are seeking comment on which of the two alternatives would provide greater clarity for permit applicants and other members of the public and would approach with be easier to implement and rely upon.

### *D. Discussion of Proposed Modifications to Nationwide Permit General Conditions*

GC 13. *Removal of Temporary Structures and Fills.* In 2017, this general condition only applied to temporary fills. We are proposing to modify this general condition to apply to temporary structures. The proposed modification of this general condition would require that temporary structures be removed after they have fulfilled their intended purpose. If a temporary structure cannot be removed or the project proponent wants the structure to

permanently remain in place, he or she can apply for an individual permit to authorize the permanent structure unless there is an applicable NWP or regional general permit that authorizes the permanent structure.

GC 17. *Tribal Rights.* In response to the Corps' July 20, 2017, **Federal Register** notice (82 FR 33470) issued by the Corps in response to E.O. 13777, some commenters recommended that either the Corps revert back to the general condition text that was in the 2012 NWPs (see 77 FR 10283) or issue a statement that the general condition text adopted in 2017 would not result in any changes in implementation of the NWPs. They expressed concern regarding how the ''minimal adverse effects'' standard would be applied to the full suite of tribal rights, and the potential for inconsistent application of that standard across Corps districts.

The text of general condition 17 for the 2017 NWPs is: ''No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.'' In the ''Definitions'' section of the 2017 NWPs we also added definitions of the terms ''protected tribal resources,'' ''tribal lands,'' and ''tribal rights'' to assist in the implementation of the revised general condition. Before the issuance of the 2017 NWPs, general condition 17, tribal rights, was written as follows: ''No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.'' The 2012 text for general condition 17 was used for the 2007 NWPs (72 FR 11192), 2002 NWPs (67 FR 2089, where it was numbered as general condition 8), 2000 NWPs (65 FR 12893, as general condition 8), 1996 NWPs (61 FR 65920, as general condition 8), 1991 NWPs (56 FR 59145, as general condition 8). Similar wording of the text for this general condition was used in the 1986 NWPs at 33 CFR 330.5(b)(10) (51 FR 41257): ''That the construction or operation of the activity will not impair reserved tribal rights, including but not limited to, reserved water rights and treaty fishing and hunting rights.'' This condition was not in the 1982 NWPs (see 33 CFR 330.5(b) at 47 FR 31834) or the 1977 NWPs (see 33 CFR 323.4–3(b) at 42 FR 37147).

In response to the concerns expressed above, we are proposing to modify this general condition to return the text that was in the 2012 NWPs and prior NWPs to eliminate any confusion about the applicable standards that apply when considering potential impacts to tribal treaty rights when consulting with tribes, and when determining the applicability of an NWP for a proposed activity. We revised this general condition in 2017 to define the tribal rights that must be considered by district engineers. While prior versions of the general condition were not limited by the examples of tribal rights they referenced, the 2017 revision replaced those examples with definitions that were intended to more explicitly cover the suite of tribal rights, including treaty rights, protected tribal resources, and tribal lands. The 2017 NWPs also defined those terms to aid users in applying the general condition.

The version of the general condition we are proposing today carries the current definition of ''tribal rights'' currently in the ''Definitions'' section of the NWPs (Section E), which was taken from the 1998 Department of Defense American Indian and Alaska Native Policy, without change. We are also proposing to retain the definition of ''tribal lands'' which is used in the ''historic properties'' general condition (GC 20). The definition of ''tribal lands'' was also adopted from the 1998 Department of Defense American Indian and Alaska Native Policy. The proposed text of general condition 17 does not include the term ''protected tribal resources,'' so we are proposing to remove that definition from Section E of the NWPs.

The 2017 revision to the general condition also sought to clarify the general threshold for when district engineers would consult with tribes for NWP activities. This was done by relying on the phrase ''cause more than minimal adverse effects'', in order to be consistent with the threshold for general permits established by Section 404(e) of the Clean Water Act. As that standard already applies as a restriction for all general permit actions, we propose a revision that eliminates any redundancy and may avoid confusion in the future. By using the word ''impair'' the general condition will be clearer that the NWPs do not change existing tribal trust duties of the Corps, or the rights of tribes. Rather, the proposed changes to the general condition will serve as a guide to users when undertaking tribal consultations regarding the application of an NWP to a particular activity, and when developing protocols regarding tribal notification that build upon the existing Department of Defense, Army, and Corps tribal consultation policies. The proposed changes to this general condition can also serve as a starting point for division engineers, tribes, and users of the NWPs to develop proposed regional conditions or activity-specific conditions

The proposed changes to this general condition are also intended to clarify that the identification of a potential effect to a tribal right does not mean that a district engineer must exercise his or her discretionary authority to require an individual permit for a proposed activity. The Clean Water Act requirement that no activity authorized by an NWP may cause more than minimal adverse effects remains applicable in the context of potential effects to tribal rights, resources, or lands. This clarification in the proposed changes to this general condition is intended only to avoid any confusion between tribal consultation policies, tribal rights, and Clean Water Act requirements.

GC 18. *Endangered Species.* We are proposing to modify this general condition to respond to the changes to U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) Endangered Species Act (ESA) section 7 consultation regulations that were published in the **Federal Register** on August 27, 2019 (84 FR 44976). Those regulations amended the definition of ''effects of the action'' at 50 CFR 402.02 by removing the term ''indirect effects.''

In the 2017 NWPs, we added definitions of ''direct effects'' and ''indirect effects'' to paragraph (a) of general condition 18 to assist with compliance with this general condition (see 81 FR 35208). We used definitions from FWS and NMFS regulations and guidance to define these terms for general condition 18. Since the FWS and NMFS simplified the definition of the ''effects of the action'' in 2019 by collapsing the terms ''direct, ''indirect,'' ''interrelated,'' and ''interdependent'' from the prior definition, we believe the definitions of ''direct effects'' and ''indirect effects'' should be removed from paragraph (a) of general condition 18. We are proposing to replace those definitions with text referring to 50 CFR 402.02 for the current definition of ''effects of the action'' for the purposes of ESA section 7 consultation. In addition, we are proposing to add a reference to 50 CFR 402.17, which provides additional regulatory text for implementing the definition of ''effects of the action'' by giving further explanation regarding ''activities that are reasonably certain to occur'' and ''consequences caused by the proposed action.'' We invite public comment on how to address the FWS's and NMFS's changes to their definition of ''effects of the action'' to facilitate ESA section 7 compliance for activities that may be authorized by NWPs.

GC 19. *Migratory Birds and Bald and Golden Eagles.* We first adopted this general condition in the 2012 NWPs (see 77 FR 10249). This general condition was added to the NWPs to clarify that permittees are responsible for complying with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, and for obtaining any ''take'' permits that may be required under the U.S. Fish and Wildlife Service's regulations issued under those two statutes. Under the current general condition, if a proposed NWP activity might result in a ''take'' of migratory birds or bald and golden eagles, then the project proponent may be responsible for obtaining ''take'' permits from the U.S. Fish and Wildlife Service, which is responsible for administering the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. For the purposes of the Migratory Bird Treaty Act the term ''take'' is defined in 50 CFR 10.12 as meaning: ''to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.'' For the purposes of the Bald and Golden Eagle Protection Act the term ''take'' is defined in 50 CFR 22.3 as meaning to: ''pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb.''

On December 22, 2017, Solicitor's Opinion M–37050 was issued by the Department of the Interior. In that memorandum, the Office of the Solicitor concluded that Migratory Bird Treaty Act does not prohibit incidental take of migratory birds. According to that Solicitor's Opinion, the Migratory Bird Treaty Act is limited to affirmative actions that have as their purpose the taking or killing of migratory birds.

We note that the Bald and Golden Eagle Protection Act continues to make project proponents responsible for obtaining any ''take'' permits that may be required under the U.S. Fish and Wildlife Service's regulations issued under that statute. Consequently, we have revised the wording of this general condition, but left it in the NWP general conditions, as a helpful reminder to the regulated public that they should determine for themselves, with the assistance of the U.S. Fish and Wildlife Service, what take permits, if any, they might require.

GC 20. *Historic Properties.* We are proposing to modify paragraph (c) of this general condition to state that the district engineer's identification efforts for historic properties shall be commensurate with potential impacts.

We are also proposing to modify paragraphs (c) and (d) of this general condition by moving the last sentence of paragraph (c) to paragraph (d). Under this proposal, paragraph (d) informs the non-federal applicant that if pre-construction notification is required under paragraph (c) of this general condition, then he or she shall not begin the NWP activity until the district engineer has determined the proposed activity has no potential to cause effects to historic properties or has completed NHPA section 106 consultation. Paragraph (d) requires the district engineer to notify the non-federal applicant within 45 days of receipt of a complete PCN whether NHPA section 106 consultation is required.

GC 23. *Mitigation.* We are proposing to modify paragraph (d) of this general condition to establish a threshold for requiring compensatory mitigation for losses of stream bed that is similar to the threshold for wetlands in paragraph (c) of this general condition. We are proposing to add a 1/10-acre threshold for requiring compensatory mitigation for losses of stream beds that require pre-construction notification, unless the district engineer determines on a case-by-case basis that compensatory mitigation should not be required because other forms of mitigation would be more environmentally appropriate and issues an activity-specific waiver of this requirement. Stream compensatory mitigation may be provided through mitigation banks, in-lieu fee programs, or permittee-responsible mitigation.

We are proposing to add this 1/10-acre threshold for requiring compensatory mitigation for losses of stream bed that require pre-construction notification to strengthen the mitigation requirements for those NWPs where we are proposing to remove the 300 linear foot limit for losses of stream bed. The mitigation requirements of the NWPs include paragraph (a) of this general condition, which requires permittees to design and construct NWP activities to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site (*i.e.,* on-site). The mitigation requirements of the NWPs also include paragraphs (c) and (d) of general condition 23, which address compensatory mitigation requirements for NWP activities. We are proposing to apply the same 1/10-acre threshold for compensatory mitigation to offset losses of stream bed that has been applied to wetland losses since 2007 (see 72 FR 11193). We are also proposing to allow the district engineer to waive the requirement to provide compensatory mitigation for losses of greater than 1/10-acre of stream bed when he or she determines that other forms of mitigation, such as best management practices and other minimization measures, are more environmentally preferable forms of mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects.

The 1/10-acre threshold for requiring wetland compensatory mitigation for wetland losses authorized by NWP that require pre-construction notification has been an effective tool in minimizing losses of wetlands, and we anticipate that applying a similar approach to losses of stream bed will be equally effective at minimizing losses of stream bed. In FY 2018, 82% of the fills in waters of the United States verified by Corps districts as being authorized by NWP impacted 1/10-acre or less. Those verified impacts include both permanent and temporary impacts. We believe that imposing this 1/10-acre threshold for requiring compensatory mitigation for losses stream bed, plus the district engineer's review of pre-construction notifications, will minimize losses of stream bed despite removing the 300 linear foot limit. When a district engineer reviews a PCN, and he or she determines that additional avoidance and minimization are necessary to qualify for NWP authorization, the district engineer can require the applicant to propose mitigation so that the adverse environmental impacts would be no more than minimal (see 33 CFR 330.1(e)(3)).

We are soliciting comment on our proposal to add a 1/10-acre threshold for requiring compensatory mitigation for losses of stream bed authorized by NWP that require compensatory mitigation. We are also seeking comment on including a provision similar to the provision for wetland compensatory mitigation, which would allow the district engineer to waive the compensatory mitigation requirement if she or he makes an activity-specific determination that other forms of mitigation would be environmentally preferable.

In paragraph (e) of this general condition, we are proposing to change the third sentence as follows: ''If restoring or enhancing riparian areas involves planting vegetation, only native species should be planted.'' The original sentence stated that restored riparian areas should consist of native species. The restoration and enhancement of riparian areas as mitigation for NWP activities should not require continuous vegetation management, since continuous vegetation management is usually not practicable for dynamic ecosystems

such as riparian areas. For initial actions to restore or enhance riparian areas that involve planting to re-establish or enhance the riparian plant community, native species should be planted. However, some of the initial plantings will die and be replaced by other plants through natural recruitment and ecosystem development processes. Some of the plants that colonize the riparian area may be non-native species, especially if non-native species are well established in the region (*e.g.,* Shackelford et al. 2013, Prach et al. 2015, Van den Bosch and Matthews 2017) and cannot be practicably managed because they are likely recolonize the site through normal plant community development processes. Non-native riparian plant species can provide important contributions to the ecological structure and functions of riparian areas.

Compensatory mitigation requirements for NWP authorizations and other types of DA permits must be practicable (see 33 CFR 332.3(a)(1)). The practicability requirement applies to all aspects of compensatory mitigation, including the mitigation work plan (33 CFR 332.4(c)(7)) and any long-term management requirements (33 CFR 332.7(d)) imposed by the district engineer. In addition, compensatory mitigation projects should be self-sustaining once their ecological performance standards have been achieved (33 CFR 332.7(b)). A self-sustaining plant community will change over time, and the species composition of the compensatory mitigation project site is likely to reflect the species composition of similar habitat types in the region, which may include a mix of native and non-native species. The potential impacts of attempts to manage or eradicate non-native plant species should also be considered, such as the impacts of herbicides on native species and water quality (Shackelford et al. 2013) and the disturbances caused by physically removing non-native individuals that may create an opportunity for other non-native individuals to colonize that space (*i.e.,* secondary invasion (Pearson et al. 2016)).

When the district engineer requires the restoration or enhancement of riparian area as compensatory mitigation for NWP activities, monitoring of the compensatory mitigation is required under 33 CFR 332.6. Monitoring requirements, including the length of the monitoring period, is determined by the district engineer. The monitoring period must be a minimum of 5 years, unless the district engineer determines that the compensatory mitigation project has achieved its performance standards before that 5-year period ends (see 33 CFR 332.6(b). If the district engineer imposes a performance standard that limits the amount of non-native species inhabiting a compensatory mitigation site, during the monitoring period the district engineer can require the party responsible for the compensatory mitigation project to remove the non-native species that exceed the limit in that performance standard. After the monitoring period ends, the restored or enhanced riparian area can be allowed to go through normal plant community development processes, with the plant community likely changing in a manner similar to the other plant communities in the region.

GC 25. *Water Quality.* We are proposing to modify this general condition to articulate that if the state, authorized tribe, or EPA (*i.e.,* the certifying authority under section 401 of the Clean Water Act) issued a water quality certification for the issuance of an NWP, and the permittee cannot comply with all of the conditions in that water quality certification, he or she must submit an application to the certifying authority that satisfies the requirements of 40 CFR 121.5(b) for a water quality certification or waiver for the activity involving a specific discharge to be authorized by the NWP.

When Corps Headquarters issues, reissues, or modifies NWPs that may result in discharges into waters of the United States, certifying authorities have the opportunity to issue water quality certifications (WQCs) for those NWPs, or waive the requirement to obtain WQC. The certifying authority may also deny WQC for the issuance of the NWP, and require project proponents to obtain WQCs or waivers for case-specific NWP activities by submitting a certification request in accordance with 40 CFR 121.5(b).

In a WQC for the issuance of an NWP, the certifying authority may impose conditions in the WQC for the issuance of the NWP. The division engineer will review the conditions in the WQC and will make those conditions regional conditions on the NWP unless he or she determines that any of those conditions do not comply with the Corps' regulations regarding permit conditions at 33 CFR 325.4 (see 33 CFR 330.4(c)(2)). If the division engineer determines that the WQC conditions do not comply with 33 CFR 325.4, she or he will consider the conditioned WQC to be a denial of certification, and any prospective permittee that wants to use that NWP needs to submit an application to the certifying authority consistent with the requirements of 40 CFR 121.5(b) to obtain an WQC or waiver for the specific activity that may result in a discharge in order for the activity to be authorized by NWP.

To qualify for NWP authorization, the proposed activity must comply with all of the NWP's terms and conditions (see 33 CFR 330.1(c)). The Corps will consider unauthorized any activity requiring Corps authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP. This includes any conditions added to the NWP authorization through a WQC.

If the certifying authority adds conditions to a WQC for the issuance of a general permit and the division engineer accepts those conditions as regional conditions to the NWP in accordance with 33 CFR 330.4(c)(2), and the applicant cannot comply with all of the conditions in the WQC, then in order to comply with the requirements of Section 401 of the Clean Water Act, the applicant would need to apply to the certifying authority for a WQC for the specific discharge to be authorized by NWP activity, or obtain an activity-specific waiver. The inability to comply with all conditions of a WQC does not preclude the use of the NWP to authorize the regulated discharge into waters of the United States; such circumstances would be considered a denial of WQC until the project proponent obtains an activity-specific WQC or waiver for the discharge to be authorized by the NWP for the proposed project. Section 401 of the Clean Water Act does not give the certifying authority the ability to dictate what type of permit or license is issued by a federal agency. The certifying authority only has the authority to determine whether a proposed discharge into waters of the United States that would be permitted or licensed by a federal agency complies with applicable water quality requirements. As stated in 33 CFR 330.4(c)(5), the district engineer will not require or process an individual permit application solely because WQC has been denied for that NWP. To comply with the requirements of Section 401 of the Clean Water Act, the applicant has the option of obtaining a WQC for that specific NWP activity, or a waiver, for the proposed activity.

GC 26. *Coastal Zone Management.* We are proposing to modify this general condition to say that if the state issued a general Coastal Zone Management Act (CZMA) consistency concurrence for the NWP, and the permittee cannot comply with all conditions of that general concurrency, then he or she must obtain an individual CZMA consistency

concurrence or presumption of concurrence from the state in order for the activity to be authorized by NWP.

When Corps Headquarters issues, reissues, or modifies NWPs that authorize activities that may have a reasonably foreseeable effect on any coastal use or resource, the state has the opportunity to issue a general CZMA consistency concurrence for those NWPs, or issue a presumption of concurrence. The state may impose conditions on that general CMZA consistency concurrence. The division engineer will review the conditions on the general CZMA consistency concurrence and will make those conditions regional conditions on the NWP unless he or she determines that any of those conditions do not comply with the Corps' regulations regarding permit conditions at 33 CFR 325.4 (see 33 CFR 330.4(d)(2)). If the division engineer determines that the general CZMA consistency concurrence conditions do not comply with 33 CFR 325.4, she or he will consider CZMA consistency to be denied without prejudice. In those circumstances, any prospective permittee that wants to use that NWP to authorize activities within or outside the state's coastal zone that affect land or water uses or natural resources of the state's coastal zone needs to obtain an individual CZMA consistency concurrence or a presumption of concurrence in order for the activity to be authorized by NWP (see 15 CFR 930.31(d)).

To qualify for NWP authorization, the proposed activity must comply with all of the NWP's terms and conditions (see 33 CFR 330.1(c)). The Corps will consider unauthorized any activity requiring Corps authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP. This includes any conditions added to the NWP authorization through a categorical or individual CZMA consistency concurrence.

If the certifying agency added conditions to a general CZMA consistency concurrence and the division engineer accepted those conditions as regional conditions to the NWP in accordance with 33 CFR 330.4(d)(2), and the applicant cannot comply with all of the conditions in the general CZMA consistency concurrence, then in order to comply with the requirements of the CZMA, the applicant would need to apply to the state for an individual CZMA consistency concurrence, or obtain a presumption of concurrence. The inability to comply with all conditions of a general CZMA consistency concurrence does not preclude the use of the NWP to authorize the permitted activities; such circumstances would be considered a denial without prejudice until the project proponent obtains an individual CZMA consistency concurrence or a presumption of concurrence. As stated in 33 CFR 330.4(d)(5), the district engineer will not require or process an individual permit application solely because CZMA consistency concurrence has not been granted for that NWP. To comply with the requirements of the CZMA, the applicant has the option of obtaining an individual CZMA consistency concurrence or a presumption of concurrence.

GC 28. *Use of Multiple Nationwide Permits.* General condition 28 address the use of more than one NWP to authorize a single and complete project. Under general condition 28, more than one NWP can be used to authorize a single and complete project, as long as the acreage loss of waters of the United States does not exceed the acreage limit of the NWP with the highest specified acreage limit. Under the current wording of this general condition, if two or more NWPs are proposed to be used to authorize a single and complete project, and two or more of those NWPs have specified acreages limits, the current wording of this general condition could result in situations where an NWP with a higher specified acreage limit could be used to circumvent the limit of an NWP with a lower specified acreage limit. For example, if NWP 39 is combined with NWP 46 to authorize a single and complete project, under the current general condition the loss of waters of the United States to construct the commercial and institutional development could be greater ½-acre since NWP 46 has a specified acreage limit of 1-acre.

There are a few NWPs that have numeric acreage limits greater than ½-acre: NWP 46, which authorizes discharges of dredged or fill material into certain ditches constructed in uplands, NWP 32 for completed enforcement actions, and NWP 34, which authorizes discharges of dredged or fill material into waters of the United States for cranberry production activities. Nationwide permit 46 has an acreage limit of one acre. NWP 32 has a 1-acre limit for tidal waters and a 5-acre limit for non-tidal waters. Nationwide permit 34 has an acreage limit of 10 acres. There are also NWPs with specified acreage limits of less than ½-acre that could potentially be used with other NWPs with higher specified acreage limits to authorize single and complete projects: NWP 18, which has a 1/10-acre limit and NWP 14, which has a ⅓-acre for activities in tidal waters.

To prevent using NWPs with higher acreage limits to increase the acreage loss of waters of the United States for NWPs with lower specified acreage limits, we are proposing to modify this general condition to address two situations: (1) Only one of the NWPs used to authorize a single and complete project has a specified acreage limit; and (2) two or more NWPs used to authorize the single and complete projects have different specified acreage limits. In the first situation, we are proposing minor changes to retain the approach that is currently in the general condition: That the loss of waters of the United States cannot exceed the specified acreage limit. To address the second situation, and ensure that an NWP with a higher specified acreage limit cannot be used to circumvent the acreage limit for another NWP and authorize a greater loss of waters of the United States than could be authorized if that second NWP were to be used to authorize an activity on its own, we are proposing to add text to the general condition to state that the activities authorized by the respective NWPs cannot exceed their specified acreage limits. We propose to include an example to help illustrate how proposed paragraph (b) of this general condition should be applied.

GC 31. *Activities Affecting Structures or Works Built by the United States.* Under the current Engineer Circular for processing requests to alter Corps Civil Works Projects pursuant to 33 U.S.C. 408 (EC 1165–2–220, issued on September 10, 2018), Corps districts are required to conduct section 10 and section 404 permit evaluations and requests for 408 permissions in a coordinated and concurrent manner. Therefore, we are proposing to retain this general condition with minor modifications. Under Appendix G–4 of EC 1165–2–220, when proposed activities may impact the usefulness of a USACE Navigation project and the scope of analysis for activities that require section 10 authorization and section 408 permission is identical, the Corps will review the proposed activities and may issue a single section 10 authorization that covers the section 408 activity. In the section 10 authorization, the Corps district will include any necessary section 408 conditions.

GC 32. *Pre-Construction Notification.* We are proposing several modifications to this general condition to provide consistency with proposed changes to the NWPs and to clarify pre-construction notification requirements.

We are proposing to change paragraph (a)(2) of this general condition by removing the following sentence: ''Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps.'' This proposed change will conform to one of the changes we are proposing for these three NWPs, which is to remove the term requiring the permittee to obtain a written verification from the district engineer before commencing the regulated activities in waters of the United States. As discussed above, we are proposing to make NWPs 21, 49, and 50 consistent with the other NWPs that require pre-construction notification, where the project proponent can proceed with the authorized work if the district engineer does not respond to the PCN within 45 days (see 33 CFR 330.1(e)(1)).

We are proposing to modify paragraph (b)(4) of this general condition by dividing it into subparagraphs to clarify different requirements of a complete PCN: The description of the proposed NWP and associated information (subparagraph (b)(4)(i)); the quantities of anticipated losses of waters, wetlands, and other special aquatic sites for linear projects (subparagraph (b)(4)(ii)); and the inclusion of sketches with the PCN (subparagraph (b)(4)(iii)). In subparagraph (b)(4)(i), we are proposing to add ''(including the same NWP for activities that do not require PCNs)'' after ''any other NWP(s)'' to clarify that the PCN must identify non-PCN NWPs that are used to authorize any part of the proposed project or related activity, including separate and distant crossings of waters and wetlands for linear projects. For example, if the applicant is constructing a highway, and there are four separate and distant water crossings that may qualify for NWP 14 authorizations, and two of those crossings require PCNs and the other two do not require PCNs, then the PCN needs to state that the applicant is proposing to use NWP 14 to provide DA authorization for the non-PCN water crossings.

In subparagraph (b)(4)(ii), we are proposing to clarify the information requirements for linear projects, and state that these information requirements do not trigger a PCN requirement for those crossings authorized by NWP that do not require PCNs. For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing, including those single and complete crossings authorized by NWP but do not require PCNs. We are also proposing to modify this subparagraph to state that this information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project. The quantity of losses of wetlands, other special aquatic sites, and other waters that are caused by single and complete crossings authorized by non-PCN NWPs is being provided to the district engineer for informational purposes only to assist in her or his cumulative effects evaluation in accordance with Section D (District Engineer's Decision), and the district engineer should not process those non-PCN NWP activities as PCNs.

In the first sentence of paragraph (b)(5), we are proposing to remove the phrase ''and perennial, intermittent, and ephemeral streams,'' and replace it with ''streams.'' If there are streams on the project site, then the PCN must include a delineation of those streams. In addition, we are proposing to modify paragraph (b)(5) to be consistent with our proposal to remove the 300 linear foot limit for losses of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, and rely on the ½-acre limit, PCN review process, and the ability of division and district engineers to modify, suspend, or revoke NWP authorizations on a regional or case-by-case basis, respectively, to comply with the requirement that NWPs may only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects. The delineation of streams on the project site will be used to calculate the area of stream bed is proposed to be filled or excavated and thus results in a loss of stream bed. The area of stream bed filled or excavated would be applied to the ½-acre limit for these NWPs, to determine whether the loss of stream bed plus the losses of any other non-tidal waters and wetlands exceeds the ½-acre limit.

We are proposing to modify paragraph (c) to state that the PCN should be submitted using Form ENG 6082 that was approved earlier this year. Form ENG 6082 should be used instead of ENG 4345, which is the standard individual permit application form. Block 18 of Form ENG 6082 has a space for the project proponent to identify the specific NWP(s) she or he wants to use to authorize the proposed activity. Therefore, we are proposing to remove the text of paragraph (c) that stated that a completed ENG 4345 must clearly indicated that it is an NWP PCN and must include all of the information required by subparagraphs (b)(1) through (10) of this general condition.

Because of our proposal to remove the 300 linear foot limit for losses of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, as well as the associated waiver provision for losses of intermittent and ephemeral stream bed, we are proposing to modify paragraph (d)(2) of the agency coordination provisions of this general condition. We are proposing to remove the requirement for agency coordination for NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed. Under the 2017 NWPs, the project proponent could request a waiver of the 300 linear foot limit, in cases where intermittent or ephemeral stream bed would be filled or excavated by the proposed NWP activity. The district engineer would coordinate the PCN with federal and state agencies to solicit comments to help the district engineer determine whether a waiver should be granted. Under this proposal, agency coordination would still be required for all NWP activities that require PCNs and result in the loss of greater than ½-acre of waters of the United States; NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges into of dredged or fill material into special aquatic sites; and NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

*E. Discussion of Proposed Modifications to Section D, ''District Engineer's Decision''*

In paragraph 1 of Section D, we are proposing to remove provisions that refer to potential waivers of the 300 linear foot limit for losses of stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. We are proposing this change to be consistent with our proposal to remove the 300 linear foot limit and the waiver provision from those NWPs. In the second sentence of paragraph 4, we are proposing to remove ''or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50'' because we are proposing to remove the requirement that permittees obtain written verification from the district engineer before these activities are authorized. Pre-construction notifications for activities authorized by NWPs 21, 49, and 50 will be subject to the same timeframes as other NWP activities that require PCNs. This includes the ability for the permittee to presume that her or his project qualifies

for the NWP unless she or he is otherwise notified by the DE within a 45-day period (see 33 CFR 330.1(e)(1)), or Endangered Species Act Section 7 consultation and/or National Historic Preservation Act Section 106 consultation needs to be completed for non-federal permittees to comply with the requirements of general conditions 18 and 20.

*F. Discussion of Proposed Modifications to Section F, ''Definitions''*

Ephemeral stream and intermittent stream. We are proposing to remove the definitions of ''ephemeral stream'' and ''intermittent stream,'' because we are proposing to remove the 300 linear foot limit and the ability of district engineers to waive that 300 linear foot limit on a case-by-case basis. Those two definitions would no longer be needed for the NWPs if the 300 linear foot limit is removed. The affected NWPs are: 21, 29, 39, 40, 42, 43, 44, 51, and 52. If the 300 linear foot limit for losses of stream bed and the waiver provision are removed in the final NWPs, the terms ''ephemeral stream'' and ''intermittent stream'' would no longer appear in the text of the NWPs and would no longer be needed to implement those NWPs. It should also be noted that ephemeral streams are not considered to be ''waters of the United States'' under the 2020 amendments to 33 CFR part 328. Part 328 of the Corps' regulations defines ''waters of the United States'' for the purposes of the Clean Water Act.

*Loss of waters of the United States.* We are proposing to rearrange the sentences in this definition so that the sentence that defines the loss of stream bed is moved to become the second sentence of this definition. In addition, we are proposing to modify this sentence to state that the stream bed would have to be permanently adversely affected, to be consistent with the first sentence of this definition. For consistency with our proposal to remove the 300 linear foot limit for losses of stream bed from 21, 29, 39, 40, 42, 43, 44, 51, and 52, and rely on the ½-acre limit and other tools to comply with the statutory requirement that the NWPs only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects, we are proposing to remove ''linear feet'' from the third sentence. This would provide consistency among the various types of waters when applying the fourth sentence of this definition, which states that the acreage loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP.

*Ordinary high water mark.* We are proposing to modify the definition of ''ordinary high water mark'' to be consistent with the definition in the 2020 final rule defining ''waters of the United States'' at 33 CFR 328.3(c)(7).

*Perennial stream.* We are proposing to modify the definition of ''perennial stream'' to be consistent with the definition of ''perennial'' in the 2020 final rule defining ''waters of the United States'' at 33 CFR 328.3(c)(8).

We are proposing to retain the definition of ''perennial stream'' in the NWPs because it would still be included in the terms of NWPs 40 and 43 if the 300 linear foot limit for losses of stream bed and the waiver provision are removed. Nationwide permit 40 does not authorize the construction of farm ponds in perennial streams. Nationwide permit 43 does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

The definitions of ''perennial stream,'' ''intermittent stream,'' and ''ephemeral stream'' were added to the NWPs in 2000 (see 65 FR 12818) because some terms and conditions of the 2000 NWPs applied to perennial, intermittent, or ephemeral streams. When the NWPs were reissued in 2002 (67 FR 2020), we added provisions to certain NWPs (*i.e.,* NWPs 39, 40, 42, and 43) that allowed district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed when the proposed NWP activities were determined by district engineers to result in no more than minimal individual and cumulative adverse environmental effects. The waiver provision did not apply to losses of perennial stream bed.

*Protected tribal resources.* Because of the proposed changes to NWP general condition 17, tribal rights, we are proposing to remove this definition from the NWPs since this term is not in the text of the proposed general condition. The term ''protected tribal resources'' does not appear elsewhere in the text of NWPs, general conditions, or definitions, or in Section D, ''District Engineer's Decision.''

## III. Compliance With Relevant Statutes

*A. National Environmental Policy Act Compliance*

We have prepared a draft decision document for each proposed NWP. Each draft decision document contains an environmental assessment (EA). The EA includes the public interest review described in 33 CFR 320.4(b). The EA generally discusses the anticipated impacts the NWP will have on the human environment and the Corps' public interest review factors. If a proposed NWP authorizes discharges of dredged or fill material into waters of the United States, the draft decision document will also include analysis conducted pursuant to guidelines set out in accordance with 40 CFR 230.7 from the Clean Water Act section 404(b)(1) Guidelines. These decision documents evaluate the environmental effects of each NWP from a national perspective.

The draft decision documents for the proposed NWPs are available on the internet at: *www.regulations.gov* (docket ID number COE–2020–0002) as Supporting Documents. We are soliciting comments on these draft national decision documents, and any comments received will be considered when preparing the final decision documents for the NWPs.

After the NWPs are issued or reissued, division engineers will issue supplemental documents to evaluate environmental effects on a regional basis (*e.g.,* state or Corps district). The supplemental documents are prepared by Corps districts, but must be approved and formally issued by the appropriate division engineer, since the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations for any specific geographic area within his or her division. For some Corps districts, their geographic area of responsibility covers an entire state. For other states, there is more than one Corps district responsible for implementing the Corps Regulatory Program, including the NWP program. In those states, there is a lead Corps district responsible for preparing the supplemental documents for all of the NWPs. The supplemental documents will discuss regional conditions imposed by division engineers to protect the aquatic environment and ensure that any adverse environmental effects resulting from NWP activities in that region will be no more than minimal, individually and cumulatively.

For the NWPs, the assessment of cumulative effects occurs at three levels: National, regional, and the verification stage. Each national NWP decision document includes a national-scale NEPA cumulative effects analysis. Each supplemental document has a NEPA cumulative effects analysis conducted for a region, which is usually a state or Corps district. When a district engineer issues a verification letter in response to

a PCN or a voluntary request for a NWP verification, the district engineer prepares a brief decision document. That decision document explains whether the proposed NWP activity, after considering permit conditions such as mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects.

If the NWP is not suspended or revoked in a state or a Corps district, the supplemental document includes a certification that the use of the NWP in that district, with any applicable regional conditions, will result in no more than minimal cumulative adverse environmental effects.

After the NWPs are issued or reissued and go into effect, district engineers will monitor the use of these NWPs on a regional basis (*e.g.,* within a watershed, county, state, Corps district or other appropriate geographic area), to ensure that the use of a particular NWP is not resulting in more than minimal cumulative adverse environmental effects. The Corps staff that evaluate NWP PCNs that are required by the text of the NWP or by NWP general conditions or regional conditions imposed by division engineers, or voluntarily submitted to the Corps district by project proponents to receive written NWP verifications, often work in a particular geographic area and have an understanding of the activities that have been authorized by NWPs, regional general permits, and individual permits over time, as well as the current environmental setting for that geographic area. If the Corps district staff believe that the use of an NWP in that geographic region may be approaching a threshold above which the cumulative adverse environmental effects for that category of activities may be more than minimal, the district engineer may either make a recommendation to the division engineer to modify, suspend, or revoke the NWP authorization in that geographic region in accordance with the procedures in 33 CFR 330.5(c). Alternatively, under the procedures at 33 CFR 330.5(d), the district engineer may also modify, suspend, or revoke NWP authorizations on a case-by-case basis to ensure that the NWP does not authorize activities that result in more than minimal cumulative adverse environmental effects.

*B. Compliance With Section 404(e) of the Clean Water Act*

The proposed NWPs are issued in accordance with Section 404(e) of the Clean Water Act and 33 CFR part 330. These NWPs authorize categories of activities that are similar in nature. The ''similar in nature'' requirement does not mean that activities authorized by an NWP must be identical to each other. We believe that the ''categories of activities that are similar in nature'' requirement in Clean Water Act section 404(e) is to be interpreted broadly, for practical implementation of this general permit program.

Nationwide permits, as well as other general permits, are intended to reduce administrative burdens on the Corps and the regulated public while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent in the 1977 amendments to the Federal Water Pollution Control Act. The NWPs provide incentives for project proponents to minimize impacts to jurisdictional waters and wetlands to qualify for NWP authorization instead of having to apply for individual permits. Keeping the number of NWPs manageable is a key component for making the NWPs protective of the environment and streamlining the authorization process for those general categories of activities that have no more than minimal individual and cumulative adverse environmental effects.

The various terms and conditions of these NWPs, including the NWP regulations at 33 CFR 330.1(d) and 330.4(e), allow district engineers to exercise discretionary authority to modify, suspend, or revoke NWP authorizations or to require individual permits, and ensure compliance with section 404(e) of the Clean Water Act. For each NWP that may authorize discharges of dredged or fill material into waters of the United States, the national decision documents prepared by Corps Headquarters include a 404(b)(1) Guidelines analysis. The supplemental documents prepared by division engineers will discuss regional circumstances to augment the 404(b)(1) Guidelines analyses in the national decision documents. These 404(b)(1) Guidelines analyses are conducted in accordance with 40 CFR part 230.7.

The 404(b)(1) Guidelines analyses in the national decision documents also include cumulative effects analyses done in accordance with 40 CFR 230.7(b) and 230.11(g). A 404(b)(1) Guidelines cumulative effects analysis is provided in addition to the NEPA cumulative effects analysis because the implementing regulations for NEPA and the 404(b)(1) Guidelines define ''cumulative impacts'' or ''cumulative effects'' differently.

*C. 2020 Revisions to the Definition of ''Waters of the United States'' (i.e., the Navigable Waters Protection Rule)*

Corps general permits are not intended to make or imply a final conclusion regarding what water bodies are or are not subject to CWA jurisdiction. Instead, a Corps general permit merely states that, if a person complies with all of the terms and conditions of the general permit, that person's proposed discharges of dredged or fill material into the water body will be consistent with the CWA, on the ground that any such discharges either (1) are legally authorized under the CWA (to the extent that the water body is subject to CWA jurisdiction) or (2) are otherwise consistent with the CWA to the extent that the water body is nor jurisdictional under the CWA. The Corps acknowledges that some members of the public may seek to comply with the conditions of a general permit even for water bodies that are not jurisdictional under the CWA. Such practice, though not required, is not unlawful. The Corps is not required to make a formal determination whether a particular wetland or water is subject to jurisdiction under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899 before issuing an individual permit or a general permit verification. Many project proponents prefer the time savings that can occur when the Corps issues an individual permit or general permit verification without expending the time and resources needed to make a formal, definitive determination whether those wetlands and waters are regulated under those two authorities.

On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Army published the Navigable Waters Protection Rule revising the definition of ''waters of the United States'' (85 FR 22250). Specifically, this final rule revises the Corps' regulations at 33 CFR 328.3, where the definition of ''waters of the United States'' is located for the purposes of implementing Section 404 of the Clean Water Act (CWA). On June 22, 2020, the Navigable Waters Protection Rule became effective in all states and jurisdictions except for the State of Colorado due to a court-issued stay in that state (the case is currently under appeal). The rule has also been challenged in several other district courts.

Please note that some of the proposed NWPs could authorize activities that involve the discharge of dredged or fill material into water bodies that are not subject to CWA jurisdiction. For example, a project proponent could

proceed with an NWP activity that does not require submission of a PCN to the Corps in a non-jurisdictional water without getting a definitive determination from the Corps that the wetland or waterbody is not a water of the United States and thus not subject to CWA jurisdiction. As another example, if a proposed NWP activity requires pre-construction notification, the district engineer could issue the NWP verification based on the delineation of wetlands, other special aquatic sites, and other waters provided with the PCN in accordance with paragraph (b)(5) of NWP general condition 32, without the Corps making any formal determination as to whether those wetlands, special aquatic sites, and other waters are ''waters of the United States.''

During the pendency of any litigation challenging the Navigable Waters Protection Rule, the NWPs will continue to authorize discharges of dredged or fill material in all water bodies that are subject to CWA jurisdiction, or may be subject to CWA jurisdiction, at the time those discharges occur. Where a particular water body into which a person proposes to discharge dredged or fill material is subject to CWA jurisdiction, compliance with the terms and conditions of one or more NWPs, or an individual permit, will be necessary. An affected party has the opportunity to request an approved jurisdictional determination from the Corps if the affected party would like the Corps' formal determination on the jurisdictional status of a water or feature under the CWA.

*D. Compliance With the Endangered Species Act*

The Corps has determined that the NWP regulations at 33 CFR 330.4(f) and NWP general condition 18, endangered species, ensure that all activities authorized by NWPs comply with section 7 of the Endangered Species Act (ESA). Those regulations and general condition 18 require non-federal permittees to submit PCNs for any activity that might affect listed species or designated critical habitat. The Corps then evaluates the PCN and makes an effect determination for the proposed NWP activity for the purposes of ESA section 7. The Corps established the ''might affect'' threshold in 33 CFR 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the ''may affect'' threshold for section 7 consultation in the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) ESA section 7 consultation regulations at 50 CFR part 402. The word ''might'' is defined as having ''less probability or possibility'' than the word ''may'' (Merriam-Webster's Collegiate Dictionary, 10th edition). Since ''might'' has a lower probability of occurring, it is below the threshold (*i.e.,* ''may affect'') that triggers the requirement for ESA section 7 consultation for a proposed Federal action.

If the project proponent is required to submit a PCN and the proposed activity might affect listed species or critical habitat, the activity is not authorized by NWP until either the Corps district makes a ''no effect'' determination or makes a ''may affect'' determination and completes formal or informal ESA section 7 consultation.

When evaluating a PCN, the Corps district will either make a ''no effect'' determination or a ''may affect'' determination. If the Corps district makes a ''may affect'' determination, it will notify the non-federal applicant and the activity is not authorized by NWP until ESA Section 7 consultation has been completed. If the non-federal project proponent does not comply with 33 CFR 330.4(f)(2) and general condition 18, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action under its regulations at 33 CFR part 326 to respond to the unauthorized activity.

Federal agencies, including state agencies (*e.g.,* certain state Departments of Transportation) to which the Federal Highway Administration has assigned its responsibilities for ESA section 7 consultation pursuant to 23 U.S.C. 327(a)(2)(B), are required to follow their own procedures for complying with Section 7 of the ESA (see 33 CFR 330.4(f)(1) and paragraph (b) of general condition 18). This includes circumstances when an NWP activity is part of a larger overall federal project or action. The federal agency's ESA section 7 compliance covers the NWP activity because it is undertaking the NWP activity and possibly other related activities that are part of a larger overall federal project or action. For those NWPs that require pre-construction notification for proposed activities, the federal permittee is required to provide the district engineer with the appropriate documentation to demonstrate compliance with section 7 of the ESA. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the proposed activity to fulfill both the federal agency's and the Corps' obligations to comply with the ESA.

On October 15, 2012, the Chief Counsel for the Corps issued a letter to the FWS and NMFS (the Services) clarifying the Corps' legal position regarding compliance with section 7 of the ESA for the NWPs. That letter explained that the issuance or reissuance of the NWPs, as compliance with section 7 of the ESA is governed by NWP general condition 18 (which applies to every NWP and which relates to endangered and threatened species), and 33 CFR 330.4(f) results in ''no effect'' to listed species or critical habitat, and therefore the reissuance/issuance action itself does not require ESA section 7 consultation. Although the reissuance/issuance of the NWPs has no effect on listed species or their critical habitat and thus requires no ESA section 7 consultation, the terms and conditions of the NWPs, including general condition 18, and 33 CFR 330.4(f) ensure that ESA consultation will take place on an activity-specific basis wherever appropriate at the field level of the Corps, FWS, and NMFS. The principles discussed in the Corps' October 15, 2012, letter apply to this proposed issuance/reissuance of NWPs. Those principles are discussed in more detail below.

The only activities that are immediately authorized by NWPs are ''no effect'' activities under Section 7 of the ESA and its implementing regulations at 50 CFR part 402. Therefore, the issuance or reissuance of NWPs does not require ESA section 7 consultation because no activities authorized by any NWPs ''may affect'' listed species or critical habitat without first completing activity-specific ESA Section 7 consultations with the Services, as required by general condition 18 and 33 CFR 330.4(f). Regional programmatic ESA section 7 consultations may also be used to satisfy the requirements of the NWPs in general condition 18 and 33 CFR 330.4(f) if a proposed NWP activity is covered by that regional programmatic consultation.

In the May 11, 2015, issue of the **Federal Register** (80 FR 26832) the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) published a final rule that amended the incidental take statement provisions of the implementing regulations for ESA section 7 at 50 CFR part 402. That final rule went into effect on June 10, 2015. In that final rule, the FWS and NMFS defined two types of programmatic ESA section 7 consultations, and discussed the circumstances which providing an

incidental take statement with a biological opinion for a programmatic section 7 consultation is appropriate. The two types of programmatic section 7 consultations are: Framework programmatic actions and mixed programmatic actions.

A framework programmatic action is federal action that approves a framework for the development of future actions that are authorized, funded, or carried out at a later time. A mixed programmatic action is a federal action that approves action(s) that will not be subject to further section 7 consultation, and approves a framework for the development of future actions that are authorized, funded, or carried out at a later time. Definitions of ''framework programmatic action'' and ''mixed programmatic action'' are provided at 50 CFR 402.02. In the preamble to the 2015 final rule, the FWS and NMFS stated that action agencies can seek to engage in section 7 consultation on programmatic actions to gain efficiencies in the section 7 consultation process (80 FR 26836).

The 2015 amendments to 50 CFR part 402 also address the circumstances when incidental take statements will be provided in biological opinions for programmatic actions. In the final rule, the FWS and NMFS stated that since a framework programmatic action does not authorize any federal action to proceed, no take is anticipated to result from the framework programmatic action itself, and, therefore, the FWS and NMFS are not required to provide an incidental take statement in a biological opinion for a framework programmatic action (see 80 FR 26835). The FWS and NMFS acknowledged that adoption of a framework action by the federal action agency would not, by itself, result in any anticipated take of listed species (see 80 FR 26836). Therefore, the FWS and NMFS determined that it is appropriate not to provide an incidental take statement at the program level; any take that may occur when future actions are implemented under the framework action would be addressed through activity-specific ESA section 7 consultations. For a national framework programmatic action, anticipated take from future actions could also be addressed through incidental take statements in regional programmatic section 7 consultations. In the preamble to the 2015 final rule, the FWS and NMFS identified the Corps' NWP program as an example of a framework action at a national scale that can address ESA section 7 consultation requirements at a later time as appropriate, as specific activities are authorized, funded, or carried out (see 80 FR 26835).

The FWS's and NMFS's regulations at 50 CFR 402.14(a) require each Federal agency to review its actions at the earliest possible time to determine whether a proposed action may affect listed species or critical habitat. This requirement applies to framework actions, including framework actions that occur at a national scale. If the Federal agency determines its proposed action may affect listed species or critical habitat, formal consultation is required unless the FWS and/or NMFS provide written concurrence that the proposed action is not likely to adversely affect any listed species or critical habitat. However, if the Federal agency determines that its proposed action, including any framework action, will have no effect on listed species or critical habitat, section 7 consultation is not required. The ESA section 7 consultation regulations at 50 CFR 402.14(a) state that the Director of FWS or NMFS may request a Federal agency to enter into consultation if he or she identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request. Section 402.14(a) provides a mechanism whereby the NMFS or FWS can provide their disagreement with a Federal agency's ''no effect'' determination for the purposes of ESA section 7 for a proposed Federal action, including a framework action.

In the August 27, 2019, issue of the **Federal Register** (84 FR 44976) the FWS and NMFS published a final rule that amended their regulations for interagency cooperation under Section 7 of the ESA. That final rule went into effect on October 28, 2019. With respect to making effects determinations for proposed federal actions, such as activities authorized by NWPs, the FWS and NMFS made two important changes to 50 CFR part 402: (a) Introducing the term ''consequences'' to help define what is an effect under ESA section 7, and (b) emphasizing that to be considered an ''effect of the action'' under section 7 consultation, the consequences caused by the action would not occur but for the proposed action and must be reasonably certain to occur (see 84 FR 44977). Further clarification of ''activities that are reasonably certain to occur'' and ''consequences caused by the proposed action'' were provided by the FWS and NMFS in rule text added at 50 CFR 402.17(a) and (b), respectively. When the Corps district receives a pre-construction notification for a proposed NWP activity, it is responsible for applying the definition of ''effect of the action'' to the proposed NWP activity and to determine the consequences caused by the proposed action and which activities are reasonably certain to occur. The Corps district determines whether the proposed NWP activity ''may affect'' listed species or designated critical habitat and initiates formal or informal section 7 consultation unless it determines the proposed NWP activity will have ''no effect'' on listed species or designated critical habitat.

Applying the 2019 amendments to the section 7 regulations to the NWP program, consequences to listed species and designated critical habitat caused by proposed NWP activities must be reasonably certain to occur. In the preamble to their final rule, the FWS and NMFS stated that for a ''consequence or an activity to be considered reasonably certain to occur, the determination must be based on clear and substantial information'' (see 84 FR 44977). The FWS and NMFS explained that ''clear and substantial'' means that there has to be a firm basis for supporting a conclusion that a consequence of a federal action is reasonably certain to occur. The determination that a consequences is reasonably certain to occur should not be based on speculation or conjecture, and the information used to make that determination should have a ''degree of certitude'' (see 84 FR 44977). The Corps will apply these considerations when evaluating pre-construction notifications for proposed NWP activities.

The final rule issued by the FWS and NMFS on August 27, 2019 (84 FR 44976) also provided further discussion of programmatic ESA section 7 consultations, including framework programmatic actions. In the preamble to that final rule, the FWS and NMFS stated that ESA section 7 provides significant flexibility for Federal agency compliance with the ESA. Furthermore, the FWS and NMFS acknowledged that while federal action agencies have an obligation to consult on programs that are considered agency actions that may a affect listed species or critical habitat, ''many types of programmatic consultation would be considered an optional form of section 7 compliance to, for example, address a collection of agency actions that would otherwise be subject to individual consultation.'' (See 84 FR 44996.)

As discussed in this proposed rule, the NWP program has been structured,

through the requirements of NWP general condition 18 and 33 CFR 330.4(f) to focus ESA section 7 compliance at the activity-specific and regional scales. Each year, Corps districts initiate thousands of formal and informal ESA section 7 consultations for specific NWP activities (see below), and many Corps districts have worked with the FWS and NMFS to develop formal and informal regional programmatic consultations. Focusing ESA section 7 compliance at the activity-specific scale and regional programmatic scale is more efficient for the permittees, the Corps, and the FWS and NMFS because it is at the activity-specific and regional scales that informal consultation written concurrences and biological opinions with incidental take statements are completed for proposed NWP activities.

As stated in 50 CFR 402.14(i)(6), for a framework programmatic action, an incidental take statement is not required at the programmatic level, and any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a proposed NWP activity that may affect listed species or designated critical habitat a biological opinion with an incidental take statement is needed for the NWP activity to go forward, unless the FWS or NMFS issued a written concurrence that the proposed NWP activity is not likely to adversely affect listed species or designated critical habitat. It is through activity-specific section 7 consultations and regional programmatic section 7 consultations that effective protection of listed species and their designated critical habitat is achieved.

After applying the 2015 and 2019 amendments to 50 CFR part 402 to the NWP rulemaking process, the Corps continues to believe that the issuance or reissuance of the NWPs has ''no effect'' on listed species or designated critical habitat, and that the ESA section 7 compliance is most effectively achieved by applying the requirements of general condition 18 and 33 CFR 330.4(f) to specific proposed NWP activities that identified after the NWPs are issued and go into effect. Compliance with the requirements of ESA section 7 can also be achieved by applying appropriate formal or informal regional programmatic ESA section 7 consultations that have been developed by Corps districts with regional offices of the FWS and NMFS.

ESA section 7 requires each federal agency to ensure, through consultation with the Services, that ''any action authorized, funded, or carried out'' by that agency ''is not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat.'' (See 16 U.S.C. 1536(a)(2).) Accordingly, the Services' section 7 regulations specify that an action agency must ensure that the action ''it authorizes,'' including authorization by permit, does not cause jeopardy or adverse modification. (See 50 CFR 402.01(a) and 402.02.) Thus, in assessing application of ESA section 7 to NWPs issued or reissued by the Corps, the proper focus is on the nature and extent of the specific activities ''authorized'' by the NWPs and the timing of that authorization.

The issuance or reissuance of the NWPs by the Chief of Engineers imposes express limitations on activities authorized by those NWPs. These limitations are imposed by the NWP terms and conditions, including the general conditions that apply to all NWPs regardless of whether pre-construction notification is required. With respect to listed species and critical habitat, general condition 18 expressly prohibits any activity ''which 'may affect' a listed species or critical habitat, unless section 7 consultation addressing the effects of the proposed activity has been completed.'' General condition 18 also states that if an activity ''might affect'' a listed species or critical habitat, a non-federal applicant must submit a PCN and ''shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.'' In addition, 33 CFR 330.4(f)(2) imposes a PCN requirement for proposed NWP activities by non-federal permittees where listed species or critical habitat might be affected or are in the vicinity of the proposed NWP activity. Section 330.4(f)(2) also prohibits those permittees from beginning the NWP activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. Permit applicants that are Federal agencies should follow their own requirements for complying with the ESA (see 33 CFR 330.4(f)(1)).

Thus, because no NWP can or does authorize an activity that may affect a listed species or critical habitat absent an activity-specific ESA section 7 consultation or applicable regional programmatic ESA section 7 consultation, and because any activity that may affect a listed species or critical habitat must undergo an activity-specific consultation or be in compliance with a regional programmatic ESA section 7 consultation before the district engineer can verify that the activity is authorized by NWP, the issuance or reissuance of NWPs has ''no effect'' on listed species or critical habitat. Accordingly, the action being ''authorized'' by the Corps (*i.e.,* the issuance or re-issuance of the NWPs themselves) has no effect on listed species or critical habitat.

To help ensure protection of listed species and critical habitat, general condition 18 and 33 CFR 330.4(f) establish a more stringent threshold than the threshold set forth in the Services' ESA section 7 regulations for initiation of section 7 consultation. Specifically, while section 7 consultation must be initiated for any activity that ''may affect'' listed species or critical habitat, for non-federal permittees general condition 18 require submission of a PCN to the Corps if ''any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat'' and prohibits work until ''notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.'' (See paragraph (c) of general condition 18.) The PCN must ''include the name(s) of the endangered or threatened species that might be affected by the proposed work or that utilize the designated critical habitat that might be affected by the proposed work.'' (See paragraph (b)(7) of the ''Pre-Construction Notification'' general condition.) Paragraph (f) of general condition 18 notes that information on the location of listed species and their critical habitat can be obtained from the Services directly or from their websites.

General condition 18 makes it clear to project proponents that an NWP does not authorize the ''take'' of an endangered or threatened species. Paragraph (e) of general condition 18 also states that a separate authorization (*e.g.,* an ESA section 10 permit or a biological opinion with an ''incidental take statement'') is required to take a listed species. In addition, paragraph (a) of general condition 18 states that no activity is authorized by NWP which is likely to ''directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation'' or ''which will directly or indirectly destroy or adversely modify the critical habitat of such species.'' Such activities would require district engineers to exercise their discretionary authority and subject the proposed activity to the individual permit review process, because an activity that would

jeopardize the continued existence of a listed species, or a species proposed for listing, or that would destroy or adversely modify the critical habitat of such species would not result in minimal adverse environmental effects and thus cannot be authorized by NWP.

The Corps' NWP regulations at 33 CFR 330.1(c) state that an ''activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions.'' Thus, if a project proponent moves forward with an activity that ''might affect'' an ESA listed species without complying with the PCN or other requirements of general condition 18, the activity is not authorized under the CWA. In this case, the project proponent could be subject to enforcement action and penalties under the CWA. In addition, if the unauthorized activity results in a ''take'' of listed species as defined by the ESA and its implementing regulations, then he or she could be subject to penalties, enforcement actions, and other actions by the FWS or NMFS under section 11 of the ESA.

For listed species under the jurisdiction of the FWS, information on listed species that may be present in the vicinity of a proposed activity is available through the Information Planning and Consultation (IPaC) system,[17] an on-line project planning tool developed and maintained by the FWS.

During the process for developing regional conditions, Corps districts coordinate or consult with FWS and/or NMFS regional or field offices to identify regional conditions that can provide additional assurance of compliance with general condition 18 and 33 CFR 330.4(f)(2). Such regional conditions can add PCN requirements to one or more NWPs in areas inhabited by listed species or where designated critical habitat occurs. Regional conditions can also be used to establish time-of-year restrictions when no NWP activity can take place to ensure that individuals of listed species are not adversely affected by such activities. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts additional information and measures to ensure protection of listed species and critical habitat, the requirements established by general condition 18 (which apply to all uses of all NWPs), and other provisions of the Corps regulations ensure full compliance with ESA section 7.

Corps district offices meet with local representatives of the FWS and NMFS to establish or modify existing procedures, where necessary, to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat. Corps districts can also establish, through local procedures or other means, additional safeguards that ensure compliance with the ESA. Through formal ESA section 7 consultation, or through other coordination with the FWS and/or the NMFS, as appropriate, the Corps establishes procedures to ensure that NWP activities will not jeopardize any threatened and endangered species or result in the destruction or adverse modification of designated critical habitat. Such procedures may result in the development of regional conditions added to the NWP by the division engineer, or in activity-specific conditions to be added to an NWP authorization by the district engineer.

Based on the fact that NWP issuance or reissuance has no effect on listed species or critical habitat and any proposed NWP activity that ''may affect'' listed species or critical habitat will undergo an activity-specific ESA section 7 consultation, there is no requirement that the Corps undertake programmatic consultation for the NWP program. The national programmatic consultations conducted in the past for the NWP program were voluntary consultations. Regional programmatic consultation can be conducted by Corps districts and regional or local offices of the FWS and/or NMFS to provide further assurance against potential adverse effects on listed species or critical habitat, and assure other benefits to listed species or critical habitat, such as through the establishment of additional procedures, regional NWP conditions, activity-specific NWP conditions, or other safeguards that may be employed by Corps district offices based on further discussions between the Corps and the FWS and NMFS.

Examples of regional programmatic consultations currently in effect, with the applicable Service the Corps consulted with, include: The Standard Local Operating Procedures for Endangered Species in Mississippi (2017—FWS); the Endangered Species Act Section 7 Programmatic Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for Tidal Area Restoration Authorized, Funded, or Implemented by the Corps of Engineers, Federal Emergency Management Agency, and Federal Highways Administration, in Oregon and the Lower Columbia River (NMFS—2018); the U.S. Anny Corps of Engineers Jacksonville District's Programmatic Biological Opinion (JAXBO) (NMFS—2017); Missouri Bat Programmatic Informal Consultation Framework (FWS—2019); Revised Programmatic Biological/Conference Opinion for bridge and culvert repair and replacement projects affecting the Dwarf Wedgemussel, Tar River Spinymussel, Yellow Lance and Atlantic Pigtoe. Programmatic Conference Opinion (PCO) for Bridge and Culvert Replacement/Repairs/Rehabilitations in Eastern North Carolina, NCDOT Divisions 1–8 (FWS—2018); and the Corps and NOAA Fisheries Greater Atlantic Regional Fisheries Office (GARFO) Not Likely to Adversely Affect Program Programmatic Consultation (NMFS—2017).

The programmatic ESA section 7 consultations the Corps conducted for the 2007 and 2012 NWPs were voluntary consultations. The voluntary programmatic consultation conducted with the NMFS for the 2012 NWPs resulted in a biological opinion issued on February 15, 2012, which was replaced by a new biological opinion issued on November 24, 2014. A new biological opinion was issued by NMFS after the proposed action was modified and triggered re-initiation of that programmatic consultation. The programmatic consultation on the 2012 NWPs with the FWS did not result in a biological opinion. For the 2017 NWPs, we did not request a national programmatic consultation.

In the Corps Regulatory Program's automated information system (ORM), the Corps collects data on all individual permit applications, all NWP PCNs, all voluntary requests for NWP verifications where the NWP or general conditions do not require PCNs, and all verifications of activities authorized by regional general permits. For all written authorizations issued by the Corps, the collected data include authorized impacts and required compensatory mitigation, as well as information on all consultations conducted under section 7 of the ESA. Every year, the Corps evaluates approximately 35,000 NWP PCNs and requests for NWP verifications for activities that do not require PCNs, and provides written verifications for those activities when district engineers determine those activities result in no more than minimal adverse environmental effects. During the evaluation process, district engineers assess potential impacts to listed species and critical habitat and conduct section 7 consultations whenever they determine proposed NWP activities ''may affect'' listed species or critical habitat. District

[17] *https://ecos.fws.gov/ipac/.*

engineers will exercise discretionary authority and require individual permits when proposed NWP activities will result in more than minimal adverse environmental effects.

Each year, the Corps conducts thousands of ESA section 7 consultations with the FWS and NMFS for activities authorized by NWPs. These section 7 consultations are tracked in ORM. In FY 2018 (October 1, 2017 to September 30, 2018), Corps districts conducted 640 formal consultations and 3,048 informal consultations under ESA section 7 for NWP PCNs. During that time period, the Corps also used regional programmatic consultations for 7,148 NWP PCNs to comply with ESA section 7. Therefore, each year an average of more than 10,800 formal, informal, and programmatic ESA section 7 consultations are conducted with the FWS and/or NMFS in response to NWP PCNs, including those activities that required PCNs under paragraph (c) of general condition 18. For a linear project authorized by NWPs 12 or 14, where the district engineer determines that one or more crossings of waters of the United States that require Corps authorization ''may affect'' listed species or designated critical habitat, the district engineer initiates a single section 7 consultation with the FWS and/or NMFS for all of those crossings that he or she determines ''may affect'' listed species or designate critical habitat. The number of section 7 consultations provided above represents the number of NWP PCNs that required some form of ESA section 7 consultation, not the number of single and complete projects authorized by NWP that may be included in a single PCN. A single NWP PCN may include more than one single and complete project, especially if it is for a linear project such as a utility line or road with multiple separate and distant crossings of jurisdictional waters and wetlands from its point of origin to its terminal point.

During the process for reissuing the NWPs, Corps districts will coordinate with regional and field offices of the FWS and NMFS to discuss whether new or modified regional conditions should be imposed on the NWPs to improve protection of listed species and designated critical habitat and ensure that the NWPs only authorize activities with no more than minimal individual and cumulative adverse environmental effects. Regional conditions must comply with the Corps' regulations at 33 CFR 325.4 for adding permit conditions to DA authorizations. The Corps decides whether suggested regional conditions identified during this coordination are appropriate for the NWPs. During this coordination, other tools, such as additional regional programmatic consultations or standard local operating procedures, might be developed to facilitate compliance with the ESA while streamlining the process for authorizing activities under the NWPs. Section 7 consultation on regional conditions occurs only when a Corps districts makes a ''may affect'' determination and initiates formal or informal section 7 consultation with the FWS and/or NMFS, depending on the species that may be affected. Otherwise, the Corps district coordinates the regional conditions with the FWS and/or NMFS. Regional conditions, standard local operating procedures, and regional programmatic consultations are important tools for protecting listed species and critical habitat and helping to tailor the NWP program to address specific species, their habitats, and the stressors that affect those species.

*E. Compliance With the Essential Fish Habitat Provisions of the Magnuson-Stevens Fishery Conservation and Management Act*

The NWP Program's compliance with the essential fish habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act will be achieved through EFH consultations between Corps districts and NMFS regional offices. This approach continues the EFH Conservation Recommendations provided by NMFS Headquarters to Corps Headquarters in 1999 for the NWP program. Corps districts that have EFH designated within their geographic areas of responsibility will coordinate with NMFS regional offices, to the extent necessary, to develop NWP regional conditions that conserve EFH and are consistent with the NMFS regional EFH Conservation Recommendations. Corps districts will conduct consultations in accordance with the EFH consultation regulations at 50 CFR 600.920.

*F. Compliance With Section 106 of the National Historic Preservation Act*

The NWP regulations at 33 CFR 330.4(g) and the ''Historic Properties'' general condition (general condition 20), ensure that all activities authorized by NWPs comply with section 106 of the NHPA. The ''Historic Properties'' general condition requires non-federal permittees to submit PCNs for any activity that might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. The Corps then evaluates the PCN and makes an effect determination for the proposed NWP activity for the purposes of NHPA section 106. We established the ''might have the potential to cause effects'' threshold in paragraph (c) of the ''Historic Properties'' general condition to require PCNs for those activities so that the district engineer can evaluate the proposed NWP activity and determine whether it has no potential to cause effects to historic properties or whether it has potential to cause effects to historic properties and thus require section 106 consultation.

If the project proponent is required to submit a PCN and the proposed activity might have the potential to cause effects to historic properties, the activity is not authorized by NWP until either the Corps district makes a ''no potential to cause effects'' determination or completes NHPA section 106 consultation.

When evaluating a PCN, the Corps will either make a ''no potential to cause effects'' determination or a ''no historic properties affected,'' ''no adverse effect,'' or ''adverse effect'' determination. If the Corps makes a ''no historic properties affected,'' ''no adverse effect,'' or ''adverse effect'' determination, it will notify the non-federal applicant and the activity is not authorized by NWP until NHPA Section 106 consultation has been completed. If the non-federal project proponent does not comply with the ''Historic Properties'' general condition, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

The only activities that are immediately authorized by NWPs are ''no potential to cause effect'' activities under section 106 of the NHPA, its implementing regulations at 36 CFR part 800, and the Corps' ''Revised Interim Guidance for Implementing Appendix C of 33 CFR part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR part 800,'' dated April 25, 2005, and amended on January 31, 2007. Therefore, the issuance or reissuance of NWPs does not require NHPA section 106 consultation because no activities that might have the potential to cause effects to historic properties can be authorized by NWP without first completing activity-specific NHPA Section 106 consultations, as required

by the ''Historic Properties'' general condition. Programmatic agreements (see 36 CFR 800.14(b)) may also be used to satisfy the requirements of the NWPs in the ''Historic Properties'' general condition if a proposed NWP activity is covered by that programmatic agreement.

NHPA section 106 requires a federal agency that has authority to license or permit any undertaking, to take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register, prior to issuing a license or permit. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Thus, in assessing application of NHPA section 106 to NWPs issued or reissued by the Corps, the proper focus is on the nature and extent of the specific activities ''authorized'' by the NWPs and the timing of that authorization.

The issuance or reissuance of the NWPs by the Chief of Engineers imposes express limitations on activities authorized by those NWPs. These limitations are imposed by the NWP terms and conditions, including the general conditions that apply to all NWPs regardless of whether pre-construction notification is required. With respect to historic properties, the ''Historic Properties'' general condition expressly prohibits any activity that ''may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places,'' until the requirements of section 106 of the NHPA have been satisfied. The ''Historic Properties'' general condition also states that if an activity ''might have the potential to cause effects'' to any historic properties, a non-federal applicant must submit a PCN and ''shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed.'' Permit applicants that are Federal agencies should follow their own requirements for complying with section 106 of the NHPA (see 33 CFR 330.4(g)(1) and paragraph (b) of the ''Historic Properties'' general condition).

Thus, because no NWP can or does authorize an activity that may have the potential to cause effects to historic properties, and because any activity that may have the potential to cause effects to historic properties must undergo an activity-specific section 106 consultation (unless that activity is covered under a programmatic agreement) before the district engineer can verify that the activity is authorized by NWP, the issuance or reissuance of NWPs has ''no potential to cause effects'' on historic properties. Accordingly, the action being ''authorized'' by the Corps, which is the issuance or re-issuance of the NWPs by Corps Headquarters, has no potential to cause effects on historic properties.

To help ensure protection of historic properties, the ''Historic Properties'' general condition establishes a higher threshold than the threshold set forth in the Advisory Council's NHPA section 106 regulations for initiation of section 106 consultation. Specifically, while section 106 consultation must be initiated for any activity that ''has the potential to cause effects to'' historic properties, for non-federal permittees the ''Historic Properties'' general condition requires submission of a PCN to the Corps if ''the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties.'' The ''Historic Properties'' general condition also prohibits the proponent from conducting the NWP activity ''until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed.'' (See paragraph (c) of the ''Historic Properties'' general condition.) The PCN must ''state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property.'' (See paragraph (b)(8) of the ''Pre-Construction Notification'' general condition.)

During the process for developing regional conditions, Corps districts can coordinate or consult with State Historic Preservation Officers, Tribal Historic Preservation Officers, and tribes to identify regional conditions that can provide additional assurance of compliance with the ''Historic Properties'' general condition and 33 CFR 330.4(g)(2) for NWP activities undertaken by non-federal permittees. Such regional conditions can add PCN requirements to one or more NWPs where historic properties occur. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts and additional information and measures to ensure protection of historic properties, the requirements established by the ''Historic Properties'' general condition (which apply to all uses of all NWPs), and other provisions of the Corps regulations and guidance ensure full compliance with NHPA section 106.

Based on the fact that NWP issuance or reissuance has no potential to cause effects on historic properties and that any activity that ''has the potential to cause effects'' to historic properties will undergo activity-specific NHPA section 106 consultation, there is no requirement that the Corps undertake programmatic consultation for the NWP program. Regional programmatic agreements can be established by Corps districts and State Historic Preservation Officers and/or Tribal Historic Preservation Officers to comply with the requirements of section 106 of the NHPA.

*G. Compliance With Section 401 of the Clean Water Act*

A water quality certification issued by a state, authorized tribe, or EPA, or a waiver thereof, is required by Section 401 of the Clean Water Act, for an activity authorized by NWP which may result in a discharge from a point source into waters of the United States. Water quality certifications may be granted without conditions, granted with conditions, denied, or waived for specific NWPs.

We believe that, in general, the activities authorized by the NWPs will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States. The NWPs are conditioned to ensure that adverse environmental effects will be no more than minimal and address the types of activities that would be routinely authorized if evaluated under the individual permit process. We recognize that in some states or tribal lands there will be a need to conduct individual state or tribal review for some activities, to ensure compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA and other appropriate provisions of state/tribal law. Each Corps district will initiate discussions with their respective state(s), tribe(s), and EPA regional offices, as appropriate, to discuss issues of concern and identify regional approaches to address the scope of waters, activities, discharges, and PCN requirements, as appropriate, to resolve any issue, as necessary.

Shortly after the publication of this proposed rule in the **Federal Register**, Corps districts will send letters to certifying agencies (*i.e.,* states,

authorized tribes, or EPA region, as appropriate) to request water quality certification for these NWPs. The certifying authorities will have 60 days to issue, deny, or waive WQC for the proposed NWPs. Their WQC requests will include this **Federal Register** notice, and may also include their proposed Corps regional conditions.

After the 60-day period, Corps districts will send letters to the EPA Administrator to notify the Administrator of the proposed NWPs and the certifications issued by the certifying agency or agencies. It is EPA's role under section 401(a)(2) to consider whether the permit for which a WQC has been granted or waived may cause potential impacts to waters within neighboring jurisdictions. The 401(a)(2) process is a separate action that occurs after the certifying authority has acted on a certification request. The statute provides EPA with 30 days to determine, in its discretion, whether the water quality of a neighboring jurisdiction may be affected by the certified permit. If the EPA determines the water quality of a neighboring jurisdiction may be affected by issuance of the certified general permit, the statute provides neighboring jurisdictions with 60 days to determine whether the discharge will violate its water quality requirements, object to the issuance of a license or permit, and request a public hearing. A federal agency may not issue the license or permit until the section 401(a)(2) process concludes.

If a certifying agency denies WQC for the issuance of an NWP, then the discharges are not authorized by that NWP unless and until a project proponent obtains WQC for the specific discharge from the certifying authority, or a waiver of WQC occurs.

Please note that in some states the Corps has issued state programmatic general permits (SPGPs) or regional general permits (RGPs), and within those states some or all of the NWPs may be suspended or revoked by division engineers. Concurrent with today's proposal, district engineers may be proposing suspension or revocation of the NWPs in states where SPGPs or RGPs will be used in place of some or all of the NWPs.

We note that EPA recently issued revisions to its regulations governing the Clean Water Act section 401 certification process on June 1, 2020. In the future, it may be necessary or appropriate for the Corps to revise its own section 401 regulations, including 33 CFR 330.4, in light of EPA's Clean Water Act Section 401 Certification Rule. We invite comments from the public on whether and, if so, when the Corps should revise those regulations in light of the new EPA regulations. We will update this language, as appropriate, in the final NWPs.

*H. Section 307 of the Coastal Zone Management Act (CZMA)*

Any state with a federally-approved CZMA program must concur with the Corps' determination that activities authorized by NWPs which are within, or will have reasonably foreseeable effects on any land or water uses or natural resources of the state's coastal zone, are consistent with the CZMA program to the maximum extent practicable. Coastal Zone Management Act consistency concurrences may be issued without conditions, issued with conditions, or denied for specific NWPs.

We believe that, in general, the activities authorized by the NWPs will be consistent with state CZMA programs/enforceable policies. The NWPs are conditioned to ensure that adverse environmental effects will be no more than minimal and address the types of activities that would be routinely authorized if evaluated under the individual permit process. We recognize that in some states there will be a need to conduct individual state review for some activities, to ensure consistency with the state's CZMA program. Each Corps district will initiate discussions with their respective state(s) to discuss issues of concern and identify regional approaches to address the scope of waters, activities, discharges, and PCN requirements, as appropriate, to resolve these issues.

This **Federal Register** notice serves as the Corps' determination that the activities authorized by these NWPs are, to the maximum extent practicable, consistent with state CZMA programs. This determination is contingent upon the addition of state CZMA conditions and/or regional conditions, by the issuance by the state of an individual consistency concurrence, or when a presumption of concurrence occurs when the state does not act within six months after receiving a request for concurrence. States are requested to concur or object to the consistency determination for these NWPs following 33 CFR 330.4(d).

The Corps' CZMA consistency determination only applies to NWP authorizations for activities that are within, or affect, any land, water uses or natural resources of a State's coastal zone. A state's coastal zone management plan may identify geographic areas in federal waters on the outer continental shelf, where activities that require federal permits conducted in those areas require consistency certification from the state because they affect any coastal use or resource. In its coastal zone management plan, the state may include an outer continental shelf plan. An outer continental shelf plan is a plan for ''the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act'' and regulations issued under that Act (see 15 CFR 930.73). Activities requiring federal permits that are not identified in the state's outer continental shelf plan are considered unlisted activities. If the state wants to review an unlisted activity under the CZMA, then it must notify the applicant and the federal permitting agency that it intends to review the proposed activity. Nationwide permit authorizations for activities that are not within or would not affect a state's coastal zone do not require the Corps' CZMA consistency determinations and thus are not contingent on a State's concurrence with the Corps' consistency determinations.

If a state objects to the Corps' CZMA consistency determination for an NWP, then the affected activities are not authorized by NWP within that state until a project proponent obtains an individual CZMA consistency concurrence, or sufficient time (*i.e.,* six months) passes after requesting a CZMA consistency concurrence for the applicant to make a presumption of consistency, as provided in 33 CFR 330.4(d)(6). However, when applicants request NWP verifications for activities that require individual consistency concurrences, and the Corps determines that those activities meet the terms and conditions of the NWP, in accordance with 33 CFR 330.6(a)(3)(iii) the Corps will issue provisional NWP verification letters. The provisional verification letter will contain general and regional conditions as well as any activity-specific conditions the Corps determines are necessary for the NWP authorization. The Corps will notify the applicant that he or she must obtain an activity-specific CZMA consistency concurrence or a presumption of concurrence before he or she is authorized to start work in waters of the United States. That is, NWP authorization will be contingent upon obtaining the necessary CZMA consistency concurrence from the state, or a presumption of concurrence. Anyone wanting to perform such activities where pre-construction notification to the Corps is not required has an affirmative responsibility to present a CZMA consistency determination to the appropriate state

agency for concurrence. Upon concurrence with such CZMA consistency determinations by the state, the activity would be authorized by the NWP. This requirement is provided at 33 CFR 330.4(d).

## IV. Economic Impact

The proposed NWPs are expected to increase the number of activities eligible for NWP authorization, and reduce the number of activities that require individual permits. The Corps estimates that the proposed NWPs will authorize an additional 255 activities each year. Subsequently, 255 fewer activities each year would require individual permits. By authorizing more activities by NWP, this proposal will reduce burden for the regulated public primarily in the form of compliance costs. The proposed changes would increase the number of categories of activities authorized by NWP, and subsequently reduce the number of activities that require individual permits. By increasing the number of activities that can be authorized by NWPs, the proposed changes would decrease compliance costs for permit applicants since, as discussed below, the compliance costs for obtaining NWP authorization are less than the compliance costs for obtaining individual permits. In addition, the NWPs provide incentives to project proponents to minimize impacts to jurisdictional waters and wetlands in exchange for receiving the required Department of the Army authorization in less time compared to the amount of time required to obtain individual permits. In FY2018, the average time to receive an NWP verification was 45 days from the date the Corps district receives a complete PCN, compared to 264 days to receive a standard individual permit after receipt of a complete permit application (see table 1.2 of the draft regulatory impact analysis for this proposed rule, which is available in the *www.regulations.gov* docket (docket number COE–2020–0002)).

As discussed in the Regulatory Impact Analysis for this proposed rule, the Corps estimates that a permit applicant's compliance cost for obtaining NWP authorization in 2016$ ranges from $4,161 to $13,871 (Institute for Water Resources (2001),[18] adjusted for inflation using the GDP deflator approach). The Corps estimates that a permit applicant's compliance costs for obtaining an individual permit for a proposed activity impacting up to 3 acres of wetland ranges from $16,646 to $33,391 in 2016$. Considering how the proposed NWPs will increase the number of activities authorized by NWP each year, the Corps estimates that the proposal, when compared with the 2017 NWPs, will decrease compliance costs for the regulated public by approximately $8 million per year. We solicit comment on the assumptions and methodology used to calculate the compliance costs and burden in general associated with the NWP. We are particularly interested in whether there is a more recent study estimating compliance cost than the Institute for Water Resources study cited above.

| Nationwide permit(s) | Proposed changes | Anticipated impacts |
|---|---|---|
| • NWP 21<br>• NWP 29<br>• NWP 39<br>• NWP 40<br>• NWP 42<br>• NWP 43<br>• NWP 44<br>• NWP 50<br>• NWP 51<br>• NWP 52 | Remove 300 linear foot limit for losses of stream bed and rely on ½-acre limit, pre-construction notification (PCN) review process, and other tools to comply with Clean Water Act Section 404(e). | Increase number of activities authorized by NWP; decrease number of activities requiring individual permits. |
| • NWP 3 | Authorize maintenance of fills that were constructed prior to establishment of requirement for Clean Water Act section 404 authorization; clarify that NWP authorizes small amounts of riprap to protect structure or fill. | Increase number of activities authorized by NWP; decrease number of activities requiring individual permits. |
| • NWP 12<br>• NWP C<br>• NWP D | Issue separate NWPs for oil or natural gas pipeline activities, electric utility line and telecommunications activities, and utility lines for water and other substances; reduce number of PCN thresholds. | No change in number of NWP authorizations. |
| • NWP 14 | Add "driveways" to examples of activities authorized by this NWP. | Increase number of activities authorized by NWP; decrease number of activities requiring individual permits. |
| • NWP 19 | Increase limit to 50 cubic yards | Increase number of activities authorized by NWP; decrease number of activities requiring individual permits. |
| • NWP 21<br>• NWP 49<br>• NWP 50 | Remove requirement for written authorization before commencing authorized activity. | No change in number of NWP authorizations. |
| • NWP 27 | Add coral restoration and relocation. Add reservoir sediment management to provide continuity in sediment transport through reservoirs. | Increase number of activities authorized by NWP; decrease number of activities requiring individual permits. |
| • NWP 41 | Add irrigation ditches | Increase number of activities authorized by NWP; decrease number of activities requiring individual permits. |
| • NWP 48 | Remove ½-acre limit for impacts to submerged aquatic vegetation and pre-construction notification thresholds. | Increase number of activities authorized by NWP; decrease number of activities requiring individual permits. |

[18] Institute for Water Resources (IWR). 2001. Cost analysis for the 2000 issuance and modification of nationwide permits. Institute for Water Resources (Alexandria, VA). 29 pp. plus appendices.

| Nationwide permit(s) | Proposed changes | Anticipated impacts |
|---|---|---|
| • NWP A | Issue new NWP to authorize seaweed mariculture activities. | Increase number of activities authorized by NWP; decrease number of activities requiring individual permits. |
| • NWP B | Issue new NWP to authorize finfish mariculture activities. | Increase number of activities authorized by NWP; decrease number of activities requiring individual permits. |
| • NWP E | Issue new NWP to authorize discharges of dredged or fill material for water reclamation and reuse facilities. | These activities may be authorized by existing NWPs, but additional clarification may be appropriate. |
| • General condition 17, tribal rights | Restore text of general condition in 2012 NWPs. | No change in number of NWP authorizations. |
| • General condition 18, endangered species | Revise to address 2019 changes to 50 CFR part 402. | No change in number of NWP authorizations. |
| • General condition 23, mitigation | Add 1/10-acre threshold for compensatory mitigation for losses of stream bed. | No change in number of NWP authorizations. |
| • General condition 25, water quality | Clarify that if NWP activity does not comply with conditions of a general water quality certification, an individual certification is required, unless a waiver occurs. | No change in number of NWP authorizations. |
| • General condition 26, coastal zone management. | Clarify that if NWP activity does not comply with conditions of a general consistency concurrence, and individual consistency concurrence is required, unless presumption occurs. | No change in number of NWP authorizations. |
| • General condition 28, use of multiple NWPs. | Modify general condition to clarify application to NWPs with different numeric limits. | No change in number of NWP authorizations. |
| • General condition 32, pre-construction notification. | Modify to encourage use of Form ENG 6082 for NWP pre-construction notifications. | No change in number of NWP authorizations. |

## V. Administrative Requirements

*Plain Language*

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31885, June 10, 1998) regarding plain language, this preamble is written using plain language. The use of ''we'' in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

*Paperwork Reduction Act*

The paperwork burden associated with the NWP relates exclusively to the preparation of the PCN. While different NWPs require that different information be included in a PCN, the Corps estimates that a PCN takes, on average, 11 hours to complete. The proposed NWPs would decrease the total paperwork burden associated with this program because the Corps estimates that under this proposal 221 fewer PCNs would be required each year. This reduction is due to the proposed removal of the PCN thresholds from NWP 48 for commercial shellfish mariculture activities and the proposed PCN thresholds for the proposed modifications for NWP 12 (oil and natural gas pipeline activities), proposed new NWP C (electric utility line and telecommunications activities), and proposed new NWP D (utility line activities for water and other substances). The paperwork burden associated with the proposed NWPs is expected to decrease by approximately 2,321 hours per year from 360,074 hours to 357,753 hours.

The following table summarizes the projected changes in paperwork burden from the 2017 NWPs to the proposed 2020 NWPs.

| | Number of NWP PCNs per year | Number of NWP activities not requiring PCNs per year | Estimated changes in NWP PCNs per year | Estimated changes in number of authorized NWP activities | Estimated changes in number of standard individual permits per year |
|---|---|---|---|---|---|
| 2017 NWPs | 32,734 | 31,920 | | | |
| Proposed 2020 NWPs | 32,523 | 32,386 | −211 | +255 | −255 |

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 Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710–0003).

*Executive Order 12866*

This action is a significant regulatory action under Executive Order 12866 (58 FR 51735, October 4, 1993) that was submitted to the Office of Management and Budget (OMB) for review.

*Executive Order 13771*

This proposed rule is expected to be a deregulatory action under E.O. 13771.

*Executive Order 13132*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of

regulatory policies that have federalism implications.'' The proposed issuance and modification of NWPs does not have federalism implications. We do not believe that the proposed NWPs will have substantial direct effects on the States, on the relationship between the federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed NWPs will not impose any additional substantive obligations on state or local governments. Therefore, Executive Order 13132 does not apply to this proposal.

*Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.*

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the proposed issuance and modification of NWPs on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The statues under which the Corps issues, reissues, or modifies nationwide permits are Section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). Under section 404, Department of the Army (DA) permits are required for discharges of dredged or fill material into waters of the United States. Under section 10, DA permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States. Small entities proposing to discharge dredged or fill material into waters of the United States and/or install structures or conduct work in navigable waters of the United States must obtain DA permits to conduct those activities, unless a particular activity is exempt from those permit requirements. Individual permits and general permits can be issued by the Corps to satisfy the permit requirements of these two statutes. Nationwide permits are a form of general permit issued by the Chief of Engineers.

Nationwide permits automatically expire and become null and void if they are not modified or reissued within five years of their effective date (see 33 CFR 330.6(b)). Furthermore, section 404(e) of the Clean Water Act states that general permits, including NWPs, can be issued for no more than five years. If the current NWPs are not modified or reissued, they will expire on March 18, 2022, and small entities and other project proponents would be required to obtain alternative forms of DA permits (*i.e.,* standard permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWPs may be available in some geographic areas, but small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

When compared with the compliance costs for individual permits, most of the terms and conditions of the proposed NWPs are expected to result in decreases in the costs of complying with the permit requirements of sections 10 and 404. The anticipated decrease in compliance cost results from the lower cost of obtaining NWP authorization instead of standard permits. Unlike standard permits, NWPs authorize activities without the requirement for public notice and comment on each proposed activity.

Another requirement of section 404(e) of the Clean Water Act is that general permits, including nationwide permits, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWPs, such as acreage limits and mitigation measures, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

After considering the economic impacts of the proposed nationwide permits on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Small entities may obtain required DA authorizations through the NWPs, in cases where there are applicable NWPs authorizing those activities and the proposed work will result in only minimal adverse effects on the aquatic environment and other public interest review factors. The terms and conditions of the revised NWPs will not impose substantially higher costs on small entities than those of the existing NWPs. If an NWP is not available to authorize a particular activity, then another form of DA authorization, such as an individual permit or a regional general permit authorization, must be secured. However, as noted above, we expect a slight to moderate increase in the number of activities than can be authorized through NWPs, because we are proposing some modifications to the NWPs to authorize additional activities. Because those activities required authorization through other forms of DA authorization (*e.g.,* individual permits or regional general permits) we expect a concurrent decrease in the numbers of individual permit and regional general permit authorizations required for these activities.

We are interested in the potential impacts of the proposed NWPs on small entities and welcome comments on issues related to such impacts.

*Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''federal mandates'' that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed,

under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the proposed NWPs do not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The proposed NWPs are generally consistent with current agency practice, do not impose new substantive requirements and therefore do not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. Therefore, this proposal is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons, we have determined that the proposed NWPs contain no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the proposed issuance and modification of NWPs is not subject to the requirements of section 203 of UMRA.

*Executive Order 13045*

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The proposed NWPs are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, the proposed NWPs do not concern an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children.

*Executive Order 13175*

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' The phrase ''policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Tribes, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes.''

The proposal to issue NWPs does not have tribal implications. It is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes. Therefore, Executive Order 13175 does not apply to this proposal. However, in the spirit of Executive Order 13175, we specifically request comment from Tribal officials on the proposed rule. Each Corps district will be conducting government-to-government consultation with Tribes, to identify regional conditions or other local NWP modifications that may be necessary to protect aquatic resources of interest to Tribes, as part of the Corps' responsibility to protect trust resources.

*Environmental Documentation*

A draft decision document has been prepared for each proposed NWP. Each draft decision document includes a draft environmental assessment and public interest review determination. If an NWP authorizes discharges of dredged or fill material into waters of the United States, the draft decision document includes a 404(b)(1) Guidelines analysis. These draft decision documents are available at: *www.regulations.gov* (docket ID number COE–2020–0002). They are also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street NW, Washington, DC 20314–1000.

*Congressional Review Act*

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. We will submit a report containing the final NWPs and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The proposed NWPs are not a ''major rule'' as defined by 5 U.S.C. 804(2), because they are not likely to result in: (1) An annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

*Executive Order 12898*

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The proposed modifications of the NWPs are not expected to negatively impact any community, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

*Executive Order 13211*

The proposed modifications of the NWPs are not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

## VI. References

A complete list of all references cited in this document is available on the internet at *http://www.regulations.gov*

in docket number COE–2020–0002 or upon request from the U.S. Army Corps of Engineers (see **FOR FURTHER INFORMATION CONTACT**).

## Authority

We are proposing to reissue 52 existing NWPs and issue 5 new NWPs under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).

**William H. Graham,**

*Major General, U.S. Army Deputy Commanding General for Civil and Emergency Operations.*

## Nationwide Permits, Conditions, Further Information, and Definitions

### *A. Index of Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions*

#### Nationwide Permits

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3. Maintenance
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5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
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29. Residential Developments
30. Moist Soil Management for Wildlife
31. Maintenance of Existing Flood Control Facilities
32. Completed Enforcement Actions
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36. Boat Ramps
37. Emergency Watershed Protection and Rehabilitation
38. Cleanup of Hazardous and Toxic Waste
39. Commercial and Institutional Developments
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41. Reshaping Existing Drainage Ditches
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54. Living Shorelines
    A. Seaweed Mariculture Activities
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4. Migratory Bird Breeding Areas
5. Shellfish Beds
6. Suitable Material
7. Water Supply Intakes
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9. Management of Water Flows
10. Fills Within 100-Year Floodplains
11. Equipment
12. Soil Erosion and Sediment Controls
13. Removal of Temporary Fills
14. Proper Maintenance
15. Single and Complete Project
16. Wild and Scenic Rivers
17. Tribal Rights
18. Endangered Species
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20. Historic Properties
21. Discovery of Previously Unknown Remains and Artifacts
22. Designated Critical Resource Waters
23. Mitigation
24. Safety of Impoundment Structures
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27. Regional and Case-by-Case Conditions
28. Use of Multiple Nationwide Permits
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31. Activities Affecting Structures or Works Built by the United States
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#### District Engineer's Decision

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#### Definitions

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Currently serviceable
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Discharge
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Enhancement
Establishment (creation)
High Tide Line
Historic property
Independent utility
Indirect effects
Loss of waters of the United States
Navigable waters
Non-tidal wetland
Open water
Ordinary high water mark
Perennial stream
Practicable
Pre-construction notification
Preservation
Re-establishment
Rehabilitation
Restoration
Riffle and pool complex
Riparian areas
Shellfish seeding
Single and complete linear project
Single and complete non-linear project
Stormwater management
Stormwater management facilities
Stream bed
Stream channelization
Structure
Tidal wetland
Tribal lands
Tribal rights
Vegetated shallows
Waterbody

### *B. Nationwide Permits*

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers that are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66). (Authority: Section 10 of the Rivers and Harbors Act of 1899 (Section 10))

2. *Structures in Artificial Canals.* Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Authority: Section 10)

3. *Maintenance.* (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, or of any currently serviceable structure or fill that did not require a permit at the time it was constructed, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in

materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This includes the placement of new or additional riprap to protect the structure or fill, provided the placement of riprap is the minimum necessary to protect the structure or fill or to ensure the safety of the structure or fill. This NWP authorizes the removal of previously authorized structures or fills. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project. This NWP also authorizes the removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (*e.g.,* bridges, culverted road crossings, water intake structures, etc.). The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

(c) This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After conducting the maintenance activity, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation. This NWP does not authorize beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

*Notification:* For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (Authorities: Section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act (Sections 10 and 404))

**Note:** This NWP authorizes the repair, rehabilitation, or replacement of any currently serviceable structure or fill that does not qualify for the Clean Water Act section 404(f) exemption for maintenance.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and clam and oyster digging, fish aggregating devices, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Authorities: Sections 10 and 404)

5. *Scientific Measurement Devices.* Devices, whose purpose is to measure and record scientific data, such as staff gages, tide and current gages, meteorological stations, water recording and biological observation devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. Upon completion of the use of the device to measure and record scientific data, the measuring device and any other structures or fills associated with that device (*e.g.,* foundations, anchors, buoys, lines, etc.) must be removed to the maximum extent practicable and the site restored to pre-construction elevations. (Authorities: Sections 10 and 404)

6. *Survey Activities.* Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, sample plots or transects for wetland delineations, and historic resources surveys. For the purposes of this NWP, the term ''exploratory trenching'' means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work and must not drain a water of the United States. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 1/10-acre in waters of the U.S. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under section 402 of the Clean Water Act. (Authorities: Sections 10 and 404)

7. *Outfall Structures and Associated Intake Structures.* Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (section 402 of the Clean Water Act). The construction of intake structures is not authorized by this

NWP, unless they are directly associated with an authorized outfall structure.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

8. *Oil and Gas Structures on the Outer Continental Shelf.* Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Bureau of Ocean Energy Management. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f), as well as 33 CFR 322.5(l) and 33 CFR part 334. Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps-designated dredged material disposal areas.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authority: Section 10)

9. *Structures in Fleeting and Anchorage Areas.* Structures, buoys, floats, and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose. (Authority: Section 10)

10. *Mooring Buoys.* Non-commercial, single-boat, mooring buoys. (Authority: Section 10)

11. *Temporary Recreational Structures.* Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use, provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir managers must approve each buoy or marker individually. (Authority: Section 10)

12. *Oil or Natural Gas Pipeline Activities.* Activities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.

*Oil or natural gas pipelines:* This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of oil and natural gas pipelines, including outfall and intake structures. There must be no change in pre-construction contours of waters of the United States. An ''oil or natural gas pipeline'' is defined as any pipe or pipeline for the transportation of any form of oil or natural gas, including petrochemical products, for any purpose.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (*e.g.,* backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

*Oil or natural gas pipeline substations:* This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with an oil or natural gas pipeline in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than ½-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

*Foundations for above-ground oil or natural gas pipelines:* This NWP authorizes the construction or maintenance of foundations for above-ground oil or natural gas pipelines in all waters of the United States, provided the foundations are the minimum size necessary.

*Access roads:* This NWP authorizes the construction of access roads for the construction and maintenance of oil or natural gas pipelines, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize oil or natural gas pipelines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (see 33 CFR part 322). Oil or natural gas pipelines routed in, over, or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the oil or natural gas pipeline activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by

expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) A section 10 permit is required; (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States; or (3) the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length. If the proposed oil or gas pipeline is greater than 250 miles in length, the pre-construction notification must include the locations and proposed impacts for all crossings of waters of the United States that require DA authorization, including those crossings authorized by NWP would not otherwise require pre-construction notification. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** Where the oil or natural gas pipeline is constructed, installed, or maintained in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the oil or natural gas pipeline to protect navigation.

**Note 2:** For oil or natural gas pipeline activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Oil or natural gas pipeline activities must comply with 33 CFR 330.6(d).

**Note 3:** Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the oil or natural gas pipeline must be removed upon completion of the work, in accordance with the requirements for temporary fills.

**Note 4:** Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, and may require a permit from the U.S. Coast Guard pursuant to section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such oil or natural gas pipelines will require a section 404 permit (see NWP 15).

**Note 5:** This NWP authorizes oil or natural gas pipeline maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

**Note 6:** For NWP 12 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, ''District Engineer's Decision.'' The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

13. *Bank Stabilization.* Bank stabilization activities necessary for erosion control or prevention, such as vegetative stabilization, bioengineering, sills, rip rap, revetment, gabion baskets, stream barbs, and bulkheads, or combinations of bank stabilization techniques, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects (an exception is for bulkheads—the district engineer cannot issue a waiver for a bulkhead that is greater than 1,000 feet in length along the bank);

(c) The activity will not exceed an average of one cubic yard per running foot, as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(e) No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored native trees and treetops may be used in low energy areas);

(g) Native plants appropriate for current site conditions, including salinity, must be used for bioengineering or vegetative bank stabilization;

(h) The activity is not a stream channelization activity; and

(i) The activity must be properly maintained, which may require repairing it after severe storms or erosion events. This NWP authorizes those maintenance and repair activities if they require authorization.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the bank stabilization activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note:** In coastal waters and the Great Lakes, living shorelines may be an appropriate option for bank stabilization, and may be authorized by NWP 54.

14. *Linear Transportation Projects.* Activities required for crossings of waters of the United States associated with the construction, expansion, modification, or improvement of linear

transportation projects (*e.g.,* roads, highways, railways, trails, driveways, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than ½-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than ⅓-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds ⅒-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** For linear transportation projects crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Linear transportation projects must comply with 33 CFR 330.6(d).

**Note 2:** Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

**Note 3:** For NWP 14 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, ''District Engineer's Decision.'' The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

15. *U.S. Coast Guard Approved Bridges.* Discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under section 9 of the Rivers and Harbors Act of 1899 or other applicable laws. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit. (Authority: Section 404 of the Clean Water Act (Section 404))

16. *Return Water From Upland Contained Disposal Areas.* Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs in an area that has no waters of the United States and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the Clean Water Act section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. (Authority: Section 404)

17. *Hydropower Projects.* Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 10,000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and section 30 of the Federal Power Act, as amended.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authority: Section 404)

18. *Minor Discharges.* Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than ⅒-acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 32.) (Authorities: Sections 10 and 404)

19. *Minor Dredging.* Dredging of no more than 50 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (*i.e.,* section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. (Authorities: Sections 10 and 404)

20. *Response Operations for Oil or Hazardous Substances.* Activities conducted in response to a discharge or release of oil or hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) including containment, cleanup, and mitigation efforts, provided that the activities are done under either: (1) The Spill Control and Countermeasure Plan required by 40 CFR 112.3; (2) the direction or oversight of the federal on-scene coordinator designated by 40 CFR

part 300; or (3) any approved existing state, regional or local contingency plan provided that the Regional Response Team (if one exists in the area) concurs with the proposed response efforts. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. This NWP also authorizes the use of temporary structures and fills in waters of the U.S. for spill response training exercises. (Authorities: Sections 10 and 404)

21. *Surface Coal Mining Activities.* Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations, provided the following criteria are met:

(a) The activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement;

(b) The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into tidal waters or non-tidal wetlands adjacent to tidal waters; and

(c) The discharge is not associated with the construction of valley fills. A ''valley fill'' is a fill structure that is typically constructed within valleys associated with steep, mountainous terrain, associated with surface coal mining activities.

*Notification:* The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.) (Authorities: Sections 10 and 404)

22. *Removal of Vessels.* Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 32.) If the vessel is listed or eligible for listing in the National Register of Historic Places, the permittee cannot commence the activity until informed by the district engineer that compliance with the ''Historic Properties'' general condition is completed. (Authorities: Sections 10 and 404)

**Note 1:** If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

**Note 2:** Compliance with general condition 18, Endangered Species, and general condition 20, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the possibility that shipwrecks may be historic properties.

23. *Approved Categorical Exclusions.* Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500), that the activity is categorically excluded from the requirement to prepare an environmental impact statement or environmental assessment analysis, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW–CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

*Notification:* Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letter(s). (Authorities: Sections 10 and 404)

**Note:** The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW–CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are: The Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05–07. Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same website.

24. *Indian Tribe or State Administered Section 404 Programs.* Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)–(l) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. (Authority: Section 10)

**Note 1:** As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

**Note 2:** Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Public Law 94–587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.4(b)).

25. *Structural Discharges.* Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a separate section 10 permit if located in navigable waters of the United States. (Authority: Section 404)

26. [Reserved]

27. *Aquatic Habitat Restoration, Enhancement, and Establishment Activities.* Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To be authorized by this NWP, the aquatic habitat restoration,

enhancement, or establishment activity must be planned, designed, and implemented so that it results in aquatic habitat that resembles an ecological reference. An ecological reference may be based on the characteristics of one or more intact aquatic habitats or riparian areas of the same type that exist in the region. An ecological reference may be based on a conceptual model developed from regional ecological knowledge of the target aquatic habitat type or riparian area.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: The removal of accumulated sediments; releasing sediment from reservoirs to restore downstream habitat, the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms are removed; the installation of current deflectors; the enhancement, rehabilitation, or re-establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or re-establish stream meanders; the removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; coral restoration or relocation; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (*e.g.,* the conversion of a stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Compensatory mitigation is not required for activities authorized by this NWP since these activities must result in net increases in aquatic resource functions and services.

*Reversion.* For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (*i.e.,* prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

*Reporting.* For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general

condition 32), except for the following activities:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS or their designated state cooperating agencies;

(2) Activities conducted in accordance with the terms and conditions of a binding coral restoration or relocation agreement between the project proponent and the NMFS or any of its designated state cooperating agencies;

(3) Voluntary stream or wetland restoration or enhancement action, or wetland establishment action, documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(4) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSMRE or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation to the district engineer to fulfill the reporting requirement. (Authorities: Sections 10 and 404)

**Note:** This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee projects. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

28. *Modifications of Existing Marinas.* Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Authority: Section 10)

29. *Residential Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

*Subdivisions:* For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed ½-acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

30. *Moist Soil Management for Wildlife.* Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams, to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies. (Authority: Section 404)

**Note:** The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

31. *Maintenance of Existing Flood Control Facilities.* Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) Were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the ''maintenance baseline,'' as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. To the extent that a Corps permit is required, this NWP authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged and excavated material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used.

*Maintenance Baseline:* The maintenance baseline is a description of the physical characteristics (*e.g.,* depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the adverse environmental impacts caused by the maintenance activities are no more than minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5.

Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner. A flood control facility will not be considered abandoned if the prospective permittee is in the process of obtaining other authorizations or approvals required for maintenance activities and is experiencing delays in obtaining those authorizations or approvals.

*Mitigation:* The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental effects are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline (see Note, below). In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require mitigation and/or best management practices as appropriate.

*Emergency Situations:* In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

*Notification:* The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 32). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the disposal site for dredged or excavated material. (Authorities: Sections 10 and 404)

**Note:** If the maintenance baseline was approved by the district engineer under a prior version of NWP 31, and the district engineer imposed the one-time compensatory mitigation requirement on maintenance for a specific reach of a flood control project authorized by that prior version of NWP 31, during the period this version of NWP 31 is in effect (*insert applicable dates based on final NWPs*) the district engineer will not require additional compensatory mitigation for maintenance activities authorized by this NWP in that specific reach of the flood control project.

32. *Completed Enforcement Actions.* Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of section 404 of the Clean Water Act, provided that:

(a) The activities authorized by this NWP cannot adversely affect more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself; non-compliance of the terms and conditions of an NWP 32 authorization may result in an additional enforcement action (*e.g.,* a Class I civil administrative penalty). Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e). (Authorities: Sections 10 and 404)

33. *Temporary Construction, Access, and Dewatering.* Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district

engineer determines that it will not cause more than minimal adverse environmental effects. Following completion of construction, temporary fill must be entirely removed to an area that has no waters of the United States, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a separate section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the activity is conducted in navigable waters of the United States (*i.e.,* section 10 waters) (see general condition 32). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. (Authorities: Sections 10 and 404)

34. *Cranberry Production Activities.* Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

*Notification:* The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 32.) (Authority: Section 404)

35. *Maintenance Dredging of Existing Basins.* The removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less. All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used for the disposal site. (Authority: Section 10)

36. *Boat Ramps.* Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the district engineer waives the 50 cubic yard limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(b) The boat ramp does not exceed 20 feet in width, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(c) The base material is crushed stone, gravel or other suitable material;

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to an area that has no waters of the United States; and,

(e) No material is placed in special aquatic sites, including wetlands.

The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging must be authorized by another NWP, a regional general permit, or an individual permit.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 32.) (Authorities: Sections 10 and 404)

37. *Emergency Watershed Protection and Rehabilitation.* Work done by or funded by:

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 2509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the permittee should wait until the district engineer issues an NWP verification or 45 calendar days have passed before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification and any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

*Notification:* Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). (Authorities: Sections 10 and 404)

38. *Cleanup of Hazardous and Toxic Waste.* Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note:** Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water

Act or Section 10 of the Rivers and Harbors Act.

39. *Commercial and Institutional Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, wastewater treatment facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses and new ski areas is not authorized by this NWP.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note:** For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

40. *Agricultural Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authority: Section 404)

**Note:** Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2).

41. *Reshaping Existing Drainage and Irrigation Ditches.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage and irrigation ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage or irrigation ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. The reshaping of the drainage ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the drainage ditch as originally constructed (*i.e.,* the capacity of the drainage ditch must be the same as originally constructed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality.

This NWP does not authorize the relocation of drainage or irrigation ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage or irrigation ditch must be approximately the same as the location of the centerline of the original drainage or irrigation ditch. This NWP does not authorize stream channelization or stream relocation projects. (Authority: Section 404)

42. *Recreational Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (*e.g.,* football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authority: Section 404)

43. *Stormwater Management Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; the construction of low impact development integrated management features such as bioretention facilities (*e.g.,* rain gardens), vegetated filter strips, grassed swales, and infiltration trenches; and the construction of pollutant reduction green infrastructure features designed to reduce inputs of sediments, nutrients, and other pollutants into waters, such as features needed to meet reduction targets established under Total Daily Maximum Loads set under the Clean Water Act.

This NWP authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features. The maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features that are not waters of the United States does not require a section 404 permit.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

*Notification:* For discharges into non-tidal waters of the United States for the construction of new stormwater management facilities or pollutant reduction green infrastructure features, or the expansion of existing stormwater management facilities or pollutant reduction green infrastructure features, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility or pollutant reduction green infrastructure feature. (Authority: Section 404)

44. *Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities, provided the activity meets all of the following criteria:

(a) For mining activities involving discharges of dredged or fill material into non-tidal wetlands, the discharge must not cause the loss of greater than ½-acre of non-tidal wetlands;

(b) For mining activities involving discharges of dredged or fill material in non-tidal open waters (*e.g.,* rivers, streams, lakes, and ponds) or work in non-tidal navigable waters of the United States (*i.e.,* section 10 waters), the mined area, including permanent and temporary impacts due to discharges of dredged or fill material into jurisdictional waters, must not exceed ½-acre; and

(c) The acreage loss under paragraph (a) plus the acreage impact under paragraph (b) does not exceed ½-acre.

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) If reclamation is required by other statutes, then a copy of the final reclamation plan must be submitted with the pre-construction notification. (Authorities: Sections 10 and 404)

45. *Repair of Uplands Damaged by Discrete Events.* This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

This NWP does not authorize beach restoration or nourishment.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

*Notification:* The permittee must submit a pre-construction notification to the district engineer (see general condition 32) within 12 months of the date of the damage; for major storms, floods, or other discrete events, the district engineer may waive the 12-month limit for submitting a pre-construction notification if the permittee can demonstrate funding, contract, or other similar delays. The pre-construction notification must include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. (Authorities: Sections 10 and 404)

**Note:** The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

46. *Discharges in Ditches.* Discharges of dredged or fill material into non-tidal ditches that are: (1) Constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authority: Section 404)

47. [Reserved]

48. *Commercial Shellfish Mariculture Activities.* Discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States necessary for new and continuing commercial shellfish mariculture operations in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is authorized to conduct commercial shellfish mariculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement that establishes an enforceable property interest for the operator.

This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize:

(a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;

(b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990; or

(c) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas, or the deposition of shell material back into waters of the United States as waste. (Authorities: Sections 10 and 404)

**Note 1:** The permittee should notify the applicable U.S. Coast Guard office regarding the project.

**Note 2:** To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

**Note 3:** The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines ''aquatic nuisance species'' as ''a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters.''

49. *Coal Remining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized, or they must currently be in process by the Department of the Interior Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts.

As part of the project, the permittee may conduct new coal mining activities in conjunction with the remining activities when he or she clearly demonstrates to the district engineer that the overall mining plan will result in a net increase in aquatic resource functions. The Corps will consider the SMCRA agency's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area.

*Notification:* The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions to the district engineer. (See general condition 32.) (Authorities: Sections 10 and 404)

50. *Underground Coal Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

*Notification:* The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Authorities: Sections 10 and 404)

51. *Land-Based Renewable Energy Generation Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy. Attendant features may include, but are not limited to roads, parking lots, and stormwater management facilities within the land-based renewable energy generation facility.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the discharge results in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** Utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP C or another Department of the Army authorization.

**Note 2:** If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove utility lines and/or road crossings, then NWP C and/or NWP 14 shall be used if those activities meet the terms and conditions of NWPs C and 14, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

**Note 3:** For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

52. *Water-Based Renewable Energy Generation Pilot Projects.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, modification, or removal of water-based wind, water-based solar, wave energy, or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based collection and distribution facilities, control facilities, roads, parking lots, and stormwater management facilities.

For the purposes of this NWP, the term ''pilot project'' means an experimental project where the water-based renewable energy generation units will be monitored to collect information on their performance and environmental effects at the project site.

The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the ½-acre limit.

For each single and complete project, no more than 10 generation units (*e.g.,* wind turbines, wave energy devices, or hydrokinetic devices) are authorized. For floating solar panels in navigable waters of the United States, each single and complete project cannot exceed ½-acre in water surface area covered by the floating solar panels.

This NWP does not authorize activities in coral reefs. Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is required.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

**Note 2:** An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate review and/or approval from the Corps under 33 U.S.C. 408.

**Note 3:** If the pilot project generation units, including any transmission lines, are placed in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation.

**Note 4:** Hydrokinetic renewable energy generation projects that require authorization by the Federal Energy Regulatory Commission under the Federal Power Act of 1920 do not require separate authorization from the Corps under section 10 of the Rivers and Harbors Act of 1899.

**Note 5:** For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

53. *Removal of Low-Head Dams.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States associated with the removal of low-head dams.

For the purposes of this NWP, the term ''low-head dam'' is defined as a dam built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest on a continual and uncontrolled basis. (During a drought, there might not be water flowing over the dam crest.) In general, a low-head dam does not have a separate spillway or spillway gates but it may have an uncontrolled spillway. The dam crest is the top of the dam from left abutment to right abutment, and if present, an uncontrolled spillway. A low-head dam provides little storage function.

The removed low-head dam structure must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

Because the removal of the low-head dam will result in a net increase in ecological functions and services provided by the stream, as a general rule compensatory mitigation is not required for activities authorized by this NWP. However, the district engineer may determine for a particular low-head dam removal activity that compensatory mitigation is necessary to ensure that the authorized activity results in no more than minimal adverse environmental effects.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note:** This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to restore the stream in the vicinity of the low-head dam, including the former impoundment area. Nationwide permit 27 or other Department of the Army permits may authorize such activities. This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to stabilize stream banks. Bank stabilization activities may be authorized by NWP 13 or other Department of the Army permits.

54. *Living Shorelines.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines to stabilize banks and shores in coastal waters, which includes the Great Lakes, along shores with small fetch and gentle slopes that are subject to low- to mid-energy waves. A living shoreline has a footprint that is made up mostly of native material. It incorporates vegetation or other living, natural ''soft'' elements alone or in combination with some type of harder shoreline structure (*e.g.,* oyster or mussel reefs or rock sills) for added protection and stability. Living shorelines should maintain the natural continuity of the land-water interface, and retain or enhance shoreline ecological processes. Living shorelines must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures. The following conditions must be met:

(a) The structures and fill area, including sand fills, sills, breakwaters, or reefs, cannot extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(c) Coir logs, coir mats, stone, native oyster shell, native wood debris, and other structural materials must be adequately anchored, of sufficient weight, or installed in a manner that prevents relocation in most wave action or water flow conditions, except for extremely severe storms;

(d) For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity, must be used if the site is planted by the permittee;

(e) Discharges of dredged or fill material into waters of the United States, and oyster or mussel reef structures in navigable waters, must be the minimum necessary for the establishment and maintenance of the living shoreline;

(f) If sills, breakwaters, or other structures must be constructed to protect fringe wetlands for the living shoreline, those structures must be the minimum size necessary to protect those fringe wetlands;

(g) The activity must be designed, constructed, and maintained so that it has no more than minimal adverse effects on water movement between the waterbody and the shore and the movement of aquatic organisms between the waterbody and the shore; and

(h) The living shoreline must be properly maintained, which may require periodic repair of sills, breakwaters, or reefs, or replacing sand fills after severe

storms or erosion events. Vegetation may be replanted to maintain the living shoreline. This NWP authorizes those maintenance and repair activities, including any minor deviations necessary to address changing environmental conditions.

This NWP does not authorize beach nourishment or land reclamation activities.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the construction of the living shoreline. (See general condition 32.) The pre-construction notification must include a delineation of special aquatic sites (see paragraph (b)(4) of general condition 32). Pre-construction notification is not required for maintenance and repair activities for living shorelines unless required by applicable NWP general conditions or regional conditions. (Authorities: Sections 10 and 404)

**Note:** In waters outside of coastal waters, nature-based bank stabilization techniques, such as bioengineering and vegetative stabilization, may be authorized by NWP 13.

A. *Seaweed Mariculture Activities.* Structures or work in marine waters, including structures anchored to the seabed in waters overlying the outer continental shelf, for seaweed mariculture activities. This NWP also authorizes shellfish mariculture if shellfish production is a component of an integrated multi-trophic mariculture system (*e.g.,* the production of seaweed and shellfish on the same structure or a nearby mariculture structure that is part of the single and complete project).

This NWP authorizes the installation of buoys, long-lines, floats, anchors, rafts, racks, and other similar structures into navigable waters of the United States. Rafts, racks and other floating structures must be securely anchored and clearly marked.

Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

This NWP does not authorize:

(a) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990; or

(b) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas.

*Notification:* The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the preconstruction notification must also include the following information: (1) A map showing the locations and dimensions of the structure(s); (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; and (3) general water depths in the project area(s) (a detailed survey is not required). No more than one pre-construction notification per structure or group of structures should be submitted for the seaweed mariculture operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake during the effective period of this NWP. (Authority: Section 10)

**Note 1:** The permittee should notify the applicable U.S. Coast Guard office regarding the project.

**Note 2:** To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

**Note 3:** The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines ''aquatic nuisance species'' as ''a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters.''

B. *Finfish Mariculture Activities.* Structures or work in marine and estuarine waters, including structures anchored to the seabed in waters overlying the outer continental shelf, for finfish mariculture activities. This NWP also authorizes shellfish mariculture and/or seaweed mariculture if the shellfish and/or seaweed production are a component of an integrated multi-trophic mariculture system (*e.g.,* the production of seaweed or shellfish on the structure used for finfish mariculture, or a nearby mariculture structure that is part of the single and complete project).

This NWP authorizes the installation of cages, net pens, anchors, floats, buoys, and other similar structures into navigable waters of the United States. Net pens, cages, and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize the construction of land-based fish hatcheries or other attendant features.

Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

This NWP does not authorize:

(a) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990; or

(b) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas.

*Notification:* The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the pre-construction notification must also include the following information: (1) A map showing the locations and dimensions of the structure(s); (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; and (3) general water depths in the project area(s) (a detailed survey is not required). No more than one pre-construction notification per structure or group of structures should be submitted for the finfish mariculture operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake during the effective period of this NWP. (Authority: Section 10)

**Note 1:** The permittee should notify the applicable U.S. Coast Guard office regarding the finfish mariculture activity.

**Note 2:** To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

**Note 3:** The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines ''aquatic nuisance species'' as ''a nonindigenous species that threatens the diversity or abundance of native species or

the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters.''

C. *Electric Utility Line and Telecommunications Activities.* Activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.

*Electric utility lines and telecommunication lines:* This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of electric utility lines and telecommunication lines. There must be no change in pre-construction contours of waters of the United States. An ''electric utility line and telecommunication line'' is defined as any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (*e.g.,* backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the electric utility line or telecommunication line crossing of each waterbody.

*Electric utility line and telecommunications substations:* This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with an electric utility line or telecommunication line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than ½-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

*Foundations for overhead electric utility line or telecommunication line towers, poles, and anchors:* This NWP authorizes the construction or maintenance of foundations for overhead electric utility line or telecommunication line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

*Access roads:* This NWP authorizes the construction of access roads for the construction and maintenance of electric utility lines or telecommunication lines, including overhead lines and substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize electric utility lines or telecommunication lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (see 33 CFR part 322). Electric utility lines or telecommunication lines constructed over section 10 waters and electric utility lines or telecommunication lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing electric utility lines or telecommunication lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing electric utility lines or telecommunication lines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the electric utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) A section 10 permit is required; or (2) the discharge will result in the loss of greater than ⅒-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** Where the electric utility line is constructed, installed, or maintained in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the electric utility line to protect navigation.

**Note 2:** For electric utility line or telecommunications activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Electric utility line and telecommunications activities must comply with 33 CFR 330.6(d).

**Note 3:** Electric utility lines or telecommunication lines consisting of aerial electric power transmission lines crossing navigable waters of the United States (which are defined at 33 CFR part 329) must comply with the applicable minimum clearances specified in 33 CFR 322.5(i).

**Note 4:** Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the electric utility line or telecommunication line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

**Note 5:** This NWP authorizes electric utility line and telecommunication line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

**Note 6:** For overhead electric utility lines and telecommunication lines authorized by this NWP, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

**Note 7:** For activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, ''District Engineer's Decision.'' The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

D. *Utility Line Activities for Water and Other Substances.* Activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, and electricity. Oil or natural gas pipeline activities or electric utility line and telecommunications activities may be authorized by NWPs 12 or C, respectively. This NWP also authorizes associated utility line facilities in waters of the United States, provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.

*Utility lines:* This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of utility lines for water and other substances, including outfall and intake structures. There must be no change in pre-construction contours of waters of the United States. A ''utility line'' is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose that is not oil, natural gas, or petrochemicals. Examples of activities authorized by this NWP include utility lines that convey water, sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals. The term ''utility line'' does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (*e.g.,* backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

*Utility line substations:* This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than ½-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

*Foundations for above-ground utility lines:* This NWP authorizes the construction or maintenance of foundations for above-ground utility lines in all waters of the United States, provided the foundations are the minimum size necessary.

*Access roads:* This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (see 33 CFR part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to

commencing the activity if: (1) A section 10 permit is required; or (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

**Note 1:** Where the utility line is constructed, installed, or maintained in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

**Note 2:** For utility line activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Utility line activities must comply with 33 CFR 330.6(d).

**Note 3:** Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

**Note 4:** Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

**Note 5:** This NWP authorizes utility line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

**Note 6:** For activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, ''District Engineer's Decision.'' The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

E. *Water reclamation and reuse facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities, including vegetated areas enhanced to improve water infiltration and constructed wetlands to improve water quality.

The discharge must not cause the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

This NWP also authorizes temporary fills, including the use of temporary mats, necessary to construct the water reuse project and attendant features. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Authority: Sections 10 and 404)

## *C. Nationwide Permit General Conditions*

**Note:** To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. *Navigation.* (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

3. *Spawning Areas.* Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (*e.g.,* through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. *Migratory Bird Breeding Areas.* Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. *Shellfish Beds.* No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. *Suitable Material.* No activity may use unsuitable material (*e.g.,* trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. *Water Supply Intakes.* No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (*e.g.,* stream restoration or relocation activities).

10. *Fills Within 100-Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. *Equipment.* Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. *Removal of Temporary Structures and Fills.* Temporary structures and fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. *Single and Complete Project.* The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. *Wild and Scenic Rivers.* (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. Permittees shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (*e.g.,* National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: *http://www.rivers.gov/.*

17. *Tribal Rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which ''may affect'' a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of ''effects of the action'' for the purposes of ESA section 7 consultation, as well as 50 CFR 402.17, which provides further explanation under ESA section 7 regarding ''activities that are reasonably certain to occur'' and ''consequences caused by the proposed action.''

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed activity. The district engineer will determine whether the proposed activity ''may affect'' or will have ''no effect'' to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. For activities where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin

work until the Corps has provided notification that the proposed activity will have ''no effect'' on listed species or critical habitat, or until ESA section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

(e) Authorization of an activity by an NWP does not authorize the ''take'' of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (*e.g.,* an ESA Section 10 Permit, a Biological Opinion with ''incidental take'' provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word ''harm'' in the definition of ''take'' means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at *http://www.fws.gov/* or *http://www.fws.gov/ipac* and *http://www.nmfs.noaa.gov/pr/species/esa/* respectively.

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for ensuring that an action authorized by NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether ''incidental take'' permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties.* (a) In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)(1)). If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: No historic properties affected, no adverse effect, or adverse effect.

(d) Where the non-Federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed. For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district

engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. *Discovery of Previously Unknown Remains and Artifacts.* Permittees that discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by NWP, they must immediately notify the district engineer of what they have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed by permittees in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after she or he determines that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.,* on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (*e.g.,* conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. If restoring riparian areas involves planting vegetation, only native species should be planted. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (*e.g.,* riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate

form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f).)

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).

(6) Compensatory mitigation requirements (*e.g.,* resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of ½-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than ½-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. *Safety of Impoundment Structures.* To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. *Water Quality.* Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed discharge must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying agency for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by NWP. The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. *Coastal Zone Management.* In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence in order for the activity to be authorized by NWP. The district engineer or a state may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. *Regional and Case-By-Case Conditions.* The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its CWA section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. *Use of Multiple Nationwide Permits.* The use of more than one NWP for a single and complete project is authorized, subject to the following restrictions:

(a) If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed ⅓-acre.

(b) If one or more of the NWPs used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWPs cannot exceed their respective specified acreage limits. For example, if a residential subdivision is constructed under NWP 29, and the single and complete project includes the filling of an upland ditch authorized by NWP 46, the maximum acreage loss of waters of the United States for the residential subdivision under NWP 29 cannot exceed ½-acre, and the total acreage loss of waters of United States due to the NWP 29 and 46 activities cannot exceed 1 acre.

29. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

''When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.''

_____

(Transferee)

_____

(Date)

30. *Compliance Certification.* Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

(a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

(c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. *Activities Affecting Structures or Works Built by the United States.* If an NWP activity also requires review by, or permission from, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a ''USACE project''), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission and/or review is not authorized by NWP until the appropriate Corps office issues the section 408 permission or completes its review to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. *Pre-Construction Notification.* (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is ''no effect'' on listed species or ''no potential to cause effects'' on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants

to use to authorize the proposed activity;

(4)(i) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures.

(ii) For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and does not change those non-PCN NWP activities into NWP PCNs.

(iii) Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (*e.g.,* a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or streams and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-federal permittees, if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed activity or utilize the designated critical habitat that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the ''study river'' (see general condition 16); and

(10) For an NWP activity that requires permission from, or review by, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from, or review by, the Corps office having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than ½-acre of waters of the United States; (ii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iii) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (*e.g.,* via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or email that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district

engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure that the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

*D. District Engineer's Decision*

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the single and complete crossings of waters of the United States that require PCNs to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings of waters of the United States authorized by NWP. If an applicant requests a waiver of an applicable limit, as provided for in NWPs 13, 36, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (*e.g.,* partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (*e.g.,* watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands or streams, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters. The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure that the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) That the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will

be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

*E. Further Information*

1. District engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

*F. Definitions*

*Best management practices (BMPs):* Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

*Compensatory mitigation:* The restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

*Currently serviceable:* Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

*Direct effects:* Effects that are caused by the activity and occur at the same time and place.

*Discharge:* The term ''discharge'' means any discharge of dredged or fill material into waters of the United States.

*Ecological reference:* A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region.

*Enhancement:* The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

*Establishment (creation):* The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

*High Tide Line:* The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

*Historic Property:* Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

*Independent utility:* A test to determine what constitutes a single and complete non-linear project in the Corps Regulatory Program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

*Indirect effects:* Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

*Loss of waters of the United States:* Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

*Navigable waters:* Waters subject to section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

*Non-tidal wetland:* A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. Non-tidal wetlands contiguous to tidal

waters are located landward of the high tide line (*i.e.,* spring high tide line).

*Open water:* For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of ''open waters'' include rivers, streams, lakes, and ponds.

*Ordinary High Water Mark:* The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

*Perennial stream:* A perennial stream has surface water flowing continuously year-round during a typical year.

*Practicable:* Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

*Pre-construction notification:* A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

*Preservation:* The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

*Re-establishment:* The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

*Rehabilitation:* The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

*Restoration:* The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: Re-establishment and rehabilitation.

*Riffle and pool complex:* Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

*Riparian areas:* Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

*Shellfish seeding:* The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (*i.e.,* spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

*Single and complete linear project:* A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term ''single and complete project'' is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (*i.e.,* a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

*Single and complete non-linear project:* For non-linear projects, the term ''single and complete project'' is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of ''independent utility''). Single and complete non-linear projects may not be ''piecemealed'' to avoid the limits in an NWP authorization.

*Stormwater management:* Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

*Stormwater management facilities:* Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (*i.e.,* by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

*Stream bed:* The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

*Stream channelization:* The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A

channelized stream remains a water of the United States.

*Structure:* An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

*Tidal wetland:* A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line.

*Tribal lands:* Any lands title to which is either: (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

*Tribal rights:* Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

*Vegetated shallows:* Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

*Waterbody:* For purposes of the NWPs, a waterbody is a jurisdictional water of the United States. If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of ''waterbodies'' include streams, rivers, lakes, ponds, and wetlands.

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Part III

## Environmental Protection Agency

40 CFR Part 60

Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 60**

**[EPA–HQ–OAR–2017–0483; FRL–10013–60–OAR]**

**RIN 2060–AT54**

## Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration

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

**ACTION:** Final rule.

**SUMMARY:** This action finalizes amendments to the new source performance standards (NSPS) for the oil and natural gas sector. The Environmental Protection Agency (EPA) granted reconsideration on the fugitive emissions requirements, well site pneumatic pump standards, requirements for certification of closed vent systems (CVS) by a professional engineer (PE), and the provisions to apply for the use of an alternative means of emission limitation (AMEL). This final action includes amendments as a result of the EPA's reconsideration of the issues associated with the above mentioned four subject areas and other issues raised in the reconsideration petitions for the NSPS, as well as amendments to streamline the implementation of the rule. This action also includes technical corrections and additional clarifying language in the regulatory text and/or preamble where the EPA concludes further clarification is warranted.

**DATES:** This final rule is effective on November 16, 2020.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2017–0483. All documents in the docket are listed on the *https://www.regulations.gov/* website. Although listed, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov.* 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. 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 Center for Disease Control, 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 questions about this action, contact Ms. Karen Marsh, Sector Policies and Programs Division (E143–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–1065; fax number: (919) 541–0516; and email address: *marsh.karen@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Preamble acronyms and abbreviations.* A number of acronyms and terms are used in this preamble. While this may not be an exhaustive list, to ease the reading of this preamble and for reference purposes, the following terms and acronyms are defined:

AMEL Alternative Means of Emission Limitation
ANSI American National Standards Institute
AVO Auditory, Visual, and Olfactory
boe Barrels of Oil Equivalent
BSER Best System of Emissions Reduction
CAA Clean Air Act
CAPP Canadian Association of Petroleum Producers
CEDRI Compliance and Emissions Data Reporting Interface
CFR Code of Federal Regulations
$CO_2$ Eq. Carbon dioxide equivalent
CPI Consumer Price Indices
CVS Closed Vent System
DOE Department of Energy
EAV Equivalent Annualized Value
EPA Environmental Protection Agency
FEAST Fugitive Emissions Abatement Simulation Toolkit
GHG Greenhouse Gases
GHGI Greenhouse Gas Inventory
HAP Hazardous Air Pollutant(s)
ITRC Interstate Technology and Regulatory Council
LDAR Leak Detection and Repair
METEC Methane Emissions Technology Evaluation Center
NEMS National Energy Modeling System
NSPS New Source Performance Standards
NSSN National Standards System Network
NTTAA National Technology Transfer and Advancement Act
OGI Optical Gas Imaging
OMB Office of Management and Budget
PE Professional Engineer
PRA Paperwork Reduction Act
PRD Pressure Relief Device
PRV Pressure Relief Valve
PTE Potential To Emit
PV Present Value
REC Reduced Emissions Completion
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
RTC Responses to Comments
SOCMI Synthetic Organic Chemicals Manufacturing Industry
The Court United States Court of Appeals for the District of Columbia Circuit
tpy Tons Per Year
TSD Technical Support Document
UIC Underground Injection Control
UMRA Unfunded Mandates Reform Act
VOC Volatile Organic Compounds

*Organization of this document.* The information presented in this preamble is presented as follows:

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## I. Executive Summary

### *A. Purpose of the Regulatory Action*

The purpose of this action is to finalize amendments to the NSPS for the Crude Oil and Natural Gas Production source category (located at 40 Code of Federal Regulations (CFR) part 60, subpart OOOOa) based on the EPA's reconsideration of those standards. On June 3, 2016, the EPA published a final rule titled ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule,'' at 81 FR 35824 (''2016 NSPS subpart OOOOa''). The 2016 NSPS subpart OOOOa set the standards for reducing emissions of greenhouse gases (GHG), in the form of limitations on methane, and volatile organic compounds (VOC) from the oil and natural gas sources constructed, modified, or reconstructed after September 15, 2015.[1] Following promulgation of the final rule, the Administrator received petitions for reconsideration of several provisions of the 2016 NSPS subpart OOOOa.[2] The EPA granted reconsideration on four issues: (1) The applicability of the fugitive emissions requirements to low production well sites, (2) the process and criteria for requesting approval of an AMEL, (3) the well site pneumatic pump standards, and (4) the requirements for certification of CVS by a PE. On October 15, 2018, the EPA published a proposed rulemaking titled ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration,'' in which we proposed amendments to the 2016 NSPS subpart OOOOa to address the issues for which reconsideration was granted, as well as other implementation issues and technical corrections. 83 FR 52056. After considering public comments and new data submitted by the commenters, the EPA is finalizing certain amendments to the 2016 NSPS subpart OOOOa as proposed, finalizing other amendments with changes from the proposal in response to comments and new data that were received, and not finalizing some of the proposed amendments in response to comments and new data that were received.

In addition to the amendments described above, this action includes amendments to address other issues raised in the reconsideration petitions for the 2016 NSPS subpart OOOOa and to clarify and streamline implementation of the rule. These amendments relate to the following provisions: Well completions (location of a separator during flowback, screenouts, and coil tubing cleanouts), onshore natural gas processing plants (definition of capital expenditure and monitoring), storage vessels (applicability), and general clarifications (certifying official and recordkeeping and reporting). Lastly, in addition to the amendments addressing reconsideration and implementation issues, the EPA is finalizing technical corrections of inadvertent errors in the 2016 NSPS subpart OOOOa.

In addition to this action, the EPA has published a separate final rule in the **Federal Register** of Monday, September 14, 2020, that finalizes additional amendments to the 2016 NSPS subpart OOOOa which are not addressed by this action. That separate final rule, titled ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review: Final Rule'' (FRL–10013–44–OAR; FR Doc. 2020–18114) is herein referred to as the ''Review Rule.'' Specifically, the Review Rule removes sources in the transmission and storage segment from the source category by revising the definition of the Crude Oil and Natural Gas Production source category, rescinds the standards (including both the VOC and methane requirements) applicable to those sources, and rescinds the methane-specific requirements of the NSPS applicable to sources in the production and processing segments. For further information about these additional amendments, see the final rule published in the *Rules and Regulations* section of the **Federal Register** of Monday, September 14, 2020. Please refer to the Regulatory Impact Analysis (RIA) for both this action and the Review Rule to see the combined impacts of both actions.

### *B. Summary of the Major Provisions of This Final Rule*

Provided below is a summary of each key amendment, clarification, or correction made to the 2016 NSPS subpart OOOOa that is included in this final action.

*Well completions.* The EPA is finalizing its proposed amendment to 40 CFR 60.5375a(a)(1)(iii) to allow the separator to be nearby during flowback, but the separator must be available and ready for use as soon as it is technically feasible for the separator to function. We are also amending 40 CFR 60.5375a(a)(1)(i) to clarify that the separator that is required during the initial flowback stage may be a production separator as long as it is designed to accommodate flowback. Finally, we are amending the definition of flowback at 40 CFR 60.5430a to exclude screenouts, coil tubing cleanouts, and plug drill outs. As explained in the preamble to the proposed rulemaking, these are functional processes that allow for flowback to begin; as such, they are not part of the flowback. 83 FR 52082.

*Pneumatic pumps.* The EPA is finalizing an amendment to extend the exemption from control where it is technically infeasible to route pneumatic pump emissions to a control device. The final rule extends this exemption to all pneumatic pump affected facilities at all well sites by removing the reference to greenfield sites in 40 CFR 60.5393a(b) and the greenfield site definition from 40 CFR 60.5430a. Additionally, in order to qualify for the technical infeasibility exemption, the 2016 NSPS subpart OOOOa requires certification by a qualified PE that routing a pneumatic pump to a control device or a process is technically infeasible. 40 CFR 60.5393a(b)(5). This final rule allows certification of technical infeasibility by either a qualified PE or an in-house engineer with expertise on the design and operation of the pneumatic pump.

*Storage vessels.* This final rule amends the applicability criteria for storage vessel affected facilities by establishing criteria for calculating potential for VOC emissions under different scenarios. Specifically, for individual storage vessels that are part of a controlled tank battery (*i.e.,* two or more storage vessels manifolded together with piping such that all vapors are shared between the headspace of the storage vessels, and where emissions are routed through a CVS to a process or a control device with a destruction efficiency of at least 95.0 percent for VOC emissions) that is subject to a

[1] Docket ID No. EPA–HQ–OAR–2010–0505.

[2] Copies of the petitions are provided in Docket ID No. EPA–HQ–OAR–2017–0483.

legally and practicably enforceable limit, potential VOC emissions may be determined by averaging the emissions from the entire tank battery across the number of storage vessels in the battery. For a controlled tank battery described above, if the average per storage vessel VOC emissions are greater than 6 tons per year (tpy), then all storage vessels in that battery are storage vessel affected facilities. For individual storage vessels that do not meet the criteria described above, the potential VOC emissions is determined according to the proposed criteria, which the EPA is finalizing in this action; where the VOC emissions are greater than 6 tpy, the storage vessel is an affected facility.

*CVS.* This final rule incorporates the option for owners and operators to demonstrate that the pneumatic pump CVS is operated with no detectable emissions by (1) an annual inspection using EPA Method 21 of appendix A–7 of part 60 (''Method 21''), (2) monthly audio/visual/olfactory (AVO) monitoring, or (3) optical gas imaging (OGI) monitoring at the frequencies specified for fugitive monitoring. Additionally, this final rule incorporates the option for a storage vessel CVS to be monitored by either monthly AVO monitoring or OGI monitoring at the frequencies specified for fugitive monitoring. Finally, this final rule allows for certification of the CVS design and capacity assessment by either a qualified PE or an in-house engineer with expertise on the design and operation of the CVS.

*Fugitive emissions requirements.* The EPA is finalizing several amendments to the requirements for the collection of fugitive emissions components at well sites and compressor stations. The monitoring frequencies in this final rule are semiannual for well sites and compressor stations, and annual for well sites and compressor stations located on the Alaska North Slope. The final rule excludes low production well sites (where the total combined oil and natural gas production for the well site is at or below 15 barrels of oil equivalent (boe) per day) from fugitive emissions monitoring, as long as they maintain the records specified in the final rule to demonstrate that their total well site production is at or below 15 boe per day. A low production well site that subsequently produces above this threshold is required to comply with the fugitive emissions requirements.

This final rule also finalizes separate initial monitoring requirements for the Alaska North Slope compressor stations, as proposed. Compressor stations located on the Alaska North Slope that start up between September and March must conduct initial monitoring within 6 months of startup or by June 30, whichever is later; compressor stations that start up between April and August must conduct initial monitoring within 90 days of startup. This final rule revises the initial monitoring requirement for well sites and compressor stations not located on the Alaska North Slope by requiring initial monitoring within 90 days of startup. Additionally, this final rule allows fugitive monitoring to stop when all major production and processing equipment is removed from a well site such that it becomes a wellhead-only well site.

In addition to the amendments related to monitoring frequencies, the final rule (1) specifies the events that constitute modifications to an existing separate tank battery surface site (which is a ''well site'' for purposes of well site fugitive emissions requirements); (2) revises the repair requirements to specify that a first attempt at repair must be made within 30 days of identifying fugitive emissions and final repair must be made within 30 days of the first attempt at repair; (3) amends the definition of a well site to exclude third-party equipment located downstream of the custody meter assembly and Underground Injection Control (UIC) Class I non-hazardous and UIC Class II disposal wells from the fugitive emissions requirements; and (4) revises the requirements for the monitoring plan, recordkeeping, and reporting associated with the fugitive emissions requirements.

*AMEL.* This final rule amends the provisions for application of an AMEL for emerging technologies or for existing state fugitive emissions programs. Additionally, this final rule provides alternative fugitive emissions standards for well sites and compressor stations located in specific states.

*Onshore natural gas processing plants.* This final rule revises the definition of ''capital expenditure'' at 40 CFR 60.5430a by replacing the equation used to determine the percent of replacement cost, ''Y'', with one that is based on the ratio of consumer price indices (CPI). Additionally, this final rule exempts components that are in VOC service for less than 300 hours/year from monitoring. The EPA is also revising the equipment leak standards for onshore natural gas processing plants (40 CFR 60.5400a) to include the same initial compliance provision that is in the original equipment leak standards for onshore natural gas processing plants. 40 CFR part 60, subpart KKK. That provision, which is codified at 40 CFR 60.632(a), requires compliance ''as soon as practicable but no later than 180 days after initial startup.'' The EPA has not been able to find a record explaining or otherwise indicating that we intended to change this initial compliance deadline for the leak standards at onshore natural gas processing plants when NSPS subparts OOOO and OOOOa were promulgated; accordingly, in these amendments to NSPS subpart OOOOa, the EPA is adding this provision back into the leak standards for onshore natural gas processing plants in NSPS subpart OOOOa at 40 CFR 60.5400a.

*Sweetening units.* This final rule revises the affected facility description for the sulfur dioxide ($SO_2$) standards to correctly define such affected facilities as any onshore sweetening unit that processes natural gas produced from either onshore or offshore wells at 40 CFR 60.5365a(g).

### *C. Costs and Benefits*

The EPA has projected the compliance cost reductions, emissions changes, and forgone benefits that may result from the final reconsideration. The projected cost reductions and forgone benefits are presented in detail in the RIA accompanying this final rule. The RIA focuses on the elements of the final rule—the provisions related to fugitive emissions requirements and certification by a PE—that are likely to result in quantifiable cost or emissions changes compared to a baseline that includes the 2016 NSPS subpart OOOOa requirements. We estimated the effects of this final rule for all sources that are projected to change compliance activities under this action for the analysis years 2021 through 2030. The RIA also presents the present value (PV) and equivalent annualized value (EAV) of costs, benefits, and net benefits of this action in 2016 dollars.

A summary of the key results of this final rule is presented in Table 1. Table 1 presents the PV and EAV, estimated using discount rates of 7 and 3 percent, of the changes in benefits, costs, and net benefits, as well as the change in emissions under the final rule. Here, the EPA refers to the cost reductions as the ''benefits'' of this rule and the forgone benefits as the ''costs'' of this rule in Table 1. The net benefits are the benefits (cost reductions) minus the costs (forgone benefits).

TABLE 1—COST REDUCTIONS, FORGONE BENEFITS AND FORGONE EMISSIONS REDUCTIONS OF THE FINAL RULE, 2021 THROUGH 2030

[Millions 2016$]

| | 7-Percent discount rate | | 3-Percent discount rate | |
|---|---|---|---|---|
| | PV | EAV | PV | EAV |
| Benefits (Total Cost Reductions) | $750 | $100 | $950 | $110 |
| Costs (Forgone Benefits) | 19 | 2.5 | 71 | 8.1 |
| Net Benefits [1] | 730 | 97 | 880 | 100 |
| Emissions | Forgone Reductions | | | |
| Methane (short tons) | 450,000 | | | |
| VOC (short tons) | 120,000 | | | |
| Hazardous Air Pollutant(s) (HAP) (short tons) | 4,700 | | | |
| Methane (million metric tons carbon dioxide equivalent ($CO_2$ Eq.)) | 10 | | | |

**Note:** Estimates are rounded to two significant digits and may not sum due to independent rounding.

This final rule is expected to result in benefits (compliance cost reductions) for affected owners and operators. The PV of these benefits (cost reductions), discounted at a 7-percent rate, is estimated to be about $750 million, with an EAV of about $100 million (Table 1). Under a 3-percent discount rate, the PV of cost reductions is $950 million, with an EAV of $110 million (Table 1).

The estimated costs (forgone benefits) include the monetized climate effects of the projected increase in methane emissions under the final rule. The PV of these climate-related costs (forgone benefits), discounted at a 7-percent rate, is estimated to be about $19 million, with an EAV of about $2.5 million (Table 1). Under a 3-percent discount rate, the PV of the climate-related costs (forgone benefits) is about $71 million, with an EAV of about $8.1 million (Table 1). The EPA also expects that there will be increases in VOC and HAP emissions under the proposal. While the EPA expects that the forgone VOC emission reductions may also degrade air quality and adversely affect health and welfare effects associated with exposure to ozone, particulate matter with a diameter of 2.5 micrometers or less ($PM_{2.5}$), and HAP, we did not quantify these effects at this time. This omission should not imply that these forgone benefits do not exist. To the extent that the EPA were to quantify these ozone and particulate matter (PM) impacts, the Agency would estimate the number and value of avoided premature deaths and illnesses using an approach detailed in the Particulate Matter National Ambient Air Quality Standards (NAAQS) and Ozone NAAQS RIA (U.S. EPA, 2012; U.S. EPA, 2015). Such an analysis would account for the distribution of air pollution-attributable risks among populations most vulnerable and susceptible to $PM_{2.5}$ and ozone exposure.

The PV of the net benefits of this rule, discounted at a 7-percent rate, is estimated to be about $730 million, with an EAV of about $97 million (Table 1). Under a 3-percent discount rate, the PV of net benefits is about $880 million, with an EAV of about $100 million (Table 1).

## II. General Information

### *A. Does this action apply to me?*

Categories and entities potentially affected by this action include:

TABLE 2—INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS ACTION

| Category | NAICS code [1] | Examples of regulated entities |
|---|---|---|
| Industry | 211120 | Crude Petroleum Extraction. |
| | 211130 | Natural Gas Extraction. |
| | 221210 | Natural Gas Distribution. |
| | 486110 | Pipeline Distribution of Crude Oil. |
| | 486210 | Pipeline Transportation of Natural Gas. |
| Federal Government | | Not affected. |
| State/local/tribal government | | Not affected. |

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. Other types of entities not listed in the table could also be affected by this action. To determine whether your entity is affected by this action, you should carefully examine the applicability criteria found in the final rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section, your air permitting authority, or your EPA Regional representative listed in 40 CFR 60.4 (General Provisions).

### *B. Where can I get a copy of this document?*

This final action is available in the docket at *https://www.regulations.gov/,* Docket ID No. EPA–HQ–OAR–2017–0483. Additionally, following signature by the Administrator, the EPA will post a copy of this final action at *https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry.* This website provides information on all of the EPA's actions related to control of air pollution in the oil and natural gas industry. Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the final rule and key technical documents at this same website. A redline version of the regulatory language that incorporates the final changes in this action is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2017–0483).

*C. What is the Agency's authority for taking this action?*

This action, which finalizes amendments to the 2016 NSPS subpart OOOOa, is based on the same legal authorities that the EPA relied upon for the original promulgation of the 2016 NSPS subpart OOOOa. The EPA promulgated the 2016 NSPS subpart OOOOa pursuant to its standard-setting authority under section 111(b)(1)(B) of the Clean Air Act (CAA) and in accordance with the rulemaking procedures in section 307(d) of the CAA. Section 111(b)(1)(B) of the CAA requires the EPA to issue ''standards of performance'' for new sources in a category listed by the Administrator based on a finding that the category of stationary sources causes or contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. In the Review Rule (published in the **Federal Register** of Monday, September 14, 2020), the EPA has interpreted CAA section 111(b)(1)(B) to require a determination that the emissions of any air pollutant not already subject to an NSPS for the source category (or evaluated in association with the listing of the source category) cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. CAA section 111(a)(1) defines ''a standard of performance'' as ''a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirement) the Administrator determines has been adequately demonstrated.'' The standard that the EPA develops, based on the best system of emission reduction (BSER) is commonly a numerical emission limit, expressed as a performance level (*e.g.,* a rate-based standard). However, CAA section 111(h)(1) authorizes the Administrator to promulgate a work practice standard or other requirements, which reflect the best technological system of continuous emission reduction, if it is not feasible to prescribe or enforce a standard of performance. This action includes amendments to the fugitive emissions standards for well sites and compressor stations, which are work practice standards promulgated pursuant to CAA section 111(h)(1). 81 FR 35829.

The final amendments in this document result from the EPA's reconsideration of various aspects of the 2016 NSPS subpart OOOOa. Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC* v. *Fox Televisions Stations, Inc.,* 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 42 (1983) (''State Farm''). ''The power to decide in the first instance carries with it the power to reconsider.'' *Trujillo* v. *Gen. Elec. Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980); see also, *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223, 229 (1965); *Mazaleski* v. *Treusdell,* 562 F.2d 701, 720 (D.C. Cir. 1977).

*D. Judicial Review*

Under section 307(b)(1) of the CAA, judicial review of this final rule is available only by filing a petition for review in the United Stated Court of Appeals for the District of Columbia Circuit by November 16, 2020. Moreover, under section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements. Section 307(d)(7)(B) of the CAA further provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, EPA WJC, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

## III. Background

On June 3, 2016, the EPA published a final rule titled ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Source; Final Rule,'' at 81 FR 35824 (''2016 NSPS subpart OOOOa''). The 2016 NSPS subpart OOOOa established standards of performance for GHG and VOC emissions from new, modified, and reconstructed sources in the oil and natural gas sector. For further information on the 2016 NSPS subpart OOOOa, see 81 FR 35824 (June 3, 2016) and associated Docket ID No. EPA–HQ–OAR–2010–0505. Following promulgation of the final rule, the Administrator received petitions for reconsideration of several provisions of the 2016 NSPS subpart OOOOa. Copies of the petitions are provided in the docket for this final rule (Docket ID No. EPA–HQ–OAR–2017–0483). Several states and industry associations also sought judicial review of the rule, and that litigation is currently being held in abeyance. *American Petroleum Institute, et al.* v. *EPA,* No. 13–1108 (D.C. Cir.) (and consolidated cases).

In a letter to the petitioners dated April 18, 2017, the EPA granted reconsideration of the fugitive emissions requirements at well sites and compressor stations.[3] In a subsequent notification, the EPA granted reconsideration of two additional issues: Well site pneumatic pump standards and the requirements for certification of CVS by a PE.[4] On October 15, 2018, the EPA proposed amendments and clarifications to address the issues under reconsideration, as well as issues related to the implementation of the 2016 NSPS subpart OOOOa that have come to the EPA's attention. During this rulemaking, the EPA reviewed additional information, including information in the annual compliance reports submitted for the 2016 NSPS subpart OOOOa and on costs associated with fugitive emissions monitoring. The additional information has allowed the EPA to more accurately assess the emission reductions and costs associated with the fugitive emissions requirements of the 2016 NSPS subpart OOOOa before evaluating revisions in this rulemaking. Further, the EPA used the additional information to update the overall burden estimates for the 2016 NSPS subpart OOOOa, thus, providing a more accurate baseline on which to compare any burden reductions achieved through this final rule. Upon review of the updated cost estimates,

[3] See Docket ID Item No. EPA–HQ–OAR–2010–0505–7730.

[4] 82 FR 25730.

the EPA concludes the burden of the 2016 NSPS subpart OOOOa was underestimated, and this rulemaking provided an opportunity to reduce the burden of the rule, particularly related to the recordkeeping and reporting requirements. This action finalizes amendments that would significantly reduce the recordkeeping and reporting burden of the rule while continuing to assure compliance. This action also addresses several other implementation issues that were raised following promulgation of the 2016 NSPS subpart OOOOa. The EPA is addressing these issues at the same time to provide clarity and certainty for the public and the regulated community regarding these requirements.

## IV. Summary of the Final Standards

This final rule amends certain requirements in the 2016 NSPS subpart OOOOa, as discussed in this section. These amendments are effective on November 16, 2020. Therefore, the standards in NSPS subpart OOOOa change from that date forward. Accordingly, after November 16, 2020, all affected facilities that commenced construction, reconstruction, or modification after September 18, 2015 must comply with the 2016 NSPS subpart OOOOa as amended; the previous requirements no longer apply.

### *A. Well Completions*

The 2016 NSPS subpart OOOOa requires that the owner or operator of a well affected facility have a separator on site during the entire flowback period. 40 CFR 60.5375a(a)(1)(iii). The EPA proposed and received supportive comments on allowing the separator to be located in close enough proximity to the well site for use as soon as sufficient flowback is present for the separator to function. Consistent with the proposal, this final rule amends 40 CFR 60.5375a(a)(1)(iii) to allow the separator to be at a nearby centralized facility or well pad that services the well affected facility during flowback as long as the separator can be utilized as soon as it is technically feasible for the separator to function. The EPA is also amending 40 CFR 60.5375a(a)(1)(i) to clarify that the separator that is required during the initial flowback stage may be a production separator as long as it is also designed to accommodate flowback.

The October 15, 2018, proposal also included proposed amendments to the definition of flowback. The 2016 NSPS subpart OOOOa, 40 CFR 60.5430a defines flowback as the process of allowing fluids and entrained solids to flow from a well following a treatment, either in preparation for a subsequent phase of treatment of in preparation for cleanup and returning the well to production. The term flowback also means the fluids and entrained solids that emerge from a well during the flowback process. The flowback period begins when material introduced into the well during the treatment returns to the surface following hydraulic fracturing or refracturing. The flowback period ends when either the well is shut in and permanently disconnected from the flowback equipment or at the startup of production. The flowback period includes the initial flowback stage and the separation flowback stage.

In the October 15, 2018, proposed rulemaking, the EPA explained that screenouts, coil tubing cleanouts, and plug drill outs are functional processes that allow for flowback to begin; as such, they are not part of the flowback. 83 FR 52082. The proposed rulemaking included definitions for screenouts, coil tubing cleanouts, and plug drill outs, as proposed. Specifically, a screenout is an attempt to clear proppant from the wellbore in order to dislodge the proppant out of the well. A coil tubing cleanout is a process where an operator runs a string of coil tubing to the packed proppant within a well and jets the well to dislodge the proppant and provide sufficient lift energy to flow it to the surface. A plug drill-out is the removal of a plug (or plugs) that was used to isolate different sections of the well. The EPA proposed to exclude screenouts, coil tubing cleanouts, and plug drill outs from the definition of flowback. This final rule amends the definition of flowback and finalizes the definitions for screenouts, coil tubing cleanouts, and plug drill outs, as proposed.

This final rule does not include a definition for a permanent separator. The EPA proposed such a definition in conjunction with our proposal to streamline reporting and recordkeeping requirements for flowback routed through production separators (which we referred to as ''permanent separators'' in the proposed rulemaking). As explained in the preamble to the proposed rulemaking, when a production separator is used for both well completions and production, the production separator is connected at the onset of the flowback and stays on after flowback and at the startup of production; in that event, certain reporting and recordkeeping requirements associated with well completions (*e.g.,* information about when a separator is hooked up or disconnected during flowback) would be unnecessary. 83 FR 52082. We, therefore, proposed to remove such unnecessary data reporting and recordkeeping requirements when a ''permanent separator'' (as defined in the proposed rulemaking) is used for flowback. Upon further review, we learned that the term ''permanent separator,'' as defined in our proposed rulemaking, does not accurately describe production separators that are also used during flowback because such production separators may not be permanent fixtures of a site. Therefore, while the final rule streamlines reporting and recordkeeping requirements for flowback routed through production separators, on the condition that those separators are designed to accommodate flowback, it does not include the term ''permanent separator'' or the proposed definition. The details of these streamlined elements are provided in section IV.I.1 of this preamble.

### *B. Pneumatic Pumps*

Under the 2016 NSPS subpart OOOOa, a pneumatic pump located at a non-greenfield site is not required to reduce its emissions by 95 percent if it is technically infeasible to route the pneumatic pump to a control device or process. This final rule expands the technical infeasibility exemption to pneumatic pumps at all well sites by removing the reference to greenfield site in 40 CFR 60.5393a(b) and the associated definition of greenfield site at 40 CFR 60.5430a. For the 2016 NSPS subpart OOOOa, the EPA concluded that circumstances that could otherwise make control of a pneumatic pump technically infeasible at an existing location could be addressed in the design and construction of a new site. In the proposal, the EPA explained petitioners' concerns that, even at greenfield sites, certain scenarios present circumstances where the control of a pneumatic pump may be technically infeasible despite the site being newly designed and constructed. 83 FR 52061. We, therefore, proposed to expand the technical infeasibility provision to apply to pneumatic pumps at all well sites and solicited comments on scenarios where routing a pump to a control device or process would be technically infeasible at greenfield sites. The EPA received numerous comments in support of the proposal. After consideration of the comments and further review of the standards, this action finalizes the proposed exemption from control if it is technically infeasible to route emissions from a pneumatic pump to a control device at all well sites, including greenfield sites. In addition to the reasons specified in the proposal, the EPA has reevaluated

the 2016 NSPS subpart OOOOa standards for pneumatic pumps, and it is clear that the EPA did not intend to require the installation of a control device for the sole purpose of controlling emissions from a pneumatic pump, even at greenfield sites. Furthermore, in the 2016 NSPS subpart OOOOa, the assessment of technical infeasibility for a pneumatic pump is conducted within the context of an existing control device, not a control device that might be installed to also accommodate the pneumatic pump emissions. Therefore, the EPA concludes that when determining technical feasibility at any site, the technical feasibility is determined for the routing of pneumatic pump emissions to the controls which are needed for the processes at the site. Moreover, while it is likely uncommon that an owner or operator cannot design a greenfield site with a control device to reduce pneumatic pump emissions (*e.g.,* because the design from conception would be able to include necessary scenarios), the EPA cannot account for every scenario that may occur, especially given the potential intermittent nature of pneumatic pump emissions. Therefore, the EPA agrees with Petitioners and numerous commenters that it is appropriate to allow the owner or operator to demonstrate that it is technically infeasible to route pneumatic pump emissions to a control device or a process at any well site. The owner or operator must justify and provide professional or in-house engineering certification for any site where the control of pneumatic pump emissions is technically infeasible. The expansion of the technical infeasibility provision is reflected in 40 CFR 60.5393a(b), where we are removing paragraphs (b)(1) and (2).

In addition, we are amending paragraph (b)(5) to state that boilers and process heaters are not control devices for the purposes of the pneumatic pump standards. Two commenters stated that boilers and process heaters located at well sites are not inherently designed for the control of emissions and raised concerns that routing pneumatic pump emissions to these devices may result in frequent safety trips and burner flame instability (*i.e.,* high temperature limit shutdowns, loss of flame signal, etc.).[5] The comments further contend that requiring the technical infeasibility evaluation for every boiler and process heater located at a wellsite would result in unnecessary administrative burden since each such evaluation would be raising the same concerns described above. The EPA agrees with the commenters and has revised the standards to state that boilers and process heaters are not considered control devices for the purposes of controlling pneumatic pump emissions.

Additionally, the EPA is finalizing revisions to the certification requirements for the determination that it is technically infeasible to route emissions from pneumatic pumps to a control device or process. The 2016 NSPS subpart OOOOa requires certification of technical infeasibility by a qualified PE; however, the EPA proposed allowing this certification by either a PE or an in-house engineer because in-house engineers may be more knowledgeable about site design and control than a third-party PE. After considering the comments, some supporting and some opposing the proposal, the EPA continues to believe that certification by an in-house engineer is appropriate. We are, therefore, amending the rule to allow certification of technical infeasibility by either a PE or an in-house engineer with expertise on the design and operation of the pneumatic pump.

*C. Storage Vessels*

The storage vessel standards apply to individual storage vessels with the potential for VOC emissions of 6 tpy or greater. The 2016 NSPS subpart OOOOa requires a calculation of the potential for VOC emissions from individual storage vessels. In the proposal, the EPA sought to address instances where storage vessels are designed and operated as a manifolded battery and to address questions regarding where averaging emissions may be appropriate for the calculation of potential for VOC emissions. This final rule addresses the challenges of calculating the potential for VOC emissions from individual storage vessels that are part of a controlled battery by specifying separate calculation requirements for these storage vessels. Specifically, the final rule allows owners and operators to average the emissions across the number of storage vessels in a controlled battery provided that specific design and operational criteria are met. These specific design and operational criteria include requirements to manifold the vessels such that all vapors are shared between the headspace of the storage vessels and route the collected vapors through a CVS to a process or a control device with a destruction efficiency of at least 95.0 percent for VOC emissions, and must be included in legally and practicably enforceable limits in a permit or other requirement established under a Federal, state, local, or tribal authority. Under the final rule, if these criteria are met, the owner or operator may calculate the average emissions from the individual storage vessels in that battery to determine if the average emissions are greater than 6 tpy. If the average emissions are greater than 6 tpy, then each of the individual storage vessels in that battery is a storage vessel affected facility. However, if the average emissions are less than 6 tpy, then none of the storage vessels in that battery are a storage vessel affected facility.

In addition, the final rule finalizes the proposed methods for calculating the potential for VOC emissions for storage vessels that do not meet the design and operational criteria specified above. Those storage vessels include individual storage vessels, as well as manifolded storage vessels that do not meet the criteria specified (*e.g.,* less than 95-percent control). These storage vessels must determine applicability by calculating their potential for VOC emissions in accordance with the methods specified in this final rule. The calculation of the potential for VOC emissions may take into account legally and practically enforceable limits on storage vessels but must be determined on an individual storage vessel basis without averaging emissions across the number of storage vessels at the site, even if the storage vessels are manifolded together. If the potential for VOC emissions from the individual storage vessel is greater than 6 tpy, then that storage vessel is a storage vessel affected facility. If the potential for VOC emissions from the individual storage vessel is less than 6 tpy, then that storage vessel is not a storage vessel affected facility.

The EPA is also amending the applicability criteria to clarify how owners and operators must determine the potential for VOC emissions for storage vessels located at onshore natural gas processing plants and compressor stations. The 2016 NSPS subpart OOOOa specifies that the calculation is based on the first 30 days of production to an individual storage vessel. We received comments on the proposal that this production period is not an accurate reflection of the potential for VOC emissions from storage vessels not located at a well site. Specifically, onshore natural gas processing plants and compressor stations are designed to process or transport a specific capacity of gas from multiple sites upstream of these facilities. The design capacity is based on planned growth with additional sites coming online over time, which means

[5] See Docket ID Item Nos. EPA–HQ–OAR–2017–0483–0781 and EPA–HQ–OAR–2017–0483–0801.

the storage vessels at gas processing plants and compressor stations do not receive the maximum throughput for which they are designed during the first 30 days of their operation. For these storage vessels, the commenters indicated they have been utilizing forecasting to predict future throughput and emissions when applying for an operating permit. The EPA agrees that the language in the 2016 NSPS subpart OOOOa does not appropriately capture the information needed to make an informed applicability determination for these storage vessels. Therefore, we are revising the final rule to clarify that, for storage vessels located at onshore natural gas processing plants and compressor stations, the potential for VOC emissions may be determined based on the emission limit or throughput limit (as an input for calculating the potential for VOC emissions), established in a legally and practicably enforceable limit, or based on the projected maximum average daily throughput determined using generally accepted engineering models, such as process simulations based on representative or actual liquid analysis to determine volumetric condensate rates from the storage vessels based on the maximum gas throughput capacity of each facility.

*D. CVS*

The 2016 NSPS subpart OOOOa requires that CVS be operated with no detectable emissions, as demonstrated through specific monitoring requirements associated with the specific affected facilities (*i.e.,* storage vessels, pneumatic pumps, centrifugal compressors, and reciprocating compressors). In the October 15, 2018, proposal, the EPA proposed amending the requirements for CVS associated with pneumatic pumps to require monthly AVO monitoring instead of the required annual Method 21 monitoring, thereby aligning the demonstration requirements for pneumatic pumps with those for storage vessels. 83 FR 52083. The EPA received comments recommending (1) retaining annual Method 21 as an option and (2) including OGI monitoring as an additional option because OGI is already being used to monitor fugitive emissions components at the well site and the CVS can readily be monitored at the same time. Based on these public comments, the EPA is amending the requirements for these no detectable emissions demonstrations for CVS for pneumatic pumps, with some changes from the proposal. Specifically, we are incorporating the option to demonstrate the pneumatic pump CVS is operated with no detectable emissions by an annual inspection using Method 21, monthly AVO monitoring, or OGI monitoring at the frequencies specified in section IV.E of this preamble.

The 2016 NSPS subpart OOOOa requires monthly AVO inspections on CVS for storage vessels to demonstrate operation with no detectable emissions. Similar to CVS for pneumatic pumps, the EPA is adding OGI monitoring at the frequencies specified in section IV.E of this preamble as another option for demonstrating no detectable emissions from CVS for storage vessels.

While the final rule provides these options for demonstrating the operation of the CVS with no detectable emissions, it is important to note that any detection with AVO or any visual image when using OGI is considered an indication of detected emissions. It is not the EPA's intent to allow owners and operators to conduct an inspection using OGI that results in the visual image of emissions, and then follow that inspection with AVO to conclude no emissions are present. If any of the options specified result in detected emissions, the standard of ''no detectable emissions'' is not met.

Additionally, the EPA is finalizing revisions to the certification requirements for CVS design. Specifically, we are amending the rule to allow either a PE or an in-house engineer with expertise on the design and operation of the CVS to certify the design and operation will meet the requirement to route all vapors to the control device or back to the process.

*E. Fugitive Emissions at Well Sites and Compressor Stations*

1. Monitoring Frequency

The 2016 NSPS subpart OOOOa requires semiannual monitoring and quarterly monitoring for fugitive emissions at well sites and compressor stations, respectively. The EPA proposed amending these monitoring frequencies as follows: (1) Annual monitoring for well sites with total combined production greater than 15 boe per day, (2) biennial monitoring for well sites with total combined production at or below 15 boe per day, and (3) co-proposed semiannual and annual monitoring for compressor stations. Additionally, the EPA proposed to allow owners and operators to stop monitoring at well sites when all of the major production and processing equipment is removed, such that the well site becomes a wellhead-only well site. After considering the comments and additional data, we are not finalizing the proposed changes to the monitoring frequencies for fugitive emissions components at well sites and compressor stations, with two exceptions explained below. The required fugitive monitoring frequencies for the collection of fugitive emissions components located at a well site or compressor station are as follows:

- Semiannual monitoring for well sites, excluding well sites with total production for the site at or below 15 boe per day (herein referred to as ''low production well sites'') and well sites on the Alaska North Slope;
- Semiannual monitoring for compressor stations, excluding those on the Alaska North Slope;
- Annual monitoring for well sites (excluding low production well sites) and compressor stations located on the Alaska North Slope; and
- Monitoring may be stopped once all major production and processing equipment is removed from a well site such that it contains only one or more wellheads.
- Low production well sites are excluded from fugitive monitoring requirements as long as the total production of the well site remains at or below 15 boe per day, as determined on a rolling 12-month basis and demonstrated by the records specified in the final rule. To determine if a well site is a low production well site, the EPA is finalizing the following calculation periods:
  - For a well site that newly triggers the fugitive emissions requirements of the NSPS after the effective date of the rule, or a well site that triggered the 2016 NSPS subpart OOOOa requirements within 11 months prior to the effective date of the rule but does not have 12-months' worth of production data, the total well site production calculation is based on the first 30 days of production;
  - For a well site subject to the fugitive emissions requirements that subsequently has production decline, the total well site production calculation is based on a rolling 12-month average;
  - For a well site that has previously been determined to be low production but later takes an action (*e.g.,* drills a new well, performs a well workover, etc.) that may increase production, the total well site production calculation is based on the first 30 days of production following completion of the action. This re-determination must be completed at any time an action occurs, regardless of the original startup of production date.

2. Modification

The October 15, 2018, proposal did not propose amendments to the events

that constitute modifications of the collection of fugitive emissions components located at a well site or a compressor station but did take comment on whether additional clarification is necessary. The EPA's consideration of the comments received did not result in changes to modifications for well sites and compressor stations, therefore, this final rule retains the events currently identified in the 2016 NSPS subpart OOOOa that qualify as modifications of the collection of fugitive emissions components located at a well site or a compressor station.

The 2016 NSPS subpart OOOOa specifies that, for the purposes of fugitive emissions components at a well site, a modification occurs when (1) a new well is drilled at an existing well site, (2) a well is hydraulically fractured at an existing well site, or (3) a well is hydraulically refractured at an existing well site. 40 CFR 60.5365a(i). Because this provision does not specifically address modifications of a well site that is a separate tank battery surface site, the EPA proposed language to address modifications of separate tank battery surface sites. Specifically, the EPA proposed that a modification of a well site that is a separate tank battery surface site occurs when (1) any of the actions listed above for well sites occurs at an existing separate tank battery surface site, (2) a well modified as described above sends production to an existing separate tank battery surface site, or (3) a well site subject to the fugitive emissions requirements removes all major production and processing equipment such that it becomes a wellhead-only well site and sends production to an existing separate tank battery surface site. After considering the comments received related to the proposed modification language relevant for separate tank battery surface sites, the EPA is finalizing this provision as proposed.

3. Initial Monitoring for Well Sites and Compressor Stations

The 2016 NSPS subpart OOOOa requires fugitive emissions monitoring to begin within 60 days of startup of production (for well sites) or startup of a compressor station. The October 15, 2018, proposal did not propose any change to this requirement but solicited comment identifying specific reasons why a change might be appropriate. 83 FR 52075. We received comments stating that well sites and compressor stations do not achieve normal operating conditions within the first 60 days of startup. Commenters suggested a range of options from 90 days to 180 days. Based on these comments, the EPA agrees that maintaining the requirement to conduct initial monitoring within 60 days of startup would not provide as effective of a survey as providing additional time to allow the well site or compressor station to reach normal operating conditions. The purpose of the initial monitoring is to identify any issues associated with installation and startup of the well site or compressor station. By providing sufficient time to allow owners and operators to conduct the initial monitoring survey during normal operating conditions, the EPA expects that there will be more opportunity to identify and repair sources of fugitive emissions, whereas, a partially operating site may result in missed emissions that remain unrepaired for a longer period of time. The additional 30 days provided in this final rule will still allow for identification and mitigation of fugitive emissions in a timely manner. Therefore, the final rule requires that initial monitoring be completed within 90 days after the startup of production for well sites and 90 days after the startup of a compressor station. Additionally, for low production well sites that take an action which subsequently increases production above 15 boe per day based on the first 30 days of production following the action, the final rule requires that initial monitoring be completed within 90 days after the startup of production following the action.

4. Repair Requirements

This final rule amends the fugitive emissions repair requirements. The 2016 NSPS subpart OOOOa requires repair within 30 days of identifying fugitive emissions and a resurvey to verify that the repair was successful within 30 days of the repair. In the proposal, the EPA proposed to require a first attempt at repair within 30 days of identifying fugitive emissions and final repair, including the resurvey to verify repair, within 60 days of identifying fugitive emissions. We proposed these revisions because stakeholders raised questions on whether emissions identified during the resurvey would result in noncompliance with the repair requirement. The EPA agreed that repairs should be verified as successful prior to the repair deadline, therefore, we proposed a definition of repair that includes the resurvey. The net result of the proposal was that sources would have up to 60 days to complete repairs, which was an increase from the 2016 NSPS subpart OOOOa requirement of 30 days. We received comments from owners and operators that a total of 60 days was not necessary to complete a successful repair, therefore, this final rule amends the fugitive emissions repair requirements with changes from the proposal. Specifically, we are finalizing the proposal that a first attempt at repair is required within 30 days of identifying fugitive emissions and requiring final repair within 30 days of the first attempt at repair. While this final rule would still allow up to a total of 60 days to complete repairs, several owners and operators indicated in their comments that the majority of repairs are completed onsite during the time of the monitoring survey. We are also finalizing as proposed definitions for the terms ''first attempt at repair'' and ''repaired.'' Specifically, the definition of ''repaired'' includes the verification of successful repair through a resurvey of the fugitive emissions component.

The EPA is also amending the requirements for when delayed repairs must be completed. The 2016 NSPS subpart OOOOa, as amended on March 12, 2018,[6] specifies that where the repair of a fugitive emissions component is ''technically infeasible, would require a vent blowdown, a compressor station shutdown, a well shutdown or well shut-in, or would be unsafe to repair during operation of the unit, the repair must be completed during the next scheduled compressor station shutdown, well shutdown, well shut-in, after a planned vent blowdown, or within 2 years, whichever is earlier.''[7] The EPA did not propose any additional revisions to this provision, but solicited comment on whether additional changes were necessary. 83 FR 52076. We received comments expressing concerns with requiring repairs during the next scheduled compressor station shutdown, without regard to whether the shutdown is for maintenance purposes. The commenters stated that repairs must be scheduled and that where a planned shutdown is for reasons other than scheduled maintenance, completion of the repairs during that shutdown may be difficult and disrupt gas transmission. The EPA agrees that requiring the completion of delayed repairs only during those scheduled compressor station shutdowns where maintenance activities are scheduled is reasonable and anticipates that these maintenance shutdowns occur on a regular schedule. Therefore, the final rule requires completion of delayed repairs during the ''next scheduled compressor station

[6] 83 FR 10638.

[7] 40 CFR 60.5397a(h)(2).

shutdown for maintenance, scheduled well shutdown, scheduled well shut-in, after a scheduled vent blowdown, or within 2 years, whichever is earliest.''

5. Definitions Related to Fugitive Emissions at Well Sites and Compressor Stations

The EPA is finalizing, as proposed, amendments to the definition of well site, for purposes of fugitive emissions monitoring, to exclude equipment owned by third parties and oilfield wastewater disposal wells (referred to as saltwater disposal wells in the proposal). Additionally, based on information received in public comments, the EPA is also amending the definition to exclude oilfield disposal wells used for solid waste disposal. The amended definition for ''well site'' excludes third party equipment from the fugitive emissions requirements by excluding ''the flange immediately upstream of the custody meter assembly and equipment, including fugitive emissions components located downstream of this flange.'' To clarify this exclusion, the final rule defines ''custody meter'' as the meter where natural gas or hydrocarbon liquids are measured for sales, transfers, and/or royalty determination, and the ''custody meter assembly'' as an assembly of fugitive emissions components, including the custody meter, valves, flanges, and connectors necessary for the proper operation of the custody meter, as proposed. The exclusion does not extend to other third-party equipment at a well site that is not associated with the custody meter and custody meter assembly (*e.g.,* dehydrators).

This final rule further amends the definition of a well site to exclude UIC Class I oilfield disposal wells and UIC Class II oilfield wastewater disposal wells. The EPA proposed excluding UIC Class II oilfield wastewater disposal wells because of our understanding that they have negligible fugitive emissions. 83 FR 52077. Commenters suggested that we also should exclude UIC Class I oilfield disposal wells for the same reasons. Both types of disposal wells are permitted through UIC programs under the Safe Drinking Water Act for surface and groundwater protection. The EPA agrees with the commenters that the potential fugitive methane and VOC emissions from UIC Class I oilfield disposal wells are low. Therefore, the final rule includes a definition for UIC Class I oilfield disposal wells. The definition for a UIC Class I oilfield disposal well is a well with a UIC Class I permit that meets the definition in 40 CFR 144.6(a)(2) and receives eligible fluids from oil and natural gas exploration and production operations. Additionally, the EPA is finalizing, as proposed, the definition of UIC Class II oilfield wastewater disposal wells. The definition for a UIC Class II oilfield wastewater disposal well is a well with a UIC Class II permit where wastewater resulting from oil and natural gas production operations is injected into underground porous rock formations not productive of oil or gas, and sealed above and below by unbroken, impermeable strata. Consequently, UIC Class I and UIC Class II disposal facilities without wells that produce oil or natural gas are not considered well sites for the purposes of fugitive emissions requirements.

The EPA is also finalizing, as proposed, the definition of startup of production as it relates to fugitive emissions requirements. Specifically, startup of production is defined as the beginning of initial flow following the end of flowback when there is continuous recovery of salable quality gas and separation and recovery of any crude oil, condensate or produced water, except as otherwise provided herein. For the purposes of the fugitive monitoring requirements of § 60.5397a, startup of production means the beginning of the continuous recovery of salable quality gas and separation and recovery of any crude oil, condensate or produced water.

*F. AMEL*

1. Incorporation of Emerging Technologies

The EPA is amending the application requirements for requesting the use of an AMEL for well completions, reciprocating compressors, and the collection of fugitive emissions components located at a well site or compressor station. Applications for an AMEL may be submitted by, among others, owners or operators of affected facilities, manufacturers or vendors of leak detection technologies, or trade associations. The application must provide sufficient information to demonstrate that the AMEL achieves emission reductions at least equivalent to the work practice standards in this rule. At a minimum, the application should include field data that encompass seasonal variations, and may be supplemented with modeling analyses, test data, and/or other documentation. The specific work practice(s), including performance methods, quality assurance, the threshold that triggers action, and the mitigation thresholds are also required as part of the application. For example, for a technology designed to detect fugitive emissions, information such as the detection criteria that indicate fugitive emissions requiring repair, the time to complete repairs, and any methods used to verify successful repair would be required.

2. Incorporation of State Fugitive Emissions Programs

This final rule includes alternative fugitive emissions standards for specific state fugitive emissions programs that the EPA has concluded are at least equivalent to the fugitive emissions monitoring and repair requirements at 40 CFR 60.5397a(e), (f), (g), and (h). These alternative fugitive emissions standards may be adopted for certain individual well sites or compressor stations that are subject to fugitive emissions monitoring and repair so long as the source complies with specified Federal requirements applicable to each approved alternative state program. For example, a well site that is subject to the requirements of Pennsylvania General Permit 5A, section G, effective August 8, 2018, could comply with those standards in lieu of the monitoring, repair, recordkeeping, and reporting requirements in the NSPS. However, the company must develop and maintain a fugitive emissions monitoring plan, as required in 40 CFR 60.5397a(c) and (d), and must monitor all of the fugitive emissions components, as defined in 40 CFR 60.5430a, regardless of the components that must be monitored under the alternative standard. Additionally, the facility must submit, as an attachment to its annual report for NSPS subpart OOOOa, the report that is submitted to its state in the format submitted to the state, or the information required in the report for NSPS subpart OOOOa if the state report does not include site-level monitoring and repair information. If a well site is located in the state but is not subject to the state requirements for monitoring and repair (*i.e.,* not obligated to monitor or repair fugitive emissions), then the well site must continue to comply with the requirements of 40 CFR 60.5397a in its entirety.

In addition to providing alternative fugitive emissions standards for well sites and compressor stations located in California, Colorado, Ohio, Pennsylvania, and Texas, and well sites in Utah, these amendments provide application requirements to request alternative fugitive emissions standards as state, local, and tribal programs continue to develop. Applications for alternative fugitive emissions standards based on state, local, or tribal programs may be submitted by any interested

person, including individuals, corporations, partnerships, associations, states, or municipalities. Similar to the applications for AMEL for emerging technologies, the application must include sufficient information to demonstrate that the alternative fugitive emissions standards achieve emissions reductions at least equivalent to the fugitive emissions monitoring and repair requirements in this rule. At a minimum, the application must include the monitoring instrument, monitoring procedures, monitoring frequency, definition of fugitive emissions requiring repair, repair requirements, recordkeeping, and reporting requirements. If any of the sections of the regulations or permits approved as alternative fugitive emissions standards are changed at a later date, the state must follow the procedures outlined in 40 CFR 60.5399a to apply for a new evaluation of equivalency.

*G. Onshore Natural Gas Processing Plants*

1. Capital Expenditure

The EPA is amending the definition of ''capital expenditure'' at 40 CFR 50.5430a by replacing the equation used to determine the percent of replacement cost, ''Y.'' The 2016 NSPS subpart OOOOa contains a definition for ''Y'' that would result in an error, thus, making it difficult to determine whether a capital expenditure had occurred. The EPA proposed to revise the base year in the equation for ''Y'' with the year 2015 and to define ''Y'' as equal to 1 for facilities constructed in the year 2015. Additionally, we solicited comment on an alternative approach that would utilize CPI. While the EPA proposed these specific amendments to the equation used to determine the value of ''Y,'' we received public comments that supported the alternative approach which would more appropriately reflect inflation than the original equation. The EPA solicited comment on this alternative and is finalizing the alternative because we agree it is appropriate. The final equation for ''Y'' is based on the CPI, where ''Y'' equals the CPI of the date of construction divided by the most recently available CPI of the date of the project, or ''$CPI_N/CPI_{PD}$.'' Further, the final rule specifies that the ''annual average of the consumer price index for all urban consumers (CPI–U), U.S. city average, all items'' must be used for determining the CPI of the year of construction, and the ''CPI–U, U.S. city average, all items'' must be used for determining the CPI of the date of the project. This amendment clarifies that the comparison of costs is between the original date of construction of the process unit and the date of the project which adds equipment to the process unit.

2. Equipment in VOC Service Less Than 300 Hours per Year (hr/yr)

The October 15, 2018, proposal included an exemption from the requirements for equipment leaks at onshore natural gas processing plants. Specifically, the EPA proposed an exemption from monitoring for equipment that an owner or operator designates as being in VOC service less than 300 hr/yr. 83 FR 52086. The EPA received comments supporting this proposed exemption; therefore, we are amending the final rule as proposed. This exemption applies to equipment at onshore natural gas processing plants that is used only during emergencies, used as a backup, or that is in service only during startup and shutdown.

3. Initial Compliance Period

The EPA is amending NSPS subpart OOOOa to specify that the initial compliance deadline for the equipment leak standards for onshore natural gas processing plants is 180 days. Specifically, the EPA is including in NSPS subpart OOOOa the provision requiring compliance ''as soon as practicable, but no later than 180 days after initial startup'' that is already in 40 CFR 60.632(a), which is part of subpart KKK of the part, ''Standards of Performance for Equipment Leaks of VOC from Onshore Natural Gas Processing Plants for which Construction, Reconstruction, or Modification Commenced After January 20, 1984, and on or before August 23, 2011'' (NSPS subpart KKK). In 2012, the EPA revised the standards in NSPS subpart KKK with the promulgation of NSPS subpart OOOO[8] by lowering the leak definition for valves from 10,000 parts per million (ppm) to 500 ppm and requiring the monitoring of connectors. 77 FR 49490, 49498. While no changes to the compliance deadlines were made or discussed in NSPS subpart OOOO, 40 CFR 60.632(a) was not included in NSPS subpart OOOO and, as a result, was also not included in NSPS subpart OOOOa. During the rulemaking for NSPS subpart OOOOa, the EPA declined a request to include the language in 40 CFR 60.632(a) in NSPS subpart OOOOa, explaining that such inclusion was not necessary because NSPS subpart OOOOa already incorporates by reference a similar statement (*i.e.,* 40 CFR 60.482–1a(a)) which requires each owner and operator to ''demonstrate compliance . . . within 180 days of initial startup,'' 80 FR 56593, 56647–8. In reassessing the issue, the EPA notes that NSPS subpart KKK includes both 40 CFR 60.632(a) and 40 CFR 60.482–1(a), a provision that is the same as 40 CFR 60.482–1a(a), suggesting that at the time of promulgation of NSPS subpart KKK, the EPA did not think that 40 CFR 60.482–1(a) (and 40 CFR 60.482–1a(a)) make 40 CFR 60.632(a) redundant or unnecessary. To remain consistent with NSPS subpart KKK, the EPA is amending NSPS subpart OOOOa to include a provision similar to 40 CFR 60.632(a).

The final rule requires monitoring to begin as soon as practicable, but no later than 180 days after the initial startup of a new, modified, or reconstructed process unit at an onshore natural gas processing plant. Once started, monitoring must continue with the required schedule. For example, if pumps are monitored by month 3 of the initial startup period, then monthly monitoring is required from that point forward. This initial compliance period is different than the compliance requirements for newly added pumps and valves within a process unit that is already subject to a leak detection and repair (LDAR) program. Initial monitoring for those newly added pumps and valves is required within 30 days of the startup of the pump or valve (*i.e.,* when the equipment is first in VOC service).

*H. Sweetening Units*

This final rule revises the applicability criteria for the $SO_2$ standards for sweetening units to correctly define an affected facility as any onshore sweetening unit that processes natural gas produced from either onshore or offshore wells. Sweetening units are used to convert hydrogen sulfide ($H_2S$) in acid gases (*i.e.,* $H_2S$ and $CO_2$) that are separated from natural gas by a sweetening process (*e.g.,* amine treatment) into elemental sulfur in the Claus process.[9] These units can exist anywhere in the production and processing segment of the source category, including as stand-alone processing facilities that do not extract or fractionate natural gas liquids from field gas. The $SO_2$ standards for onshore sweetening units were first promulgated in 1985 and codified in 40 CFR part 60, subpart LLL. In 2012,

[8] ''Standards of Performance for Crude Oil and Natural Gas Production, Transmission and Distribution for Which Construction, Modification or Reconstruction Commenced After August 23, 2011, and on or before September 18, 2015.''

[9] See Docket ID Item No. EPA–HQ–OAR–2010–0505–0045.

based on our review of the standards, the EPA tightened the $SO_2$ standards, which were codified in NSPS subpart OOOO and later carried over to NSPS subpart OOOOa. In the process of finalizing this current rulemaking to amend NSPS subpart OOOOa, the EPA discovered that NSPS subpart OOOOa inexplicably limits the applicability of the $SO_2$ standards to only those sweetening units that are located at onshore natural gas processing plants, which NSPS subpart OOOOa defines as ''any processing site engaged in the extraction of natural gas liquids from field gas, fractionation of mixed natural gas liquids to natural gas products, or both. . . .'' 40 CFR 60.5430a. NSPS subpart LLL did not contain this limitation, and the EPA did not offer any rationale for creating it during the promulgation of either NSPS subpart OOOO or NSPS subpart OOOOa, nor can we identify any reason why the extraction of natural gas liquids relates in any way to the $SO_2$ standards such that the standards should only apply to sweetening units located at onshore natural gas processing plants engaged in extraction or fractionation activities. Sweetening units emit $SO_2$ in the same manner, regardless of whether they are located at an onshore natural gas processing plant or at processing facilities without extraction or fractionation activities. Therefore, the EPA concludes that the limitation was made in error and is now correcting the error by revising the affected facility description for the $SO_2$ standards to include all onshore sweetening units that process natural gas produced from either onshore or offshore wells.

*I. Recordkeeping and Reporting*

The EPA is amending NSPS subpart OOOOa to streamline the recordkeeping and reporting requirements as discussed below for the specified affected facilities. These amendments reflect consideration of the public comments received on the proposal.

1. Well Completions

For each well site affected facility that routes flowback entirely through one or more production separators, owners and operators are only required to record and report the following elements:

- Well Completion ID;
- Latitude and longitude of the well in decimal degrees to an accuracy and precision of five (5) decimals of a degree using North American Datum of 1983;
- U.S. Well ID;
- The date and time of the onset of flowback following hydraulic fracturing or refracturing or identification that the well immediately starts production; and
- The date and time of the startup of production.

For periods where salable gas is unable to be separated, owners and operators will also be required to record and report the date and time of onset of flowback, the duration and disposition of recovery, the duration of combustion and venting (if applicable), reasons for venting (if applicable), and deviations.

2. Fugitive Emissions at Well Sites and Compressor Stations

For each collection of fugitive emissions components located at a well site or compressor station, the EPA is amending the recordkeeping and reporting requirements as follows:

- Revise the requirements in 40 CFR 60.5397a(d)(1) to require inclusion of procedures that ensure all fugitive emissions components are monitored during each survey within the monitoring plan.
- Remove the requirement to maintain records of a digital photo of each monitoring survey performed, captured from the OGI instrument used for monitoring.
- Remove the requirement to maintain records of the number and type of fugitive emissions components or digital photo of fugitive emissions components that are not repaired during the monitoring survey. These records are not required once repair is completed and verified with a resurvey.
- Require records of the total well site production for low production well sites.
- Require records of the date of first attempt at repair and date of successful repair.
- Revise reporting to specify the type of site (*i.e.,* well site, low production well site, or compressor station) and when the well site changes status to a wellhead-only well site.
- Remove requirement to report the name or ID of operator performing the monitoring survey.
- Remove requirement to report the number and type of difficult-to-monitor and unsafe-to-monitor components that are monitored during each monitoring survey.
- Remove requirement to report the ambient temperature, sky conditions, and maximum wind speed.
- Remove requirement to report the date of successful repair.
- Remove requirement to report the type of instrument used for resurvey.

In addition to streamlining the recordkeeping and reporting requirements, the EPA is also finalizing the form that is used for submitting annual reports through the Compliance and Emissions Data Reporting Interface (CEDRI) with this final rule. Per the requirement in 40 CFR 60.5420a(b)(11), affected facilities must submit all subsequent reports via CEDRI, once the form has been available in CEDRI for at least 90 calendar days. The EPA anticipates that the deadline to begin submitting subsequent annual reports required by 40 CFR 60.5420a(b) through CEDRI will be [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. However, owners and operators should verify the date that the form becomes available in CEDRI by checking the ''Initial Availability Date'' listed on the CEDRI website (*https://www.epa.gov/electronic-reporting-air-emissions/cedri*).

*J. Technical Corrections and Clarifications*

The EPA is revising NSPS subpart OOOOa to include the following technical corrections and clarifications.

- Revise 40 CFR 60.5385a(a)(1), 60.5410a(c)(1), 60.5415a(c)(1), and 60.5420a(b)(4)(i) and (c)(3)(i) to clarify that hours or months of operation at reciprocating compressor facilities must be measured beginning with the date of initial startup, the effective date of the requirement (August 2, 2016), or the last rod packing replacement, whichever is latest.
- Revise 40 CFR 60.5393a(b)(3)(ii) to correctly cross-reference paragraph (b)(3)(i) of that section.
- Revise 40 CFR 60.5397a(c)(8) to clarify the calibration requirements when Method 21 of appendix A–7 to part 60 is used for fugitive emissions monitoring.
- Revise 40 CFR 60.5397a(d)(3) to correctly cross-reference paragraphs (g)(3) and (4) of that section.
- Revise 40 CFR 60.5401a(e) to remove the word ''routine'' to clarify that pumps in light liquid service, valves in gas/vapor service and light liquid service, and pressure relief devices in gas/vapor service within a process unit at an onshore natural gas processing plant located on the Alaska North Slope are not subject to any monitoring requirements.
- Revise 40 CFR 60.5410a(e) to correctly reference pneumatic pump affected facilities located at a well site as opposed to pneumatic pump affected facilities not located at a natural gas processing plant (which would include those not at a well site). This correction reflects that the 2016 NSPS subpart OOOOa did not finalize requirements for pneumatic pumps at gathering and boosting compressor stations. 81 FR 35850.

• Revise 40 CFR 60.5411a(a)(1) to remove the reference to § 60.5412a(a) and (c) for reciprocating compressor affected facilities.

• Revise 40 CFR 60.5411a(d)(1) to remove the reference to storage vessels, as this paragraph applies to all the sources listed in 40 CFR 60.5411a(d), not only storage vessels.

• Revise 40 CFR 60.5412a(a)(1) and (d)(1)(iv) to clarify that all boilers and process heaters used as control devices on centrifugal compressors and storage vessels must introduce the vent stream into the flame zone. Additionally, revise 40 CFR 60.5412a(a)(1)(iv) and (d)(1)(iv)(D) to clarify that the vent stream must be introduced with the primary fuel or as the primary fuel to meet the performance requirement option. This is consistent with the performance testing exemption in 40 CFR 60.5413a and continuous monitoring exemption in 40 CFR 60.5417a for boilers and process heaters that introduce the vent stream with the primary fuel or as the primary fuel.

• Revise 40 CFR 60.5412a(c) to correctly reference both paragraphs (c)(1) and (2) of that section, for managing carbon in a carbon adsorption system.

• Revise 40 CFR 60.5413a(d)(5)(i) to reference fused silica-coated stainless steel evacuated canisters instead of a specific name brand product.

• Revise 40 CFR 60.5413a(d)(9)(iii) to clarify the basis for the total hydrocarbon span for the alternative range is propane, just as the basis for the recommended total hydrocarbon span is propane.

• Revise 40 CFR 60.5413a(d)(12) to clarify that all data elements must be submitted for each test run.

• Revise 40 CFR 60.5415a(b)(3) to reference all applicable reporting and recordkeeping requirements.

• Revise 40 CFR 60.5416a(a)(4) to correctly cross-reference 40 CFR 60.5411a(a)(3)(ii).

• Revise 40 CFR 60.5417a(a) to clarify requirements for controls not specifically listed in paragraph (d) of that section.

• Revise 40 CFR 60.5422a(b) to correctly cross-reference 40 CFR 60.487a(b)(1) through (3) and (b)(5).

• Revise 40 CFR 60.5422a(c) to correctly cross-reference 40 CFR 60.487a(c)(2)(i) through (iv) and (c)(2)(vii) through (viii).

• Revise 40 CFR 60.5423a(b) to simplify the reporting language and clarify what data are required in the report of excess emissions for sweetening unit affected facilities.

• Revise 40 CFR 60.5430a to remove the phrase ''including but not limited to'' from the ''fugitive emissions component'' definition. During the 2016 NSPS subpart OOOOa rulemaking, we stated in a response to comment that we are removing this phrase,[10] but we did not do so in that rulemaking and are finalizing that change in this final rule.

• Revise 40 CFR 60.5430a to remove the phrase ''at the sales meter'' from the ''low pressure well'' definition to clarify that when determining the low pressure status of a well, pressure is measured within the flow line, rather than at the sales meter.

• Revise Table 3 to correctly indicate that the performance tests in 40 CFR 60.8 do not apply to pneumatic pump affected facilities.

• Revise Table 3 to include the collection of fugitive emissions components at a well site and the collection of fugitive emissions components at a compressor station in the list of exclusions for notification of reconstruction.

• Revise 40 CFR 60.5393a(f), 60.5410a(e)(8), 60.5411a(e), 60.5415a(b) introductory text and (b)(4), 60.5416a(d), 60.5420a(b) introductory text and (b)(13), and introductory text in §§ 60.5411a and 60.5416a, to remove language associated with the administrative stay we issued under section (d)(7)(B) of the CAA in ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay'' (June 5, 2017). The administrative stay was vacated by the U.S. Court of Appeals for the District Of Columbia Circuit on July 3, 2017.

## V. Significant Changes Since Proposal

This section identifies significant changes since the proposed rulemaking. These changes reflect the EPA's consideration of over 500,000 comments submitted on the proposal and other information received since the proposal. In this section, we discuss the significant changes since proposal by affected facility type and the rationales for those changes. Additional information related to these changes, such as specific comments and our responses, is in section VI of this preamble and in materials available in the docket.[11]

### *A. Storage Vessels*

In the October 15, 2018, proposal, the EPA proposed clarifications on how to calculate the potential for VOC emissions for purposes of determining whether a storage vessel has the potential for 6 tpy or more of VOC emissions and, therefore, is an affected facility subject to the storage vessels standards under the 2016 NSPS subpart OOOOa. Specifically, the EPA proposed amendments to the definition of ''maximum average daily throughput'' that provided distinct methodologies for calculating the throughput of an individual storage vessel based on how throughput is measured and recorded. We proposed the amendments because owners and operators continued to express confusion over how to calculate this throughput.

Numerous commenters [12] expressed objections to several aspects of the proposed amendments, particularly to the EPA's assumption that averaging emissions across storage vessels in a controlled battery would underestimate a storage vessel's potential VOC emissions. The commenters explained why averaging across storage vessels in controlled batteries has a sound basis in engineering and addresses the EPA's concern about flash emissions, which constitute most of the emissions from storage vessels.

Specifically, the commenters pointed out that tank batteries typically share vapor space (the tank volume above the liquid) and joint piping used to collect generated vapors, which are then routed back to a process or conveyed to a control device, when one is used, or vented through one common pressure relief valve (PRV). For purposes of this discussion, the EPA considers this configuration as a manifolded system that collects and routes vapors across the headspace. (This is different than liquid manifolded systems where liquids can be introduced to any tank in the system.) The commenters noted that vapors flow both into and out of each tank within the battery and into overflow piping on a continuous basis, and vapors will always flow from high pressure areas to low pressure areas when flow is mechanically unrestricted. The commenters explained that, in this configuration, the flash emissions from the first tank will flow into the other tanks and vent line space associated with the battery until the total pressure in the system exceeds the back-pressure of the flare or other control device, or in systems without controls, the PRV.

[10] See Docket ID Item No. EPA–HQ–OAR–2010–0505–7632, Chapter 4, page 4–319.

[11] See Response to Comments (RTC) document and technical support documents (TSD) in Docket ID No. EPA–HQ–OAR–2017–0483.

[12] See Docket ID Item Nos. EPA–HQ–OAR–2017–0483–0773, EPA–HQ–OAR–2017–0483–0775, EPA–HQ–OAR–2017–0483–0780, EPA–HQ–OAR–2017–0483–0801, EPA–HQ–OAR–2017–0483–0996, EPA–HQ–OAR–2017–0483–0999, EPA–HQ–OAR–2017–0483–1006, EPA–HQ–OAR–2017–0483–1009, EPA–HQ–OAR–2017–0483–1236, EPA–HQ–OAR–2017–0483–1243, EPA–HQ–OAR–2017–0483–1248, EPA–HQ–OAR–2017–0483–1261, EPA–HQ–OAR–2017–0483–1343, and EPA–HQ–OAR–2017–0483–1578.

The commenters asserted that only then will the emissions (*i.e.,* the vapors) be released from the PRV if uncontrolled; routed back to a process; or combusted by the control equipment. Therefore, the commenters suggested that because the vapors from individual storage vessels are comingled and not individually emitted from the originating storage vessels, it is appropriate to allow sources to average the emissions across the number of storage vessels in the controlled battery in order to attribute emissions to individual storage vessels.

After considering these comments and subsequent conversations with the commenters,[13] the EPA reevaluated the proposal. Based on this review, the EPA agrees with the commenters that, in certain situations, averaging emissions across a controlled battery may be appropriate for purposes of determining whether to subject the storage vessels in the tank battery to the storage vessel standards in NSPS subpart OOOOa.

In order to fully understand where averaging of emissions across a controlled battery may be appropriate, under this final rule, for purposes of determining whether to subject the storage vessels in the controlled battery to the storage vessel standards in NSPS subpart OOOOa, the EPA considered the level of control that would be achieved where uncontrolled potential emissions are greater than 6 tpy. The standards in the 2016 NSPS subpart OOOOa require reducing uncontrolled emissions from individual storage vessel affected facilities by 95.0 percent.

For controlled batteries, as liquids are introduced to a storage vessel in the system, the vapors transfer to the piping, or common header, enter the common vapor space, and commingle with vapors from other storage vessels in the manifolded system. When the combined vapor pressure in the common header reaches a specified set point, the vapors are typically conveyed through a CVS to either a vapor recovery unit (which routes vapors back to a process) or a control device. Where this controlled battery is designed and operated to route the vapors in this manner, emissions from an individual storage vessel within the controlled battery are indistinguishable from emissions from other storage vessels within the controlled battery; each individual storage vessel does not directly emit (*e.g.,* flash emissions) to the atmosphere. These controlled batteries are typically subject to specific design and operational criteria through a legally and practicably enforceable limit (*e.g.,* through permits or other requirements established through Federal, state, local, or tribal authority). To the extent that the control, through the battery's design and operation, already reduces 95 percent or more of the VOC emissions, no additional emission reductions would be achieved by subjecting each individual storage vessel in the controlled battery operating under legally and practicably enforceable limits to the storage vessel standards in the 2016 NSPS subpart OOOOa. However, the 2016 NSPS subpart OOOOa considers any storage vessel with the potential for VOC emissions greater than 6 tpy, including those with legally and practicably enforceable limits, a storage vessel affected facility. This final rule does not change that 6 tpy applicability threshold, but it does include specific criteria that must be included in the legally and practicably enforceable limit before averaging of emissions will be allowed for the purposes of determining whether the potential for VOC emissions from the individual storage vessels in a controlled tank battery is above the 6 tpy threshold. Specifically, the legally and practicably enforceable limit must require the storage vessels to be (1) manifolded together with piping such that all vapors are shared among the headspaces of the storage vessels, (2) equipped with a CVS that is designed, operated, and maintained to route vapors back to the process or to a control device, and (3) designed and operated to route vapors back to the process or to a control device that reduces VOC emissions by at least 95.0 percent. The EPA concludes that averaging emissions across the number of storage vessels in a controlled battery subject to the design and operational criteria specified above, through a legally and practicably enforceable limit, is the appropriate way to determine if the storage vessels in that battery are affected facilities under NSPS subpart OOOOa. Where the average VOC emissions across the number of storage vessels in the controlled battery is 6 tpy or greater, all of the storage vessels in the controlled battery are storage vessel affected facilities and subject to the requirements for storage vessels in NSPS subpart OOOOa. However, where the average emissions are less than 6 tpy, none of the storage vessels in the controlled battery are storage vessels affected facilities.

For storage vessels that do not meet all of the design and operational criteria specified in this final rule, which includes single storage vessels (whether controlled or not) and storage vessels that are connected in some way but do not meet all of the criteria described above, the final rule requires owners and operators to calculate the potential for VOC emissions on an individual storage vessel basis to determine if the storage vessel is a storage vessel affected facility, as proposed. Where the potential for VOC emissions from a storage vessel is 6 tpy or greater, the storage vessel is a storage vessel affected facility. We have not revised the BSER for storage vessel affected facilities; as a result, the storage vessel standards in the 2016 NSPS subpart OOOOa remain applicable to these storage vessels if their potential for VOC emissions is 6 tpy or greater, based on each individual storage vessel and without averaging across the storage vessels at the site.

The final rule continues to require that an owner or operator calculate the potential for VOC emissions using generally accepted methods for estimating emissions based on the maximum average daily throughput. In this final rule, the EPA is amending the definition of maximum average daily throughput to specify how to determine throughput for the calculation of the potential for VOC emissions. Specifically, this amended definition specifies how storage vessels that commence construction, reconstruction, or modification after the effective date of this final rule must determine the throughput to each individual storage vessel in order to calculate the potential for VOC emissions. This definition is relevant to the individual storage vessels or connected storage vessels that do not meet the specified design and operational criteria defined for controlled tank batteries (*i.e.,* tank batteries that are allowed to average emissions across the tanks in the battery).

In summary, this final rule amends the definition of ''maximum average daily throughput,'' to specify how the potential for VOC emissions are calculated. Additionally, this final rule allows for a calculation of the average VOC emissions to determine the applicability of the storage vessel standards to storage vessels in controlled batteries where specific design and operational criteria are incorporated as legally and practicably enforceable requirements into a permit or other requirement established under Federal, state, local, or tribal authority. The specific design and operational criteria are as follows: (1) The storage vessels are manifolded together with piping such that all vapors are shared

[13] See Memoranda for March 27, 2019 Meeting with American Petroleum Institute, April 9, 2019 Meeting with Hess, and May 1, 2019 Meeting with GPA Midstream located at Docket ID No. EPA–HQ–OAR–2017–0483.

between the headspace of the storage vessels, (2) the storage vessels are equipped with a CVS that is designed, operated, and maintained to route collected vapors back to the process or to a control device, and (3) collected vapors are routed to a process or a control device that achieves at least 95.0-percent control of VOC emissions. If the potential for VOC emissions (or average emissions where applicable) is greater than or equal to 6 tpy, the storage vessel is a storage vessel affective facility.

The amendments discussed above, including the definition of ''maximum average daily throughput,'' apply to storage vessels that commence construction, reconstruction, or modification after the effective date of this final rule, which is November 16, 2020. Owners and operators of storage vessels that commenced construction, reconstruction, or modification after September 18, 2015, and on or before November 16, 2020 may still have uncertainty regarding whether they determined their applicability appropriately. If so, these owners and operators should contact the EPA if they have questions regarding how they previously determined applicability for these sources.

*B. Fugitive Emissions at Well Sites and Compressor Stations*

The October 15, 2018, proposal included various proposed amendments to the fugitive emissions standards. Two major aspects of those proposed amendments were (1) reduction in the monitoring frequency for well sites and compressor stations and (2) revisions to the monitoring plan, recordkeeping, and reporting requirements. This final rule includes changes from the proposal in both areas. First, the EPA is not finalizing the proposed annual monitoring frequency at non-low production well sites. As explained in more detail below, the EPA concluded that the three areas of uncertainty that were the basis for proposing amendments to the monitoring frequencies for well sites and compressor stations did not result in an overestimate of the cost-effectiveness of the monitoring frequencies in the 2016 NSPS subpart OOOOa, and semiannual monitoring remains cost effective based on the revised cost estimates for well sites with total production greater than 15 boe per day, which are presented in the TSD for this final rule. Therefore, the final rule retains semiannual monitoring for well sites with total production greater than 15 boe per day.

Additionally, the EPA is neither finalizing the proposed biennial monitoring frequency at low production well sites (*i.e.,* well sites with total production at or below 15 boe per day) nor retaining the current semiannual monitoring requirement because monitoring is not cost effective at any frequency for these well sites based on the revised cost estimates. Instead, the final rule requires that a low production well site either maintain its total production at or below 15 boe per day or conduct semiannual monitoring. This requirement applies to well sites that produce at or below 15 boe per day during the first 30 days of production, as well as those sites that experience a decline in production where the total production for the well site, based on a rolling 12-month average, is at or below 15 boe per day, as demonstrated by the records required in the final rule.

Further, the EPA is finalizing the co-proposed semiannual monitoring frequency for gathering and boosting compressor stations. As explained in more detail below in section V.B.4 of the preamble, based on our comparison of the cost-effectiveness of semiannual and quarterly monitoring and consideration of other cost-related factors, we are finalizing semiannual monitoring for gathering and boosting compressor stations. This final rule does not address fugitive emissions monitoring for transmission and storage compressor stations because the Review Rule (published in the **Federal Register** of Monday, September 14, 2020) revises the source category by removing sources in the transmission and storage segment from the category. As such, the Review Rule rescinds the GHG and VOC standards for sources in the transmission and storage segment. Regardless, the TSD for this final action does include relevant updates to the model plants for the transmission and storage compressor stations.

The revised cost estimates for fugitive monitoring of well sites and gathering and boosting compressor stations rely on updates the EPA made to the model plants, including updates that address the areas of uncertainty that we identified in the October 15, 2018, proposal, as well as the revisions to the monitoring plan, recordkeeping, and reporting requirements we are making in this final rule, which reduce administrative burden without compromising our ability to determine compliance with the standards. This section describes the analyses and resulting amendments to the fugitive emissions standards in this final rule.

1. Areas of Uncertainty

In the 2016 NSPS subpart OOOOa, the EPA concluded that a fugitive emissions monitoring and repair program that includes semiannual OGI monitoring at well sites and quarterly monitoring at compressor stations and the repair of any components identified with fugitive emissions was the BSER for the collection of fugitive emissions components at well sites and compressor stations.[14] 81 FR 35826. While the EPA continued to maintain that OGI is the BSER for reducing fugitive emissions at well sites and compressor stations in the October 15, 2018, proposal, we proposed less frequent monitoring after identifying three areas of uncertainty that led to concerns that we might have overestimated the emission reductions, and, therefore, cost effectiveness, of the monitoring frequencies specified in the 2016 NSPS subpart OOOOa. We solicited comments on these three areas of uncertainty, as well as additional information, so that we could better assess the emission reductions that occur at different monitoring frequencies. Additional detailed discussion on the areas of uncertainty is available in the TSD for this final rule.[15]

In the October 15, 2018, proposal, regarding the EPA's cost analysis in the 2016 NSPS subpart OOOOa, we stated that the ''EPA identified three areas of the analysis that raise concerns regarding the emissions reductions: (1) The percent emission reduction achieved by OGI, (2) the occurrence rate of fugitive emissions at different monitoring frequencies, and (3) the initial percentage of fugitive emissions components identified with fugitive emissions.'' 83 FR 52063. Given these areas of concern, we solicited information to further refine our analysis and reduce or eliminate these uncertainties. Several commenters provided information that the EPA used to evaluate each of these areas for this final rule.

*Reductions using OGI.* In the October 15, 2018, proposal, the EPA maintained the estimates for emissions reductions achieved when using OGI at any type of site, which are 30 percent for biennial monitoring, 40 percent for annual monitoring, 60 percent for semiannual monitoring, and 80 percent for quarterly monitoring. As stated in the proposal, one stakeholder asserted that annual monitoring was more appropriate for compressor stations than the required quarterly monitoring. This stakeholder stated that the estimated control

[14] The rule allows the use of Method 21 as an alternative to OGI but did not conclude Method 21 was BSER because OGI was found to be more cost effective. See 81 FR 35856.

[15] See TSD located at Docket ID No. EPA–HQ–OAR–2017–0483.

efficiency for quarterly monitoring should be 90 percent (instead of 80 percent) and annual monitoring should be 80 percent (instead of 40 percent), based on the stakeholder's interpretation of results from a study conducted by the Canadian Association of Petroleum Producers (CAPP).[16] In response to this information, the EPA reviewed the CAPP report and was unable to conclude that annual OGI monitoring would achieve 80-percent emissions reductions, as stated by the stakeholder.[17] In its submission of public comments on the proposal, and in subsequent clarifying discussions, the stakeholder continued to assert that the EPA had understated the emissions reductions achieved with annual monitoring.[18] As discussed in the TSD,[19] we have reevaluated the information provided in the CAPP report and are still unable to conclude that the CAPP report demonstrates that annual OGI monitoring would achieve 80-percent emissions reductions. In brief, we concluded that the results of the CAPP report indicate that quarterly monitoring could achieve 92-percent emission reductions while annual monitoring could achieve 56-percent emission reductions based on attributing the recommended frequencies at which the components at compressor stations should be monitored to the emissions reported for those component types. However, as stated in our discussion in the TSD, these emissions reductions may also be due to factors such as improved emissions factors and not actual emissions reductions resulting from monitoring and repair.

Another commenter provided information related to the emissions reductions achieved when using OGI at the various monitoring frequencies.[20] The commenter referenced a study performed by Dr. Arvind Ravikumar as supporting the EPA's estimates of emissions reductions for annual and semiannual monitoring using OGI.[21] This study utilized the Fugitive Emissions Abatement Simulation Toolkit (FEAST) model that was developed by Stanford University to simulate emissions reductions achieved at the various monitoring frequencies. The study used information from the EPA's model plant analysis for the 2016 NSPS subpart OOOOa, including the site-level baseline emissions. Emissions reductions were estimated at 32 percent for annual monitoring, 54 percent for semiannual monitoring, and 70 percent for quarterly monitoring, which the EPA considers to be comparable to the EPA's estimated reduction efficiencies for OGI at these monitoring frequencies.

Finally, the EPA updated its analysis of emissions reductions using Method 21 for comparison to the estimated reductions using OGI. As previously stated in the proposal TSD,[22] data from the Synthetic Organic Chemicals Manufacturing Industry (SOCMI) in the 1995 Equipment Leak Protocol Document (1995 Protocol) was used to estimate the Method 21 effectiveness at the various monitoring frequencies. In the proposal TSD, we stated, ''it is not possible to correlate OGI detection capabilities with a Method 21 instrument reading, provided in ppm. However, based on the EPA's current understanding of OGI technology and the types of hydrocarbons found at oil and natural gas well sites and compressor stations, the emission reductions from an OGI monitoring and repair program likely correlate to a Method 21 monitoring and repair program with a fugitive emissions definition somewhere between 2,000 to 10,000 ppm.'' [23] We received comments asserting that the EPA inappropriately used Method 21 effectiveness estimates based on SOCMI to justify the emissions reductions for OGI. In response to these comments, the EPA updated the Method 21 effectiveness estimates using information for the oil and gas industry, as described in the TSD for this final rule.[24] The revised analysis estimates emissions reductions when using Method 21 to be 40 percent for annual monitoring, 54 percent for semiannual monitoring, and 67 percent for quarterly monitoring, when using the average reductions achieved at leak definitions of 500 ppm and 10,000 ppm. While not a direct comparison, the EPA estimates emission reductions using OGI would likely be higher because OGI will detect large emissions, such as emissions from thief hatches on controlled storage vessels, that Method 21 would otherwise not detect.

In conclusion, the EPA performed detailed analyses of the CAPP studies, the FEAST model results, and the updated Method 21 estimates to determine whether changes to the estimated effectiveness of OGI monitoring is appropriate. Based on these analyses, we conclude that the estimated effectiveness percentages of OGI monitoring at the various frequencies are appropriate and do not need adjustment.

*Leak occurrence rates.* The second uncertainty identified in the October 15, 2018, proposal relates to the occurrence rate of fugitive emissions, or the percentage of components identified with fugitive emissions during each survey. In the proposal, the EPA stated, ''because the model plants assume that the percentage of components found with fugitive emissions is the same regardless of the monitoring frequency, we acknowledge that we may have overestimated the total number of fugitive emissions components identified during each of the more frequent monitoring cycles.'' 83 FR 52064. There are numerous ways the number of leaking components could impact the cost effectiveness of monitoring, including (1) the amount of baseline emissions, (2) the potential emission reductions, and (3) the number of repairs required.

In the 2016 analysis, the EPA assumed that each monitoring survey at a well site would identify four components with fugitive emissions. That is, when a site is monitored annually, we estimated four total components leaking for that year, but if that same site were monitored semiannually, we estimated eight total components leaking for that year. However, we have found that a constant leak occurrence rate is not reflected in our analysis of Method 21 monitoring, the information provided through comments on the proposal, or a review of the annual compliance reports submitted to the EPA for the NSPS subpart OOOOa. Rather, the information demonstrates that occurrence rates differ based on monitoring frequency. For example, the information we reviewed in the annual compliance reports for well site fugitive emissions components demonstrated that, on average, three components were identified as leaking where only one survey had taken place in a 12-month period, and two components were identified as leaking, per survey, where more than one survey had occurred in

[16] CAPP, ''Update of Fugitive Equipment Leak Emission Factors,'' prepared for CAPP by Clearstone Engineering, Ltd., February 2014.

[17] See memorandum, ''EPA Analysis of Fugitive Emissions Data Provided by Interstate Natural Gas Association of America (INGAA),'' located at Docket ID Item No. EPA–HQ–OAR–2017–0483–0060. August 21, 2018.

[18] See Docket ID Item No. EPA–HQ–OAR–2017–0483–1002 and Memorandum for the April 30, 2019 Meeting with INGAA, located at Docket ID No. EPA–HQ–OAR–2017–0483.

[19] See TSD, section 2.4.1.1 for more details at Docket ID No. EPA–HQ–OAR–2017–0483.

[20] See Docket ID Item No. EPA–HQ–OAR–2017–0483–2041.

[21] See Appendix D to Docket ID Item No. EPA–HQ–OAR–2017–0483–2041.

[22] See Docket ID Item No. EPA–HQ–OAR–2017–0483–0040.

[23] See Docket ID Item No. EPA–HQ–OAR–2017–0483–0040, at page 25.

[24] See TSD at Docket ID No. EPA–HQ–OAR–2017–0483.

a 12-month period.[25] These values are similar to those provided by two commenters that provided detailed information on the number of components identified with fugitive emissions at different monitoring frequencies.[26] Therefore, we updated the well site model plant analysis to include an average of three components per annual survey and two components per semiannual survey (for a total of four repairs annually).[27]

In the 2016 analysis, the EPA assigned each type of compressor station (*i.e.,* gathering and boosting, transmission, and storage) a specific leak occurrence rate. While annual compliance reports were submitted for compressor stations complying with NSPS subpart OOOOa, it was not possible to determine which stations were which type. However, for gathering and boosting compressor stations, detailed information was provided by GPA Midstream.[28] While the number of reported leaks varied widely in the dataset, the EPA's analysis of the data demonstrated that, on average, 11 components were identified as leaking during a 12-month period, with monitoring frequencies ranging from monthly to annually.[29] Therefore, we assumed that a total of 11 components, on average, would be identified as leaking over the course of a full year's worth of monitoring, regardless of monitoring frequency. That is, we assumed that if monitoring occurs semiannually, on average, 11 components will be leaking over the course of the two surveys in that year. This estimate takes into account the reported variation in the number of components identified as leaking during each survey. For example, a gathering and boosting compressor station that is monitoring quarterly may identify the following number of components as leaking: Three components in Quarter 1; two components in Quarter 2; four components in Quarter 3; and two components in Quarter 4. If that same gathering and boosting compressor station were monitored annually, then all 11 components would be identified during the one annual survey. This is different than the assumption used in the 2016 NSPS subpart OOOOa. Utilizing the estimate of 11 components identified as leaking over the course of 1 year provides an annual estimate of the repair costs for gathering and boosting compressor stations which is independent of the monitoring survey costs. That is, on average, the same number of repairs are made in a single year, regardless of the frequency of surveys, which helps account for the variability presented in the dataset.

In summary, the EPA is no longer using a linear function for occurrence rates as we did in the proposal or the 2016 NSPS subpart OOOOa. Instead, we have based occurrence rates on available information that is specific to fugitive emissions monitoring frequencies for each type of facility. Specifically, we estimate a total of two repairs (leaking components) at the annual monitoring frequency and three repairs at the semiannual monitoring frequency for well sites. For gathering and boosting compressor stations we estimate that, on average, 11 repairs are necessary over the course of a year. This updated analysis more directly reflects the reality that leak occurrence rates are not linear between frequencies and more appropriately estimates the number of repairs (and, thus, emission reductions and costs) at more frequent monitoring. Thus, the EPA no longer considers leak occurrence rates to raise uncertainties with the analysis or to overestimate emissions.

*Initial leak rate.* The final uncertainty raised in the October 15, 2018, proposal was the initial percentage of components identified with fugitive emissions (''initial leak rate''). While the EPA did not use an initial leak rate in our estimate of the baseline emissions, one commenter noted that initial leak rate should be considered a key element for understanding potential baseline emissions. The commenter stated its belief that the emissions factor the EPA used to estimate baseline emissions was calculated using an initial leak rate that was too high, thus, biasing the baseline emissions (and the resulting emission reductions) high.[30]

In the 2016 NSPS subpart OOOOa TSD, the EPA stated incorrectly that the model plant analysis assumed an initial leak rate of 1.18 percent.[31] One commenter pointed out that this initial leak rate, which was also cited in the October 15, 2018, proposal, was not the actual estimate used for the model plant analysis. The commenter is correct on this point. The uncontrolled emissions factors for non-thief hatch fugitive emission components the EPA used to estimate model plant emissions are based on Table 2–4 of the Protocol for Equipment Leak Emission Estimates (''Protocol Document'').[32] While the initial leak rates that are inherent in these emissions factors are not specifically stated in the Protocol Document, the commenter performed a back-calculation of the fraction of leaking components using Table 5–7 of the Protocol Document and the weighted leak fraction for all components using the number of each component per model plant. That result, with which the EPA agrees, shows that when using Method 21 and a leak definition of 500 ppm, the estimated initial leak rate is 2.5%, and when using Method 21 and a leak definition of 10,000 ppm, the estimated initial leak rate is 1.65 percent.[33] However, the initial leak rate is only one contributing factor to baseline emissions. Another contributing factor is the magnitude of emissions.

While several commenters[34] provided information on the number or percentage of components identified with fugitive emissions, no commenters provided component-level information on the magnitude of those emissions.[35] In June 2019, a study was published in Elementa that examined fugitive emissions from 67 oil and natural gas well sites and gathering and boosting compressor stations in the Western U.S.[36] As discussed in the TSD, the study included quantification of fugitive emissions from components located at well sites and gathering and boosting compressor stations. The EPA evaluated the measured fugitive emissions from that study for central production, well production, and well site facilities, as defined by the study. We then evaluated the average emissions across those three site types to compare those emissions to

[25] See TSD located at Docket ID No. EPA–HQ–OAR–2017–0483.

[26] See Docket ID Item Nos. EPA–HQ–OAR–2017–0483–0801 and EPA–HQ–OAR–2017–0483–2041.

[27] The 2016 model plant analysis included an evaluation of quarterly monitoring for well sites. Because semiannual monitoring is required, it was not possible to determine the quarterly occurrence rate for well sites using this information. See TSD for additional analysis.

[28] See Docket ID Item No. EPA–HQ–OAR–2017–0483–1261.

[29] See TSD located at Docket ID No. EPA–HQ–OAR–2017–0483.

[30] See Docket ID Item No. EPA–HQ–OAR–2017–0483–0801.

[31] See Docket ID Item No. EPA–HQ–OAR–2010–0505–7631.

[32] See U.S. EPA, ''1995 Protocol for Equipment Leak Emission Estimates Emission Standards'' located at Docket ID Item No. EPA–HQ–OAR–2017–0483–0002.

[33] See memorandum, ''Summary of Data Received on the October 15, 2018 Proposed Amendments to 40 CFR part 60, subpart OOOOa Related to Model Plant Fugitive Emissions.'' February 10, 2020.

[34] See, for example, Docket ID Item Nos. EPA–HQ–OAR–2017–0483–0801, EPA–HQ–OAR–2017–0483–1261, and EPA–HQ–OAR–2017–0483–2041.

[35] See memorandum, ''Summary of Data Received on the October 15, 2018 Proposed Amendments to 40 CFR part 60, subpart OOOOa Related to Model Plant Fugitive Emissions.'' February 10, 2020.

[36] See Pasci, A.P., Ferrara, T., Schwan, K., Tupper, P., Lev-On, M., Smith, R., and Ritter, K., 2019. ''Equipment Leak Detection and Quantification at 67 Oil and Gas Sites in the Western United States.'' Elem Sci Anth, 7(1), p.29 located at *http://doi.org/10.1525/elementa.368.*

the estimated emissions using the average emissions factors from the EPA Protocol Document. The average well site emissions measured in the study were comparable to the model plant well site emissions. Therefore, the EPA determined that the use of the emissions factors from the 1995 Protocol Document was still appropriate and has maintained use of these average emissions factors in the model plant analyses supporting this final rule.

In conclusion, we identified three areas of potential uncertainty in the October 15, 2018, proposal: (1) The effectiveness of OGI at the various frequencies, (2) the leak occurrence rate for each survey, and (3) the initial leak rate. The EPA was concerned that we might have overestimated the emission reductions from the monitoring frequencies in the 2016 NSPS subpart OOOOa due to these three areas of uncertainties. However, after evaluating the data provided by commenters and making the appropriate revisions to our model plant analysis, the EPA no longer believes that these three areas create uncertainty or resulted in an overestimation of emissions reductions.

2. Recordkeeping, Reporting, and Other Administrative Burden Associated With the Fugitive Emissions Program

In addition to proposing reduced monitoring frequencies, the EPA proposed amending the monitoring plan requirements in the 2016 NSPS subpart OOOOa. Specifically, we proposed these amendments to address concerns that the requirements, such as the site map and observation path, resulted in significant costs that increase over time due to the increase in the number of facilities subject to the requirements each year. The EPA proposed allowing alternatives to the site map and observation path that would also ensure that all fugitive components at a site are monitored. 83 FR 52078 and 9. The EPA received comments expressing concern that, in addition to the costs associated with the development and necessary updates of the monitoring plan, the EPA had underestimated the administrative burden associated with the extensive recordkeeping and reporting requirements of the fugitive emissions standards in the 2016 NSPS subpart OOOOa. These commenters stated that this burden represents the largest cost of the fugitive emissions program in the 2016 NSPS subpart OOOOa.[37] In the October 15, 2018, proposed rulemaking, the EPA proposed to streamline certain recordkeeping and reporting requirements in the 2016 NSPS subpart OOOOa to reduce burden on the industry, including the fugitive emissions recordkeeping and reporting. 83 FR 52059. In response to these comments, the EPA re-evaluated the fugitive emissions program, with a focus on identifying areas to reduce unnecessary administrative burden and provide flexibility for future innovation, while retaining sufficient recordkeeping and reporting requirements to assure that affected facilities are complying with the standards. After concluding this re-evaluation, we found that certain requirements were unnecessary and burdensome.

First, we examined the commenters' assertion and supporting information that the EPA underestimated the recordkeeping and reporting costs in both the 2016 NSPS subpart OOOOa and the October 15, 2018, proposal. To better understand the commenters' statements regarding the recordkeeping and reporting costs associated with the 2016 NSPS subpart OOOOa, we reviewed the specific recordkeeping and reporting requirements for the fugitive emissions program, including the monitoring plan. Based on this review, we agree with the commenters that the recordkeeping and reporting burden was underestimated in both the 2016 NSPS subpart OOOOa and the October 15, 2018, proposal, as described below.

In the October 15, 2018, proposal, we had proposed reducing certain monitoring frequencies. While we updated portions of the model plant analysis for fugitive emissions to reflect these proposed changes, we did not make specific changes related to recordkeeping and reporting costs. As shown in the proposal TSD,[38] we estimated that the development of a monitoring plan was a one-time cost of $3,672 per company-defined area, which is estimated as consisting of 22 well sites or seven gathering and boosting compressor stations. We estimated reporting costs to be at $245 per site per year.

Second, we reevaluated the cost burden of the recordkeeping and reporting requirements associated with the fugitive emissions standards in the 2016 NSPS subpart OOOOa prior to considering any additional changes to those standards that might further reduce the cost burden. This step was necessary to provide a correct baseline for comparison when evaluating the burden reductions associated with potential changes to the standards.

Before considering the information provided in the comments, we removed certain line items from the previous analysis as described. We removed the initial and subsequent planning activities because these items were not clearly representative of actual recordkeeping activities that are associated with the fugitive emissions requirements of the rule (*e.g.,* records management systems, tracking components, data review, etc.). We also removed the cost associated with notification of initial compliance status because such notification is not required under the 2016 NSPS subpart OOOOa. Next, we considered the comments and information received on our estimate of the cost to develop a monitoring plan under the 2016 NSPS subpart OOOOa. One commenter provided information on the range of costs that have been incurred by owners and operators to develop a monitoring plan since the rule has been in place.[39] These estimated costs range from $5,600 to $8,800, which is more than our estimate of $3,672. In examining the information provided by the commenter in further detail, we note that hourly rates are higher than the standard labor rate used in EPA's calculations, which would attribute to the difference in costs. Next, commenters dispute our assumption that the monitoring plan is a one-time cost for the company. Several commenters stated while most of the monitoring plan is associated with a one-time cost, the required site map and observation path require frequent updates as the equipment at the site changes. One of these commenters provided an estimate of the cost to develop the initial site map and observation path for an individual site, and the cost of updating these items for each monitoring survey.[40] This information provided estimates that companies have already spent approximately $650 developing the individual site map and observation path for each site and an additional $150 updating these items for each monitoring survey. Based on this information, we agree it is appropriate to account for the necessary updates for

[37] See Docket ID Item No. EPA–HQ–OAR–2017–0483–0016.

[38] See TSD at Docket ID Item No. EPA–HQ–OAR–2017–0483–0040.

[39] See Docket ID No. EPA–HQ–OAR–2017–0483; EPA's ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration; Proposed Rule''; 83 FR 52056 (October 15, 2018). Dated May 22, 2019, located at Docket ID No. EPA–HQ–OAR–2017–0483.

[40] See Docket ID No. EPA–HQ–OAR–2017–0483; EPA's ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration; Proposed Rule''; 83 FR 52056 (October 15, 2018). Dated May 22, 2019, located at Docket ID No. EPA–HQ–OAR–2017–0483.

the site map and observation path when estimating the cost burden of the rule. Therefore, we split the monitoring plan costs into three items in our model plant analysis: (1) Develop company-wide fugitive emissions monitoring plan, (2) develop site-specific fugitive monitoring plan (*i.e.,* site map and observation path), and (3) management of change (site map and observation path). Additionally, we applied hourly rates, based on information provided by the commenter, to estimate costs instead of using the flat cost values provided. The updated estimates associated with developing a monitoring plan for well sites under the existing standards are $2,448 to develop the general company-wide monitoring plan (assumes 22 well sites), $400 to develop the site map and observation path for each site, and $184 to update the individual site map and observation path annually (based on semiannual monitoring). This would result in a total cost for development of the monitoring plan for the 22 well site company-defined area of $15,296, including updates to the site map and observation path at the semiannual surveys conducted that first year. For gathering and boosting compressor stations, we estimate it costs $1,530 to develop a company-wide monitoring plan (assumes seven stations per plan), $400 to develop the site map and observation path for each site, and $367 to update the individual site map and observation path annually (based on quarterly monitoring). This would result in a total cost of $6,899 for development of the monitoring plan for the seven gathering and boosting compressor station company-defined area, including updates to the site map and observation path at the quarterly surveys conducted that first year. Based on available information, we believe these costs are representative of the costs to develop and maintain the monitoring plan as required in the 2016 NSPS subpart OOOOa.

We then examined the recordkeeping costs associated with the fugitive emissions requirements. As stated above, we were unable to locate clearly defined estimates for recordkeeping costs for the 2016 NSPS subpart OOOOa, therefore, all costs are new in our baseline estimate of the actual cost of the existing standards and are based on information received from commenters and previous information collected by the Agency for similar programs. There are extensive records required for each survey that is performed, regardless of the frequency; therefore, we recognize that appropriate data management is critical to ensuring compliance with the standards. As explained in the TSD for this final rule,[41] we evaluated costs for the set-up for a database system, which ranged from commercially available options to customized systems. Because there are commercial systems currently available that allow owners and operators to maintain records in compliance with the standards, we did not find it appropriate to apply customized system costs to determine an average or range of costs. Therefore, our initial database set-up fee is estimated as $18,607 for 22 well sites and seven gathering and boosting compressor stations. In addition to this initial set-up fee, we recognize that there are annual licensing fees that include technical support and updates to software. Therefore, we have incorporated an ongoing annual fee of approximately $470. Finally, there is recordkeeping associated with tracking observed fugitive emissions and repairs, such as scheduling repairs and quality control of the data. Based on information provided by commenters,[42] we estimate additional recordkeeping costs at $430 for well sites and $860 for gathering and boosting compressor stations.

Finally, we evaluated the current estimate for reporting costs associated with the 2016 NSPS subpart OOOOa. One commenter asserted they spent over 500 hours reporting information through the Compliance and Emissions Data Reporting Interface (CEDRI) for their sources.[43] We examined the information reported to CEDRI for this commenter and concluded they have reported information for approximately 100 well sites, which would equate to 5 hours per site. This is comparable to our estimate of 4 hours per well site; therefore, we did not update the cost estimate for reporting associated with the 2016 NSPS subpart OOOOa.

In summary, we updated the cost burden estimates for recordkeeping based on the 2016 NSPS subpart OOOOa. As updated, the annualized recordkeeping and reporting costs for the existing rule, on a per site basis, are approximately $1,500 per well site and $2,500 per gathering and boosting compressor station. These costs represent the baseline from which any changes to the cost burden for reporting and recordkeeping requirements in this final rule are compared. It is important to note that while these costs represent the costs for each individual site, the EPA estimates that currently there are over 40,000 well sites and 1,250 compressor stations currently subject to the fugitive emissions requirements in the 2016 NSPS subpart OOOOa. When multiplied, the total annualized costs to the industry is estimated to exceed $60 million per year.

After updating the recordkeeping and reporting costs for the existing requirements, we evaluated requests by commenters recommending specific changes to those requirements. Several commenters requested removal of or amendments to specific line items. These included items such as the site map and observation path requirement in the monitoring plan, records related to the date and repair method for each repair attempt, and name of the operator performing the survey. After further review of the specific requirements, for the reasons explained below, we agree with the commenters that some of the items are not critical or are redundant for demonstrating compliance and, therefore, are an unnecessary burden.

We are amending the monitoring plan by removing the requirement for a site map and observation path when OGI is used to perform fugitive emissions surveys. This requirement was in place to ensure that all fugitive emissions components could and would be imaged during each survey. As explained in the TSD,[44] we agree with the commenters that a site map and observation path are only one way to ensure all components are imaged. We are replacing the specified site map and observation path with a requirement to include procedures to ensure that all fugitive emissions components are monitored during each survey in the monitoring plan. These procedures may include a site map and observation path, an inventory, or narrative of the location of each fugitive emissions component, but may also include other procedures not listed here. These company-defined procedures are consistent with other requirements for procedures in the monitoring plan, such as the requirement for procedures for determining the maximum viewing distance and maintaining this viewing distance during a survey. As previously stated, we had not accurately accounted for the ongoing cost of updating the site map and observation path as changes

[41] See TSD at Docket ID No. EPA–HQ–OAR–2017–0483.

[42] See Re: Docket ID No. EPA–HQ–OAR–2017–0483; EPA's ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration; Proposed Rule''; 83 FR 52056 (October 15, 2018). Dated May 22, 2019, located at Docket ID No. EPA–HQ–OAR–2017–0483. See memorandum for May 1, 2019 meeting with GPA Midstream located at Docket ID No. EPA–HQ–OAR–2017–0483.

[43] See Docket ID Item No. EPA–HQ–OAR–2017–0483–0757.

[44] See TSD at Docket ID No. EPA–HQ–OAR–2017–0483.

occur at the site. Based on information provided by one commenter, we estimate this amendment will save each site $580 with the semiannual monitoring frequency. These cost reductions are based on an initial cost of $400 to develop the site map and observation path, plus $180 to update the site map or observation path each year, based on a semiannual monitoring frequency.

We are not finalizing the proposed recordkeeping requirement to keep records of each repair attempt. Instead, the final rule requires maintaining a record only for the first attempt at repair and the completion of repair. Other interim repair attempts are not necessary for demonstrating compliance with the repair requirements. Additionally, we are removing the requirement to maintain records of the number and type of components not repaired during the monitoring survey. The 2016 NSPS subpart OOOOa required maintaining a record of the number and type of components found with fugitive emissions that were not repaired during the monitoring survey. After further review, this information can be derived from, and is, therefore, redundant to, other records of the survey date and repair dates required for all fugitive emissions components. While it is difficult to quantify the reduction in cost burden of the removal of these records, we have estimated a reduction in cost of 25 percent, or $107 per site per year as discussed in the TSD.

We are also amending the reporting requirements to streamline reporting based on comments received and further reconsideration of what information is essential to demonstrate compliance with the standards. First, as we are finalizing the electronic reporting form for the annual report required by 40 CFR 60.5420a(b) concurrently with this action, we are updating the CEDRI reporting template to reflect the streamlined reporting requirements in this final action and ease review of the information contained within the form. Specifically, for reporting compliance with the fugitive emissions requirements, we have created dropdown menus for the operator to select the type of site for which they are reporting (*i.e.,* well site or compressor station), to indicate whether the well site changed status to a wellhead-only well site during the reporting period, and identify any approved alternative fugitive emissions standard that was used during the reporting period for the site. Second, we are removing specific items from the annual report as listed in section IV.I.3 of this preamble. We are removing the requirement to report the name or unique ID of the operator performing the survey; however, this information must be maintained in the record, similar to the LDAR requirements for onshore natural gas processing plants. We are removing the requirement to report the number and type of difficult-to-monitor and unsafe-to-monitor components that were monitored during the specified survey. This information is required to be kept in the record, and the type and number of these components would already be included in the reported number and type of components found with fugitive emissions during the survey. The date of successful repair is being removed from the report because we already require owners and operators to report the number and type of fugitive emissions not repaired on time. The date of successful repair will be maintained in the record. Finally, the type of instrument used for the resurvey is being removed from the report because the rule allows either OGI or Method 21 (analyzer or a soap bubbles test). The information is required to be kept in the record. Similar to the recordkeeping changes identified in the previous paragraph, it is difficult to estimate the reduced cost burden of each of these individual items. That said, as shown in the TSD, we have estimated a burden reduction of 25 percent, or $61 per site per annual report.

In summary, the amendments to the recordkeeping and reporting requirements in this final rule will reduce the recordkeeping and reporting burden for NSPS subpart OOOOa. The estimated annualized recordkeeping and reporting costs for this final rule, on a per site basis, are approximately $1,100 per well site and $1,750 per gathering and boosting compressor station. This results in an annualized burden reduction of approximately 27 percent for well sites and 30 percent for gathering and boosting compressor stations.[45]

3. Additional Updates to the Model Plants

We also received information from commenters that suggested additional updates beyond those already discussed above. These included the major equipment counts and survey costs. A detailed discussion of these updates, which we agree are necessary, is provided in the TSD.[46] A summary of these updates is provided below.

*Well sites.* In the October 15, 2018, proposal, we maintained the assumed flat contractor fee of $600 per survey. However, information from commenters suggested this may be an overestimate of survey costs if an hourly rate were used. To examine this comment, we analyzed the CEDRI reports, and evaluated the survey times that were reported. Based on this information, we estimated it takes operators 3.4 hours to complete a survey at a well site, including the travel time to and from the well site. This is based on an average survey time of approximately 1.4 hours. The travel time considers travel between sites and the shared travel of mobilizing a monitoring operator. We applied an hourly rate of $134 based on the Regulatory Analysis performed by the Colorado Department of Public Health and Environment in support of Colorado's Regulation 7.[47] We believe this more accurately reflects the costs of performing the survey than the previously assumed flat rate of $600.

*Low production well sites.* The low production well site model plants (*i.e.,* well sites with total production at or below 15 boe per day) were updated after further review of the Fort Worth Study, updates to the Greenhouse Gas Inventory (GHGI), and based on comments received. First, the counts of wellheads, separators, meters/piping, and dehydrators were recalculated after removing well sites that listed no production on the day prior to emissions measurements during the Fort Worth Study. This resulted in a decrease in the number of separators and meters/piping for the low production gas well pad. The scaling factors were also updated based on these revisions and applied to low production oil well pads and low production associated gas well pads. Further discussion on these changes are in the TSD. Like the well sites discussed above, we maintained the estimate of one controlled storage vessel per low production well site. One commenter provided some preliminary information regarding component counts, specific to valves and storage vessels, but also stated in their comments that the information was not representative.[48] Therefore, as discussed in the TSD, it was not appropriate to revise the model plants using information this commenter provided. We also

[45] See TSD for additional information on the estimated cost burden at the individual site level at Docket ID No. EPA–HQ–OAR–2017–0483.

[46] See TSD at Docket ID No. EPA–HQ–OAR–2017–0483.

[47] Colorado Department of Public Health and Environment, ''Regulatory Analysis for Proposed Revisions to Colorado Air Quality Control Commission Regulation Numbers 3, 6, and 7'' (5 CCR 1001–5, 5 CCR 1001–8, and CCR 1001–9), February 2014.

[48] See Docket ID Item No. EPA–HQ–OAR–2017–0483–1006.

performed an analysis of the survey time and found that on average, the surveys for low production well sites were approximately 30 minutes. After accounting for travel time, we estimate that each survey of a low production well site takes 2.4 hours. We applied the same hourly rate of $134 to estimate the total cost of each survey.

*Gathering and boosting compressor stations.* Information of average equipment counts were provided by GPA Midstream for gathering and boosting compressor stations.[49] We updated the model plant estimate to use this information. Specifically, we revised the estimated number of separators from 11 to five, meter/piping from seven to six, gathering compressors from five to three, in-line heaters from seven to one, and dehydrators from five to one, which reduces the baseline emissions estimated for the compressor station. We maintained the cost for the survey of $2,300 because the commenter indicated this was appropriate based on implementation of the rule.

4. Cost Effectiveness of Fugitive Emissions Requirements

With the revisions discussed in sections V.B.1 through 3 of this preamble incorporated in the model plants, we reexamined the costs and emission reductions for various monitoring frequencies to determine the updated costs of control. In evaluating the costs for this final rule, we also reexamined the decisions made in the 2016 NSPS subpart OOOOa for comparison. In the 2016 NSPS subpart OOOOa, we evaluated the controls under different approaches, namely a single pollutant approach and multipollutant approach.[50] Further, we stated that a frequency is considered cost effective if the cost of control for any one scenario of methane (without consideration of VOC), VOC (without consideration of methane), or the combination of both pollutants is cost effective.[51] That is, if the cost of control for reducing VOC, where all costs are attributed to VOC control and zero to methane control, is cost effective, then that frequency is cost effective regardless of the methane-only or multipollutant costs.

In the Review Rule, finalized in the **Federal Register** of Monday, September 14, 2020, we are rescinding the methane standards for NSPS subpart OOOOa. Therefore, in this final rule, we examined the cost effectiveness for the control of VOC emissions only. For each frequency evaluated in this final rule, we examined the total cost effectiveness of each monitoring frequency (*i.e.,* the cost of control for each frequency from a baseline of no monitoring). This is consistent with how costs were examined in the 2016 NSPS subpart OOOOa. For the reason explained in the preamble to the October 15, 2018, proposal, in addition to evaluating the total cost effectiveness of the different monitoring frequencies, this final rule also considers incremental cost (*i.e.,* the additional cost to achieve the next increment of emission reduction) to be an appropriate tool for assessing the effects of different stringency levels of control costs.[52] 83 FR 52070. It is important to note that the 2016 NSPS subpart OOOOa analysis did not present the incremental costs between each of the monitoring frequencies evaluated. The TSD supporting this final rule presents the cost of control for annual, semiannual, and quarterly monitoring frequencies for well sites producing greater than 15 boe per day and compressor stations, and biennial, annual, and semiannual monitoring frequencies for low production well sites.

When examining the costs of each monitoring frequency, we recognized that a significant percentage of the costs are independent of the monitoring frequency. That is, when annualized, the recordkeeping and reporting costs remain unchanged as monitoring frequencies increase. For example, the annualized cost of semiannual monitoring is approximately 20 percent higher than the annualized cost of annual monitoring at well sites. However, the cost effectiveness of the annual monitoring is a higher $/ton reduced because semiannual monitoring results in approximately 50 percent more emissions reductions than annual monitoring. Therefore, while more frequent monitoring does increase the costs of surveys for the year, the bulk of the costs are realized regardless of monitoring frequency. In other words, whereas we assumed during the proposal that reduced monitoring frequencies would lead to large cost savings, the analyses we performed for this final rule demonstrate that monitoring frequency is not the most significant factor in the overall cost of the fugitive emissions requirements. Below we present the costs of control for the monitoring frequencies at the model plants for well sites, low production well sites, and compressor stations.

Table 3 presents the costs of control for VOC emissions at the monitoring frequencies evaluated in this final rule and compares those costs to the costs presented for the 2016 NSPS subpart OOOOa. With the updates to the model plants discussed in section V.B.1 through 3 of this preamble, the EPA estimates that the semiannual monitoring currently required by the 2016 NSPS subpart OOOOa for well sites has a cost-effectiveness value of $4,324/ton of VOC emissions reduced. This value is $1,135/ton less than was estimated for semiannual monitoring in 2016, after adjusting for inflation. Therefore, we have determined that semiannual monitoring remains cost effective for well sites producing greater than 15 boe per day. We also considered the incremental cost effectiveness of semiannual monitoring compared to annual monitoring. This analysis showed that it cost $2,666/ton of additional VOC emissions reduced between the annual and semiannual monitoring frequencies. This cost is very reasonable and, therefore, further supports retaining semiannual monitoring. Finally, the EPA notes that, while we did not propose or take comment on quarterly monitoring for well sites, this monitoring frequency results in a total cost of control of $4,725/ton of VOC emissions reduced, which is also less than the inflation-adjusted cost-effectiveness value for quarterly monitoring that was calculated in 2016. However, the incremental cost to reduce additional emissions by going from semiannual monitoring to quarterly monitoring is $5,927/ton, which is a value that is higher than the EPA has previously found to be cost effective in the past.[53]

[49] See Docket Item ID No. EPA–HQ–OAR–2017–0483–1261.

[50] See 80 FR 56616. Under the single pollutant approach, we assign all costs to the reduction of one pollutant and zero costs for all other pollutants simultaneously reduced. Under the multipollutant approach, we allocate the annualized costs across the pollutant reductions addressed by the control option in proportion to the relative percentage reduction of each pollutant controlled. For purposes of the multipollutant approach, we assume that emissions of methane and VOC are controlled at the same time, therefore, half of the cost is apportioned to the methane emission reductions and half of the cost is apportioned to VOC emission reductions. In this evaluation, we examined both approaches across the range of identified monitoring frequencies, annual, semiannual, and quarterly.

[51] See 80 FR 56617.

[52] See also, ''Standards of Performance for Equipment Leaks of VOC in the Synthetic Organic Chemical Manufacturing Industry (SOCMI); Standards of Performance for Equipment Leaks of VOC in Petroleum Refineries''; 72 FR 64860, 64864 (''2007 NSPS subparts VV and VVa'') (in its BSER analysis, the EPA evaluated the additional cost and emission reduction from lowering the leak definition for valves and determined that the additional emission reduction for SOCMI, at $5,700/ton of VOC, is not cost effective.)

[53] See 2007 NSPS subparts VV and VVa, 72 FR 64864, cited in the 2016 NSPS subpart OOOOa final rule, 80 FR 56636. See TSD for additional analysis

TABLE 3—COST-EFFECTIVENESS OF CONTROL FOR WELL SITES SUBJECT TO FUGITIVE EMISSIONS STANDARDS UNDER SUBPART OOOOA OF 40 CFR PART 60

| Monitoring frequency | Cost effectiveness ($/ton VOC) | | |
|---|---|---|---|
| | 2016 TSD total cost effectiveness [1] | 2020 TSD total cost effectiveness [2] | 2020 TSD incremental cost effectiveness |
| Annual | $4,723 | $5,153 | |
| Semiannual | 5,459 | 4,324 | 2,666 |
| Quarterly | 7,559 | 4,725 | 5,927 |

[1] Values from the 2016 TSD have been adjusted for inflation for comparison purposes.
[2] As discussed in section V.B of this preamble, the EPA received comments that our original 2016 estimates were low, especially for recordkeeping and reporting burden. The 2020 estimates include adjustments to the 2016 estimates based on this information (which is higher than the 2016 TSD) plus include streamlined recordkeeping and reporting as well as other updates. In addition, the revised analysis found that the majority of the costs of the fugitive requirements are annual costs and do not vary with the monitoring frequency. That is, the recordkeeping and reporting burden remain consistent regardless of the monitoring frequency and the cost of each survey is not directly proportional to the incremental emissions reductions achieved at more frequent surveys. This is further explained in section V.B.2 of this preamble. Hence, Table 3 shows an increase in cost effectiveness for the annual monitoring frequency, but a decrease in the cost effectiveness for the semiannual and quarterly cost effectiveness from the 2020 TSD. In contrast, the 2016 values presented here are directly from the 2016 TSD and have not been adjusted based on our new analysis of what the 2016 rule cost.

As shown in the EPA's revised model plant analysis in the TSD for this final rule, and consistent with the October 15, 2018, proposal, there is sufficient evidence that low production well sites are different than well sites with higher production and, therefore, warrant a separate evaluation of the cost of control. The EPA did not include a separate analysis of low production well sites in the 2016 NSPS subpart OOOOa. Therefore, all costs presented above for well sites from the 2016 analysis also would apply to low production well sites. The EPA proposed biennial monitoring of low production well sites (*i.e.,* well sites with total production at or below 15 boe per day). Based on the revised cost analysis, the EPA estimates that the proposed biennial monitoring frequency has a cost effectiveness of $6,061/ton of VOC emissions reduced. In addition, we estimate that annual monitoring would cost $7,577/ton VOC, and semiannual monitoring currently required by the 2016 NSPS subpart OOOOa has a cost of $6,116/ton of VOC emissions reduced. All of these values are higher than the inflation-adjusted value of $5,459/ton VOC that was estimated for semiannual monitoring at well sites in 2016. Further, all of these costs are higher than a value the EPA has previously stated is not cost effective.[54] Therefore, we have determined that none of the monitoring frequencies are cost effective for low production well sites. Table 4 provides a summary of the costs of control for low production well sites.

TABLE 4—COST-EFFECTIVENESS OF CONTROL FOR LOW PRODUCTION WELL SITES SUBJECT TO FUGITIVE EMISSIONS STANDARDS UNDER SUBPART OOOOA OF 40 CFR PART 60

| Monitoring frequency | Cost effectiveness ($/ton VOC) | | |
|---|---|---|---|
| | 2016 TSD total cost effectiveness [1] | 2020 TSD total cost effectiveness [2] | 2020 TSD incremental cost effectiveness |
| Biennial [3] | N/A | $6,061 | |
| Annual | $4,723 | 7,577 | $12,125 |
| Semiannual | 5,459 | 6,116 | 3,192 |

[1] Values from the 2016 TSD have been adjusted for inflation for comparison purposes.
[2] As discussed in section V.B of this preamble, the EPA received comments that our original 2016 estimates were low, especially for recordkeeping and reporting burden. The 2020 estimates include adjustments to the 2016 estimates based on this information (which is higher than the 2016 TSD) plus include streamlined recordkeeping and reporting as well as other updates. In addition, the revised analysis found that the majority of the costs of the fugitive requirements are annual costs and do not vary with the monitoring frequency. That is, the recordkeeping and reporting burden remain consistent regardless of the monitoring frequency and the cost of each survey is not directly proportional to the incremental emissions reductions achieved at more frequent surveys. This is further explained in section V.B.2 of this preamble. Further, low production well site model plants were not developed as part of the 2016 rulemaking. Therefore, the 2016 values presented here were for all well sites, without consideration of production. Hence, Table 4 shows an increase in cost effectiveness for the monitoring frequencies presented. In contrast, the 2016 values presented here are directly from the 2016 TSD and have not been adjusted based on our new analysis of what the 2016 rule cost.
[3] Biennial monitoring was not evaluated in 2016, therefore, no cost effectiveness is presented in Table 4.

Further, while this final rule does not have to consider the costs of controlling methane emissions, the EPA did evaluate those costs. The costs for all of the monitoring frequencies evaluated for low production well sites are greater

and cost information, located at Docket ID No. EPA–HQ–OAR–2017–0483.

[54] See 2007 NSPS subparts VV and VVa, 72 FR 64864, cited in the 2016 NSPS subpart OOOOa final rule, 80 FR 56636. See TSD for additional analysis and cost information, located at Docket ID No. EPA–HQ–OAR–2017–0483.

than the highest value for methane that the EPA determined to be reasonable in the 2016 NSPS subpart OOOOa for both methane only and under the multipollutant approach.[55] In the 2015 proposal for NSPS subpart OOOOa, the EPA stated that a cost of control of $738 per ton of methane reduced did not appear excessive when all costs are assigned to methane reduction and zero to VOC reduction. 80 FR 56624. Based on the revised analysis, the costs of control of methane emissions under the single pollutant approach for low production well sites are more than double this value of $738 per ton at all of the monitoring frequencies evaluated. This value is also exceeded under a multipollutant approach where methane reduction only assumes half the cost, as explained in the TSD.[56] Therefore, even if we had not rescinded the methane standards in the Review Rule, we would still conclude that fugitive emissions monitoring, at any of the frequencies evaluated, is not cost effective for low production well sites.

While we are concluding that fugitive emissions monitoring is not cost effective for low production well sites, production at these well sites could potentially increase to greater than 15 boe per day, rendering monitoring to be cost effective. For example, a new well may be drilled at a well site, or the existing wells may be refractured to increase the production levels. When these actions occur, the final rule requires a new 30-day calculation of the total well site production. If the total production remains at or below 15 boe per day, no monitoring is required as long as the owner or operator continues to maintain the production at these low levels. However, if the total production following one of these actions has increased to greater than 15 boe per day, the owner or operator must begin monitoring for fugitive emissions within 90 days of the startup of production following such action, the same as the requirement for a modified well site. Therefore, under the final rule, low production well sites remain affected facilities; however, they have the option of maintaining production at or below 15 boe per day on a continuous basis instead of implementing the fugitive monitoring requirement.

There are three timeframes in which we are requiring sources to calculate the total production from the well site. First, there are well sites that have not yet triggered the requirements in NSPS subpart OOOOa, which are those constructed, reconstructed, or modified after this final rule becomes effective. The owner or operator of such a well site has the option to calculate the total well site production based on the first 30 days of production. If the total production from all of the wells at the well site is at or below 15 boe per day (combined for both oil and natural gas produced at the site), then the owner or operator of the well site may either maintain production at or below this threshold on a rolling 12-month average or begin the fugitive emissions program. The owner or operator must comply with one of these two requirements at any and all times. If the total production of the well site is above 15 boe per day as determined in the first 30 days of production, then the site must begin the fugitive emissions program, including completing the initial monitoring within 90 days of startup of production. Recognizing that there are some well sites that have triggered the fugitive emissions requirements that may not have 12-months' worth of production data yet but are already able to demonstrate they are low production, the final rule contains a provision to allow the owner or operator to use production records based on the first 30 days of production after becoming subject to the NSPS to determine if the well site is low production. This determination must be made by December 14, 2020. After that date, the owner or operator may use the rolling 12-month average, as described next, for demonstrating the well site is low production.

Next, recognizing that production declines over time, we are also allowing an option for owners or operators subject to the monitoring requirement to determine whether the total production for the well site declines to 15 boe per day or below when calculated on a rolling 12-month average. If the total well site production is at or below this threshold on a rolling 12-month average, then the owner or operator has the option to stop fugitive monitoring and instead maintain total well site production below this threshold. The owner or operator must comply with either the fugitive monitoring requirement or maintain total well site production below this threshold at any and all times.

Finally, the EPA is aware that a low production well site could later increase production due to subsequent activities, as discussed above. For example, owners or operators commonly take actions to increase production as production declines or continue to drill new wells after the initial startup of production of the well site. If production subsequently increases to greater than 15 boe per day, it would be cost effective to implement the fugitive emissions monitoring requirement. In light of the above, the final rule requires that any well site that is not conducting fugitive emissions monitoring because total well site production is at or below the threshold must redetermine the total well site production following any of the following actions: A new well is drilled, a well is hydraulically fractured or re-fractured, a well is stimulated in any manner for the purpose of increasing production (including well workovers), or a well at the well site is shut-in for the purposes of increasing production from the well site. These well sites must recalculate the total well site production based on the first 30 days of production following the completion of that action. It is inappropriate to continue to utilize a rolling 12-month average because the production in the 11 months prior to the action that increased production would bias the average low. Like well sites constructed, reconstructed, or modified after this final rule, these well sites must recalculate the total well site production based on the first 30 days of production following the completion of that action to increase production.

We have not calculated the impacts of the production calculation because owners and operators are already required to track production for other purposes, regardless of environmental regulation, and we do not anticipate any additional burden associated with these records for purposes of this rule.

The final rule also requires semiannual monitoring of gathering and boosting compressor stations. As with fugitive monitoring of well sites, based on the revised cost analysis in the TSD for the final rule, the EPA reexamined the costs and emission reductions, including incremental cost and emission reductions, for various monitoring frequencies. In the October 15, 2018, proposed rulemaking, the EPA co-proposed annual and semiannual monitoring of fugitive emissions at all compressor stations. As previously discussed, the 2016 NSPS subpart OOOOa requires quarterly monitoring for compressor stations, including gathering and boosting stations, transmission stations, and storage stations. Therefore, the 2016 determination that quarterly monitoring was cost effective was based on the

[55] See Section 2.5.1.1 of the TSD for additional information.

[56] For the multipollutant approach, the emissions of each pollutant are calculated based on the relative percentage of each pollutant in the gas emitted. Since the same control is applied to the gas emitted, the cost is divided in half to attribute the costs of control equally between the two pollutants (methane and VOC).

weighted average of the cost-effectiveness values for all of those station types. In the Review Rule, which was finalized in the **Federal Register** of Monday, September 14, 2020, the EPA has removed the transmission and storage segments from the Crude Oil and Natural Gas Production source category and rescinded the standards for those sources. As a consequence, only gathering and boosting compressor stations remain subject to the standards of NSPS subpart OOOOa.

After updating the compressor station model plants, the EPA estimates that the quarterly monitoring currently required by the 2016 NSPS subpart OOOOa has a cost effectiveness of $3,221/ton of VOC emissions reduced at gathering and boosting compressor stations. The EPA also considered the incremental cost effectiveness of going from semiannual monitoring to quarterly monitoring. This analysis showed that it cost $4,988/ton of additional VOC emissions reduced between the semiannual and quarterly monitoring frequencies. These values (total and incremental) are considered cost-effective for VOC reduction based on past EPA decisions, including the 2016 rulemaking. However, the incremental cost of $4,988/ton of additional VOC reduced is on the high end of the range that we had previously found to be cost-effective for VOC.[57] In contrast, semiannual monitoring is very cost-effective, at a total cost of $2,632/ton and incremental cost of $2,501/ton between annual and semiannual monitoring to reduce an additional 2,156 tons of VOC per year.[58] We further note that moving from annual to semiannual monitoring achieves the same incremental reduction in VOC emissions as moving from semiannual to quarterly monitoring (2,156 tons/year) but at half the cost per ton of additional VOC reduced ($2,501/ton instead of $4,988/ton). Moreover, additional factors influence our evaluation of the appropriateness of selecting quarterly monitoring as compared to semiannual monitoring for compressor stations. In particular, the oil and gas industry is currently experiencing significant financial hardship that may weigh against the appropriateness of imposing the additional costs associated with more frequent monitoring.[59] The EPA also acknowledges that there are potential efficiencies, and potential cost savings, with applying the same monitoring frequencies for well sites and compressor stations,[60] In light of all of these considerations, the EPA thinks it is reasonable to forgo quarterly monitoring and choose semiannual monitoring as the BSER for compressor stations. Table 5 provides a summary and comparison of these costs per ton of VOC reduced.

While this final rule does not have to consider the cost-effectiveness of controlling methane emissions, the EPA did evaluate those costs per ton of methane reduced. As discussed above for low production well sites, the highest costs per ton of methane reduced that we have found to be cost-effective in the past is $738/ton. Assigning all costs to methane (under the single pollutant approach) results in a total cost per ton of $895/ton and incremental cost per ton of $1,387/ton of methane reduced for quarterly monitoring, which almost doubles the highest cost per ton of methane reduced that we had previously found to be cost-effective ($738/ton). Under the multipollutant approach, the incremental cost per ton of additional methane reduced is $695/ton. While this incremental cost per ton is cost-effective, it is also at the high end of the range. Therefore, based on these costs per ton of methane reduced and considering the current financial hardships being experienced across the oil and gas industry, we would have similarly required semiannual monitoring even if methane had remained a regulated pollutant.

TABLE 5—COST-EFFECTIVENESS OF CONTROL FOR COMPRESSOR STATIONS SUBJECT TO FUGITIVE EMISSIONS STANDARDS UNDER SUBPART OOOOA OF 40 CFR PART 60

| Monitoring frequency | Cost effectiveness ($/ton VOC) | | | | | |
|---|---|---|---|---|---|---|
| | Gathering and boosting stations | | | Compressor station weighted-average | | |
| | 2016 TSD total cost effectiveness [1] | 2020 TSD total cost effectiveness [2] | 2020 TSD incremental cost effectiveness | 2016 TSD total cost effectiveness [1] | 2020 TSD total cost effectiveness | 2020 TSD incremental cost effectiveness |
| Annual | $2,105 | $2,698 | ..... | $3,278 | $3,606 | ..... |
| Semiannual | 2,443 | 2,632 | $2,501 | 3,682 | 3,341 | $2,811 |
| Quarterly | 3,391 | 3,221 | 4,988 | 5,006 | 3,908 | 5,607 |

[1] Values from the 2016 TSD have been adjusted for inflation for comparison purposes.

[2] As discussed in section V.B of this preamble, the EPA received comments that our original 2016 estimates were low, especially for recordkeeping and reporting burden. The 2020 estimates include adjustments to the 2016 estimates based on this information (which is higher than the 2016 TSD) plus include streamlined recordkeeping and reporting as well as other updates. In addition, the revised analysis found that the majority of the costs of the fugitive requirements are annual costs and do not vary with the monitoring frequency. That is, the recordkeeping and reporting burden remain consistent regardless of the monitoring frequency and the cost of each survey is not directly proportional to the incremental emissions reductions achieved at more frequent surveys. This is further explained in section V.B.2 of this preamble. Hence, Table 5 shows an increase in cost effectiveness for the annual and semiannual monitoring frequencies, but a decrease in the cost effectiveness for the quarterly cost effectiveness from the 2020 TSD. In contrast, the 2016 values presented here are directly from the 2016 TSD and have not been adjusted based on our new analysis of what the 2016 rule cost.

*C. AMEL*

The 2016 NSPS subpart OOOOa contains provisions for requesting an AMEL for specific work practice standards covering well completions, reciprocating compressors, and the collection of fugitive emissions components at well sites and compressor stations. While written with emerging technologies as the focus, the provisions in the 2016 NSPS subpart

[57] See 2007 NSPS subparts VV and VVa, 72 FR 64864, cited in the 2016 NSPS subpart OOOOa final rule, 80 FR 56636. See TSD for additional analysis and cost information, located at Docket ID No. EPA–HQ–OAR–2017–0483.

[58] See Table 2–35f of the TSD located at Docket ID No. EPA–HQ–OAR–2017–0483.

[59] See Iyke, B. N., 2020. ''COVID–19: The reaction of US oil and gas producers to the pandemic.'' Energy RESEARCH LETTERS, 1(2), located at *https://erl.scholasticahq.com/article/13912.pdf.*

See Gil-Alana, L. A., & Monge, M., 2020. ''Crude Oil Prices and COVID–19: Persistence of the Shock.'' Energy RESEARCH LETTERS, 1(1), located at *https://doi.org/10.46557/001c.13200.*

See Sharif, et al., 2020. ''COVID–19 pandemic, oil prices, stock market, geopolitical risk and policy uncertainty nexus in the US economy: Fresh evidence from the wavelet-based approach.'' International Review of Financial Analysis, 70, 7101496, located at *https://doi.org/10.1016/j.irfa.2020.101496.*

[60] See Docket ID Nos. EPA–HQ–OAR–2017–0483–0755 and EPA–HQ–OAR–2017–0483–0773.

OOOOa could also be used for state programs, though the application requirements were unclear on certain points. Therefore, the EPA proposed amendments to the application requirements as they relate to emerging technologies in order to streamline the application process, and proposed a new section to address state programs, including proposed alternative fugitive emissions standards based on our review of existing state programs. This section describes changes, based on information provided in public comments, to the AMEL provisions.

1. Emerging Technologies

The EPA continues to recognize that new technologies are expected to enter the market soon that could locate sources of fugitive emissions sooner and at lower costs than the current technologies required by the 2016 NSPS subpart OOOOa. While the EPA established a foundation for approving the use of these emerging technologies in the 2016 NSPS subpart OOOOa, we proposed specific revisions in the October 15, 2018, proposal to help streamline the application requirements and process. Specifically, we proposed to allow owners and operators to apply for an AMEL on their own, or in conjunction with manufacturers or vendors and trade associations. We also proposed to allow the use of test data, modeling analyses, and other documentation to support field test data, provided seasonal variations are accounted for in the analyses. While we received many supportive comments on these specific proposed amendments, we also received comments asserting that the application process is still too restrictive and burdensome to promote innovation.

First, the commenters stated that applications seeking approval of an alternative should be accepted by the EPA from manufacturers and vendors independently of owners and operators. We have reviewed the information provided by the commenters and agree that it is appropriate in the context of the revisions to 40 CFR 60.5398a to remove language that previously indicated from whom the Administrator would consider applications under that section because section 111(h)(3) of the CAA states ''any person'' can request an AMEL, and if they establish to the satisfaction of the Administrator that the AMEL will achieve emission reductions that are at least equivalent with the requirements of the rule, then the Administrator will allow the alternative. While the final rule allows any person to submit an application for an AMEL under this provision, the final rule still includes the minimum information that must be included in each application in order for the EPA to make a determination of equivalency and, thus, be able to approve an alternative. This final rule requires applications for these AMEL to include site-specific information to demonstrate equivalent emissions reductions, as well as site-specific procedures for ensuring continuous compliance.

Next, the commenters generally supported the proposal to allow the use of test data, modeling analyses, and other documentation to support field test data. In addition to their support of these supplemental data, commenters also requested that the final rule allow the use of information collected during testing at controlled testing facilities to be considered in lieu of site-specific field testing. The EPA considered whether it would be appropriate to allow this information and has concerns related to the representativeness of the information when compared to actual operating sites. For example, we are aware of one controlled testing facility located in the U.S., the Methane Emissions Technology Evaluation Center (METEC) located in Fort Collins, Colorado.[61] That facility is equipped with several different configurations of well pads using equipment that was donated from the oil and natural gas industry. The test well pads do not produce or process field gas; in fact, none of the equipment that is onsite is in contact with field gas. Instead, METEC utilizes compressed natural gas that is transported from offsite in order to create controlled leaks. In establishing controlled leaks, METEC uses tubing with leak points near typical leak interfaces to simulate a leak; however, these releases are not operated at pressures or temperatures that are typically encountered at an operating well site in the field. While we agree that testing at a controlled testing facility such as the METEC site can be helpful to understanding how a technology may perform, and the information gathered from such controlled test sites can be useful in supplementing other data, it is inappropriate to rely solely on the information collected at these types of facilities as being representative of how the technology would perform at an operating well site or compressor station. At this time, the EPA does not believe that it can determine the efficacy of a monitoring or detection technology where demonstrations take place only under controlled conditions. By extension, the EPA would be unable to determine the validity of whether an alternative indeed achieves equivalent emissions reductions if only presented with data from testing at a controlled testing facility. Therefore, we are finalizing amendments that require field test data, but that allow the use of test data, modeling analyses, data collected at controlled testing facilities, and other documentation to support and supplement field test data.

Next, we solicited comment on whether groups of sites within a specific area that are operated by the same operator could be grouped under a single AMEL. We received comments that discussed this broad application of alternatives in two distinct ways: (1) Allowing the aggregation of emission sources beyond the individual site in order to demonstrate equivalent emission reductions, and (2) allowing the use of approved AMELs at future sites that are designed and operated under the conditions specified in the approved AMEL. We evaluated both types of broad approval options raised in the comments by considering the definitions in the existing rule and the AMEL provisions of section 111(h)(3) of the CAA.

In the first instance, we evaluated whether it would be appropriate to allow the aggregation of emission sources beyond the individual site when evaluating the equivalency of an alternative. Specifically, we considered whether an applicant for an AMEL related to fugitive emissions monitoring could aggregate the total fugitive emissions across multiple sites within a specific geographic area, such as a basin, in order to demonstrate the requested AMEL would achieve at least equivalent emission reductions as the NSPS requirements for fugitive emissions monitoring and repair at an individual site. The work practice standards for the collection of fugitive emissions components at a well site or at a compressor station were established pursuant to section 111(h) of the CAA, which allows an opportunity for an AMEL. In accordance with section 111(h)(3) of the CAA, a source may use an approved AMEL for purposes of compliance with the established work practice. The commenters stated that the generic use of the word ''source'' allows aggregation of fugitive emissions components amongst multiple sites and is not limited to single sites. The EPA does not agree that aggregating fugitive emissions across multiple sites is a viable method to determine equivalency with the NSPS provided the definitions of affected facility in NSPS subpart OOOOa related to the collection of

[61] See *https://energy.colostate.edu/metec* for more information on the METEC facility.

fugitive emissions components. NSPS subpart OOOOa defines the ''source'' that is subject to the work practice standards for fugitive emissions as the ''collection of fugitive emissions components at a well site'' and the ''collection of fugitive emissions components at a compressor station'' in 40 CFR 60.5365a(i) and (j). These terms specify single-site applicability for the work practice standard. Because the rule does not define an affected facility or a source to be a geographic area, such as a basin, it is the EPA's determination that a demonstration of equivalent emission reductions for purposes of evaluating alternatives to the BSER has been based on the fugitive emissions at a single site, and not an aggregation of emissions across multiple well sites, compressor stations, or a combination of these two site types with an averaging or trading program akin to what the EPA has referred to in the past as a ''bubble'' approach. For further discussion on this topic, see section VI.C.2 of this preamble.

The second point raised by commenters was that requiring site-specific approvals (*i.e.,* AMELs that list specific well sites or compressor stations) would result in unnecessary burden as new sites with the same owner or operator, similar equipment, operating conditions, and in the same geographic area (*e.g.,* basin) are constructed. According to commenters, this unnecessary burden results from the need for the owner or operator to apply for an AMEL for each of these sites in the future, even though the AMEL would be identical to the previously approved AMELs for similar sites. We agree with the commenters that it is possible that AMELs could, where appropriate, be approved for future use at sites not included in the original application as discussed below. Commenters also encouraged the EPA to consider the potential for AMELs applicable to specific types of facilities with different owners or operators within an industry category or geographic region.

While the EPA is not amending 40 CFR 60.5398a at this time to address broad approvals of AMEL applications, we do recognize that the Agency has discretion in certain circumstances to allow for broad approval of alternatives via several different paths. First, for example, an applicant could submit an AMEL application for an alternative technology (and associated work practice) that includes specific site characteristics under which the technology (and associated work practice) has been tested and that demonstrates equivalent reductions to the standards in the NSPS. The application would include an explanation of these characteristics (*e.g.,* characteristics of the formation, operating conditions at the site, type of equipment and processes located at the site, and variables that affect performance of the technology or work practice) and a request that the EPA consider broad approval of the application such that sites (including those subject to the NSPS at the time of application and future sites) that meet the same characteristics could utilize the same approved alternative without the need for additional application to the EPA. The scope of such an approval might be limited based on any number of conditions as appropriate (such as those mentioned above). The EPA believes that, depending on the facts of the application, some type of broad approval may be a feasible path forward, but we will need to evaluate the information specific to the application in hand once received. As of the date of this final rule, the EPA has received no applications for AMELs to be able to determine if additional amendments (beyond those in this final rule) are necessary for such a situation, and how such potential amendments might be drafted to facilitate such broad approvals. In summary, if the applicant believes that it is appropriate to apply the alternative to more sites than those listed in the application because the proposed alternative can achieve equivalency for other sites, then the applicant should state this intent and make this demonstration to the EPA within the application. If provided with sufficient information, explanation, justification, and documentation, the EPA may determine under what defined conditions, if any, it is appropriate to allow the use of the alternative once approved at any site meeting those conditions, including sites constructed in the future.

Second, the EPA is interested in developing a framework in the future for AMEL requests that share similar characteristics (*e.g.,* technologies) in order to streamline both applications and approvals. While the EPA has not received applications related to the work practice standards in the 2016 NSPS subpart OOOOa, we have evaluated and approved AMELs for other sources in a few instances for one specific control technology, pressure assisted multi-point flares (for further information, see the EPA rulemaking Docket ID No. EPA–HQ–OAR–2014–0783). In the course of reviewing those applications, the EPA was able to establish testing criteria for this particular control technology to demonstrate equivalency with the underlying operational standards (*i.e.,* 98-percent control efficiency) as well as other certain design, equipment, and work practice standards, which, if met, would help streamline approval of applications submitted after that point. The EPA is committed to working with stakeholders to develop testing criteria for technologies and work practices for NSPS subpart OOOOa. However, due to the variability of this sector, as well as the wide-ranging array of technologies currently being pursued for development, we are unable to amend the language within this rule and provide such a framework at this time. For the pressure assisted multi-point flares, the EPA developed the testing framework in conjunction with an application and with stakeholder feedback from the first AMEL requests received and approved for that particular technology. We have not yet reached that critical first step of an application being submitted to the EPA to determine what testing framework might be appropriate, or how that framework might be technology family-specific (*e.g.,* continuous point monitors, aerial surveys, mobile equipment). We encourage interested stakeholders to continue engaging with us early in any application process so additional streamlining measures can be evaluated. The EPA is committed to improving this process of evaluating emerging technologies and may publish another request for information regarding technology innovation and the application process.

Third, if an applicant can demonstrate that a technology has very broad applicability across the entire industry, then, in addition to exploring the possibility of an AMEL, the EPA also would consider whether to undertake a rulemaking process to amend NSPS subpart OOOOa to allow for widespread use of the technology. As always, the EPA will review each application individually to determine if it has demonstrated that the alternative will achieve equivalent or greater emission reductions than the work practice standard the alternative would replace.

In summary, we are finalizing amendments to the application requirements for an AMEL in 40 CFR 60.5398a. We are allowing applications from any person. Further, we are allowing the use of supplemental data, such as test data, data collected at controlled testing facilities, modeling analyses, and other relevant documentation, to support field data that are collected to demonstrate the emissions reductions achieved. While

we are not amending the rule to specifically state an approved AMEL can be used for future sources, we recognize that it may be possible, where appropriate, for the EPA to establish specific conditions during the AMEL process under which an approved alternative may be applied at sites not specifically listed in the application.

2. State Fugitive Emissions Programs

To reduce duplicative burdens to the industry related to the fugitive emissions requirements, the EPA proposed alternative fugitive emissions standards for well sites and compressor stations located in specific states. These alternative standards were proposed based on the EPA's review of the monitoring and repair requirements of the individual state fugitive emissions requirements [62] relevant to well sites and compressor stations. In the proposal, we stated that a well site or compressor station, located in the specified state, could elect to comply with the specified state program as an alternative to the monitoring, repair, and recordkeeping requirements in the NSPS. However, these sites would be required to monitor all fugitive emissions components, as defined in the NSPS, comply with the requirement to develop a monitoring plan, and report the information required by the NSPS because the sites remain affected facilities.

Similar to the proposed amendments for emerging technologies, we received support for the proposed amendments for state programs. However, some commenters stated that the EPA should recognize the approved state programs as wholly equivalent to the NSPS, including for all reporting and recordkeeping requirements. The commenters indicated that the EPA's equivalency determination still leaves the regulated community in certain states subject to duplicative requirements. They added that complying with two different reporting and recordkeeping schemes for the same site is very burdensome and provided no environmental benefit.

For the proposal, we evaluated 14 existing state programs to determine whether they are equivalent to the fugitive emissions requirements in 40 CFR 60.5397a. That evaluation included a qualitative comparison of the fugitive emissions components covered by the state programs, monitoring instruments, leak or fugitive emissions definitions, monitoring frequencies, repair requirements, and recordkeeping requirements to the requirements of the NSPS.[63] However, at the time of the proposal, the EPA had not evaluated the reporting requirements of the 14 individual state programs. We have completed that evaluation for this final rule for the state programs that we proposed as alternative standards and the results of that evaluation are discussed in more detail in section VI.C.2 of this preamble. We also updated the overall analysis of equivalency.[64] Through this additional evaluation, we concluded that the recordkeeping and reporting requirements of the various state programs do not need to be exactly equivalent to the requirements of the NSPS subpart OOOOa because the purpose of recordkeeping and reporting requirements is to ensure compliance with whatever standards apply. Obviously, the state programs we evaluated are not identical to the NSPS, so it stands to reason that their associated recordkeeping and reporting requirements might differ. Therefore, when evaluating the recordkeeping and reporting requirements in the individual state programs, we focused our review on the elements of those requirements that we deemed essential to a demonstration of compliance with the individual alternative standards. Sites remain subject to the NSPS, because the alternative standards are standards within the NSPS, therefore, compliance demonstrations are necessary through recordkeeping and reporting.

At a minimum, the EPA requires reports to include information that allows a demonstration of compliance for all fugitive emissions components (as defined in 40 CFR 60.5430a) at the individual site level (*i.e.,* well site or compressor station). This means the report must provide information on each individual monitoring survey conducted at each well site or compressor station adopting the alternative fugitive emissions standards. We reviewed the reports required under state law for the six states for which we are finalizing alternative fugitive emissions standards (*i.e.,* California, Colorado, Ohio, Pennsylvania, Texas, and Utah) to determine (1) if site-level information is required in the reports and (2) if the information reported demonstrates compliance through inclusion of elements such as the date of the survey, monitoring instrument used, information for each identified fugitive emission, repair information, and delayed repair information. For three of the six states (California, Ohio, and Pennsylvania) where we are finalizing alternative standards, the required state reports are site-specific and include information that will demonstrate compliance with the alternative standards. For the other three states (Colorado, Texas, and Utah), site-specific reporting is not required, or will not demonstrate compliance with the alternative standards. Therefore, the sites adopting the alternative standards for Colorado, Texas, and Utah, would need to provide the site-specific reports required in 40 CFR 60.5420a(b)(7). As discussed in detail in section V.B.2 of this preamble, the EPA is amending the recordkeeping and reporting requirements related to the fugitive emissions requirements. The result of these amendments is an annualized burden reduction of approximately 27 percent for well sites and 30 percent for gathering and boosting compressor stations, and those same burden reductions will be realized by sites in these three states.[65]

For the three states that do not require site-specific reporting, we reviewed the state's recordkeeping requirements to determine if any additional records would be necessary for reporting the required information under the NSPS. We found that for each of the three states, the records are very similar to, if not the same as, the information required under the NSPS. Given that additional records beyond those required by the state are not necessary, the EPA concludes that there is no duplicative recordkeeping burden associated with compliance with these alternative standards. This, in addition to the significant reduction in reporting burden discussed in section V.B.2 of this preamble, allows the EPA to conclude the submission of the reports required in 40 CFR 60.5420a(b)(7) presents minimal burden for sites in Colorado, Texas, and Utah.

Therefore, to summarize, the final rule requires reporting of information to demonstrate site-level compliance with the alternative fugitive emissions standards as follows:

- Where the state report includes site-specific information for each fugitive emissions survey that demonstrates compliance with the alternative

[62] Note, several states refer to the fugitive emissions standards as LDAR.

[63] See memorandum, ''Equivalency of State Fugitive Emissions Programs for Well Sites and Compressor Stations to Final Standards at 40 CFR part 60, subpart OOOOa,'' located at Docket ID No. EPA–HQ–OAR–2017–0483. January 17, 2020.

[64] See memorandum, ''Equivalency of State Fugitive Emissions Programs for Well Sites and Compressor Stations to Final Standards at 40 CFR part 60, subpart OOOOa,'' located at Docket ID No. EPA–HQ–OAR–2017–0483. January 17, 2020.

[65] See TSD for additional information on the estimated cost burden at the individual site level at Docket ID No. EPA–HQ–OAR–2017–0483.

standard, the owner or operator has the option to either (a) provide the EPA with a copy of the state report, in the format in which is it submitted to the state, based on the following order of preference: (1) As a binary file; (2) as an Extensible Markup Language (XML) schema; (3) as a searchable portable document format (PDF); or (4) as a scanned PDF of a hard copy, or (b) provide the report required by 40 CFR 60.5420a(b)(7)(i) and (ii) to the EPA in accordance with the applicable reporting procedures.

- Where the state report does not include site-specific information for each fugitive emissions survey, the owner or operator must report the information required by 40 CFR 60.5420a(b)(7)(i) and (ii) to the EPA in accordance with the procedures applicable to such a submission.

Any owner or operator has the option to complete the information required by 40 CFR 60.5420a(b)(7) in lieu of submitting a copy of the state report. As described in section IV.I of this preamble, electronic reporting through CEDRI is now required for all reports under 40 CFR 60.5420a(b). Thus, the EPA is requiring electronic submission of reports for the alternative fugitive emissions requirements, regardless of whether the state continues to allow paper copy submissions.

The EPA believes that adoption of these alternative standards will further reduce the burden of the fugitive emissions standards on the industry from this rule. No additional recordkeeping beyond that required by the alternative standard is necessary. Additional justification for the EPA's decision to adopt these state programs as alternative fugitive emission standards is provided in the memorandum [66] summarizing the EPA's review of each state program's requirements and in section VI of this preamble.

We note that one commenter expressed concern over the proposed state equivalency determinations and noted that several of the programs evaluated have specific applicability thresholds where the standards only apply to a subset of sources, whereas the NSPS applies to all new, modified, or reconstructed sources.[67] We agree that the applicability thresholds for these state programs are different from the NSPS, but we do not agree that additional regulatory text is necessary to address this concern. The regulatory thresholds included in state programs that limit or reduce monitoring and repair requirements do not affect the requirements for sources subject to the NSPS. Therefore, if a site subject to the NSPS is not also subject to the state program because of the state-specific applicability threshold, the site would still be required to comply with the requirements of the NSPS. Where appropriate, we have amended the regulatory text to clearly define the requirements of the alternative standard. More discussion of this comment and our response is provided in section VI.C.2 of this preamble.

## VI. Summary of Significant Comments and Responses

This section summarizes the significant comments on the proposed amendments and our responses to those comments. Additional comments and responses are summarized in the RTC document available in the docket.

### *A. Major Comments Concerning Storage Vessels*

The EPA received numerous comments on the proposed amendments to the definition of ''maximum average daily throughput,'' which is key in the determination of storage vessel affected facility status under the 2016 NSPS subpart OOOOa. Many of the comments we received were related to manifolded storage vessel systems. The EPA considered those comments and is finalizing changes to the rule to address a subset of these manifolded storage vessel systems (*i.e.,* controlled storage vessel batteries as described in section V.A of this preamble). A more detailed summary of the comments regarding controlled storage vessel batteries, and our responses to those comments, is available in the RTC document for this action (see Chapter 6).[68]

In addition to the comments the EPA received on controlled storage vessel batteries, we also received other comments related to storage vessel applicability determination criteria. Below is a discussion related to three of these topics: (1) The use of legally and practicably enforceable limits that maintain VOC emissions from storage vessels below 6 tpy, (2) the calculation of maximum average daily throughput based only on the days of actual production in the first 30 days, and (3) the determination of maximum average daily throughput for storage vessels at gathering and boosting compressor stations, onshore natural gas processing plants, and transmission and storage compressor stations.

*Comment:* Some commenters stated that the EPA proposed additional parameters on what constitutes a ''legally and practicably enforceable'' limit; and, therefore, heightened the standard for allowing use of such limit in estimating a storage vessel's potential VOC emissions for purposes of determining applicability of the storage vessel standards at 40 CFR 60.5395a. Specifically, the commenters took issue with the statement in the preamble to the October 15, 2018, proposed rulemaking where the EPA stated ''only limits that meet certain enforceability criteria may be used to restrict a source's potential to emit, and the permit or requirement must include sufficient compliance assurance terms and conditions such that the source cannot lawfully exceed the limit.'' 83 FR 52085. One commenter claimed that these additional criteria (1) conflict with prior EPA statements made during earlier oil and gas NSPS rulemakings; (2) conflict with the EPA's traditional practice of deferring to states regarding the appropriate mechanisms for limiting potential to emit (PTE); (3) raise concerns about how this new interpretation/approach would apply in the title V and New Source Review/Prevention of Significant Deterioration context where operators are relying on the same control requirements to limit their PTE; (4) raise significant concerns about retroactive application; and (5) ignore that the requirements for fugitive components under the 2016 NSPS subpart OOOOa are not tied to storage tank applicability and apply regardless of whether a storage tank is an affected facility under the rule.

Commenters also cited the EPA's ''enforceability criteria'' guidance, which was first introduced in 1995, and asserted that the EPA's proposed additional criteria were not consistent with that guidance. One commenter was concerned that the EPA's proposal not only conflicted with the Agency's traditional and consistent practice, it also threatened to subject sources to the NSPS that already determined their potential for VOC emissions was below the 6 tpy threshold by using the EPA's prior guidance.

*Response:* The EPA disagrees with the commenters because we did not propose additional parameters on what would constitute a legally and practicably enforceable limit. Rather, in the proposal preamble, the EPA simply summarized its position on this matter based on the existing substantial body of EPA guidance and administrative

[66] See memorandum, ''Equivalency of State Fugitive Emissions Programs for Well Sites and Compressor Stations to Final Standards at 40 CFR part 60, subpart OOOOa,'' located at Docket ID No. EPA–HQ–OAR–2017–0483. January 17, 2020.

[67] See Docket ID Item No. EPA–HQ–OAR–2017–0483–2041.

[68] See Chapter 6 of the RTC document located at Docket ID No. EPA–HQ–OAR–2017–0483.

decisions relating to potential emissions and emissions limits. As the EPA explained, limits that meet certain enforceability criteria may be used to restrict a source's potential emissions. For example, any such emission limit must be enforceable as a practical matter, which requires that the permit or requirement specifies how emissions will be measured or determined for purposes of demonstrating compliance with the limit. The permit or requirement must also include sufficient terms and conditions such that the source cannot lawfully exceed the limit (*e.g.,* monitoring, recordkeeping, and reporting). For additional information and a summary of the EPA's position on establishing legally and practicably enforceable limits on potential emissions, including examples of ''enforceability criteria,'' see In the Matter of Yuhuang Chemical Inc. Methanol Plant St. James Parish, Louisiana, Order on Petition No. VI–2015–03 (August 31, 2016) at 13–15.

*Comment:* Under the 2016 NSPS subpart OOOOa, the applicability of the storage vessel standards is based on a single storage vessel's potential for VOC emissions, which is calculated using the storage vessel's ''maximum average daily throughput.'' While ''maximum average daily throughput'' is defined in 40 CFR 60.5430a of the 2016 NSPS subpart OOOOa, several stakeholders indicated that clarification of this definition was needed. As a result, the EPA proposed a revised definition. 83 FR 52106. The EPA received several comments related to the proposed definition, which requires that ''production to a single storage vessel must be averaged over the number of days production was actually sent to that storage vessel.'' Most of the commenters objected to this proposed definition, claiming that it would be more appropriate to average over the entire 30-day evaluation period rather than only those days when production was sent to the storage vessel. With regard to tank batteries, one commenter asserted that the proposed definition would not result in an accurate estimate of the potential emissions from individual storage vessels because it would overestimate the total amount of production that each tank could receive over the 30-day evaluation period. Further, the commenter stated that the proposed definition would significantly overestimate the volume of flow to the tank battery as a whole when compounded across multiple tanks and extrapolated across an entire year. Multiple commenters also generally stated that the EPA's proposed definition failed to account for the fact that maximum well production has a limit based on what the wells can produce. However, the EPA did receive one comment that agreed with the proposed definition and that owners and operators should not be able to include days where the storage vessel does not receive production when determining storage vessel applicability.

*Response:* The EPA disagrees with the comments suggesting that ''maximum average daily throughput'' should be determined by averaging across the full 30-day evaluation period instead of the days when production is actually sent to an individual storage vessel during that period. As stated in the proposal, the maximum average daily throughput ''was intended to represent the maximum of the average daily production rates in the first 30-day period to each individual storage vessel,'' 83 FR 52084, which is not the same as an average daily production rate based on averaging total production across a full 30-day period. As explained further in the proposal, in all possible scenarios for determining the daily production, only the number of days in which production is sent to the individual storage vessel is used for averaging, which may be less than the full 30 days in the evaluation period. Indeed, including days where no production was received would reduce the maximum average daily throughput to an individual storage vessel under any of the scenarios described in the proposal. 83 FR 52084. The commenters did not explain how averaging actual throughput to a storage vessel across the full 30 days would accurately reflect the ''maximum average daily production rates,'' therefore, we do not agree with the commenters' suggestion to use this value for the purpose of determining a storage vessel's potential for VOC emissions.

The EPA also disagrees with comments suggesting that the EPA's proposed definition would overestimate the potential for VOC emissions for individual storage vessels in a tank battery by failing to account for the overall production to the tank battery during the 30-day period. In addition to the definition of ''maximum average daily throughput'' which provided for two operational scenarios, the EPA further explained in the proposal how to determine the daily or average daily throughput, from which the maximum average daily throughput is determined, depending on how throughput is measured. 83 FR 52084. The EPA's proposed definition is based on either the daily (*i.e.,* directly measured via automated level gauging or daily manual gauging) or average daily (*i.e.,* manual gauging at the start and end of loadouts which occur over more than one day) throughput routed to a storage vessel while receiving production; the fact that the storage vessel is receiving that amount daily clearly indicates that it has the potential to do so. The total throughput to the entire tank battery during the 30-day period is not germane to this determination. Because there are likely multiple daily throughput or average daily throughput values for an individual storage vessel during the 30-day evaluation period, the maximum of those values is used to calculate the potential for VOC emissions, thus, the use of the term ''maximum average daily throughput.''

While the EPA is finalizing the definition of ''maximum average daily throughput'' as proposed, we note that the final rule provides other mechanisms for determining a storage vessel's applicability without having to calculate the maximum average daily throughput. Specifically, the final rule allows owners and operators of controlled tank batteries meeting specified criteria to average VOC emissions across the number of storage vessels in the tank battery to determine applicability for the individual storage vessels in the battery. Also, as provided in the 2016 NSPS subpart OOOOa, and unchanged by this final rule, if a facility has a legally and practicably enforceable limit that restricts production to an individual storage vessel, then it is acceptable to use this restricted production level as the maximum average daily throughput for that individual storage vessel.

*Comment:* Commenters stated that the methods for determining the potential for VOC emissions from storage vessels in the 2016 NSPS subpart OOOOa were not appropriate for storage vessels located at compressor stations (including gathering and boosting compressor stations) and onshore natural gas processing plants, and they indicated that the proposed revisions to 40 CFR 60.5365a(e) and the definition of maximum average daily throughput did not alleviate this problem. More specifically, commenters noted that the 2016 NSPS subpart OOOOa is clear that storage vessels at well sites must determine the potential for VOC emissions based on the maximum average daily throughput based on the first 30 days that liquids are sent to the storage vessel. The commenter noted that storage vessels at compressor stations and onshore natural gas processing plants are designed to receive liquids from multiple well sites that may start up production over a

longer period of time. Because these storage vessels may not experience the same peak in throughput to the storage vessels during the first 30-days of receiving liquids as storage vessels at well sites, the commenter indicated that owners or operators may underestimate the potential emissions using the throughput for the first 30 days. Therefore, commenters requested that the EPA clarify the appropriate time period for calculating the maximum average daily throughput for storage vessels at facilities located downstream of well sites. Alternatively, commenters suggested that storage vessels at gathering and boosting compressor stations be allowed to use generally accepted engineering models that project future throughput. The commenters explained that compressor stations (including gathering and boosting compressor stations) and onshore natural gas processing plants typically utilize process simulations based on representative or actual liquid analysis to determine potential VOC emissions and volumetric condensate rates from the storage vessels based on the maximum gas throughput capacity of each facility. These generally accepted engineering models and calculation methodologies are then utilized to obtain Federal, state, local, or tribal authority issued permits to set legally and practicably enforceable limits to maintain potential VOC emissions from storage vessels at less than 6 tpy. The commenter requested that the EPA allow use of these generally accepted models and calculation methodologies to project future maximum throughput volumes.

*Response:* The EPA agrees with these commenters that potential VOC emissions from storage vessels at facilities downstream of well sites should not be determined based on the first 30 days that liquids are sent to those storage vessels as they are unlikely to experience the same peak in throughput during that period as storage vessels at well sites. It is the EPA's understanding, based on the information provided by the commenters and subsequent conversations,[69] that these midstream and downstream storage vessels may continue to see an increase in throughput as additional upstream well sites begin sending fluids to these compressor stations and onshore natural gas processing plants. Based on the EPA's review and understanding of the generally accepted engineering models for projecting future throughput to a storage vessel, the EPA agrees that these engineering models are appropriate for projecting the maximum throughput for purposes of calculating the potential for VOC emissions from storage vessels located downstream of well sites.

Based on the above reasons, the EPA is amending the 2016 NSPS subpart OOOOa to specifically provide the following two options for determining the potential for VOC emissions from storage vessels at facilities downstream of well sites. The first option, which is already allowed in the 2016 NSPS subpart OOOOa, allows owners or operators to take into account throughput and/or emission limits incorporated as legally and practicably enforceable limits in a permit or other requirement established under a Federal, state, local, or tribal authority. The second option allows the use of generally accepted engineering models (*e.g.,* volumetric condensate rates from the storage vessels based on the maximum gas throughput capacity of each producing facility) to project the maximum throughput used to calculate the potential for VOC emissions.

*B. Major Comments Concerning Fugitive Emissions at Well Sites and Compressor Stations*

In section V.B of this preamble, we discuss the significant changes from the proposal to this final rule related to the fugitive emissions requirements for well sites and compressor stations. The discussions in section V.B of this preamble include a summary of the major comments and our responses related to those changes. Specifically, section V.B of this preamble discusses the following topics: (1) The three areas of uncertainty potentially affecting the cost-effectiveness analysis that were identified in the October 15, 2018, proposal; (2) recordkeeping, reporting, and other administrative burden from the fugitive emissions requirements; (3) other updates to the model plants; and (4) cost effectiveness of fugitive emissions requirements. We also discuss our re-evaluation of BSER after consideration of all these topics.

In addition to the topics discussed in section V.B of this preamble, the EPA received comments on other aspects related to the fugitive emissions requirements. This section provides a discussion of comments and our responses regarding the following three topics: (1) The EPA's model plant analysis for low production well sites; (2) the effect of system pressure on fugitive emissions at low production well sites; and (3) monitoring of compressors at compressor stations when operating and not in standby mode. More detailed summaries and additional comments on the fugitive emissions requirements are included in Chapter 8 of the RTC document included in the rulemaking docket for this action.

*Comment:* The EPA created model plants representing low production well sites for purposes of analyzing the emissions and costs of a fugitive emissions monitoring and repair program at these types of well sites. In the proposal, we also acknowledged that operating pressures and production volumes are factors that can cause changes in the fugitive emissions at a well site. 83 FR 52067. However, the EPA was unable to incorporate these factors into the emission estimates in the model plants, and, therefore, developed model plants that relied on equipment and component counts to analyze fugitive emissions from low production well sites.

Some industry commenters disagreed with the use of model plants that rely on component counts alone to estimate fugitive emissions from low production wells due to differences in the type and size of equipment and operating conditions (*e.g.,* operating pressure) at low production well sites. The commenters did agree that it is reasonable to associate the number of components to the potential for leaks. However, the commenters continued to maintain that emissions from low production wells are inherently different from large production wells because of the basic physics of production and how operators change the physical equipment as production warrants. Commenters indicated that the fugitive emissions factors used by the EPA, which were developed for generally predicting emission levels, account for different types of fugitive emission components, but do not factor in the amount of production or line pressure.

*Response:* As stated in the proposal, the EPA continues to recognize that variations in equipment, operating conditions, and geological aspects across the country at low production well sites may affect fugitive emissions from low production well sites. As described in section V.B of this preamble, we have made updates to the low production well site model plants and re-evaluated the emissions and costs of fugitive emissions monitoring and repair requirements at low production well sites. Based on this updated analysis, the EPA concludes that fugitive emissions monitoring and repair is not cost effective at any monitoring frequency for low

[69] See memorandum for ''May 1, 2019 Meeting with GPA Midstream,'' located at Docket ID No. EPA–HQ–OAR–2017–0483.

production well sites. See section V.B of this preamble for additional discussion.

*Comment:* The EPA received additional comments and data related to the low production well site model plants developed and analyzed for the proposal. One commenter conducted a brief survey of its member companies' gas well site operations in 13 states and provided low production well site component counts. This commenter pointed out that the majority of emissions (around 80 percent) from the low production well site model plants are from valves and storage vessel thief hatches. Therefore, the commenter only provided counts of these components, along with the number of wellheads. This commenter explained that the data show fewer wellheads and valves than assumed in the proposal model plant for low production gas well sites. The commenter stated that it did not consider the data to be fully representative of low production well sites nationwide; nevertheless, relying on the difference in component counts, the commenter claimed that the EPA overestimated the fugitive emissions in the low production model plants used for the proposal.

*Response:* While the commenter specifically stated that it did not consider the data to be fully representative of low production well sites nationwide, we reviewed the information and compared it to the low production well site model plants used for the proposal analysis. Specifically, we compared the weighted-average component counts of the information provided by the commenter to the EPA's low production well site model plant. The information provided by the commenter showed that the weighted-average number of storage vessels was approximately the same as that used in the EPA model plant, the number of well heads was half (one versus two in the EPA model plant), and the number of valves was just under 25 percent (23 versus 100 in the EPA model plant). If the model plant was modified with these adjusted component counts, the overall difference in emissions would be just over 50 percent.

After consideration of this information, the EPA concluded it provides an insufficient basis to revise the low production well site model plant component counts because the information was limited to valves, connectors, and storage vessels at a sample of sites the commenter admitted were not fully representative of low production well sites. However, as discussed above in section V.B of this preamble, we did conduct further review of the data originally used to develop the model plant parameters, as well as GHGI data. That review resulted in a 35-percent decrease in the number of valves for the low production gas well site model plant, as well as decreases in the numbers of the other components. More detailed information on our analysis of the component count information submitted by commenters is contained in a technical memorandum.[70] As shown in the revised model plant analysis, a fugitive emissions monitoring program is not cost effective for low production well sites at any of the frequencies analyzed.

*Comment:* The EPA proposed defining low production well sites as sites where the average combined oil and natural gas production for the wells at the site is at or below 15 boe per day averaged over the first 30 days of production. 83 FR 52093. Several commenters recommended changing the definition of a low production well site to be based on the U.S. Tax Code definition of stripper wells. These commenters also recommended using 12 months of production to determine if a site is low production because most well sites newly affected by NSPS subpart OOOOa will not meet the definition based on the first 30 days of production and because production declines over time such that eventually all well sites become low production.

*Response:* The EPA has not adopted the stripper well definition for purposes of determining if a well site is low production in this action because the U.S. Tax Code definition applies to individual wells, not well sites. The fugitive emissions standards apply to the collection of fugitive emissions components located at a well site. Adoption of the stripper well definition could result in a scenario where one well at the site is considered low production but the other wells are not, which is inconsistent with the affected facility definition for fugitive emissions components, where the entire site is treated as one unit. Therefore, the calculation of production for purposes of determining if the well site is low production is based on the total well site production and not the individual well production averaged across the number of wells at the well site.

However, the EPA does agree with the commenters that determination of low production status based solely on the first 30 days of production does not account for decline in production over time. Therefore, the final rule specifies that a low production well site is a well site with total well site production of oil and natural gas at or below 15 boe per day. This calculation can be based on the first 30 days of production for determining initial applicability to the rule and based on a rolling 12-month average to account for production decline. See section V.B of this preamble for additional discussion.

*Comment:* Commenters urged the EPA to use the Department of Energy (DOE) research program[71] announced on October 23, 2018, to determine more accurate assessments of low production well emissions. The commenters asserted that the DOE study provides the EPA the opportunity to collect direct emissions data on fugitive emissions at low production well sites. The commenters concluded that these data would provide the EPA with a baseline that shows the distinctions between large wells and low production wells and the differences that may exist between types of wells and between production regions.

*Response:* The EPA is regularly updated on the DOE program and provides technical input on many projects. However, data from the DOE-funded study on low production wells are not currently available. The conclusions made in this final rule are based on currently available information, which includes many data sources that cover low production wells, such as DrillingInfo, Greenhouse Gas Reporting Program, and other emission measurement studies. As discussed in this section and in section V.B of this preamble, the EPA agrees that existing information shows that low production well sites may have lower emissions than well sites with higher production. As such, the final rule has separate requirements for well sites with total production at or below 15 boe per day, instead of the required fugitive emissions monitoring program (including semiannual monitoring) for well sites above this production threshold.

*Comment:* In addition to co-proposing annual monitoring of fugitive emissions components located at a compressor station, the EPA proposed a requirement that each compressor at the station must be monitored at least once per calendar year when it is operating. The EPA also solicited comment regarding the effect the compressor operating mode has on fugitive emissions and the proposal to require at least one monitoring a year during times that are representative of operating conditions for the compressor station.

[70] Memorandum. ''Summary of Data Received on the October 15, 2018 Proposed Amendments to 40 CFR Part 60, subpart OOOOa Related to Model Plant Fugitive Emissions.'' February 10, 2020.

[71] *https://www.netl.doe.gov/node/5775.*

Several industry commenters opposed the EPA's proposal to require that each compressor be monitored while in operation (*i.e.,* not in stand-by mode), because if the station is subject to annual monitoring (which was co-proposed), this requirement would result in a requirement for every compressor to be operating during the monitoring survey, even if all of the compressors are not needed at that time to move gas downstream. The commenters believed that the result of this requirement would be the generation of emissions from compressor blowdowns following the monitoring survey in order to return the compressors to the operating modes they were in prior to the survey. The requirement would also create unnecessary recordkeeping and scheduling complexity/burden, according to commenters. Requiring equipment to be monitored in a specific mode of operation, especially at less frequent monitoring than quarterly, would increase overall emissions if that equipment must change its operational status solely to fulfill that requirement. These commenters recommended that the EPA allow operators to conduct surveys with facility operations as they are found when the survey is conducted.

However, another commenter stated that its data suggests that it is important to conduct monitoring on fully operating compressors to maximize the number of leaks detected. The commenter stated that beyond these data, it is also simply common sense that as the ratio of pressurized to depressurized components increases, so will the number of leaks detected (depressurized components do not leak). One of the problems is that operation modes vary seasonally at each compressor station, and within each compressor station, the operating modes of each unit can vary daily based on demand. The commenter asserted that the current quarterly compressor monitoring frequency creates a higher probability of conducting a survey where each compressor is monitored in a pressurized mode at least once per year. If the EPA moved to less frequent monitoring, the commenter recommended that there should be some condition to ensure that a reasonable effort is made to schedule the surveys during a time of peak operation.

*Response:* The EPA reviewed the input provided by the commenters. While we agree with the one commenter that the opportunity for fugitive emissions is greater when a compressor is pressurized and operating, the EPA is not finalizing the proposed requirement that each compressor must be monitored while in operation (*i.e.,* not in stand-by mode) at least annually. The EPA has specified in the final rule that the monitoring survey of fugitive emissions components at a gathering and boosting compressor station is semiannual after the initial survey and subsequent semiannual monitoring surveys must be conducted at least every 4 to 7 months. Therefore, as pointed out by the commenter, the likelihood that all monitoring events in a year will be when a specific individual compressor is not operating is relatively low. For the reason stated above, this final rule does not require monitoring of each individual compressor at the station while it is in operation (*i.e.,* not in stand-by mode) at least once per calendar year.

However, the EPA does conclude that it is important that the operating mode during the monitoring survey be recorded. While we would not expect that owners or operators would modify their operating schedules to avoid monitoring when the compressor is operating, or that they would purposely schedule every monitoring event during shutdown periods, we believe that this record would inform the Agency if this were occurring and, if so, how often. This information will provide valuable points for future analyses on leak rates and operating modes. Therefore, the final rule requires that owners and operators keep a record of the operating mode of each compressor at the time of the monitoring survey.

*C. Major Comments Concerning AMELs*

1. Emerging Technologies

The EPA received comments related to AMELs for emerging technologies on several topics. The comments received by the EPA that resulted in significant rule changes are discussed in section V.C.1 of this preamble, along with our response and rationale for the changes. The specific topics were (1) who can submit an AMEL application, (2) what data can or must be included in an AMEL application, and (3) what broader applications of alternatives are permitted. Further details on comments related to the broader applications of AMEL technology, specifically on the issues of applying AMEL to multiple similar sites or to categories of sources, are provided below along with the EPA's responses. Other comments, and more detailed comments covering the topics discussed in this preamble related to emerging technologies can be found in the RTC document available in the docket, along with EPA's responses.

*Comment:* In the proposal, the EPA reiterated its position that AMEL approvals would be made on a site-specific basis but noted that applicants could include multiple sites within one application as necessary. Many commenters disagreed with that proposal, stating that the EPA should allow approved AMELs to apply more broadly to multiple sites, basin-wide, industry-wide, or even based on nation-wide efficacy. Commenters asserted that restricting AMEL approval to a specific site is inconsistent with the EPA's past practice for OGI, in which the EPA determined that OGI achieves emission reductions equivalent to Method 21 for several industries and source categories in a single rulemaking.[72] Some commenters feared that the site-specific approval process that includes **Federal Register** notice and comment requirements is so onerous that it will stifle innovation in new technology, and another noted that its customers have indicated that they would not apply for an AMEL if approval is site-specific. Commenters pointed out that the site-specific approval process could create a crush of AMEL applications for hundreds or thousands of sites, but the applications would be limited to only the technologies previously approved or most likely to be approved as AMEL.

In response to the EPA's concern that alternative technologies may need to be adjusted for site-specific conditions, such as gas compositions, allowable emissions, or the landscape, several commenters suggested that the EPA could account for factors affecting variability, such as the weather or landscaping, by imposing conditions for the use of the technology and/or require periodic instrument checks, calibration records, or other actions to ensure equivalent emission reductions are achieved within the approved AMEL. The commenters also noted that if there is concern about allowable emissions impacting the usability of a particular technology, that technology may only be approvable for use as an approach to direct inspection efforts, but this factor would not affect the ability for it to be approved for that use at multiple sites.

*Response:* The EPA does not seek to stifle innovation of emerging technologies. In fact, the Agency is actively involved in many multi-stakeholder groups aimed at developing frameworks and criteria that will promote the development of possible alternatives. As such, the EPA strongly encourages interested parties to discuss possible alternatives with the Agency.

[72] See the Alternative Work Practice located at 40 CFR 60.18(g), (h), and (i).

However, the EPA disagrees that this final rule should be the vehicle used to make determinations about any particular technology because the proposed rulemaking did not evaluate any specific technology. The EPA also disagrees that this rule is inconsistent with the EPA's past practice for OGI, in which the EPA allowed the use of OGI as an alternative to Method 21 for several industries and source categories in a single rulemaking.[73] The EPA notes that while the AMEL process provided for in CAA section 111(h)(3) contains elements similar to a rulemaking (such as notice and opportunity for public hearing), approval of an alternative does not always require rulemaking. If a technology is developed that could be broadly applied to oil and gas sites as an alternative to what is required in NSPS subpart OOOOa, it may be more appropriate to incorporate such a technology into the rule through a formal rulemaking process so that every affected facility can make use of that alternative.

As discussed in section V.C.1 of this preamble, the EPA agrees that in some circumstances, it may be appropriate to apply an approved AMEL to multiple sites, including future sites. If the applicant of an AMEL believes that it is appropriate to apply the alternative to more sites than those listed in the application, the applicant should specify this within the application and provide any characteristics or variables that are applicable to the type of sites where the equivalency demonstration is being made. Specifically, the applicant should provide relevant information, including any specific conditions (*e.g.,* technology-specific variables that affect performance), procedures (*e.g.,* specific work practice that will be followed to identify emissions and make repairs), or site characteristics under which the alternative must be applied (*e.g.,* formation variables, site operating conditions, equipment at the site, etc.), to demonstrate equivalence with the emissions reductions that would be achieved under the requirements of the NSPS. The EPA will evaluate these defined conditions and additional conditions, if any, under which it might be appropriate to allow future use of the alternative once approved via the AMEL process. For example, the EPA might approve the use of a specific fugitive emissions detection technology that operates with the same performance under specific work practice requirements, environmental conditions, and site configurations and operations. In that example, the EPA might determine it is appropriate to approve the AMEL and define the specific parameters (*e.g.,* environmental conditions, site configurations, and operations) within the approval to allow the use of that alternative at sites meeting those same conditions without the need for additional future application to the EPA. However, each of these determinations would necessarily be made on a case-by-case basis provided the application contains all necessary information to make such a broad determination for applicability of the AMEL. Given that these determinations are made on facts and showings that are specific to each proposed alternative, the EPA has determined that the best course forward is for an applicant to submit an application seeking a broadly applicable AMEL and for the Agency to then use its evaluation of that application as a template for future applications, thereby streamlining the process.

*Comment:* Several commenters stated that the EPA should approve the use of alternative technologies under the Agencies' AMEL authority for broad categories of sources subject to NSPS subpart OOOOa, such as fugitive emissions components across multiple sites. They remarked that there is nothing in the statute that requires the EPA to set source-specific AMELs, and the EPA's position regarding the necessity of source-by-source applications and approvals for AMEL is incorrectly taken from a narrow reading of the language of CAA section 111(h)(3). The commenters stated that, while the language of CAA section 111(h)(3) provides that an AMEL is permitted to be used ''by the source'' for purposes of compliance, the EPA's reading of this provision to disallow the granting of AMEL for use by multiple sources is inconsistent with the NSPS approach of developing standards for whole categories of sources.

Some commenters said that because an AMEL will serve as a replacement for a category-wide CAA section 111(h)(1) standard, a demonstration that an AMEL will achieve an emission reduction at least equivalent to a CAA section 111(h)(1) standard could be made on a category-wide basis and be applied to an entire source category. These commenters suggested that allowing for source category-wide AMEL determinations would be consistent with the overall structure of CAA section 111 and its focus on category-wide standards under CAA sections 111(b) and (h)(1) and with the limitation prohibiting the EPA from imposing specific technological emission reduction requirements pursuant to CAA section 111(b)(5).

These commenters further stated that the EPA's regulation implementing CAA section 112(h)(3) recognizes that the EPA is authorized to approve an AMEL for ''source(s) or category(ies) of sources on which the alternative means will achieve equivalent emission reductions.''[74] They contended that, given the similarities between the programs authorized under CAA section 111 and CAA section 112, and particularly the similarity of CAA sections 111(h)(3) and 112(h)(3), the EPA should adopt a policy of applying an AMEL to source categories for CAA section 111(h)(3) in the same manner as it has done with respect to CAA section 112(h)(3). They noted that in other rules, such as the visibility provisions that require the best available retrofit technology (BART), the EPA's rules allow the EPA and the states to authorize BART alternatives that can apply to groups of sources and that allow emission averaging across sources, even over wide regions, rather than imposing source-specific emission limits or source-specific alternatives to such limits. The commenters stated that if alternatives to emission limits (or work practice standards) for groups of sources under these provisions are permissible despite the continued references to the term ''source'' in the statutory language, then a source category-wide AMEL is surely permissible under CAA section 111(h)(3).

*Response:* On the first point raised by commenters, and as explained in the EPA's response above, the EPA agrees that in some instances broad use of an approved alternative may be appropriate. The current construct of the AMEL application process in NSPS subpart OOOOa does not prevent the EPA from taking this path as suggested by the commenters.

The commenters also suggest that the EPA should apply AMEL to a source category in the same manner in which the EPA has done for applications submitted through section 112(h)(3) of the CAA. While the EPA has approved AMEL for sources subject to standards under section 112 of the CAA, these approvals have been made on a site-specific basis, in which each application specifically lists the facilities that are applying for approval. Further, while similar, CAA section 112(h)(3) does not apply for purposes of demonstrating equivalence with work practice standards in the NSPS.

[73] See 40 CFR 60.18(g), (h), and (i).

[74] See 40 CFR 63.6(g)(1).

For purposes of evaluating whether an alternative to fugitives monitoring provides at least equivalent emission reductions as the applicable standards in the context of NSPS subpart OOOOa, the EPA asserts that the emissions from an individual site are the only appropriate measure for comparison. First, the BSER determination for the collection of fugitive emissions components is based on a single well site, or a single compressor station, not a collection of well sites and/or compressor stations, and not the emissions of the entire source category. The source category for which NSPS subpart OOOOa sets standards of performance under CAA section 111 is the Crude Oil and Natural Gas Production source category. This category is defined in 40 CFR 60.5430a as crude oil production, which includes the well and extends to the point of custody transfer to the crude oil transmission pipeline or any other forms of transportation; and natural gas production and processing, which includes the well and extend to, but does not include, the point of custody transfer to the natural gas transmission and storage segment.[75] Within this source category, the EPA has set standards of performance (BSER) for individual affected facilities. These affected facilities are the only emission sources within the Crude Oil and Natural Gas Production source category for which these NSPS apply and are defined in 40 CFR 60.5365a.

Specifically, the EPA has defined the collection of fugitive emissions components at a well site and the collection of fugitive emissions components at a compressor station as individual affected facilities in the rule. Affected facilities are defined at the individual site level, and not as the collection of fugitive emissions components across multiple sites, or a collection of sources within a basin. Further, the standards that apply to these affected facilities are specific to the individual well site or compressor station, as defined in 40 CFR 60.5365a(i) and (j) and 40 CFR 60.5397a. For example, the collection of fugitive emissions components at an existing well site become subject to the fugitive emissions requirements when (1) a new well is drilled at that well site, (2) an existing well at that well site is hydraulically fractured, or (3) an existing well at that well site is hydraulically refractured. In all three cases, the event that triggers the requirements for an existing well site are based on site-specific changes, and not changes at other nearby sites. Drilling a new well at a well site within the same basin, for instance, does not trigger the fugitive emissions requirements for all well sites located in that basin.

When establishing the requirements for the collection of fugitive emissions components, the EPA limited the applicability to individual well sites or compressor stations. The work practice standards set in accordance with section 111(h)(1) of the CAA were established for the collection of fugitive emissions components at an individual well site or compressor station. Since the NSPS does not define the emission source subject to BSER as a basin, or other aggregation of emission points, the EPA finds it inappropriate to evaluate alternatives that seek to implement such a definition. As a practical matter, the EPA concludes that any determination of equivalent emission reductions through an AMEL under section 111(h)(3), or for an alternative work practice under section 111(h)(1), of the CAA for these NSPS should be determined at the same affected facility level (*i.e.,* collection of fugitive emissions components at a well site or at a compressor station) as the original work practice standards.

Similar to the EPA's explanation in the Affordable Clean Energy rule (''ACE''), here the EPA does not need to determine whether it would have reasonable grounds to define ''source'' for purposes of the fugitive emissions monitoring work practice standard as a geographic area, such as a basin. Because these NSPS define an affected facility for this purpose as the collection of fugitive emissions components at a well site, and the collection of fugitive emissions components at a compressor station, the EPA does not think it is appropriate for AMEL applications to accommodate the averaging of emissions.[76]

Second, it is unclear whether the commenters are suggesting that such aggregation would take into account emissions from sources within a basin not subject to these NSPS, such as existing oil and gas well sites or compressor stations, or sources that emit VOC that are included in a different source category. In response to this point, the EPA directs commenters to the discussion of CAA section 111, generation shifting, and emission offsets included in ACE.[77] ''[T]he plain language of CAA section 111 does not authorize the EPA to select as the BSER a system that is premised on application to the source category as a whole or to entities entirely outside the regulated source category.'' [78] This principle also applies in the context of evaluating alternatives to the established BSER.

Lastly, commenters suggest that averaging should be appropriate here because the EPA allows averaging in its BART program. However, that comparison is not appropriate because it fails to consider differences between BART and the BSER for this NSPS. The BART requirement is just one component of a larger strategy to make reasonable progress towards the national goal of remedying visibility impairment in certain areas. The EPA determined in the BART context that if a state can demonstrate that an alternative strategy, such as an emissions trading scheme, will be even more effective at improving visibility, such a ''better-than-BART'' strategy may be adopted to fulfill the role that would otherwise by filled by BART. However, in the context of this NSPS there is less flexibility on this point than in the BART program because, as explained above, there are no other components to reducing emissions aside from the BSER, the BSER is not based on reasonable progress, and this NSPS does not define the emission source subject to BSER as a basin or other aggregation of emission points.

2. State Fugitive Emissions Programs

The EPA received comments related to the alternative fugitive emissions standards on several topics. The comments received by the EPA that resulted in significant rule changes are discussed in section V.C.2 of this preamble, along with our response and rationale for the changes. Specifically, these topics were related to whether the state regulations/requirements determined to be alternative fugitive standards to NSPS subpart OOOOa fugitive requirements will provide adequate coverage of the emission sources in the state and the potential for duplicative reporting and recordkeeping requirements. Further details on comments related to these topics are provided below, along with other significant comments and the EPA's responses. Other comments, and more detailed comments covering the topics discussed in this preamble, related to the state fugitive monitoring programs can be found in the RTC document

[75] See the Review Rule published in the **Federal Register** of Monday, September 14, 2020 and supporting information located at Docket ID No. EPA–HQ–OAR–2017–0757.

[76] See 81 FR 32520, 32556 and 57 (July 8, 2019) (section titled ''Averaging and Trading'').

[77] *Id.* at 32523–26.

[78] *Id.* at 32524.

available in the docket, along with the EPA's responses.

*Comment:* The EPA proposed alternative fugitive emissions standards based on our determination that certain states had existing requirements equivalent to the proposed fugitive emissions requirements. These determinations were based on qualitative assessments comparing various aspects of the requirements, such as monitoring frequencies and repair deadlines. Two commenters stated that the equivalency determinations must be quantitative if the EPA wants to set alternative standards because they are similar to AMELs. The commenters indicated that the Agency's analysis evaluated whether a state has regulations that are similar to the EPA's regulations, rather than whether the emissions reductions achieved by those regulations are quantitatively equivalent. One of the commenters stated that the EPA's qualitative comparison is legally insufficient because it does not meet the statutory requirement that an applicant ''establish'' that an AMEL ''will achieve'' reductions in emissions ''at least equivalent to'' the reduction achieved under the Federal standards.[79] This commenter stated that, without a quantitative comparison, it is impossible to determine whether an AMEL will achieve at least an equivalent reduction in pollutant emissions. The commenter further notes that past AMEL approvals under this provision were based on detailed quantitative determinations for each facility to determine the exact emissions levels that would be achievable at that facility, and then those levels were compared to the emissions levels achievable under the present NSPS. The commenter stated that the EPA's policy changes in how equivalency is determined are inconsistent with the requirements of section 111(h) of the CAA and also stated that the EPA's approach of ''combining . . . aspects of the state requirements to formulate alternatives,'' [80] to determine equivalency is not a permissible or reasonable approach. The commenter noted that while some aspects of a state-level program may be more protective than the corresponding Federal requirements, others may not be, and the commenter stated that qualitative comparisons cannot determine the net effects of program elements that point in opposite directions.

*Response:* The EPA agrees that in some instances when the EPA is evaluating an alternative, it would be preferable to use a quantitative analysis, but we do not agree that such analysis is necessary or prudent in this instance for determining the equivalency of fugitive emissions requirements in state regulations. The CAA does not require the EPA to conduct a quantitative analysis to evaluate an alternative standard or to determine whether that alternative is equivalent to the underlying standard. Work practice standards under section 111(h)(1) of the CAA are set when ''it is not feasible to prescribe or enforce a standard of performance.'' Section 111(h)(2) of the CAA further defines that the phrase not feasible to prescribe or enforce a standard of performance means any situation in which the Administrator determines that: (A) A pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant; or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations. Fugitive emissions are not quantified within the rule, and the technologies used in this rule to detect fugitive emissions do not quantify the actual emissions that are detected and then remediated through repair. Further, even if direct quantification were possible through the currently approved technologies, those quantified emissions would only represent the fugitive emissions detected on that specific day and would not offer information related to how long those emissions were present prior to detection, or account for any emissions that occur between monitoring surveys. Due to the fact-specific circumstances of the work practice standard in the existing rule, it is not practical for the EPA to conduct an accurate and meaningful quantitative analysis of the alternatives. It is also not necessary for the EPA to conduct a quantitative analysis. The statute does not require a quantitative analysis. Therefore, the most practical way to evaluate the equivalence of a fugitive emissions monitoring and repair program is through the site-specific qualitative comparison that we used. It is the EPA's determination that the analysis, which evaluates the types of components monitored, the frequency of monitoring, the detection instrument, the threshold that triggers repairs, and the repair deadline, is sufficient and appropriate for demonstrating that the six programs identified as alternative fugitive standards are equivalent to the fugitive emissions requirements of NSPS subpart OOOOa.[81] Therefore, we have not conducted a quantitative analysis of the individual state programs that are finalized in this action as alternative standards.

*Comment:* One commenter performed its own quantitative assessment of the state programs that the EPA proposed as equivalent to NSPS subpart OOOOa with the October 15, 2018, proposal. From this analysis, the commenter stated that it found differences in the applicability thresholds for several of the state programs, which results in the state programs (combined) covering only 34 percent of the total wells that would be covered by the proposal or the 2016 NSPS subpart OOOOa in these states. The commenter also stated that state programs vary in stringency and may not reduce emissions to the same level as the EPA standards, such as the Ohio and Texas provisions that allow for inspection frequency to decrease based on the percentage of components leaking. The commenter asserted that its assessment demonstrates that both the Ohio and Texas programs reduce emissions to a lesser extent than the proposed requirements, while California and Colorado meet the emission reduction levels accomplished by the proposal. Overall, the commenter said that the state programs will achieve a reduction of methane emissions that is 36 percent less than the reduction that would be achieved by the amendments proposed on October 15, 2018. When compared to the 2016 NSPS subpart OOOOa requirements, the commenter said that the state programs would result in 58 percent less emissions reductions. The commenter remarked that these findings demonstrate that these state programs are not equivalent to either the proposal or the 2016 NSPS subpart OOOOa. Another commenter also remarked that the California Air Resources Board has performed a preliminary assessment of state programs against the 2016 NSPS subpart OOOOa and found that only the California, Colorado, Pennsylvania, Utah, and Texas programs (within narrow parameters) are likely to be equivalent.

*Response:* The EPA reviewed the analysis provided by the commenter but notes that the analysis appears to include an incorrect assumption. Specifically, the commenter stated that only 34 percent of the wells covered by the fugitive emissions requirements in NSPS subpart OOOOa and that are also

[79] See CAA section 111(h)(3).

[80] See 83 FR 52081.

[81] See memorandum, ''Equivalency of State Fugitive Emissions Programs for Well Sites and Compressor Stations to Final Standards at 40 CFR part 60, subpart OOOOa,'' located at Docket ID No. EPA–HQ–OAR–2017–0483. January 17, 2020.

located in one of the six states with proposed alternative fugitive standards would actually be subject to those alternative fugitive standards. This is not correct. The assumption by the commenter is that the alternative standards are deficient because not all of the sites that are currently subject to NSPS subpart OOOOa would be required to monitor and, thus, reduce fugitive emissions. This assumption is incorrect. The applicability criteria found in NSPS subpart OOOOa will continue to apply regardless of the state's applicability criteria.

Using Texas as an example, the commenters stated that only 5 percent of the sites that are subject to NSPS subpart OOOOa would have monitoring requirements under the alternative fugitive standards for well sites located in Texas. While this percentage may represent those sites in Texas that can utilize the alternative, this does not mean that the other 95 percent of sites escape regulation under the NSPS. If a well site is subject to the Texas standards, then that well site may opt to comply with those State-level standards as an alternative to certain Federal fugitive emissions requirements in NSPS subpart OOOOa. However, if a well site located in Texas is not subject to the State-level requirements and is subject to the NSPS (95 percent of the sites according to the commenter), then the alternative standard would not be available to that site, and monitoring would be required through the requirements in NSPS subpart OOOOa. Put another way, the alternatives included in this final rule do not alter the applicability criteria of the NSPS for any sites. If a well site in Texas was required to comply with the NSPS before the alternative was approved, then that site is still required to comply with the NSPS, but the final rule affords certain sites an alternative way to demonstrate that compliance with the NSPS, if they so choose. Moreover, regardless of whether the site complies with the fugitive emissions requirements in NSPS subpart OOOOa, or the alternative fugitive standards for their state, they must conduct the specific monitoring and repair for the NSPS subpart OOOOa defined fugitive emissions components at a well site or compressor station, as applicable.

*Comment:* Several commenters asserted that the EPA should recognize the approved state programs as wholly equivalent to the fugitive emissions requirements in the NSPS and fully delegate the implementation of those fugitive emissions requirements to those states, including the states' recordkeeping and reporting requirements. The commenters noted that the EPA is requiring operators to use the fugitive emission component definition from the 2016 NSPS subpart OOOOa and the 2016 NSPS subpart OOOOa reporting and monitoring plan.

Two of the commenters observed that they are required to comply with both the state requirements and Federal fugitive emissions programs concurrently. The commenters stated that complying with two different recordkeeping and reporting schemes for the same site is very burdensome with no added benefit for the environment. Sites that operate where they are subject to both the NSPS and a state program will sometimes be required to keep two very similar sets of records to comply with both standards. Likewise, sites in this situation may be required to report similar overlapping information to both the Federal system and a state system. According to commenters, this overlap in recordkeeping and reporting (and sometimes in monitoring plans) creates redundant work that unnecessarily consumes resources. The commenters go on to assert that requiring the Federal reporting and monitoring plan defeats the purpose and any benefit from the EPA approving state programs and suggest that if a state program is not adequate in the EPA's opinion, then the EPA should address the issue with the individual state, so it can be approved in whole. Commenters added that as an alternative, the EPA could require that the fugitive emissions component definition from NSPS subpart OOOOa be used when following an alternative standard, even if the state program definitions differ, but the EPA should not require any duplicative administrative burden.

Further, the commenters stated that CAA Section 111 fits squarely within the cooperative federalism tradition, with CAA section 111(c) expressly calling on states to develop ''a procedure for implementing and enforcing standards of performance for new sources'' and calling on the Administrator to delegate ''any authority he has . . . to implement and enforce such standards.'' [82] Two commenters noted that the EPA did not evaluate the equivalency of state reporting requirements or monitoring plans and, thus, did not propose any alternative standards for these aspects of the NSPS subpart OOOOa fugitive emissions requirements. These commenters stated that the exclusion of state reporting and monitoring plan requirements from the EPA's equivalency evaluation leaves the regulated community in certain states subject to potentially duplicative regulation.

*Response:* It is unclear to the EPA what commenters mean by ''wholly equivalent'' and ''fully delegate,'' but we are providing a response based on our interpretation that commenters are requesting approved alternative standards only require recordkeeping and reporting to the individual states and not to the EPA. After considering the comments provided, the EPA reviewed the recordkeeping and reporting requirements for each of the six states that were proposed for alternative fugitive standards in the October 15, 2018, proposal (California, Colorado, Ohio, Pennsylvania, Texas, and Utah). For California, Ohio, and Pennsylvania, the EPA was able to identify site-specific reporting requirements in the state reports which, while not identical to the reporting for NSPS subpart OOOOa, were determined to be appropriate to demonstrate compliance with the alternative fugitive standards for those states. Therefore, in this final rule, we are allowing well sites and compressor stations located in California, Ohio, and Pennsylvania that adopt the alternative fugitive standards to electronically submit a copy of the report that is submitted to their state as specified in 40 CFR 60.5420a(b)(7)(iii). As discussed in section V.C of this preamble, this report must be submitted in the format in which it was submitted to the state, noting the following order of preference: (1) As a binary file, (2) as a XML schema, (3) as a searchable PDF, or (4) as a scanned PDF of a hard copy.

In reviewing the reporting requirements for Colorado, we noted that the report is a fillable form to the state that summarizes all monitoring events for that year at the company-level. Therefore, no site-specific information is available. We then reviewed the recordkeeping forms for Colorado to identify what information is required for the individual sites and compared that information to the required annual report for NSPS subpart OOOOa. We identified one recordkeeping element required by NSPS subpart OOOOa that was not already included in the recordkeeping requirements for Colorado: Deviations from certain requirements in the monitoring plan. Given that the Federal monitoring plan, and deviations from that plan, are still required for all sites that adopt the alternative fugitive standards, there are no additional recordkeeping elements that would be needed beyond what the State already requires. While the EPA has determined

[82] See CAA section 111(c)(1).

that the Colorado program for fugitive emissions requirements is an acceptable alternative to NSPS subpart OOOOa, the company-level reports in Colorado are insufficient to demonstrate compliance for individual sites. Therefore, we are still requiring that well sites and compressor stations located in Colorado that adopt the alternative fugitive standard must report the information required by NSPS subpart OOOOa for fugitive emissions components at well sites and compressor stations.

Our review of the Texas reporting requirements found that sites only report information when fugitive emissions are found. While this may be appropriate for demonstrating compliance to the State, it is not adequate information for the EPA to ensure compliance with the alternative fugitive standards for well sites and compressor stations located in Texas. Similar to Colorado, we examined the recordkeeping requirements and found that sites located in the State are already required by the State to keep records that facilitate the reporting required by NSPS subpart OOOOa for fugitive emissions components at well sites and compressor stations. Therefore, we are requiring that well sites and compressor stations located in Texas that adopt the alternative fugitive standards must report the information required in NSPS subpart OOOOa.

Finally, the requirements in Utah do not include reporting. Similar to Colorado and Texas, we reviewed the recordkeeping requirements. For Utah, sites must keep records of the monitoring plan and the monitoring surveys. We found these records are similar to the information that is required in the NSPS subpart OOOOa report for fugitive emissions components and would not require additional recordkeeping. Therefore, we are requiring that well sites located in Utah that adopt the alternative fugitive standards must report the information required in NSPS subpart OOOOa.

## VII. Impacts of These Final Amendments

### *A. What are the air impacts?*

The EPA projected that, from 2021 to 2030, relative to the baseline, the final rule will forgo about 450,000 short tons of methane emissions reductions (10 million tons $CO_2$ Eq.), 120,000 short tons of VOC emissions reductions, and 4,700 short tons of HAP emission reductions from facilities affected by this reconsideration. The EPA estimated regulatory impacts beginning in 2021 as it is the first full year of implementation of this rule. The EPA estimated impacts through 2030 to illustrate the accumulating effects of this rule over a longer period. The EPA did not estimate impacts after 2030 for reasons including limited information, as explained in the RIA.

### *B. What are the energy impacts?*

There will likely be minimal change in emissions control energy requirements resulting from this rule. Additionally, this final action continues to encourage the use of emission controls that recover hydrocarbon products that can be used on-site as fuel or reprocessed within the production process for sale. The energy impacts described in this section are those energy requirements associated with the operation of emission control devices. Potential impacts on the national energy economy from the rule are discussed in the economic impacts section.

### *C. What are the compliance cost reductions?*

The PV of the regulatory compliance cost reduction associated with this final rule over the 2021 to 2030 period was estimated to be $800 million (in 2016 dollars) using a 7-percent discount rate and $1.0 billion using a 3-percent discount rate. The EAV (rounded to two significant figures) of these cost reductions is estimated to be $110 million per year using either a 7-percent or 3-percent discount rate.

These estimates do not, however, include the forgone producer revenues associated with the decrease in the recovery of saleable natural gas, though some of the compliance actions required in the baseline would likely have captured saleable product that would have otherwise been emitted to the atmosphere. Estimates of the value of the recovered product were included in previous regulatory analyses as offsetting compliance costs. Because of the deregulatory nature of this final action, the EPA projected a reduction in the recovery of saleable product. Using the 2020 Annual Energy Outlook (AEO) projection of natural gas prices to estimate the value of the change in the recovered gas at the wellhead projected to result from the final action, the EPA estimated a PV of regulatory compliance cost reductions of the final rule over the 2021 to 2030 period of $750 million using a 7-percent discount rate and $950 million using a 3-percent discount rate. The corresponding estimates of the EAV of cost reductions after accounting for the forgone revenues were $100 million per year using a 7-percent discount rate and $110 million per year using a 3-percent discount rate.

### *D. What are the economic and employment impacts?*

The EPA used the National Energy Modeling System (NEMS) to estimate the impacts of the 2016 NSPS subpart OOOOa on the U.S. energy system. The NEMS is a publicly available model of the U.S. energy economy developed and maintained by the U.S. Energy Information Administration and is used to produce the AEO, a reference publication that provides detailed projections of the U.S. energy economy. The EPA estimated small impacts on crude oil and natural gas markets of the 2016 NSPS subpart OOOOa rule over the 2020 to 2025 period. This final rule will result in a decrease in total compliance costs relative to the baseline. Therefore, the EPA expects that this rule will partially reduce the impacts estimated for the 2016 NSPS subpart OOOOa in the 2016 NSPS subpart OOOOa RIA.

Executive Order 13563 directs Federal agencies to consider the effect of regulations on job creation and employment. According to the Executive order, ''our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science.'' (Executive Order 13563, 2011). While a standalone analysis of employment impacts is not included in a standard benefit-cost analysis, such an analysis is of concern in the current economic climate given continued interest in the employment impact of regulations such as this final rule. The EPA estimated the changes in compliance-related labor impacts due to the changes finalized in this rule. As presented in the RIA for this action, the EPA projected there will be reductions in the labor required for compliance-related activities associated with the 2016 NSPS subpart OOOOa requirements relating to fugitive emissions monitoring and certifications of CVS.

### *E. What are the forgone benefits?*

The EPA expects forgone climate and health benefits due to the forgone emissions reductions projected under this final rule. The EPA estimated the forgone domestic climate benefits from the forgone methane emissions reductions using an interim measure of the domestic social cost of methane (SC-$CH_4$). The SC-$CH_4$ estimates used here were developed under Executive Order 13783 for use in regulatory analyses until an improved estimate of the impacts of climate change to the U.S.

can be developed based on the best available science and economics. Executive Order 13783 directed agencies to ensure that estimates of the social cost of GHG used in regulatory analyses ''are based on the best available science and economics'' and are consistent with the guidance contained in Office of Management and Budget (OMB) Circular A–4, ''including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates'' (Executive Order 13783, Section 5(c)). In addition, Executive Order 13783 withdrew the TSDs and the August 2016 Addendum to these TSDs describing the global social cost of GHG estimates developed under the prior Administration as no longer representative of government policy. The withdrawn TSDs and Addendum were developed by an interagency working group that included the EPA and other executive branch entities and were used in the 2016 NSPS subpart OOOOa RIA.

The EPA estimated the PV of the forgone domestic climate benefits over the 2021 to 2030 period to be $19 million under a 7-percent discount rate and $71 million under a 3-percent discount rate. The EAV of these forgone benefits is estimated $2.5 million per year under a 7-percent discount rate and $8.1 million per year under a 3-percent discount rate. These values represent only a partial accounting of domestic climate impacts from methane emissions and do not account for health effects of ozone exposure from the increase in methane emissions.

Under the final rule, the EPA expects that forgone VOC emission reductions will degrade air quality and are likely to adversely affect health and welfare associated with exposure to ozone, $PM_{2.5}$, and HAP, but we did not quantify these effects at this time due to the data limitations described below. This omission should not imply that these forgone benefits may not exist; rather, it reflects the inherent difficulties in accurately modeling the direct and indirect impacts of the projected reductions in emissions for this industrial sector. To the extent that the EPA were to quantify these ozone and PM impacts, it would estimate the number and value of avoided premature deaths and illnesses using an approach detailed in the Particulate Matter NAAQS and Ozone NAAQS RIAs.[83] [84] This approach relies on full-form air quality modeling. The Agency is committed to assessing ways of conducting full-form air quality modeling for the oil and natural gas sector that would be suitable for use in regulatory analysis in the context of NSPS, including ways to address the uncertainties regarding the scope and magnitude of VOC emissions.

When quantifying the incidence and economic value of the human health impacts of air quality changes, the Agency sometimes relies upon alternative approaches to using full-form air quality modeling, called reduced-form techniques, often reported as ''benefit-per-ton'' values that relate air pollution impacts to changes in air pollutant precursor emissions.[85] A small, but growing, literature characterizes the air quality and health impacts from the oil and natural gas sector.[86] [87] [88] The Agency feels more work needs to be done to vet the analysis and methodologies for all potential approaches for valuing the health effects of VOC emissions before they are used in regulatory analysis, but is committed to continuing this work. Recently, the EPA systematically compared the changes in benefits, and concentrations where available, from its benefit-per-ton technique and other reduced-form techniques to the changes in benefits and concentrations derived from full-form photochemical model representation of a few different specific emissions scenarios.[89] The Agency's goal was to create a methodology by which investigators could better understand the suitability of alternative reduced-form air quality modeling techniques for estimating the health impacts of criteria pollutant emissions changes in the EPA's benefit-cost analysis, including the extent to which reduced form models may over- or under-estimate benefits (compared to full-scale modeling) under different scenarios and air quality concentrations. The EPA Science Advisory Board (SAB) recently convened a panel to review this report.[90] In particular, the SAB will assess the techniques the Agency used to appraise these tools; the Agency's approach for depicting the results of reduced-form tools; and, steps the Agency might take for improving the reliability of reduced-form techniques for use in future RIAs.

## VIII. Statutory and Executive Order Reviews

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

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

This action is an economically significant regulatory action that was submitted to OMB for review. Any changes made in response to OMB recommendations have been documented in the docket. The EPA prepared an analysis of the potential costs and benefits associated with this action. This RIA is available in the docket. The RIA describes in detail the basis for the EPA's assumptions and characterizes the various sources of uncertainties affecting the estimates below.

Table 6 shows the present value and equivalent annualized value of the costs, benefits, and net benefits of the final rule for the 2021 to 2030 period relative to the baseline using discount rates of 7 and 3 percent, respectively. The table also shows the total forgone emission reductions projected from 2021 to 2030 relative to the baseline. In the following table, we refer to the compliance cost reductions as the ''benefits'' and the forgone benefits as the ''costs'' of this final action. The net benefits are the benefits (total cost

[83] U.S. EPA. December 2012. ''Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter.'' EPA–452/R–12–005. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. *https://www3.epa.gov/ttnecas1/regdata/RIAs/finalria.pdf.* Accessed January 9, 2020.

[84] U.S. U.S. EPA. September 2015. ''Regulatory Impact Analysis of the Final Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone.'' EPA–452/R–15–007. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. *https://www3.epa.gov/ttnecas1/docs/20151001ria.pdf.* Accessed January 9, 2020.

[85] U.S. EPA. 2018. ''Technical Support Document: Estimating the Benefit per Ton of Reducing $PM_{2.5}$ Precursors from 17 Sectors.'' February. *https://www.epa.gov/sites/production/files/2018-02/documents/sourceapportionmentbpttsd_2018.pdf.* Accessed January 9, 2020.

[86] Fann, N., K.R. Baker, E.A.W. Chan, A. Eyth, A. Macpherson, E. Miller, and J. Snyder. 2018. ''Assessing Human Health $PM_{2.5}$ and Ozone Impacts from U.S. Oil and Natural Gas Sector Emissions in 2025.'' Environmental Science and Technology 52(15):8095–8103.

[87] Litovitz, A., A. Curtright, S. Abramzon, N. Burger, and C. Samaras. 2013. ''Estimation of Regional Air-Quality Damages from Marcellus Shale Natural Gas Extraction in Pennsylvania.'' Environmental Research Letters 8(1), 014017.

[88] Loomis, J. and M. Haefele. 2017. ''Quantifying Market and Non-market Benefits and Costs of Hydraulic Fracturing in the United States: A Summary of the Literature.'' Ecological Economics 138:160–167.

[89] This analysis compared the benefits estimated using full-form photochemical air quality modeling simulations (CMAQ and CAMx) against four reduced-form tools, including: InMAP; AP2/3; EASIUR and the EPA's benefit-per-ton.

[90] 85 FR 23823 (April 29, 2020).

reductions) minus the costs (forgone domestic climate benefits).

TABLE 6—SUMMARY OF THE PRESENT VALUE AND EQUIVALENT ANNUALIZED VALUE OF THE MONETIZED FORGONE BENEFITS, COST REDUCTIONS, AND NET BENEFITS FROM 2021 TO 2030, 7-PERCENT AND 3-PERCENT DISCOUNT RATES

[Millions of 2016$]

| | 7-Percent discount rate | | 3-Percent discount rate | |
|---|---|---|---|---|
| | PV | EAV | PV | EAV |
| Benefits (Total Cost Reductions) | $750 | $100 | $950 | $110 |
| *Compliance Cost Reductions* | *800* | *110* | *1,000* | *110* |
| *Forgone Value of Product Recovery* | *44* | *5.9* | *57* | *6.5* |
| Costs (Forgone Domestic Climate Benefits) | 19 | 2.5 | 71 | 8.1 |
| Net Benefits | 730 | 97 | 880 | 100 |
| Non-monetized Forgone Benefits | Non-monetized climate impacts from increases in methane emissions.<br>Health effects of $PM_{2.5}$ and ozone exposure from an increase of about 120,000 short tons of VOC from 2021 through 2030.<br>Health effects of HAP exposure from an increase of about 4,700 short tons of HAP from 2021 through 2030.<br>Health effects of ozone exposure from an increase of about 450,000 short tons of methane from 2021 through 2030.<br>Visibility impairment.<br>Vegetation effects. | | | |

**Note:** Estimates are rounded to two significant digits and may not sum due to independent rounding.

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

This action is considered an Executive Order 13771 deregulatory action. Details on the estimated cost reductions of this final rule can be found in the EPA's analysis of the potential costs and benefits associated with this action.

*C. Paperwork Reduction Act (PRA)*

The information collection activities in this rule have been submitted for approval to the OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2523.04, Control Number 2060–0721. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

A summary of the information collection activities previously submitted to the OMB for the final action titled ''Standards of Performance for Crude Oil and Natural Gas Facilities for which Construction, Modification, or Reconstruction Commenced After September 18, 2015'' (2016 NSPS subpart OOOOa), under the PRA, and assigned OMB Control Number 2060–0721, can be found at 81 FR 35890. You can find a copy of the 2016 ICR in the 2016 NSPS subpart OOOOa docket (EPA–HQ–OAR–2010–0505–7626). The EPA is revising the information collection activities as a result of the amendments in this final rule. You can find a copy of the revised ICR in the docket for this rule (EPA–HQ–OAR–2017–0483), and it is briefly summarized here.

Comments were received on the October 15, 2018 (83 FR 52056) proposed rulemaking indicating that the recordkeeping and reporting burden for the 2016 NSPS subpart OOOOa was significantly underestimated, as discussed in section V.B.2 of this preamble. After consideration of these comments, the EPA updated the assessment of the recordkeeping and reporting burden for the 2016 NSPS subpart OOOOa. The updated 2016 NSPS subpart OOOOa ICR was used as the ''baseline'' from which changes in the Review Rule published in the **Federal Register** of Monday, September 14, 2020 were compared. Additional information on the Review Rule can be found at Docket ID No. EPA–HQ–OAR–2017–0757.

This final rule includes additional revisions to the information collection activities for NSPS subpart OOOOa.

*Respondents/affected entities:* Owners or operators of onshore oil and natural gas affected facilities.

*Respondent's obligation to respond:* Mandatory.

*Estimated number of respondents:* 519.

*Frequency of response:* Annually or semiannually, depending on the requirement.

*Total estimated burden:* 1,124,965 hours. Burden is defined at 5 CFR 1320.3(b).

*Total estimated cost:* $215,874,903, includes $2,681,370 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

*D. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. This is a deregulatory action, and the burden on all entities affected by this final rule, including small entities, is reduced compared to the 2016 NSPS subpart

OOOOa. See the RIA for details. We have, therefore, concluded that this action will relieve regulatory burden for all directly regulated small entities.

*E. Unfunded Mandates Reform Act (UMRA)*

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

*F. Executive Order 13132: Federalism*

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

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

This action does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

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

This action is not subject to Executive Order 13045 because the EPA does not believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. While children may experience forgone benefits as a result of this action, the potential forgone emission reductions (and related benefits) from the final amendments are small compared to the overall emission reductions (and related benefits) from the 2016 NSPS subpart OOOOa.

This final action does not affect the level of public health and environmental protection already being provided by existing NAAQS and other mechanisms in the CAA. This action does not affect applicable local, state, or Federal permitting or air quality management programs that will continue to address areas with degraded air quality and maintain the air quality in areas meeting current standards. Areas that need to reduce criteria air pollution to meet the NAAQS will still need to rely on control strategies to reduce emissions. The EPA does not believe this decrease in emission reductions projected from this action will have a disproportionate adverse effect on children's health.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. In the RIA accompanying the 2016 NSPS subpart OOOOa, the EPA used the NEMS to estimate the impacts of the 2016 NSPS subpart OOOOa on the United States energy system. The EPA estimated small impacts of that rule over the 2020 to 2025 period relative to the baseline for that rule. This final rule is estimated to result in a decrease in total compliance costs, with the reduction in costs affecting a subset of the affected entities under NSPS subpart OOOOa. Therefore, the EPA expects that this deregulatory action will reduce the impacts estimated for the final NSPS in the 2016 RIA and, as such, is not a significant energy action.

*J. National Technology Transfer and Advancement Act (NTTAA)*

This action involves technical standards.[91] Therefore, the EPA conducted searches for the Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration through the Enhanced National Standards Systems Network (NSSN) Database managed by the American National Standards Institute (ANSI). Searches were conducted for EPA Methods 1, 1A, 2, 2A, 2C, 2D, 3A, 3B, 3C, 4, 6, 10, 15, 16, 16A, 18, 21, 22, and 25A of 40 CFR part 60, appendix A. No applicable voluntary consensus standards (VCS) were identified for EPA Methods 1A, 2A, 2D, 21, and 22 and none were brought to its attention in comments. All potential standards were reviewed to determine the practicality of the VCS for this rule.

Two VCS were identified as an acceptable alternative to the EPA test methods for the purpose of this rule. First, ANSI/ASME PTC 19–10–1981, ''Flue and Exhaust Gas Analyses (Part 10),'' was identified to be used in lieu of EPA Methods 3B, 6, 6A, 6B, 15A, and 16A manual portions only and not the instrumental portion. This standard includes manual and instructional methods of analysis for carbon dioxide, carbon monoxide, hydrogen sulfide, nitrogen oxides, oxygen, and $SO_2$. Second, ASTM D6420–99 (2010), ''Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography/Mass Spectrometry,'' is an acceptable alternative to EPA Method 18 with the following caveats; only use when the target compounds are all known and the target compounds are all listed in ASTM D6420 as measurable. ASTM D6420 should never be specified as a total VOC Method. (ASTM D6420–99 (2010) is not incorporated by reference in 40 CFR part 60.) The search identified 19 VCS that were potentially applicable for this rule in lieu of the EPA reference methods. However, these have been determined to not be practical due to lack of equivalency, documentation, validation of data, and other important technical and policy considerations. For additional information, please see the memorandum, ''Voluntary Consensus Standard Results for Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration,'' located at Docket ID No. EPA–HQ–OAR–2017–0483.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). While these communities may experience forgone benefits as a result of this action, the potential forgone emission reductions (and related benefits) from the final amendments are small compared to the overall emission reductions (and related benefits) from the 2016 NSPS subpart OOOOa. The amendments in this final action will decrease the projected emission reductions of the rule it revises by a small degree. Based on the revisions in this final rule, for the year 2025, we estimate a decrease in the projected emissions reductions anticipated by the 2016 NSPS subpart OOOOa in the production and processing segments of about 12 to 15 percent for methane and about 7 to 9 percent for VOC.

[91] These technical standards are the same as those previously finalized at 40 CFR part 60, subpart OOOOa (81 FR 35824). 2016 NSPS subpart OOOOa also previously incorporated by reference 10 technical standards. The incorporation by reference remains unchanged in this action. See Docket ID Item Nos. EPA–HQ–OAR–2010–0505–7657 and EPA–HQ–OAR–2010–0505–7658.

Moreover, this action does not affect the level of public health and environmental protection already being provided by existing NAAQS, including ozone and $PM_{2.5}$, and other mechanisms in the CAA. This action does not affect applicable local, state, or Federal permitting or air quality management programs that will continue to address areas with degraded air quality and maintain the air quality in areas meeting current standards. Areas that need to reduce criteria air pollution to meet the NAAQS will still need to rely on control strategies to reduce emissions.

*L. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a ''major rule'' as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 60**

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping.

**Andrew Wheeler,**

*Administrator.*

For the reasons set out in the preamble, 40 CFR part 60 is amended as follows:

## PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

■ 1. The authority citation for part 60 continues to read as follows:

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

## Subpart OOOOa—Standards of Performance for Crude Oil and Natural Gas Facilities for Which Construction, Modification or Reconstruction Commenced After September 18, 2015

■ 2. Section 60.5360a is amended by revising paragraph (a) to read as follows:

### § 60.5360a What is the purpose of this subpart?

(a) This subpart establishes emission standards and compliance schedules for the control of volatile organic compounds (VOC) and sulfur dioxide ($SO_2$) emissions from affected facilities in the crude oil and natural gas production source category that commence construction, modification, or reconstruction after September 18, 2015.

* * * * *

■ 3. Section 60.5365a is amended by revising paragraphs (e), (f) introductory text, (g) introductory text, and (g)(1) and adding paragraph (i)(4) to read as follows:

### § 60.5365a Am I subject to this subpart?

* * * * *

(e) Each storage vessel affected facility, which is a single storage vessel as specified in paragraph (e)(1), (2), or (3) of this section.

(1) A single storage vessel that commenced construction, reconstruction, or modification after September 18, 2015, and on or before November 16, 2020, is a storage vessel affected facility if its potential for VOC emissions is equal to or greater than 6 tons per year (tpy) as determined according to this paragraph (e)(1). The potential for VOC emissions must be calculated using a generally accepted model or calculation methodology, based on the maximum average daily throughput (as defined in § 60.5430a) determined for a 30-day period prior to the applicable emission determination deadline specified in paragraphs (e)(2)(i) and (ii) of this section, except as provided in paragraph (e)(5)(iv). The determination may take into account requirements under a legally and practicably enforceable limit in an operating permit or other requirement established under a Federal, state, local, or tribal authority.

(2) Except as specified in paragraph (e)(3) of this section, a single storage vessel that commenced construction, reconstruction or modification after November 16, 2020, is a storage vessel affected facility if the potential for VOC emissions is equal to or greater than 6 tpy as determined according to paragraph (e)(2)(i) or (ii) of this section, except as provided in paragraph (e)(5)(iv) of this section. The determination may take into account requirements under a legally and practicably enforceable limit in an operating permit or other requirement established under a Federal, state, local, or tribal authority. The potential for VOC emissions is calculated on an individual storage vessel basis and is not averaged across the number of storage vessels at the site.

(i) For each storage vessel receiving liquids pursuant to the standards for well affected facilities in § 60.5375a, including wells subject to § 60.5375a(f), you must determine the potential for VOC emissions within 30 days after startup of production of the well, except as provided in paragraph (e)(5)(iv) of this section. The potential for VOC emissions must be calculated for each individual storage vessel using a generally accepted model or calculation methodology, based on the maximum average daily throughput, as defined in § 60.5430a, determined for a 30-day period of production.

(ii) For each storage vessel located at a compressor station or onshore natural gas processing plant, you must determine the potential for VOC emissions prior to startup of the compressor station or onshore natural gas processing plant using either method described in paragraph (e)(2)(ii)(A) or (B) of this section.

(A) Determine the potential for VOC emissions using a generally accepted model or calculation methodology and based on the throughput established in a legally and practicably enforceable limit in an operating permit or other requirement established under a Federal, state, local, or tribal authority; or

(B) Determine the potential for VOC emissions using a generally accepted model or calculation methodology and based on projected maximum average daily throughput. Maximum average daily throughput is determined using a generally accepted engineering model (*e.g.,* volumetric condensate rates from the storage vessels based on the maximum gas throughput capacity of each producing facility) to project the maximum average daily throughput for the storage vessel.

(3) If a storage vessel battery, which consists of two or more storage vessels, meets all of the design and operational criteria specified in paragraphs (e)(3)(i) through (iv) of this section through legally and practicably enforceable standards in a permit or other requirement established under Federal, state, local, or tribal authority, then each storage vessel in such storage vessel battery is a storage vessel affected facility.

(i) The storage vessels must be manifolded together with piping such that all vapors are shared among the headspaces of the storage vessels;

(ii) The storage vessels must be equipped with a closed vent system that is designed, operated, and maintained to route the vapors back to the process or to a control device;

(iii) The vapors collected in paragraph (e)(3)(i) of this section must be routed back to the process or to a control device that reduces VOC emissions by at least 95.0 percent; and

(iv) The VOC emissions, averaged across the number of storage vessels in the battery meeting all of the criteria of paragraphs (e)(3)(i) through (iii) of this section, are equal to or greater than 6 tpy.

(v) If a storage vessel battery meeting all of the criteria specified in paragraphs (e)(3)(i) through (iii) of this section through legally and practicably

enforceable standards in a permit or other requirements established under Federal, state, local, or tribal authority, emits less than 6 tpy of VOC emissions averaged across the number of storage vessels in the battery, none of the storage vessels in the battery are storage vessel affected facilities.

(4) A storage vessel affected facility that subsequently has its potential for VOC emissions decrease to less than 6 tpy shall remain an affected facility under this subpart.

(5) For storage vessels not subject to a legally and practicably enforceable limit in an operating permit or other requirement established under Federal, state, local, or tribal authority, any vapor from the storage vessel that is recovered and routed to a process through a VRU designed and operated as specified in this section is not required to be included in the determination of potential for VOC emissions for purposes of determining affected facility status, provided you comply with the requirements in paragraphs (e)(5)(i) through (iv) of this section.

(i) You meet the cover requirements specified in § 60.5411a(b).

(ii) You meet the closed vent system requirements specified in § 60.5411a(c) and (d).

(iii) You must maintain records that document compliance with paragraphs (e)(5)(i) and (ii) of this section.

(iv) In the event of removal of apparatus that recovers and routes vapor to a process, or operation that is inconsistent with the conditions specified in paragraphs (e)(5)(i) and (ii) of this section, you must determine the storage vessel's potential for VOC emissions according to this section within 30 days of such removal or operation.

(6) The requirements of this paragraph (e)(6) apply to each storage vessel affected facility immediately upon startup, startup of production, or return to service. A storage vessel affected facility that is reconnected to the original source of liquids is a storage vessel affected facility subject to the same requirements that applied before being removed from service. Any storage vessel that is used to replace any storage vessel affected facility is subject to the same requirements that applied to the storage vessel affected facility being replaced.

(7) A storage vessel with a capacity greater than 100,000 gallons used to recycle water that has been passed through two stage separation is not a storage vessel affected facility.

(f) The group of all equipment within a process unit at an onshore natural gas processing plant is an affected facility.

* * * * *

(g) Sweetening units located at onshore natural gas processing plants that commenced construction, modification, or reconstruction after September 18, 2015, and on or before November 16, 2020, and sweetening units that commence construction, modification, or reconstruction after November 16, 2020.

(1) Each sweetening unit that processes natural gas produced from either onshore or offshore wells is an affected facility; and

* * * * *

(i) * * *

(4) For purposes of § 60.5397a, a ''modification'' to an existing source separate tank battery surface site occurs when:

(i) Any of the actions in paragraphs (i)(3)(i) through (iii) of this section occurs at an existing source separate tank battery surface site;

(ii) A well sending production to an existing source separate tank battery site is modified, as defined in paragraphs (i)(3)(i) through (iii) of this section; or

(iii) A well site subject to the requirements in § 60.5397a removes all major production and processing equipment, as defined in § 60.5430a, such that it becomes a wellhead only well site and sends production to an existing source separate tank battery surface site.

* * * * *

■ 4. Section 60.5375a is amended by revising paragraphs (a)(1)(i), (a)(1)(iii) introductory text, and (f)(3)(ii) and adding paragraph (f)(4) to read as follows:

**§ 60.5375a What VOC standards apply to well affected facilities?**

* * * * *

(a) * * *

(1) * * *

(i) During the initial flowback stage, route the flowback into one or more well completion vessels or storage vessels and commence operation of a separator unless it is technically infeasible for a separator to function. The separator may be a production separator, but the production separator also must be designed to accommodate flowback. Any gas present in the initial flowback stage is not subject to control under this section.

* * * * *

(iii) You must have the separator onsite or otherwise available for use at a centralized facility or well pad that services the well affected facility during well completions. The separator must be available and ready for use to comply with paragraph (a)(1)(ii) of this section during the entirety of the flowback period, except as provided in paragraphs (a)(1)(iii)(A) through (C) of this section.

* * * * *

(f) * * *

(3) * * *

(ii) Route all flowback into one or more well completion vessels and commence operation of a separator unless it is technically infeasible for a separator to function. Any gas present in the flowback before the separator can function is not subject to control under this section. Capture and direct recovered gas to a completion combustion device, except in conditions that may result in a fire hazard or explosion, or where high heat emissions from a completion combustion device may negatively impact tundra, permafrost, or waterways. Completion combustion devices must be equipped with a reliable continuous pilot flame.

(4) You must submit the notification as specified in § 60.5420a(a)(2), submit annual reports as specified in § 60.5420a(b)(1) and (2) and maintain records specified in § 60.5420a(c)(1)(iii) for each wildcat and delineation well. You must submit the notification as specified in § 60.5420a(a)(2), submit annual reports as specified in § 60.5420a(b)(1) and (2), and maintain records as specified in § 60.5420a(c)(1)(iii) and (vii) for each low pressure well.

* * * * *

■ 5. Section 60.5385a is amended by revising paragraph (a)(1) to read as follows:

**§ 60.5385a What VOC standards apply to reciprocating compressor affected facilities?**

* * * * *

(a) * * *

(1) On or before the compressor has operated for 26,000 hours. The number of hours of operation must be continuously monitored beginning upon initial startup of your reciprocating compressor affected facility, August 2, 2016, or the date of the most recent reciprocating compressor rod packing replacement, whichever is latest.

* * * * *

■ 6. Section 60.5393a is amended by revising paragraphs (b) and (c) and removing paragraph (f) to read as follows:

**§ 60.5393a What VOC standards apply to pneumatic pump affected facilities?**

* * * * *

(b) For each pneumatic pump affected facility at a well site you must reduce natural gas emissions by 95.0 percent, except as provided in paragraphs (b)(3), (4), and (5) of this section.

(1)–(2) [Reserved]

(3) You are not required to install a control device solely for the purpose of complying with the 95.0 percent reduction requirement of paragraph (b) of this section. If you do not have a control device installed on site by the compliance date and you do not have the ability to route to a process, then you must comply instead with the provisions of paragraphs (b)(3)(i) and (ii) of this section. For the purposes of this section, boilers and process heaters are not considered control devices. In addition, routing emissions from pneumatic pump discharges to boilers and process heaters is not considered routing to a process.

(i) Submit a certification in accordance with § 60.5420a(b)(8)(i)(A) in your next annual report, certifying that there is no available control device or process on site and maintain the records in § 60.5420a(c)(16)(i) and (ii).

(ii) If you subsequently install a control device or have the ability to route to a process, you are no longer required to comply with paragraph (b)(3)(i) of this section and must submit the information in § 60.5420a(b)(8)(ii) in your next annual report and maintain the records in § 60.5420a(c)(16)(i), (ii), and (iii). You must be in compliance with the requirements of paragraph (b) of this section within 30 days of startup of the control device or within 30 days of the ability to route to a process.

(4) If the control device available on site is unable to achieve a 95-percent reduction and there is no ability to route the emissions to a process, you must still route the pneumatic pump affected facility's emissions to that control device. If you route the pneumatic pump affected facility to a control device installed on site that is designed to achieve less than a 95-percent reduction, you must submit the information specified in § 60.5420a(b)(8)(i)(C) in your next annual report and maintain the records in § 60.5420a(c)(16)(iii).

(5) If an owner or operator determines, through an engineering assessment, that routing a pneumatic pump to a control device or a process is technically infeasible, the requirements specified in paragraphs (b)(5)(i) through (iv) of this section must be met.

(i) The owner or operator shall conduct the assessment of technical infeasibility in accordance with the criteria in paragraph (b)(5)(iii) of this section and have it certified by either a qualified professional engineer or an in-house engineer with expertise on the design and operation of the pneumatic pump in accordance with paragraph (b)(5)(ii) of this section.

(ii) The following certification, signed and dated by the qualified professional engineer or in-house engineer, shall state: ''I certify that the assessment of technical infeasibility was prepared under my direction or supervision. I further certify that the assessment was conducted and this report was prepared pursuant to the requirements of § 60.5393a(b)(5)(iii). Based on my professional knowledge and experience, and inquiry of personnel involved in the assessment, the certification submitted herein is true, accurate, and complete.''

(iii) The assessment of technical infeasibility to route emissions from the pneumatic pump to an existing control device onsite or to a process shall include, but is not limited to, safety considerations, distance from the control device or process, pressure losses and differentials in the closed vent system, and the ability of the control device or process to handle the pneumatic pump emissions which are routed to them. The assessment of technical infeasibility shall be prepared under the direction or supervision of the qualified professional engineer or in-house engineer who signs the certification in accordance with paragraph (b)(5)(ii) of this section.

(iv) The owner or operator shall maintain the records specified in § 60.5420a(c)(16)(iv).

(6) If the pneumatic pump is routed to a control device or a process and the control device or process is subsequently removed from the location or is no longer available, you are no longer required to be in compliance with the requirements of paragraph (b) of this section, and instead must comply with paragraph (b)(3) of this section and report the change in the next annual report in accordance with § 60.5420a(b)(8)(ii).

(c) If you use a control device or route to a process to reduce emissions, you must connect the pneumatic pump affected facility through a closed vent system that meets the requirements of §§ 60.5411a(d) and (e), 60.5415a(b)(3), and 60.5416a(d).

* * * * *

■ 7. Section 60.5395a is amended by revising the introductory text to read as follows:

**§ 60.5395a What VOC standards apply to storage vessel affected facilities?**

Each storage vessel affected facility must comply with the VOC standards in this section, except as provided in paragraph (e) of this section.

* * * * *

■ 8. Section 60.5397a is amended by revising paragraphs (a), (c)(2), (c)(7)(i) introductory text, and (c)(8) introductory text, adding paragraph (c)(8)(iii), and revising paragraphs (d), (f), (g) introductory text, (g)(1), (2), and (5), and (h) to read as follows:

**§ 60.5397a What fugitive emissions VOC standards apply to the affected facility which is the collection of fugitive emissions components at a well site and the affected facility which is the collection of fugitive emissions components at a compressor station?**

* * * * *

(a) You must comply with paragraph (a)(1) of this section, unless your affected facility under § 60.5365a(i) (*i.e.,* the collection of fugitive emissions components at a well site) meets the conditions specified in either paragraph (a)(1)(i) or (ii) of this section. If your affected facility under § 60.5365a(i) (*i.e.,* the collection of fugitive emissions components at a well site) meets the conditions specified in either paragraph (a)(1)(i) or (ii) of this section, you must comply with either paragraph (a)(1) or (2) of this section.

(1) You must monitor all fugitive emission components, as defined in § 60.5430a, in accordance with paragraphs (b) through (g) of this section. You must repair all sources of fugitive emissions in accordance with paragraph (h) of this section. You must keep records in accordance with paragraph (i) of this section and report in accordance with paragraph (j) of this section. For purposes of this section, fugitive emissions are defined as any visible emission from a fugitive emissions component observed using optical gas imaging or an instrument reading of 500 parts per million (ppm) or greater using Method 21 of appendix A–7 to this part.

(i) *First 30-day production.* For the collection of fugitive emissions components at a well site, where the total production of the well site is at or below 15 barrels of oil equivalent (boe) per day for the first 30 days of production, according to § 60.5415a(j), you must comply with the provisions of either paragraph (a)(1) or (2) of this section. Except as provided in this paragraph (a)(1)(i), the calculation must be performed within 45 days of the end of the first 30 days of production. To convert gas production to equivalent barrels of oil, divide the cubic feet of gas produced by 6,000. For well sites that commenced construction, reconstruction, or modification between

October 15, 2019, and November 16, 2020, the owner or operator may use the records of the first 30 days of production after becoming subject to this subpart, if available, to determine if the total well site production is at or below 15 boe per day, provided this determination is completed by December 14, 2020.

(ii) *Well site production decline.* For the collection of fugitive emissions components at a well site, where, at any time, the total production of the well site is at or below 15 boe per day based on a rolling 12-month average, you must comply with the provisions of either paragraph (a)(1) or (2) of this section. To convert gas production to equivalent barrels of oil, divide the cubic feet of gas produced by 6,000.

(2) You must maintain the total production for the well site at or below 15 boe per day based on a rolling 12-month average, according to §§ 60.5410a(k) and 60.5415a(i), comply with the reporting requirements in § 60.5420a(b)(7)(i)(C), and the recordkeeping requirements in § 60.5420a(c)(15)(ii), until such time that you perform any of the actions in paragraphs (a)(2)(i) through (v) of this section. If any of the actions listed in paragraphs (a)(2)(i) through (v) of this section occur, you must comply with paragraph (a)(3) of this section.

(i) A new well is drilled at the well site;

(ii) A well at the well site is hydraulically fractured;

(iii) A well at the well site is hydraulically refractured;

(iv) A well at the well site is stimulated in any manner for the purpose of increasing production, including well workovers; or

(v) A well at the well site is shut-in for the purpose of increasing production from the well.

(3) You must determine the total production for the well site for the first 30 days after any of the actions listed in paragraphs (a)(2)(i) through (v) of this section is completed, according to § 60.5415a(j), comply with paragraph (a)(3)(i) or (ii) of this section, the reporting requirements in § 60.5420a(b)(7)(i)(C), and the recordkeeping requirements in § 60.5420a(c)(15)(iii).

(i) If the total production for the well site is at or below 15 boe per day for the first 30 days after the action is completed, according to § 60.5415a(j), you must either continue to comply with paragraph (a)(2) of this section or comply with paragraph (a)(1) of this section.

(ii) If the total production for the well site is greater than 15 boe per day for the first 30 days after the action is completed, according to § 60.5415a(j), you must comply with paragraph (a)(1) of this section and conduct an initial monitoring survey for the collection of fugitive emissions components at the well site in accordance with the same schedule as for modified well sites as specified in § 60.5397a(f)(1).

* * * * *

(c) * * *

(2) Technique for determining fugitive emissions (*i.e.,* Method 21 of appendix A–7 to this part or optical gas imaging meeting the requirements in paragraphs (c)(7)(i) through (vii) of this section).

* * * * *

(7) * * *

(i) Verification that your optical gas imaging equipment meets the specifications of paragraphs (c)(7)(i)(A) and (B) of this section. This verification is an initial verification, and may either be performed by the facility, by the manufacturer, or by a third party. For the purposes of complying with the fugitive emissions monitoring program with optical gas imaging, a fugitive emission is defined as any visible emissions observed using optical gas imaging.

* * * * *

(8) If you are using Method 21 of appendix A–7 of this part, your plan must also include the elements specified in paragraphs (c)(8)(i) through (iii) of this section. For the purposes of complying with the fugitive emissions monitoring program using Method 21 of appendix A–7 of this part a fugitive emission is defined as an instrument reading of 500 ppm or greater.

* * * * *

(iii) Procedures for calibration. The instrument must be calibrated before use each day of its use by the procedures specified in Method 21 of appendix A–7 of this part. At a minimum, you must also conduct precision tests at the interval specified in Method 21 of appendix A–7 of this part, Section 8.1.2, and a calibration drift assessment at the end of each monitoring day. The calibration drift assessment must be conducted as specified in paragraph (c)(8)(iii)(A) of this section. Corrective action for drift assessments is specified in paragraphs (c)(8)(iii)(B) and (C) of this section.

(A) Check the instrument using the same calibration gas that was used to calibrate the instrument before use. Follow the procedures specified in Method 21 of appendix A–7 of this part, Section 10.1, except do not adjust the meter readout to correspond to the calibration gas value. If multiple scales are used, record the instrument reading for each scale used. Divide the arithmetic difference of the initial and post-test calibration response by the corresponding calibration gas value for each scale and multiply by 100 to express the calibration drift as a percentage.

(B) If a calibration drift assessment shows a negative drift of more than 10 percent, then all equipment with instrument readings between the fugitive emission definition multiplied by (100 minus the percent of negative drift/divided by 100) and the fugitive emission definition that was monitored since the last calibration must be re-monitored.

(C) If any calibration drift assessment shows a positive drift of more than 10 percent from the initial calibration value, then, at the owner/operator's discretion, all equipment with instrument readings above the fugitive emission definition and below the fugitive emission definition multiplied by (100 plus the percent of positive drift/divided by 100) monitored since the last calibration may be re-monitored.

(d) Each fugitive emissions monitoring plan must include the elements specified in paragraphs (d)(1) through (3) of this section, at a minimum, as applicable.

(1) If you are using optical gas imaging, your plan must include procedures to ensure that all fugitive emissions components are monitored during each survey. Example procedures include, but are not limited to, a sitemap with an observation path, a written narrative of where the fugitive emissions components are located and how they will be monitored, or an inventory of fugitive emissions components.

(2) If you are using Method 21 of appendix A–7 of this part, your plan must include a list of fugitive emissions components to be monitored and method for determining the location of fugitive emissions components to be monitored in the field (*e.g.,* tagging, identification on a process and instrumentation diagram, etc.).

(3) Your fugitive emissions monitoring plan must include the written plan developed for all of the fugitive emissions components designated as difficult-to-monitor in accordance with paragraph (g)(3) of this section, and the written plan for fugitive emissions components designated as unsafe-to-monitor in accordance with paragraph (g)(4) of this section.

* * * * *

(f)(1) You must conduct an initial monitoring survey within 90 days of the startup of production, as defined in

§ 60.5430a, for each collection of fugitive emissions components at a new well site or by June 3, 2017, whichever is later. For a modified collection of fugitive emissions components at a well site, the initial monitoring survey must be conducted within 90 days of the startup of production for each collection of fugitive emissions components after the modification or by June 3, 2017, whichever is later. Notwithstanding the preceding deadlines, for each collection of fugitive emissions components at a well site located on the Alaskan North Slope, as defined in § 60.5430a, that starts up production between September and March, you must conduct an initial monitoring survey within 6 months of the startup of production for a new well site, within 6 months of the first day of production after a modification of the collection of fugitive emission components, or by the following June 30, whichever is latest.

(2) You must conduct an initial monitoring survey within 90 days of the startup of a new compressor station for each collection of fugitive emissions components at the new compressor station or by June 3, 2017, whichever is later. For a modified collection of fugitive emissions components at a compressor station, the initial monitoring survey must be conducted within 90 days of the modification or by June 3, 2017, whichever is later. Notwithstanding the preceding deadlines, for each collection of fugitive emissions components at a new compressor station located on the Alaskan North Slope that starts up between September and March, you must conduct an initial monitoring survey within 6 months of the startup date for new compressor stations, within 6 months of the modification, or by the following June 30, whichever is latest.

(g) A monitoring survey of each collection of fugitive emissions components at a well site or at a compressor station must be performed at the frequencies specified in paragraphs (g)(1) and (2) of this section, with the exceptions noted in paragraphs (g)(3) through (5) of this section.

(1) Except as provided in this paragraph (g)(1), a monitoring survey of each collection of fugitive emissions components at a well site must be conducted at least semiannually after the initial survey. Consecutive semiannual monitoring surveys must be conducted at least 4 months apart and no more than 7 months apart. A monitoring survey of each collection of fugitive emissions components at a well site located on the Alaskan North Slope must be conducted at least annually. Consecutive annual monitoring surveys must be conducted at least 9 months apart and no more than 13 months apart.

(2) Except as provided in this paragraph (g)(2), a monitoring survey of the collection of fugitive emissions components at a compressor station must be conducted at least semiannually after the initial survey. Consecutive semiannual monitoring surveys must be conducted at least 4 months apart and no more than 7 months apart. A monitoring survey of the collection of fugitive emissions components at a compressor station located on the Alaskan North Slope must be conducted at least annually. Consecutive annual monitoring surveys must be conducted at least 9 months apart and no more than 13 months apart.

* * * * *

(5) You are no longer required to comply with the requirements of paragraph (g)(1) of this section when the owner or operator removes all major production and processing equipment, as defined in § 60.5430a, such that the well site becomes a wellhead only well site. If any major production and processing equipment is subsequently added to the well site, then the owner or operator must comply with the requirements in paragraphs (f)(1) and (g)(1) of this section.

(h) Each identified source of fugitive emissions shall be repaired, as defined in § 60.5430a, in accordance with paragraphs (h)(1) and (2) of this section.

(1) A first attempt at repair shall be made no later than 30 calendar days after detection of the fugitive emissions.

(2) Repair shall be completed as soon as practicable, but no later than 30 calendar days after the first attempt at repair as required in paragraph (h)(1) of this section.

(3) If the repair is technically infeasible, would require a vent blowdown, a compressor station shutdown, a well shutdown or well shut-in, or would be unsafe to repair during operation of the unit, the repair must be completed during the next scheduled compressor station shutdown for maintenance, scheduled well shutdown, scheduled well shut-in, after a scheduled vent blowdown, or within 2 years, whichever is earliest. For purposes of this paragraph (h)(3), a vent blowdown is the opening of one or more blowdown valves to depressurize major production and processing equipment, other than a storage vessel.

(4) Each identified source of fugitive emissions must be resurveyed to complete repair according to the requirements in paragraphs (h)(4)(i) through (iv) of this section, to ensure that there are no fugitive emissions.

(i) The operator may resurvey the fugitive emissions components to verify repair using either Method 21 of appendix A–7 of this part or optical gas imaging.

(ii) For each repair that cannot be made during the monitoring survey when the fugitive emissions are initially found, a digital photograph must be taken of that component or the component must be tagged during the monitoring survey when the fugitives were initially found for identification purposes and subsequent repair. The digital photograph must include the date that the photograph was taken and must clearly identify the component by location within the site (*e.g.,* the latitude and longitude of the component or by other descriptive landmarks visible in the picture).

(iii) Operators that use Method 21 of appendix A–7 of this part to resurvey the repaired fugitive emissions components are subject to the resurvey provisions specified in paragraphs (h)(4)(iii)(A) and (B) of this section.

(A) A fugitive emissions component is repaired when the Method 21 instrument indicates a concentration of less than 500 ppm above background or when no soap bubbles are observed when the alternative screening procedures specified in section 8.3.3 of Method 21 of appendix A–7 of this part are used.

(B) Operators must use the Method 21 monitoring requirements specified in paragraph (c)(8)(ii) of this section or the alternative screening procedures specified in section 8.3.3 of Method 21 of appendix A–7 of this part.

(iv) Operators that use optical gas imaging to resurvey the repaired fugitive emissions components, are subject to the resurvey provisions specified in paragraphs (h)(4)(iv)(A) and (B) of this section.

(A) A fugitive emissions component is repaired when the optical gas imaging instrument shows no indication of visible emissions.

(B) Operators must use the optical gas imaging monitoring requirements specified in paragraph (c)(7) of this section.

* * * * *

■ 9. Section 60.5398a is revised to read as follows:

**§ 60.5398a What are the alternative means of emission limitations for VOC from well completions, reciprocating compressors, the collection of fugitive emissions components at a well site and the collection of fugitive emissions components at a compressor station?**

(a) If, in the Administrator's judgment, an alternative means of emission limitation will achieve a reduction in VOC emissions at least equivalent to the reduction in VOC emissions achieved under § 60.5375a, § 60.5385a, or § 60.5397a, the Administrator will publish, in the **Federal Register**, a notice permitting the use of that alternative means for the purpose of compliance with § 60.5375a, § 60.5385a, or § 60.5397a. The authority to approve an alternative means of emission limitation is retained by the Administrator and shall not be delegated to States under section 111(c) of the Clean Air Act (CAA).

(b) Any notice under paragraph (a) of this section must be published only after notice and an opportunity for a public hearing.

(c) Determination of equivalence to the design, equipment, work practice, or operational requirements of this section will be evaluated by the following guidelines:

(1) The applicant must provide information that is sufficient for demonstrating the alternative means of emission limitation achieves emission reductions that are at least equivalent to the emission reductions that would be achieved by complying with the relevant standards. At a minimum, the application must include the following information:

(i) Details of the specific equipment or components that would be included in the alternative.

(ii) A description of the alternative work practice, including, as appropriate, the monitoring method, monitoring instrument or measurement technology, and the data quality indicators for precision and bias.

(iii) The method detection limit of the technology, technique, or process and a description of the procedures used to determine the method detection limit. At a minimum, the applicant must collect, verify, and submit field data encompassing seasonal variations to support the determination of the method detection limit. The field data may be supplemented with modeling analyses, controlled test site data, or other documentation.

(iv) Any initial and ongoing quality assurance/quality control measures necessary for maintaining the technology, technique, or process, and the timeframes for conducting such measures.

(v) Frequency of measurements. For continuous monitoring techniques, the minimum data availability.

(vi) Any restrictions for using the technology, technique, or process.

(vii) Initial and continuous compliance procedures, including recordkeeping and reporting, if the compliance procedures are different than those specified in this subpart.

(2) For each technology, technique, or process for which a determination of equivalency is requested, the application must provide a demonstration that the emission reduction achieved by the alternative means of emission limitation is at least equivalent to the emission reduction that would be achieved by complying with the relevant standards in this subpart.

(d) Any alternative means of emission limitations approved under this section shall constitute a required work practice, equipment, design, or operational standard within the meaning of section 111(h)(1) of the CAA.

■ 10. Add § 60.5399a to read as follows:

**§ 60.5399a What alternative fugitive emissions standards apply to the affected facility which is the collection of fugitive emissions components at a well site and the affected facility which is the collection of fugitive emissions components at a compressor station: Equivalency with state, local, and tribal programs?**

This section provides alternative fugitive emissions standards based on programs under state, local, or tribal authorities for the collection of fugitive emissions components, as defined in § 60.5430a, located at well sites and compressor stations. Paragraphs (a) through (e) of this section outline the procedure for submittal and approval of alternative fugitive emissions standards. Paragraphs (f) through (n) provide approved alternative fugitive emissions standards. The terms ''fugitive emissions components'' and ''repaired'' are defined in § 60.5430a and must be applied to the alternative fugitive emissions standards in this section. The requirements for a monitoring plan as specified in § 60.5397a(c) and (d) apply to the alternative fugitive emissions standards in this section.

(a) *Alternative fugitive emissions standards.* If, in the Administrator's judgment, an alternative fugitive emissions standard will achieve a reduction in VOC emissions at least equivalent to the reductions achieved under § 60.5397a, the Administrator will publish, in the **Federal Register**, a notice permitting use of the alternative fugitive emissions standard for the purpose of compliance with § 60.5397a. The authority to approve alternative fugitive emissions standards is retained by the Administrator and shall not be delegated to States under section 111(c) of the CAA.

(b) *Notice.* Any notice under paragraph (a) of this section will be published only after notice and an opportunity for public hearing.

(c) *Evaluation guidelines.* Determination of alternative fugitive emissions standards to the design, equipment, work practice, or operational requirements of § 60.5397a will be evaluated by the following guidelines:

(1) The monitoring instrument, including the monitoring procedure;

(2) The monitoring frequency;

(3) The fugitive emissions definition;

(4) The repair requirements; and

(5) The recordkeeping and reporting requirements.

(d) *Approval of alternative fugitive emissions standard.* Any alternative fugitive emissions standard approved under this section shall:

(1) Constitute a required design, equipment, work practice, or operational standard within the meaning of section 111(h)(1) of the CAA; and

(2) Be made available for use by any owner or operator in meeting the relevant standards and requirements established for affected facilities under § 60.5397a.

(e) *Notification.* (1) An owner or operator must notify the Administrator of adoption of the alternative fugitive emissions standards within the first annual report following implementation of the alternative fugitive emissions standard, as specified in § 60.5420a(a)(3).

(2) An owner or operator implementing one of the alternative fugitive emissions standards must submit the reports specified in § 60.5420a(b)(7)(iii). An owner or operator must also maintain the records specified by the specific alternative fugitive emissions standard for a period of at least 5 years.

(f) *Alternative fugitive emissions requirements for the collection of fugitive emissions components located at a well site or a compressor station in the State of California.* An affected facility, which is the collection of fugitive emissions components, as defined in § 60.5430a, located at a well site or a compressor station in the State of California may elect to reduce VOC emissions through compliance with the monitoring, repair, and recordkeeping

requirements in the California Code of Regulations, title 17, sections 95665–95667, effective January 1, 2020, as an alternative to complying with the requirements in § 60.5397a(f)(1) and (2), (g)(1) through (4), (h), and (i). The information specified in § 60.5420a(b)(7)(iii)(A) and the information specified in either § 60.5420a(b)(7)(iii)(B) or (C) may be provided as an alternative to the requirements in § 60.5397a(j).

(g) *Alternative fugitive emissions requirements for the collection of fugitive emissions components located at a well site or a compressor station in the State of Colorado.* An affected facility, which is the collection of fugitive emissions components, as defined in § 60.5430a, located at a well site or a compressor station in the State of Colorado may elect to comply with the monitoring, repair, and recordkeeping requirements in Colorado Regulation 7, Part D, section I.L or II.E, effective February 14, 2020, for well sites and compressor stations, as an alternative to complying with the requirements in § 60.5397a(f)(1) and (2), (g)(1) through (4), (h), and (i), provided the monitoring instrument used is an optical gas imaging or a Method 21 instrument (see appendix A–7 of this part). Monitoring must be conducted on at least a semiannual basis for well sites and compressor stations. If using the alternative in this paragraph (g), the information specified in § 60.5420a(b)(7)(iii)(A) and (C) must be provided in lieu of the requirements in § 60.5397a(j).

(h) *Alternative fugitive emissions requirements for the collection of fugitive emissions components located at a well site in the State of Ohio.* An affected facility, which is the collection of fugitive emissions components, as defined in § 60.5430a, located at a well site in the State of Ohio may elect to comply with the monitoring, repair, and recordkeeping requirements in Ohio General Permits 12.1, Section C.5 and 12.2, Section C.5, effective April 14, 2014, as an alternative to complying with the requirements in § 60.5397a(f)(1), (g)(1), (3), and (4), (h), and (i), provided the monitoring instrument used is optical gas imaging or a Method 21 instrument (see appendix A–7 of this part) with a leak definition and reading of 500 ppm or greater. Monitoring must be conducted on at least a semiannual basis and skip periods cannot be applied. The information specified in § 60.5420a(b)(7)(iii)(A) and the information specified in either § 60.5420a(b)(7)(iii)(B) or (C) may be provided as an alternative to the requirements in § 60.5397a(j).

(i) *Alternative fugitive emissions requirements for the collection of fugitive emissions components located at a compressor station in the State of Ohio.* An affected facility, which is the collection of fugitive emissions components, as defined in § 60.5430a, located at a compressor station in the State of Ohio may elect to comply with the monitoring, repair, and recordkeeping requirements in Ohio General Permit 18.1, effective February 7, 2017, as an alternative to complying with the requirements in § 60.5397a(f)(2), (g)(2) through (4), (h), and (i), provided the monitoring instrument used is optical gas imaging or a Method 21 instrument (see appendix A–7 of this part) with a leak definition and reading of 500 ppm or greater. Monitoring must be conducted on at least a semiannual basis and skip periods cannot be applied. The information specified in § 60.5420a(b)(7)(iii)(A) and the information specified in either § 60.5420a(b)(7)(iii)(B) or (C) may be provided as an alternative to the requirements in § 60.5397a(j).

(j) *Alternative fugitive emissions requirements for the collection of fugitive emissions components located at a well site in the State of Pennsylvania.* An affected facility, which is the collection of fugitive emissions components, as defined in § 60.5430a, located at a well site in the State of Pennsylvania may elect to comply with the monitoring, repair, and recordkeeping requirements in Pennsylvania General Permit 5A, section G, effective August 8, 2018, as an alternative to complying with the requirements in § 60.5397a(f)(2), (g)(2) through (4), (h), and (i), provided the monitoring instrument used is an optical gas imaging or a Method 21 instrument (see appendix A–7 of this part). The information specified in § 60.5420a(b)(7)(iii)(A) and the information specified in either § 60.5420a(b)(7)(iii)(B) or (C) may be provided as an alternative to the requirements in § 60.5397a(j).

(k) *Alternative fugitive emissions requirements for the collection of fugitive emissions components located at a compressor station in the State of Pennsylvania.* An affected facility, which is the collection of fugitive emissions components, as defined in § 60.5430a, located at a compressor station in the State of Pennsylvania may elect to comply with the monitoring, repair, and recordkeeping requirements in Pennsylvania General Permit 5, section G, effective August 8, 2018, as an alternative to complying with the requirements in § 60.5397a(f)(2), (g)(2) through (4), (h), and (i), provided the monitoring instrument used is an optical gas imaging or a Method 21 instrument (see appendix A–7 of this part). The information specified in § 60.5420a(b)(7)(iii)(A) and the information specified in either § 60.5420a(b)(7)(iii)(B) or (C) may be provided as an alternative to the requirements in § 60.5397a(j).

(l) *Alternative fugitive emissions requirements for the collection of fugitive emissions components located at a well site in the State of Texas.* An affected facility, which is the collection of fugitive emissions components, as defined in § 60.5430a, located at a well site in the State of Texas may elect to comply with the monitoring, repair, and recordkeeping requirements in the Air Quality Standard Permit for Oil and Gas Handling and Production Facilities, section (e)(6), effective November 8, 2012, or at 30 Texas Administrative Code section 116.620, effective September 4, 2000, as an alternative to complying with the requirements in § 60.5397a(f)(2), (g)(2) through (4), (h), and (i), provided the monitoring instrument used is optical gas imaging or a Method 21 instrument (see appendix A–7 of this part) with a leak definition and reading of 500 ppm or greater. Monitoring must be conducted on at least a semiannual basis and skip periods may not be applied. If using the requirement in this paragraph (l), the information specified in § 60.5420a(b)(7)(iii)(A) and (C) must be provided in lieu of the requirements in § 60.5397a(j).

(m) *Alternative fugitive emissions requirements for the collection of fugitive emissions components located at a compressor station in the State of Texas.* An affected facility, which is the collection of fugitive emissions components, as defined in § 60.5430a, located at a compressor in the State of Texas may elect to comply with the monitoring, repair, and recordkeeping requirements in the Air Quality Standard Permit for Oil and Gas Handling and Production Facilities, section (e)(6), effective November 8, 2012, or at 30 Texas Administrative Code section 116.620, effective September 4, 2000, as an alternative to complying with the requirements in § 60.5397a(f)(2), (g)(2) through (4), (h), and (i), provided the monitoring instrument used is optical gas imaging or a Method 21 instrument (see appendix A–7 of this part) with a leak definition and reading of 500 ppm or greater. Monitoring must be conducted on at least a semiannual basis and skip

periods may not be applied. If using the alternative in this paragraph (m), the information specified in § 60.5420a(b)(7)(iii)(A) and (C) must be provided in lieu of the requirements in § 60.5397a(j).

(n) *Alternative fugitive emissions requirements for the collection of fugitive emissions components located at a well site in the State of Utah.* An affected facility, which is the collection of fugitive emissions components, as defined in § 60.5430a, and is required to control emissions in accordance with Utah Administrative Code R307–506 and R307–507, located at a well site in the State of Utah may elect to comply with the monitoring, repair, and recordkeeping requirements in the Utah Administrative Code R307–509, effective March 2, 2018, as an alternative to complying with the requirements in § 60.5397a(f)(2), (g)(2) through (4), (h), and (i). If using the alternative in this paragraph (n), the information specified in § 60.5420a(b)(7)(iii)(A) and (C) must be provided in lieu of the requirements in § 60.5397a(j).

■ 11. Section 60.5400a is amended by revising the introductory text and paragraph (a) to read as follows:

**§ 60.5400a What equipment leak VOC standards apply to affected facilities at an onshore natural gas processing plant?**

This section applies to the group of all equipment, except compressors, within a process unit located at an onshore natural gas processing plant.

(a) You must comply with the requirements of §§ 60.482–1a(a), (b), (d), and (e), 60.482–2a, and 60.482–4a through 60.482–11a, except as provided in § 60.5401a, as soon as practicable but no later than 180 days after the initial startup of the process unit.

* * * * *

■ 12. Section 60.5401a is amended by revising paragraphs (e) and (g) to read as follows:

**§ 60.5401a What are the exceptions to the equipment leak VOC standards for affected facilities at onshore natural gas processing plants?**

* * * * *

(e) Pumps in light liquid service, valves in gas/vapor and light liquid service, pressure relief devices in gas/vapor service, and connectors in gas/vapor service and in light liquid service within a process unit that is located in the Alaskan North Slope are exempt from the monitoring requirements of §§ 60.482–2a(a)(1), 60.482–7a(a), and 60.482–11a(a) and paragraph (b)(1) of this section.

* * * * *

(g) An owner or operator may use the following provisions instead of § 60.485a(b)(2): A calibration drift assessment shall be performed, at a minimum, at the end of each monitoring day. Check the instrument using the same calibration gas(es) that were used to calibrate the instrument before use. Follow the procedures specified in Method 21 of appendix A–7 of this part, Section 10.1, except do not adjust the meter readout to correspond to the calibration gas value. Record the instrument reading for each scale used as specified in § 60.486a(e)(8). For each scale, divide the arithmetic difference of the most recent calibration and the post-test calibration response by the corresponding calibration gas value, and multiply by 100 to express the calibration drift as a percentage. If any calibration drift assessment shows a negative drift of more than 10 percent from the most recent calibration response, then all equipment monitored since the last calibration with instrument readings below the appropriate leak definition and above the leak definition multiplied by (100 minus the percent of negative drift/divided by 100) must be re-monitored. If any calibration drift assessment shows a positive drift of more than 10 percent from the most recent calibration response, then, at the owner/operator's discretion, all equipment since the last calibration with instrument readings above the appropriate leak definition and below the leak definition multiplied by (100 plus the percent of positive drift/divided by 100) may be re-monitored.

■ 13. Section 60.5405a is amended by revising the section heading to read as follows:

**§ 60.5405a What standards apply to sweetening unit affected facilities?**

* * * * *

■ 14. Section 60.5406a is amended by revising the section heading to read as follows:

**§ 60.5406a What test methods and procedures must I use for my sweetening unit affected facilities?**

* * * * *

■ 15. Section 60.5407a is amended by revising the section heading and paragraph (a) introductory text to read as follows:

**§ 60.5407a What are the requirements for monitoring of emissions and operations from my sweetening unit affected facilities?**

(a) If your sweetening unit affected facility is subject to the provisions of § 60.5405a(a) or (b) you must install, calibrate, maintain, and operate monitoring devices or perform measurements to determine the following operations information on a daily basis:

* * * * *

■ 16. Section 60.5410a is amended by:

■ a. Revising the section heading, introductory text, and paragraphs (c)(1) and (e)(2) through (5);

■ b. Removing paragraph (e)(8);

■ c. Revising paragraphs (g) introductory text, (g)(3), (h), (j) introductory text, and (j)(1); and

■ d. Adding paragraph (k).

The revisions and addition read as follows:

**§ 60.5410a How do I demonstrate initial compliance with the standards for my well, centrifugal compressor, reciprocating compressor, pneumatic controller, pneumatic pump, storage vessel, collection of fugitive emissions components at a well site, collection of fugitive emissions components at a compressor station, and equipment leaks at onshore natural gas processing plants and sweetening unit affected facilities?**

You must determine initial compliance with the standards for each affected facility using the requirements in paragraphs (a) through (k) of this section. Except as otherwise provided in this section, the initial compliance period begins on August 2, 2016, or upon initial startup, whichever is later, and ends no later than 1 year after the initial startup date for your affected facility or no later than 1 year after August 2, 2016. The initial compliance period may be less than 1 full year.

* * * * *

(c) * * *

(1) If complying with § 60.5385a(a)(1) or (2), during the initial compliance period, you must continuously monitor the number of hours of operation or track the number of months since initial startup, since August 2, 2016, or since the last rod packing replacement, whichever is latest.

* * * * *

(e) * * *

(2) If you own or operate a pneumatic pump affected facility located at a well site, you must reduce emissions in accordance with § 60.5393a(b)(1) or (2), and you must collect the pneumatic pump emissions through a closed vent system that meets the requirements of § 60.5411a(d) and (e).

(3) If you own or operate a pneumatic pump affected facility located at a well site and there is no control device or process available on site, you must submit the certification in § 60.5420a(b)(8)(i)(A).

(4) If you own or operate a pneumatic pump affected facility located at a well

site, and you are unable to route to an existing control device or to a process due to technical infeasibility, you must submit the certification in § 60.5420a(b)(8)(i)(B).

(5) If you own or operate a pneumatic pump affected facility located at a well site and you reduce emissions in accordance with § 60.5393a(b)(4), you must collect the pneumatic pump emissions through a closed vent system that meets the requirements of § 60.5411a(d) and (e).

* * * * *

(g) For sweetening unit affected facilities, initial compliance is demonstrated according to paragraphs (g)(1) through (3) of this section.

* * * * *

(3) You must submit the results of paragraphs (g)(1) and (2) of this section in the initial annual report submitted for your sweetening unit affected facilities.

(h) For each storage vessel affected facility you must comply with paragraphs (h)(1) through (6) of this section. Except as otherwise provided in this paragraph (h), you must demonstrate initial compliance by August 2, 2016, or within 60 days after startup, whichever is later.

(1) You must determine the potential VOC emission rate as specified in § 60.5365a(e).

(2) You must reduce VOC emissions in accordance with § 60.5395a(a).

(3) If you use a control device to reduce emissions, you must equip the storage vessel with a cover that meets the requirements of § 60.5411a(b) and is connected through a closed vent system that meets the requirements of § 60.5411a(c) and (d) to a control device that meets the conditions specified in § 60.5412a(d) within 60 days after startup for storage vessels constructed, modified, or reconstructed at well sites with no other wells in production, or upon startup for storage vessels constructed, modified, or reconstructed at well sites with one or more wells already in production.

(4) You must conduct an initial performance test as required in § 60.5413a within 180 days after initial startup or within 180 days of August 2, 2016, whichever is later, and you must comply with the continuous compliance requirements in § 60.5415a(e).

(5) You must submit the information required for your storage vessel affected facility in your initial annual report as specified in § 60.5420a(b)(1) and (6).

(6) You must maintain the records required for your storage vessel affected facility, as specified in § 60.5420a(c)(5) through (8), (12) through (14), and (17), as applicable, for each storage vessel affected facility.

* * * * *

(j) To achieve initial compliance with the fugitive emission standards for each collection of fugitive emissions components at a well site and each collection of fugitive emissions components at a compressor station you must comply with paragraphs (j)(1) through (5) of this section.

(1) You must develop a fugitive emissions monitoring plan as required in § 60.5397a(b), (c), and (d).

* * * * *

(k) To demonstrate initial compliance with the requirement to maintain the total well site production at or below 15 boe per day based on a rolling 12-month average, as specified in § 60.5397a(a)(2), you must comply with paragraphs (k)(1) through (3) of this section.

(1) You must demonstrate that the total daily combined oil and natural gas production for all wells at the well site is at or below 15 boe per day, based on a 12-month average from the previous 12 months of operation, according to paragraphs (k)(1)(i) through (iii) of this section within 45 days of the end of each month. The rolling 12-month average of the total well site production determined according to paragraph (k)(1)(iii) of this section must be at or below 15 boe per day.

(i) Determine the daily combined oil and natural gas production for each individual well at the well site for the month. To convert gas production to equivalent barrels of oil, divide the cubic feet of gas produced by 6,000.

(ii) Sum the daily production for each individual well at the well site to determine the total well site production and divide by the number of days in the month. This is the average daily total well site production for the month.

(iii) Use the result determined in paragraph (k)(1)(ii) of this section and average with the daily total well site production values determined for each of the preceding 11 months to calculate the rolling 12-month average of the total well site production.

(2) You must maintain records as specified in § 60.5420a(c)(15)(ii).

(3) You must submit compliance information in the initial and subsequent annual reports as specified in § 60.5420a(b)(7)(i)(C) and (b)(7)(iv).

■ 17. Section 60.5411a is amended by revising the introductory text and paragraphs (a) introductory text, (a)(1), (c)(1) and (2), (d)(1), and (e) to read as follows:

**§ 60.5411a What additional requirements must I meet to determine initial compliance for my covers and closed vent systems routing emissions from centrifugal compressor wet seal fluid degassing systems, reciprocating compressors, pneumatic pumps and storage vessels?**

You must meet the applicable requirements of this section for each cover and closed vent system used to comply with the emission standards for your centrifugal compressor wet seal degassing systems, reciprocating compressors, pneumatic pumps, and storage vessels.

(a) Closed vent system requirements for reciprocating compressors and centrifugal compressor wet seal degassing systems.

(1) You must design the closed vent system to route all gases, vapors, and fumes emitted from the reciprocating compressor rod packing emissions collection system to a process. You must design the closed vent system to route all gases, vapors, and fumes emitted from the centrifugal compressor wet seal fluid degassing system to a process or a control device that meets the requirements specified in § 60.5412a(a) through (c).

* * * * *

(c) * * *

(1) You must design the closed vent system to route all gases, vapors, and fumes emitted from the material in the storage vessel affected facility to a control device that meets the requirements specified in § 60.5412a(c) and (d), or to a process.

(2) You must design and operate a closed vent system with no detectable emissions, as determined using olfactory, visual, and auditory inspections or optical gas imaging inspections as specified in § 60.5416a(c).

* * * * *

(d) * * *

(1) You must conduct an assessment that the closed vent system is of sufficient design and capacity to ensure that all emissions from the affected facility are routed to the control device and that the control device is of sufficient design and capacity to accommodate all emissions from the affected facility, and have it certified by a qualified professional engineer or an in-house engineer with expertise on the design and operation of the closed vent system in accordance with paragraphs (d)(1)(i) and (ii) of this section.

(i) You must provide the following certification, signed and dated by a qualified professional engineer or an in-house engineer: ''I certify that the closed vent system design and capacity assessment was prepared under my

direction or supervision. I further certify that the closed vent system design and capacity assessment was conducted and this report was prepared pursuant to the requirements of subpart OOOOa of 40 CFR part 60. Based on my professional knowledge and experience, and inquiry of personnel involved in the assessment, the certification submitted herein is true, accurate, and complete.''

(ii) The assessment shall be prepared under the direction or supervision of a qualified professional engineer or an in-house engineer who signs the certification in paragraph (d)(1)(i) of this section.

* * * * *

(e) Closed vent system requirements for pneumatic pump affected facilities using a control device or routing emissions to a process.

(1) You must design the closed vent system to route all gases, vapors, and fumes emitted from the pneumatic pump to a control device or a process.

(2) You must design and operate a closed vent system with no detectable emissions, as demonstrated by § 60.5416a(b), olfactory, visual, and auditory inspections or optical gas imaging inspections as specified in § 60.5416a(d).

(3) You must meet the requirements specified in paragraphs (e)(3)(i) and (ii) of this section if the closed vent system contains one or more bypass devices that could be used to divert all or a portion of the gases, vapors, or fumes from entering the control device or to a process.

(i) Except as provided in paragraph (e)(3)(ii) of this section, you must comply with either paragraph (e)(3)(i)(A) or (B) of this section for each bypass device.

(A) You must properly install, calibrate, maintain, and operate a flow indicator at the inlet to the bypass device that could divert the stream away from the control device or process to the atmosphere that sounds an alarm, or initiates notification via remote alarm to the nearest field office, when the bypass device is open such that the stream is being, or could be, diverted away from the control device or process to the atmosphere. You must maintain records of each time the alarm is activated according to § 60.5420a(c)(8).

(B) You must secure the bypass device valve installed at the inlet to the bypass device in the non-diverting position using a car-seal or a lock-and-key type configuration.

(ii) Low leg drains, high point bleeds, analyzer vents, open-ended valves or lines, and safety devices are not subject to the requirements of paragraph (e)(3)(i) of this section.

■ 18. Section 60.5412a is amended by revising paragraphs (a)(1) introductory text, (a)(1)(iv), (c) introductory text, (d)(1)(iv) introductory text, and (d)(1)(iv)(D) to read as follows:

**§ 60.5412a What additional requirements must I meet for determining initial compliance with control devices used to comply with the emission standards for my centrifugal compressor, and storage vessel affected facilities?**

* * * * *

(a) * * *

(1) Each combustion device (*e.g.,* thermal vapor incinerator, catalytic vapor incinerator, boiler, or process heater) must be designed and operated in accordance with one of the performance requirements specified in paragraphs (a)(1)(i) through (iv) of this section. If a boiler or process heater is used as the control device, then you must introduce the vent stream into the flame zone of the boiler or process heater.

* * * * *

(iv) You must introduce the vent stream with the primary fuel or use the vent stream as the primary fuel in a boiler or process heater.

* * * * *

(c) For each carbon adsorption system used as a control device to meet the requirements of paragraph (a)(2) or (d)(2) of this section, you must manage the carbon in accordance with the requirements specified in paragraphs (c)(1) and (2) of this section.

* * * * *

(d) * * *

(1) * * *

(iv) Each enclosed combustion control device (*e.g.,* thermal vapor incinerator, catalytic vapor incinerator, boiler, or process heater) must be designed and operated in accordance with one of the performance requirements specified in paragraphs (d)(1)(iv)(A) through (D) of this section. If a boiler or process heater is used as the control device, then you must introduce the vent stream into the flame zone of the boiler or process heater.

* * * * *

(D) You must introduce the vent stream with the primary fuel or use the vent stream as the primary fuel in a boiler or process heater.

* * * * *

■ 19. Section 60.5413a is amended by revising paragraphs (d)(5)(i) introductory text, (d)(9)(iii), and (d)(12) introductory text to read as follows:

**§ 60.5413a What are the performance testing procedures for control devices used to demonstrate compliance at my centrifugal compressor and storage vessel affected facilities?**

* * * * *

(d) * * *

(5) * * *

(i) At the inlet gas sampling location, securely connect a fused silica-coated stainless steel evacuated canister fitted with a flow controller sufficient to fill the canister over a 3-hour period. Filling must be conducted as specified in paragraphs (d)(5)(i)(A) through (C) of this section.

* * * * *

(9) * * *

(iii) A 0–10 parts per million by volume-wet (ppmvw) (as propane) measurement range is preferred; as an alternative a 0–30 ppmvw (as propane) measurement range may be used.

* * * * *

(12) The owner or operator of a combustion control device model tested under this paragraph (d)(12) must submit the information listed in paragraphs (d)(12)(i) through (vi) of this section for each test run in the test report required by this section in accordance with § 60.5420a(b)(10). Owners or operators who claim that any of the performance test information being submitted is confidential business information (CBI) must submit a complete file including information claimed to be CBI, on a compact disc, flash drive, or other commonly used electronic storage media to the EPA. The electronic media must be clearly marked as CBI and mailed to Attn: CBI Document Control Officer; Office of Air Quality Planning and Standards (OAQPS), Room 521; 109 T.W. Alexander Drive; Research Triangle Park, NC 27711. The same file with the CBI omitted must be submitted to *Oil_and_Gas_PT@EPA.GOV.*

* * * * *

■ 20. Section 60.5415a is amended by:

■ a. Revising the section heading and paragraphs (b) introductory text and (b)(3);

■ b. Removing paragraph (b)(4);

■ c. Revising paragraphs (c)(1), (g) introductory text, (h) introductory text, and (h)(2); and

■ d. Adding paragraphs (i) and (j).

The revisions and additions read as follows:

**§ 60.5415a How do I demonstrate continuous compliance with the standards for my well, centrifugal compressor, reciprocating compressor, pneumatic controller, pneumatic pump, storage vessel, collection of fugitive emissions components at a well site, and collection of fugitive emissions components at a compressor station affected facilities, equipment leaks at onshore natural gas processing plants and sweetening unit affected facilities?**

* * * * *

(b) For each centrifugal compressor affected facility and each pneumatic pump affected facility, you must demonstrate continuous compliance according to paragraph (b)(3) of this section. For each centrifugal compressor affected facility, you also must demonstrate continuous compliance according to paragraphs (b)(1) and (2) of this section.

* * * * *

(3) You must submit the annual reports required by § 60.5420a(b)(1), (3), and (8) and maintain the records as specified in § 60.5420a(c)(2), (6) through (11), (16), and (17), as applicable.

* * * * *

(c) * * *

(1) You must continuously monitor the number of hours of operation for each reciprocating compressor affected facility or track the number of months since initial startup, since August 2, 2016, or since the date of the most recent reciprocating compressor rod packing replacement, whichever is latest.

* * * * *

(g) For each sweetening unit affected facility, you must demonstrate continuous compliance with the standards for $SO_2$ specified in § 60.5405a(b) according to paragraphs (g)(1) and (2) of this section.

* * * * *

(h) For each collection of fugitive emissions components at a well site and each collection of fugitive emissions components at a compressor station, you must demonstrate continuous compliance with the fugitive emission standards specified in § 60.5397a(a)(1) according to paragraphs (h)(1) through (4) of this section.

* * * * *

(2) You must repair each identified source of fugitive emissions as required in § 60.5397a(h).

* * * * *

(i) For each collection of fugitive emissions components at a well site complying with § 60.5397a(a)(2), you must demonstrate continuous compliance according to paragraphs (i)(1) through (4) of this section. You must perform the calculations shown in paragraphs (i)(1) through (4) of this section within 45 days of the end of each month. The rolling 12-month average of the total well site production determined according to paragraph (i)(4) of this section must be at or below 15 boe per day.

(1) Begin with the most recent 12-month average.

(2) Determine the daily combined oil and natural gas production of each individual well at the well site for the month. To convert gas production to equivalent barrels of oil, divide the cubic feet of gas produced by 6,000.

(3) Sum the daily production for each individual well at the well site and divide by the number of days in the month. This is the average daily total well site production for the month.

(4) Use the result determined in paragraph (i)(3) of this section and average with the daily total well site production values determined for each of the preceding 11 months to calculate the rolling 12-month average of the total well site production.

(j) To demonstrate that the well site produced at or below 15 boe per day for the first 30 days after startup of production as specified in § 60.5397a(3), you must calculate the daily production for each individual well at the well site during the first 30 days of production after completing any action listed in § 60.5397a(a)(2)(i) through (v) and sum the individual well production values to obtain the total well site production. The calculation must be performed within 45 days of the end of the first 30 days of production after completing any action listed in § 60.5397a(a)(2)(i) through (v). To convert gas production to equivalent barrels of oil, divide cubic feet of gas produced by 6,000.

■ 21. Section 60.5416a is amended by revising the introductory text and paragraphs (a) introductory text, (a)(4) introductory text, (b) introductory text, (c) introductory text, (c)(1), and (c)(2) introductory text, adding paragraph (c)(2)(iv), and revising paragraph (d) to read as follows:

**§ 60.5416a What are the initial and continuous cover and closed vent system inspection and monitoring requirements for my centrifugal compressor, reciprocating compressor, pneumatic pump, and storage vessel affected facilities?**

For each closed vent system or cover at your centrifugal compressor, reciprocating compressor, pneumatic pump, and storage vessel affected facilities, you must comply with the applicable requirements of paragraphs (a) through (d) of this section.

(a) *Inspections for closed vent systems and covers installed on each centrifugal compressor or reciprocating compressor affected facility.* Except as provided in paragraphs (b)(11) and (12) of this section, you must inspect each closed vent system according to the procedures and schedule specified in paragraphs (a)(1) and (2) of this section, inspect each cover according to the procedures and schedule specified in paragraph (a)(3) of this section, and inspect each bypass device according to the procedures of paragraph (a)(4) of this section.

* * * * *

(4) For each bypass device, except as provided for in § 60.5411a(a)(3)(ii), you must meet the requirements of paragraph (a)(4)(i) or (ii) of this section.

* * * * *

(b) *No detectable emissions test methods and procedures.* If you are required to conduct an inspection of a closed vent system or cover at your centrifugal compressor or reciprocating compressor affected facility as specified in paragraph (a)(1), (2), or (3) of this section, you must meet the requirements of paragraphs (b)(1) through (13) of this section.

* * * * *

(c) *Cover and closed vent system inspections for storage vessel affected facilities.* If you install a control device or route emissions to a process, you must comply with the inspection and recordkeeping requirements for each closed vent system and cover as specified in paragraphs (c)(1) and (2) of this section. You must also comply with the requirements of paragraphs (c)(3) through (7) of this section.

(1) *Closed vent system inspections.* For each closed vent system, you must conduct an inspection as specified in paragraphs (c)(1)(i) through (iii) or paragraph (c)(1)(iv) of this section.

(i) You must maintain records of the inspection results as specified in § 60.5420a(c)(6).

(ii) Conduct olfactory, visual, and auditory inspections at least once every calendar month for defects that could result in air emissions. Defects include, but are not limited to, visible cracks, holes, or gaps in piping; loose connections; liquid leaks; or broken or missing caps or other closure devices.

(iii) Monthly inspections must be separated by at least 14 calendar days.

(iv) Conduct optical gas imaging inspections for any visible emissions at the same frequency as the frequency for the collection of fugitive emissions components located at the same type of site, as specified in § 60.5397a(g)(1).

(2) *Cover inspections.* For each cover, you must conduct inspections as specified in paragraphs (c)(2)(i) through (iii) or paragraph (c)(2)(iv) of this section.

* * * * *

(iv) Conduct optical gas imaging inspections for any visible emissions at the same frequency as the frequency for the collection of fugitive emissions components located at the same type of site, as specified in § 60.5397a(g)(1).

* * * * *

(d) *Closed vent system inspections for pneumatic pump affected facilities.* If you install a control device or route emissions to a process, you must comply with the inspection and recordkeeping requirements for each closed vent system as specified in paragraph (d)(1) of this section. You must also comply with the requirements of paragraphs (c)(3) through (7) of this section.

(1) For each closed vent system, you must conduct an inspection as specified in paragraphs (d)(1)(i) through (iii), paragraph (d)(1)(iv), or paragraph (d)(1)(v) of this section.

(i) You must maintain records of the inspection results as specified in § 60.5420a(c)(6).

(ii) Conduct olfactory, visual, and auditory inspections at least once every calendar month for defects that could result in air emissions. Defects include, but are not limited to, visible cracks, holes, or gaps in piping; loose connections; liquid leaks; or broken or missing caps or other closure devices.

(iii) Monthly inspections must be separated by at least 14 calendar days.

(iv) Conduct optical gas imaging inspections for any visible emissions at the same frequency as the frequency for the collection of fugitive components located at the same type of site, as specified in § 60.5397a(g)(1).

(v) Conduct inspections as specified in paragraphs (a)(1) and (2) of this section.

(2) [Reserved]

■ 22. Section 60.5417a is amended by revising the introductory text and paragraph (a) to read as follows:

**§ 60.5417a What are the continuous control device monitoring requirements for my centrifugal compressor and storage vessel affected facilities?**

You must meet the applicable requirements of this section to demonstrate continuous compliance for each control device used to meet emission standards for your storage vessel affected facility or centrifugal compressor affected facility.

(a) For each control device used to comply with the emission reduction standard for centrifugal compressor affected facilities in § 60.5380a(a)(1), you must install and operate a continuous parameter monitoring system for each control device as specified in paragraphs (c) through (g) of this section, except as provided for in paragraph (b) of this section. If you install and operate a flare in accordance with § 60.5412a(a)(3), you are exempt from the requirements of paragraphs (e) and (f) of this section. If you install and operate an enclosed combustion device or control device which is not specifically listed in paragraph (d) of this section, you must demonstrate continuous compliance according to paragraphs (h)(1) through (4) of this section.

* * * * *

■ 23. Revise § 60.5420a to read as follows:

**§ 60.5420a What are my notification, reporting, and recordkeeping requirements?**

(a) *Notifications.* You must submit the notifications according to paragraphs (a)(1) and (2) of this section if you own or operate one or more of the affected facilities specified in § 60.5365a that was constructed, modified, or reconstructed during the reporting period.

(1) If you own or operate an affected facility that is the group of all equipment within a process unit at an onshore natural gas processing plant, or a sweetening unit, you must submit the notifications required in §§ 60.7(a)(1), (3), and (4) and 60.15(d). If you own or operate a well, centrifugal compressor, reciprocating compressor, pneumatic controller, pneumatic pump, storage vessel, collection of fugitive emissions components at a well site, or collection of fugitive emissions components at a compressor station, you are not required to submit the notifications required in §§ 60.7(a)(1), (3), and (4) and 60.15(d).

(2)(i) If you own or operate a well affected facility, you must submit a notification to the Administrator no later than 2 days prior to the commencement of each well completion operation listing the anticipated date of the well completion operation. The notification shall include contact information for the owner or operator; the United States Well Number; the latitude and longitude coordinates for each well in decimal degrees to an accuracy and precision of five (5) decimals of a degree using the North American Datum of 1983; and the planned date of the beginning of flowback. You may submit the notification in writing or in electronic format.

(ii) If you are subject to state regulations that require advance notification of well completions and you have met those notification requirements, then you are considered to have met the advance notification requirements of paragraph (a)(2)(i) of this section.

(3) An owner or operator electing to comply with the provisions of § 60.5399a shall notify the Administrator of the alternative fugitive emissions standard selected within the annual report, as specified in paragraph (b)(7) of this section.

(b) *Reporting requirements.* You must submit annual reports containing the information specified in paragraphs (b)(1) through (8) and (12) of this section and performance test reports as specified in paragraph (b)(9) or (10) of this section, if applicable. You must submit annual reports following the procedure specified in paragraph (b)(11) of this section. The initial annual report is due no later than 90 days after the end of the initial compliance period as determined according to § 60.5410a. Subsequent annual reports are due no later than same date each year as the initial annual report. If you own or operate more than one affected facility, you may submit one report for multiple affected facilities provided the report contains all of the information required as specified in paragraphs (b)(1) through (8) and (12) of this section. Annual reports may coincide with title V reports as long as all the required elements of the annual report are included. You may arrange with the Administrator a common schedule on which reports required by this part may be submitted as long as the schedule does not extend the reporting period.

(1) The general information specified in paragraphs (b)(1)(i) through (iv) of this section is required for all reports.

(i) The company name, facility site name associated with the affected facility, U.S. Well ID or U.S. Well ID associated with the affected facility, if applicable, and address of the affected facility. If an address is not available for the site, include a description of the site location and provide the latitude and longitude coordinates of the site in decimal degrees to an accuracy and precision of five (5) decimals of a degree using the North American Datum of 1983.

(ii) An identification of each affected facility being included in the annual report.

(iii) Beginning and ending dates of the reporting period.

(iv) A certification by a certifying official of truth, accuracy, and completeness. This certification shall

state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(2) For each well affected facility that is subject to § 60.5375a(a) or (f), the records of each well completion operation conducted during the reporting period, including the information specified in paragraphs (b)(2)(i) through (xiv) of this section, if applicable. In lieu of submitting the records specified in paragraphs (b)(2)(i) through (xiv) of this section, the owner or operator may submit a list of each well completion with hydraulic fracturing completed during the reporting period, and the digital photograph required by paragraph (c)(1)(v) of this section for each well completion. For each well affected facility that routes flowback entirely through one or more production separators, only the records specified in paragraphs (b)(2)(i) through (iv) and (vi) of this section are required to be reported. For periods where salable gas is unable to be separated, the records specified in paragraphs (b)(2)(iv) and (viii) through (xii) of this section must also be reported, as applicable. For each well affected facility that is subject to § 60.5375a(g), the record specified in paragraph (b)(2)(xv) of this section is required to be reported.

(i) Well Completion ID.

(ii) Latitude and longitude of the well in decimal degrees to an accuracy and precision of five (5) decimals of a degree using North American Datum of 1983.

(iii) U.S. Well ID.

(iv) The date and time of the onset of flowback following hydraulic fracturing or refracturing or identification that the well immediately starts production.

(v) The date and time of each attempt to direct flowback to a separator as required in § 60.5375a(a)(1)(ii).

(vi) The date and time that the well was shut in and the flowback equipment was permanently disconnected, or the startup of production.

(vii) The duration (in hours) of flowback.

(viii) The duration (in hours) of recovery and disposition of recovery (*i.e.,* routed to the gas flow line or collection system, re-injected into the well or another well, used as an onsite fuel source, or used for another useful purpose that a purchased fuel or raw material would serve).

(ix) The duration (in hours) of combustion.

(x) The duration (in hours) of venting.

(xi) The specific reasons for venting in lieu of capture or combustion.

(xii) For any deviations recorded as specified in paragraph (c)(1)(ii) of this section, the date and time the deviation began, the duration of the deviation, and a description of the deviation.

(xiii) For each well affected facility subject to § 60.5375a(f), a record of the well type (*i.e.,* wildcat well, delineation well, or low pressure well (as defined § 60.5430a)) and supporting inputs and calculations, if applicable.

(xiv) For each well affected facility for which you claim an exception under § 60.5375a(a)(3), the specific exception claimed and reasons why the well meets the claimed exception.

(xv) For each well affected facility with less than 300 scf of gas per stock tank barrel of oil produced, the supporting analysis that was performed in order the make that claim, including but not limited to, GOR values for established leases and data from wells in the same basin and field.

(3) For each centrifugal compressor affected facility, the information specified in paragraphs (b)(3)(i) through (v) of this section.

(i) An identification of each centrifugal compressor using a wet seal system constructed, modified, or reconstructed during the reporting period.

(ii) For each deviation that occurred during the reporting period and recorded as specified in paragraph (c)(2) of this section, the date and time the deviation began, the duration of the deviation, and a description of the deviation.

(iii) If required to comply with § 60.5380a(a)(2), the information in paragraphs (b)(3)(iii)(A) through (C) of this section.

(A) Dates of each inspection required under § 60.5416a(a) and (b);

(B) Each defect or leak identified during each inspection, date of repair or the date of anticipated repair if the repair is delayed; and

(C) Date and time of each bypass alarm or each instance the key is checked out if you are subject to the bypass requirements of § 60.5416a(a)(4).

(iv) If complying with § 60.5380a(a)(1) with a control device tested under § 60.5413a(d) which meets the criteria in § 60.5413a(d)(11) and (e), the information in paragraphs (b)(3)(iv)(A) through (D) of this section.

(A) Identification of the compressor with the control device.

(B) Make, model, and date of purchase of the control device.

(C) For each instance where the inlet gas flow rate exceeds the manufacturer's listed maximum gas flow rate, where there is no indication of the presence of a pilot flame, or where visible emissions exceeded 1 minute in any 15-minute period, include the date and time the deviation began, the duration of the deviation, and a description of the deviation.

(D) For each visible emissions test following return to operation from a maintenance or repair activity, the date of the visible emissions test, the length of the test, and the amount of time for which visible emissions were present.

(v) If complying with § 60.5380a(a)(1) with a control device not tested under § 60.5413a(d), identification of the compressor with the tested control device, the date the performance test was conducted, and pollutant(s) tested. Submit the performance test report following the procedures specified in paragraph (b)(9) of this section.

(4) For each reciprocating compressor affected facility, the information specified in paragraphs (b)(4)(i) through (iii) of this section.

(i) The cumulative number of hours of operation or the number of months since initial startup, since August 2, 2016, or since the previous reciprocating compressor rod packing replacement, whichever is latest. Alternatively, a statement that emissions from the rod packing are being routed to a process through a closed vent system under negative pressure.

(ii) If applicable, for each deviation that occurred during the reporting period and recorded as specified in paragraph (c)(3)(iii) of this section, the date and time the deviation began, duration of the deviation and a description of the deviation.

(iii) If required to comply with § 60.5385a(a)(3), the information in paragraphs (b)(4)(iii)(A) through (C) of this section.

(A) Dates of each inspection required under § 60.5416a(a) and (b);

(B) Each defect or leak identified during each inspection, and date of repair or date of anticipated repair if repair is delayed; and

(C) Date and time of each bypass alarm or each instance the key is checked out if you are subject to the bypass requirements of § 60.5416a(a)(4).

(5) For each pneumatic controller affected facility, the information specified in paragraphs (b)(5)(i) through (iii) of this section.

(i) An identification of each pneumatic controller constructed, modified, or reconstructed during the reporting period, including the month and year of installation, reconstruction or modification and identification information that allows traceability to the records required in paragraph (c)(4)(iii) or (iv) of this section.

(ii) If applicable, reason why the use of pneumatic controller affected facilities with a natural gas bleed rate greater than the applicable standard are required.

(iii) For each instance where the pneumatic controller was not operated in compliance with the requirements specified in § 60.5390a, a description of the deviation, the date and time the deviation began, and the duration of the deviation.

(6) For each storage vessel affected facility, the information in paragraphs (b)(6)(i) through (ix) of this section.

(i) An identification, including the location, of each storage vessel affected facility for which construction, modification, or reconstruction commenced during the reporting period. The location of the storage vessel shall be in latitude and longitude coordinates in decimal degrees to an accuracy and precision of five (5) decimals of a degree using the North American Datum of 1983.

(ii) Documentation of the VOC emission rate determination according to § 60.5365a(e)(1) for each storage vessel that became an affected facility during the reporting period or is returned to service during the reporting period.

(iii) For each deviation that occurred during the reporting period and recorded as specified in paragraph (c)(5) of this section, the date and time the deviation began, duration of the deviation and a description of the deviation.

(iv) A statement that you have met the requirements specified in § 60.5410a(h)(2) and (3).

(v) For each storage vessel constructed, modified, reconstructed, or returned to service during the reporting period complying with § 60.5395a(a)(2) with a control device tested under § 60.5413a(d) which meets the criteria in § 60.5413a(d)(11) and (e), the information in paragraphs (b)(6)(v)(A) through (D) of this section.

(A) Identification of the storage vessel with the control device.

(B) Make, model, and date of purchase of the control device.

(C) For each instance where the inlet gas flow rate exceeds the manufacturer's listed maximum gas flow rate, where there is no indication of the presence of a pilot flame, or where visible emissions exceeded 1 minute in any 15-minute period, include the date and time the deviation began, the duration of the deviation, and a description of the deviation.

(D) For each visible emissions test following return to operation from a maintenance or repair activity, the date of the visible emissions test, the length of the test, and the amount of time for which visible emissions were present.

(vi) If complying with § 60.5395a(a)(2) with a control device not tested under § 60.5413a(d), identification of the storage vessel with the tested control device, the date the performance test was conducted, and pollutant(s) tested. Submit the performance test report following the procedures specified in paragraph (b)(9) of this section.

(vii) If required to comply with § 60.5395a(b)(1), the information in paragraphs (b)(6)(vii)(A) through (C) of this section.

(A) Dates of each inspection required under § 60.5416a(c);

(B) Each defect or leak identified during each inspection, and date of repair or date of anticipated repair if repair is delayed; and

(C) Date and time of each bypass alarm or each instance the key is checked out if you are subject to the bypass requirements of § 60.5416a(c)(3).

(viii) You must identify each storage vessel affected facility that is removed from service during the reporting period as specified in § 60.5395a(c)(1)(ii), including the date the storage vessel affected facility was removed from service.

(ix) You must identify each storage vessel affected facility returned to service during the reporting period as specified in § 60.5395a(c)(3), including the date the storage vessel affected facility was returned to service.

(7) For the collection of fugitive emissions components at each well site and the collection of fugitive emissions components at each compressor station, report the information specified in paragraphs (b)(7)(i) through (iii) of this section, as applicable.

(i)(A) Designation of the type of site (*i.e.,* well site or compressor station) at which the collection of fugitive emissions components is located.

(B) For each collection of fugitive emissions components at a well site that became an affected facility during the reporting period, you must include the date of the startup of production or the date of the first day of production after modification. For each collection of fugitive emissions components at a compressor station that became an affected facility during the reporting period, you must include the date of startup or the date of modification.

(C) For each collection of fugitive emissions components at a well site that meets the conditions specified in either § 60.5397a(a)(1)(i) or (ii), you must specify the well site is a low production well site and submit the total production for the well site.

(D) For each collection of fugitive emissions components at a well site where during the reporting period you complete the removal of all major production and processing equipment such that the well site contains only one or more wellheads, you must include the date of the change to status as a wellhead only well site.

(E) For each collection of fugitive emissions components at a well site where you previously reported under paragraph (b)(7)(i)(C) of this section the removal of all major production and processing equipment and during the reporting period major production and processing equipment is added back to the well site, the date that the first piece of major production and processing equipment is added back to the well site.

(ii) For each fugitive emissions monitoring survey performed during the annual reporting period, the information specified in paragraphs (b)(7)(ii)(A) through (G) of this section.

(A) Date of the survey.

(B) Monitoring instrument used.

(C) Any deviations from the monitoring plan elements under § 60.5397a(c)(1), (2), and (7) and (c)(8)(i) or a statement that there were no deviations from these elements of the monitoring plan.

(D) Number and type of components for which fugitive emissions were detected.

(E) Number and type of fugitive emissions components that were not repaired as required in § 60.5397a(h).

(F) Number and type of fugitive emission components (including designation as difficult-to-monitor or unsafe-to-monitor, if applicable) on delay of repair and explanation for each delay of repair.

(G) Date of planned shutdown(s) that occurred during the reporting period if there are any components that have been placed on delay of repair.

(iii) For each collection of fugitive emissions components at a well site or collection of fugitive emissions components at a compressor station complying with an alternative fugitive emissions standard under § 60.5399a, in lieu of the information specified in paragraphs (b)(7)(i) and (ii) of this section, you must provide the information specified in paragraphs (b)(7)(iii)(A) through (C) of this section.

(A) The alternative standard with which you are complying.

(B) The site-specific reports specified by the specific alternative fugitive emissions standard, submitted in the format in which they were submitted to the state, local, or tribal authority. If the report is in hard copy, you must scan

the document and submit it as an electronic attachment to the annual report required in paragraph (b) of this section.

(C) If the report specified by the specific alternative fugitive emissions standard is not site-specific, you must submit the information specified in paragraphs (b)(7)(i) and (ii) of this section for each individual site complying with the alternative standard.

(8) For each pneumatic pump affected facility, the information specified in paragraphs (b)(8)(i) through (iv) of this section.

(i) For each pneumatic pump that is constructed, modified or reconstructed during the reporting period, you must provide certification that the pneumatic pump meets one of the conditions described in paragraph (b)(8)(i)(A), (B), or (C) of this section.

(A) No control device or process is available on site.

(B) A control device or process is available on site and the owner or operator has determined in accordance with § 60.5393a(b)(5) that it is technically infeasible to capture and route the emissions to the control device or process.

(C) Emissions from the pneumatic pump are routed to a control device or process. If the control device is designed to achieve less than 95 percent emissions reduction, specify the percent emissions reductions the control device is designed to achieve.

(ii) For any pneumatic pump affected facility which has been previously reported as required under paragraph (b)(8)(i) of this section and for which a change in the reported condition has occurred during the reporting period, provide the identification of the pneumatic pump affected facility and the date it was previously reported and a certification that the pneumatic pump meets one of the conditions described in paragraph (b)(8)(ii)(A), (B), (C), or (D) of this section.

(A) A control device has been added to the location and the pneumatic pump now reports according to paragraph (b)(8)(i)(C) of this section.

(B) A control device has been added to the location and the pneumatic pump affected facility now reports according to paragraph (b)(8)(i)(B) of this section.

(C) A control device or process has been removed from the location or otherwise is no longer available and the pneumatic pump affected facility now report according to paragraph (b)(8)(i)(A) of this section.

(D) A control device or process has been removed from the location or is otherwise no longer available and the owner or operator has determined in accordance with § 60.5393a(b)(5) through an engineering evaluation that it is technically infeasible to capture and route the emissions to another control device or process.

(iii) For each deviation that occurred during the reporting period and recorded as specified in paragraph (c)(16)(ii) of this section, the date and time the deviation began, duration of the deviation, and a description of the deviation.

(iv) If required to comply with § 60.5393a(b), the information in paragraphs (b)(8)(iv)(A) through (C) of this section.

(A) Dates of each inspection required under § 60.5416a(d);

(B) Each defect or leak identified during each inspection, and date of repair or date of anticipated repair if repair is delayed; and

(C) Date and time of each bypass alarm or each instance the key is checked out if you are subject to the bypass requirements of § 60.5416a(c)(3).

(9) Within 60 days after the date of completing each performance test (see § 60.8) required by this subpart, except testing conducted by the manufacturer as specified in § 60.5413a(d), you must submit the results of the performance test following the procedure specified in either paragraph (b)(9)(i) or (ii) of this section.

(i) For data collected using test methods supported by the EPA's Electronic Reporting Tool (ERT) as listed on the EPA's ERT website (*https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert*) at the time of the test, you must submit the results of the performance test to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI), except as outlined in this paragraph (b)(9)(i). (CEDRI can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*).) The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as confidential business information (CBI). Anything submitted using CEDRI cannot later be claimed CBI. Performance test data must be submitted in a file format generated through the use of the EPA's ERT or an alternate electronic file format consistent with the extensible markup language (XML) schema listed on the EPA's ERT website. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim, you must submit a complete file generated through the use of the EPA's ERT or an alternate electronic file consistent with the XML schema listed on the EPA's ERT website, including information claimed to be CBI, on a compact disc, flash drive, or other commonly used electronic storage media to the EPA. The electronic media must be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Measurement Policy Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same ERT or alternate file with the CBI omitted must be submitted to the EPA via the EPA's CDX as described earlier in this paragraph (b)(9)(i). All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(ii) For data collected using test methods that are not supported by the EPA's ERT as listed on the EPA's ERT website at the time of the test, you must submit the results of the performance test to the Administrator at the appropriate address listed in § 60.4.

(10) For combustion control devices tested by the manufacturer in accordance with § 60.5413a(d), an electronic copy of the performance test results required by § 60.5413a(d) shall be submitted via email to *Oil_and_Gas_PT@EPA.GOV* unless the test results for that model of combustion control device are posted at the following website: *epa.gov/airquality/oilandgas/*.

(11) You must submit reports to the EPA via CEDRI, except as outlined in this paragraph (b)(11). (CEDRI can be accessed through the EPA's CDX (*https://cdx.epa.gov/*).) The EPA will make all the information submitted through CEDRI available to the public without further notice to you. Do not use CEDRI to submit information you claim as CBI. Anything submitted using CEDRI cannot later be claimed CBI. You must use the appropriate electronic report in CEDRI for this subpart or an alternate electronic file format consistent with the extensible markup language (XML) schema listed on the CEDRI website (*https://www.epa.gov/electronic-reporting-air-emissions/cedri/*). If the reporting form specific to this subpart is not available in CEDRI at the time that the report is due, you must submit the report to the Administrator at the appropriate address listed in § 60.4. Once the form has been available in CEDRI for at least 90 calendar days, you must begin submitting all subsequent reports via CEDRI. The reports must be submitted by the

deadlines specified in this subpart, regardless of the method in which the reports are submitted. Although we do not expect persons to assert a claim of CBI, if you wish to assert a CBI claim, submit a complete report generated using the appropriate form in CEDRI or an alternate electronic file consistent with the XML schema listed on the EPA's CEDRI website, including information claimed to be CBI, on a compact disc, flash drive, or other commonly used electronic storage medium to the EPA. The electronic medium shall be clearly marked as CBI and mailed to U.S. EPA/OAQPS/CORE CBI Office, Attention: Group Leader, Fuels and Incineration Group, MD C404–02, 4930 Old Page Rd., Durham, NC 27703. The same file with the CBI omitted shall be submitted to the EPA via CEDRI. All CBI claims must be asserted at the time of submission. Furthermore, under CAA section 114(c), emissions data is not entitled to confidential treatment, and the EPA is required to make emissions data available to the public. Thus, emissions data will not be protected as CBI and will be made publicly available.

(12) You must submit the certification signed by the qualified professional engineer or in-house engineer according to § 60.5411a(d) for each closed vent system routing to a control device or process.

(13) If you are required to electronically submit a report through CEDRI in the EPA's CDX, you may assert a claim of EPA system outage for failure to timely comply with the reporting requirement. To assert a claim of EPA system outage, you must meet the requirements outlined in paragraphs (b)(13)(i) through (vii) of this section.

(i) You must have been or will be precluded from accessing CEDRI and submitting a required report within the time prescribed due to an outage of either the EPA's CEDRI or CDX systems.

(ii) The outage must have occurred within the period of time beginning 5 business days prior to the date that the submission is due.

(iii) The outage may be planned or unplanned.

(iv) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or caused a delay in reporting.

(v) You must provide to the Administrator a written description identifying:

(A) The date(s) and time(s) when CDX or CEDRI was accessed and the system was unavailable;

(B) A rationale for attributing the delay in reporting beyond the regulatory deadline to the EPA system outage;

(C) Measures taken or to be taken to minimize the delay in reporting; and

(D) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(vi) The decision to accept the claim of EPA system outage and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(vii) In any circumstance, the report must be submitted electronically as soon as possible after the outage is resolved.

(14) If you are required to electronically submit a report through CEDRI in the EPA's CDX, the owner or operator may assert a claim of force majeure for failure to timely comply with the reporting requirement. To assert a claim of force majeure, you must meet the requirements outlined in paragraphs (b)(14)(i) through (v) of this section.

(i) You may submit a claim if a force majeure event is about to occur, occurs, or has occurred or there are lingering effects from such an event within the period of time beginning 5 business days prior to the date the submission is due. For the purposes of this section, a force majeure event is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents you from complying with the requirement to submit a report electronically within the time period prescribed. Examples of such events are acts of nature (*e.g.,* hurricanes, earthquakes, or floods), acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility (*e.g.,* large scale power outage).

(ii) You must submit notification to the Administrator in writing as soon as possible following the date you first knew, or through due diligence should have known, that the event may cause or caused a delay in reporting.

(iii) You must provide to the Administrator:

(A) A written description of the force majeure event;

(B) A rationale for attributing the delay in reporting beyond the regulatory deadline to the force majeure event;

(C) Measures taken or to be taken to minimize the delay in reporting; and

(D) The date by which you propose to report, or if you have already met the reporting requirement at the time of the notification, the date you reported.

(iv) The decision to accept the claim of force majeure and allow an extension to the reporting deadline is solely within the discretion of the Administrator.

(v) In any circumstance, the reporting must occur as soon as possible after the force majeure event occurs.

(c) *Recordkeeping requirements.* You must maintain the records identified as specified in § 60.7(f) and in paragraphs (c)(1) through (18) of this section. All records required by this subpart must be maintained either onsite or at the nearest local field office for at least 5 years. Any records required to be maintained by this subpart that are submitted electronically via the EPA's CDX may be maintained in electronic format.

(1) The records for each well affected facility as specified in paragraphs (c)(1)(i) through (vii) of this section, as applicable. For each well affected facility for which you make a claim that the well affected facility is not subject to the requirements for well completions pursuant to § 60.5375a(g), you must maintain the record in paragraph (c)(1)(vi) of this section, only. For each well affected facility that routes flowback entirely through one or more production separators that are designed to accommodate flowback, only records of the United States Well Number, the latitude and longitude of the well in decimal degrees to an accuracy and precision of five (5) decimals of a degree using North American Datum of 1983, the Well Completion ID, and the date and time of startup of production are required. For periods where salable gas is unable to be separated, records of the date and time of onset of flowback, the duration and disposition of recovery, the duration of combustion and venting (if applicable), reasons for venting (if applicable), and deviations are required.

(i) Records identifying each well completion operation for each well affected facility.

(ii) Records of deviations in cases where well completion operations with hydraulic fracturing were not performed in compliance with the requirements specified in § 60.5375a, including the date and time the deviation began, the duration of the deviation, and a description of the deviation.

(iii) You must maintain the records specified in paragraphs (c)(1)(iii)(A) through (C) of this section.

(A) For each well affected facility required to comply with the requirements of § 60.5375a(a), you must record: The latitude and longitude of the well in decimal degrees to an accuracy and precision of five (5) decimals of a

degree using North American Datum of 1983; the United States Well Number; the date and time of the onset of flowback following hydraulic fracturing or refracturing; the date and time of each attempt to direct flowback to a separator as required in § 60.5375a(a)(1)(ii); the date and time of each occurrence of returning to the initial flowback stage under § 60.5375a(a)(1)(i); and the date and time that the well was shut in and the flowback equipment was permanently disconnected, or the startup of production; the duration of flowback; duration of recovery and disposition of recovery (*i.e.,* routed to the gas flow line or collection system, re-injected into the well or another well, used as an onsite fuel source, or used for another useful purpose that a purchased fuel or raw material would serve); duration of combustion; duration of venting; and specific reasons for venting in lieu of capture or combustion. The duration must be specified in hours. In addition, for wells where it is technically infeasible to route the recovered gas as specified in § 60.5375a(a)(1)(ii), you must record the reasons for the claim of technical infeasibility with respect to all four options provided in § 60.5375a(a)(1)(ii).

(B) For each well affected facility required to comply with the requirements of § 60.5375a(f), you must record: Latitude and longitude of the well in decimal degrees to an accuracy and precision of five (5) decimals of a degree using North American Datum of 1983; the United States Well Number; the date and time of the onset of flowback following hydraulic fracturing or refracturing; the date and time that the well was shut in and the flowback equipment was permanently disconnected, or the startup of production; the duration of flowback; duration of recovery and disposition of recovery (*i.e.,* routed to the gas flow line or collection system, re-injected into the well or another well, used as an onsite fuel source, or used for another useful purpose that a purchased fuel or raw material would serve); duration of combustion; duration of venting; and specific reasons for venting in lieu of capture or combustion. The duration must be specified in hours.

(C) For each well affected facility for which you make a claim that it meets the criteria of § 60.5375a(a)(1)(iii)(A), you must maintain the following:

(*1*) The latitude and longitude of the well in decimal degrees to an accuracy and precision of five (5) decimals of a degree using North American Datum of 1983; the United States Well Number; the date and time of the onset of flowback following hydraulic fracturing or refracturing; the date and time that the well was shut in and the flowback equipment was permanently disconnected, or the startup of production; the duration of flowback; duration of recovery and disposition of recovery (*i.e.,* routed to the gas flow line or collection system, re-injected into the well or another well, used as an onsite fuel source, or used for another useful purpose that a purchased fuel or raw material would serve); duration of combustion; duration of venting; and specific reasons for venting in lieu of capture or combustion. The duration must be specified in hours.

(*2*) If applicable, records that the conditions of § 60.5375a(a)(1)(iii)(A) are no longer met and that the well completion operation has been stopped and a separator installed. The records shall include the date and time the well completion operation was stopped and the date and time the separator was installed.

(*3*) A record of the claim signed by the certifying official that no liquids collection is at the well site. The claim must include a certification by a certifying official of truth, accuracy, and completeness. This certification shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(iv) For each well affected facility for which you claim an exception under § 60.5375a(a)(3), you must record: The latitude and longitude of the well in decimal degrees to an accuracy and precision of five (5) decimals of a degree using North American Datum of 1983; the United States Well Number; the specific exception claimed; the starting date and ending date for the period the well operated under the exception; and an explanation of why the well meets the claimed exception.

(v) For each well affected facility required to comply with both § 60.5375a(a)(1) and (3), if you are using a digital photograph in lieu of the records required in paragraphs (c)(1)(i) through (iv) of this section, you must retain the records of the digital photograph as specified in § 60.5410a(a)(4).

(vi) For each well affected facility for which you make a claim that the well affected facility is not subject to the well completion standards according to § 60.5375a(g), you must maintain:

(A) A record of the analysis that was performed in order the make that claim, including but not limited to, GOR values for established leases and data from wells in the same basin and field;

(B) the latitude and longitude of the well in decimal degrees to an accuracy and precision of five (5) decimals of a degree using North American Datum of 1983; the United States Well Number;

(C) A record of the claim signed by the certifying official. The claim must include a certification by a certifying official of truth, accuracy, and completeness. This certification shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(vii) For each well affected facility subject to § 60.5375a(f), a record of the well type (*i.e.,* wildcat well, delineation well, or low pressure well (as defined § 60.5430a)) and supporting inputs and calculations, if applicable.

(2) For each centrifugal compressor affected facility, you must maintain records of deviations in cases where the centrifugal compressor was not operated in compliance with the requirements specified in § 60.5380a, including a description of each deviation, the date and time each deviation began and the duration of each deviation. Except as specified in paragraph (c)(2)(viii) of this section, you must maintain the records in paragraphs (c)(2)(i) through (vii) of this section for each control device tested under § 60.5413a(d) which meets the criteria in § 60.5413a(d)(11) and (e) and used to comply with § 60.5380a(a)(1) for each centrifugal compressor.

(i) Make, model, and serial number of purchased device.

(ii) Date of purchase.

(iii) Copy of purchase order.

(iv) Location of the centrifugal compressor and control device in latitude and longitude coordinates in decimal degrees to an accuracy and precision of five (5) decimals of a degree using the North American Datum of 1983.

(v) Inlet gas flow rate.

(vi) Records of continuous compliance requirements in § 60.5413a(e) as specified in paragraphs (c)(2)(vi)(A) through (E) of this section.

(A) Records that the pilot flame is present at all times of operation.

(B) Records that the device was operated with no visible emissions except for periods not to exceed a total of 1 minute during any 15-minute period.

(C) Records of the maintenance and repair log.

(D) Records of the visible emissions test following return to operation from a maintenance or repair activity, including the date of the visible emissions test, the length of the test, and

the amount of time for which visible emissions were present.

(E) Records of the manufacturer's written operating instructions, procedures, and maintenance schedule to ensure good air pollution control practices for minimizing emissions.

(vii) Records of deviations for instances where the inlet gas flow rate exceeds the manufacturer's listed maximum gas flow rate, where there is no indication of the presence of a pilot flame, or where visible emissions exceeded 1 minute in any 15-minute period, including a description of the deviation, the date and time the deviation began, and the duration of the deviation.

(viii) As an alternative to the requirements of paragraph (c)(2)(iv) of this section, you may maintain records of one or more digital photographs with the date the photograph was taken and the latitude and longitude of the centrifugal compressor and control device imbedded within or stored with the digital file. As an alternative to imbedded latitude and longitude within the digital photograph, the digital photograph may consist of a photograph of the centrifugal compressor and control device with a photograph of a separately operating GPS device within the same digital picture, provided the latitude and longitude output of the GPS unit can be clearly read in the digital photograph.

(3) For each reciprocating compressor affected facility, you must maintain the records in paragraphs (c)(3)(i) through (iii) of this section.

(i) Records of the cumulative number of hours of operation or number of months since initial startup, since August 2, 2016, or since the previous replacement of the reciprocating compressor rod packing, whichever is latest. Alternatively, a statement that emissions from the rod packing are being routed to a process through a closed vent system under negative pressure.

(ii) Records of the date and time of each reciprocating compressor rod packing replacement, or date of installation of a rod packing emissions collection system and closed vent system as specified in § 60.5385a(a)(3).

(iii) Records of deviations in cases where the reciprocating compressor was not operated in compliance with the requirements specified in § 60.5385a, including the date and time the deviation began, duration of the deviation, and a description of the deviation.

(4) For each pneumatic controller affected facility, you must maintain the records identified in paragraphs (c)(4)(i) through (v) of this section, as applicable.

(i) Records of the month and year of installation, reconstruction, or modification, location in latitude and longitude coordinates in decimal degrees to an accuracy and precision of five (5) decimals of a degree using the North American Datum of 1983, identification information that allows traceability to the records required in paragraph (c)(4)(iii) or (iv) of this section and manufacturer specifications for each pneumatic controller constructed, modified, or reconstructed.

(ii) Records of the demonstration that the use of pneumatic controller affected facilities with a natural gas bleed rate greater than the applicable standard are required and the reasons why.

(iii) If the pneumatic controller is not located at a natural gas processing plant, records of the manufacturer's specifications indicating that the controller is designed such that natural gas bleed rate is less than or equal to 6 standard cubic feet per hour.

(iv) If the pneumatic controller is located at a natural gas processing plant, records of the documentation that the natural gas bleed rate is zero.

(v) For each instance where the pneumatic controller was not operated in compliance with the requirements specified in § 60.5390a, a description of the deviation, the date and time the deviation began, and the duration of the deviation.

(5) For each storage vessel affected facility, you must maintain the records identified in paragraphs (c)(5)(i) through (vii) of this section.

(i) If required to reduce emissions by complying with § 60.5395a(a)(2), the records specified in §§ 60.5420a(c)(6) through (8) and 60.5416a(c)(6)(ii) and (c)(7)(ii). You must maintain the records in paragraph (c)(5)(vi) of this section for each control device tested under § 60.5413a(d) which meets the criteria in § 60.5413a(d)(11) and (e) and used to comply with § 60.5395a(a)(2) for each storage vessel.

(ii) Records of each VOC emissions determination for each storage vessel affected facility made under § 60.5365a(e) including identification of the model or calculation methodology used to calculate the VOC emission rate.

(iii) For each instance where the storage vessel was not operated in compliance with the requirements specified in §§ 60.5395a, 60.5411a, 60.5412a, and 60.5413a, as applicable, a description of the deviation, the date and time each deviation began, and the duration of the deviation.

(iv) For storage vessels that are skid-mounted or permanently attached to something that is mobile (such as trucks, railcars, barges or ships), records indicating the number of consecutive days that the vessel is located at a site in the crude oil and natural gas production source category. If a storage vessel is removed from a site and, within 30 days, is either returned to the site or replaced by another storage vessel at the site to serve the same or similar function, then the entire period since the original storage vessel was first located at the site, including the days when the storage vessel was removed, will be added to the count towards the number of consecutive days.

(v) You must maintain records of the identification and location in latitude and longitude coordinates in decimal degrees to an accuracy and precision of five (5) decimals of a degree using the North American Datum of 1983 of each storage vessel affected facility.

(vi) Except as specified in paragraph (c)(5)(vi)(G) of this section, you must maintain the records specified in paragraphs (c)(5)(vi)(A) through (H) of this section for each control device tested under § 60.5413a(d) which meets the criteria in § 60.5413a(d)(11) and (e) and used to comply with § 60.5395a(a)(2) for each storage vessel.

(A) Make, model, and serial number of purchased device.

(B) Date of purchase.

(C) Copy of purchase order.

(D) Location of the control device in latitude and longitude coordinates in decimal degrees to an accuracy and precision of five (5) decimals of a degree using the North American Datum of 1983.

(E) Inlet gas flow rate.

(F) Records of continuous compliance requirements in § 60.5413a(e) as specified in paragraphs (c)(5)(vi)(F)(*1*) through (*5*) of this section.

(*1*) Records that the pilot flame is present at all times of operation.

(*2*) Records that the device was operated with no visible emissions except for periods not to exceed a total of 1 minute during any 15-minute period.

(*3*) Records of the maintenance and repair log.

(*4*) Records of the visible emissions test following return to operation from a maintenance or repair activity, including the date of the visible emissions test, the length of the test, and the amount of time for which visible emissions were present.

(*5*) Records of the manufacturer's written operating instructions, procedures, and maintenance schedule to ensure good air pollution control practices for minimizing emissions.

(G) Records of deviations for instances where the inlet gas flow rate exceeds the manufacturer's listed maximum gas flow rate, where there is no indication of the presence of a pilot flame, or where visible emissions exceeded 1 minute in any 15-minute period, including a description of the deviation, the date and time the deviation began, and the duration of the deviation.

(H) As an alternative to the requirements of paragraph (c)(5)(vi)(D) of this section, you may maintain records of one or more digital photographs with the date the photograph was taken and the latitude and longitude of the storage vessel and control device imbedded within or stored with the digital file. As an alternative to imbedded latitude and longitude within the digital photograph, the digital photograph may consist of a photograph of the storage vessel and control device with a photograph of a separately operating GPS device within the same digital picture, provided the latitude and longitude output of the GPS unit can be clearly read in the digital photograph.

(vii) Records of the date that each storage vessel affected facility is removed from service and returned to service, as applicable.

(6) Records of each closed vent system inspection required under § 60.5416a(a)(1) and (2) and (b) for centrifugal compressors and reciprocating compressors, § 60.5416a(c)(1) for storage vessels, or § 60.5416a(e) for pneumatic pumps as required in paragraphs (c)(6)(i) through (iii) of this section.

(i) A record of each closed vent system inspection or no detectable emissions monitoring survey. You must include an identification number for each closed vent system (or other unique identification description selected by you) and the date of the inspection.

(ii) For each defect or leak detected during inspections required by § 60.5416a(a)(1) and (2), (b), (c)(1), or (d), you must record the location of the defect or leak, a description of the defect or the maximum concentration reading obtained if using Method 21 of appendix A–7 of this part, the date of detection, and the date the repair to correct the defect or leak is completed.

(iii) If repair of the defect is delayed as described in § 60.5416a(b)(10), you must record the reason for the delay and the date you expect to complete the repair.

(7) A record of each cover inspection required under § 60.5416a(a)(3) for centrifugal or reciprocating compressors or § 60.5416a(c)(2) for storage vessels as required in paragraphs (c)(7)(i) through (iii) of this section.

(i) A record of each cover inspection. You must include an identification number for each cover (or other unique identification description selected by you) and the date of the inspection.

(ii) For each defect detected during inspections required by § 60.5416a(a)(3) or (c)(2), you must record the location of the defect, a description of the defect, the date of detection, the corrective action taken the repair the defect, and the date the repair to correct the defect is completed.

(iii) If repair of the defect is delayed as described in § 60.5416a(b)(10) or (c)(5), you must record the reason for the delay and the date you expect to complete the repair.

(8) If you are subject to the bypass requirements of § 60.5416a(a)(4) for centrifugal compressors or reciprocating compressors, or § 60.5416a(c)(3) for storage vessels or pneumatic pumps, you must prepare and maintain a record of each inspection or a record of each time the key is checked out or a record of each time the alarm is sounded.

(9) [Reserved]

(10) For each centrifugal compressor or pneumatic pump affected facility, records of the schedule for carbon replacement (as determined by the design analysis requirements of § 60.5413a(c)(2) or (3)) and records of each carbon replacement as specified in § 60.5412a(c)(1).

(11) For each centrifugal compressor affected facility subject to the control device requirements of § 60.5412a(a), (b), and (c), records of minimum and maximum operating parameter values, continuous parameter monitoring system data, calculated averages of continuous parameter monitoring system data, results of all compliance calculations, and results of all inspections.

(12) For each carbon adsorber installed on storage vessel affected facilities, records of the schedule for carbon replacement (as determined by the design analysis requirements of § 60.5412a(d)(2)) and records of each carbon replacement as specified in § 60.5412a(c)(1).

(13) For each storage vessel affected facility subject to the control device requirements of § 60.5412a(c) and (d), you must maintain records of the inspections, including any corrective actions taken, the manufacturers' operating instructions, procedures and maintenance schedule as specified in § 60.5417a(h)(3). You must maintain records of EPA Method 22 of appendix A–7 of this part, section 11 results, which include: Company, location, company representative (name of the person performing the observation), sky conditions, process unit (type of control device), clock start time, observation period duration (in minutes and seconds), accumulated emission time (in minutes and seconds), and clock end time. You may create your own form including the above information or use Figure 22–1 in EPA Method 22 of appendix A–7 of this part. Manufacturer's operating instructions, procedures and maintenance schedule must be available for inspection.

(14) A log of records as specified in § 60.5412a(d)(1)(iii), for all inspection, repair, and maintenance activities for each control device failing the visible emissions test.

(15) For each collection of fugitive emissions components at a well site and each collection of fugitive emissions components at a compressor station, maintain the records identified in paragraphs (c)(15)(i) through (viii) of this section.

(i) The date of the startup of production or the date of the first day of production after modification for each collection of fugitive emissions components at a well site and the date of startup or the date of modification for each collection of fugitive emissions components at a compressor station.

(ii) For each collection of fugitive emissions components at a well site complying with § 60.5397a(a)(2), you must maintain records of the daily production and calculations demonstrating that the rolling 12-month average is at or below 15 boe per day no later than 12 months before complying with § 60.5397a(a)(2).

(iii) For each collection of fugitive emissions components at a well site complying with § 60.5397a(a)(3)(i), you must keep records of daily production and calculations for the first 30 days after completion of any action listed in § 60.5397a(a)(2)(i) through (v) demonstrating that total production from the well site is at or below 15 boe per day, or maintain records demonstrating the rolling 12-month average total production for the well site is at or below 15 boe per day.

(iv) For each collection of fugitive emissions components at a well site complying with § 60.5397a(a)(3)(ii), you must keep the records specified in paragraphs (c)(15)(i), (vi), and (vii) of this section.

(v) For each collection of fugitive emissions components at a well site where you complete the removal of all major production and processing equipment such that the well site contains only one or more wellheads, record the date the well site completes

the removal of all major production and processing equipment from the well site, and, if the well site is still producing, record the well ID or separate tank battery ID receiving the production from the well site. If major production and processing equipment is subsequently added back to the well site, record the date that the first piece of major production and processing equipment is added back to the well site.

(vi) The fugitive emissions monitoring plan as required in § 60.5397a(b), (c), and (d).

(vii) The records of each monitoring survey as specified in paragraphs (c)(15)(vii)(A) through (I) of this section.

(A) Date of the survey.

(B) Beginning and end time of the survey.

(C) Name of operator(s), training, and experience of the operator(s) performing the survey.

(D) Monitoring instrument used.

(E) Fugitive emissions component identification when Method 21 of appendix A–7 of this part is used to perform the monitoring survey.

(F) Ambient temperature, sky conditions, and maximum wind speed at the time of the survey. For compressor stations, operating mode of each compressor (*i.e.,* operating, standby pressurized, and not operating-depressurized modes) at the station at the time of the survey.

(G) Any deviations from the monitoring plan or a statement that there were no deviations from the monitoring plan.

(H) Records of calibrations for the instrument used during the monitoring survey.

(I) Documentation of each fugitive emission detected during the monitoring survey, including the information specified in paragraphs (c)(15)(vii)(I)(*1*) through (*8*) of this section.

(*1*) Location of each fugitive emission identified.

(*2*) Type of fugitive emissions component, including designation as difficult-to-monitor or unsafe-to-monitor, if applicable.

(*3*) If Method 21 of appendix A–7 of this part is used for detection, record the component ID and instrument reading.

(*4*) For each repair that cannot be made during the monitoring survey when the fugitive emissions are initially found, a digital photograph or video must be taken of that component or the component must be tagged for identification purposes. The digital photograph must include the date that the photograph was taken and must clearly identify the component by location within the site (*e.g.,* the latitude and longitude of the component or by other descriptive landmarks visible in the picture). The digital photograph or identification (*e.g.,* tag) may be removed after the repair is completed, including verification of repair with the resurvey.

(*5*) The date of first attempt at repair of the fugitive emissions component(s).

(*6*) The date of successful repair of the fugitive emissions component, including the resurvey to verify repair and instrument used for the resurvey.

(*7*) Identification of each fugitive emission component placed on delay of repair and explanation for each delay of repair

(*8*) Date of planned shutdowns that occur while there are any components that have been placed on delay of repair.

(viii) For each collection of fugitive emissions components at a well site or collection of fugitive emissions components at a compressor station complying with an alternative means of emissions limitation under § 60.5399a, you must maintain the records specified by the specific alternative fugitive emissions standard for a period of at least 5 years.

(16) For each pneumatic pump affected facility, you must maintain the records identified in paragraphs (c)(16)(i) through (v) of this section.

(i) Records of the date, location, and manufacturer specifications for each pneumatic pump constructed, modified, or reconstructed.

(ii) Records of deviations in cases where the pneumatic pump was not operated in compliance with the requirements specified in § 60.5393a, including the date and time the deviation began, duration of the deviation, and a description of the deviation.

(iii) Records on the control device used for control of emissions from a pneumatic pump including the installation date, and manufacturer's specifications. If the control device is designed to achieve less than 95-percent emission reduction, maintain records of the design evaluation or manufacturer's specifications which indicate the percentage reduction the control device is designed to achieve.

(iv) Records substantiating a claim according to § 60.5393a(b)(5) that it is technically infeasible to capture and route emissions from a pneumatic pump to a control device or process; including the certification according to § 60.5393a(b)(5)(ii) and the records of the engineering assessment of technical infeasibility performed according to § 60.5393a(b)(5)(iii).

(v) You must retain copies of all certifications, engineering assessments, and related records for a period of five years and make them available if directed by the implementing agency.

(17) For each closed vent system routing to a control device or process, the records of the assessment conducted according to § 60.5411a(d):

(i) A copy of the assessment conducted according to § 60.5411a(d)(1);

(ii) A copy of the certification according to § 60.5411a(d)(1)(i); and

(iii) The owner or operator shall retain copies of all certifications, assessments, and any related records for a period of 5 years, and make them available if directed by the delegated authority.

(18) A copy of each performance test submitted under paragraph (b)(9) of this section.

■ 24. Section 60.5422a is amended by revising paragraphs (a), (b), and (c) introductory text to read as follows:

**§ 60.5422a What are my additional reporting requirements for my affected facility subject to VOC requirements for onshore natural gas processing plants?**

(a) You must comply with the requirements of paragraphs (b) and (c) of this section in addition to the requirements of § 60.487a(a), (b)(1) through (3) and (5), and (c)(2)(i) through (iv) and (vii) through (viii). You must submit semiannual reports to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI). (CEDRI can be accessed through the EPA's Central Data Exchange (CDX) (*https://cdx.epa.gov/*).) Use the appropriate electronic report in CEDRI for this subpart or an alternate electronic file format consistent with the extensible markup language (XML) schema listed on the CEDRI website (*https://www3.epa.gov/ttn/chief/cedri/*). If the reporting form specific to this subpart is not available in CEDRI at the time that the report is due, submit the report to the Administrator at the appropriate address listed in § 60.4. Once the form has been available in CEDRI for at least 90 days, you must begin submitting all subsequent reports via CEDRI. The report must be submitted by the deadline specified in this subpart, regardless of the method in which the report is submitted.

(b) An owner or operator must include the following information in the initial semiannual report in addition to the information required in § 60.487a(b)(1) through (3) and (5): Number of pressure relief devices subject to the requirements of § 60.5401a(b) except for those pressure relief devices designated for no detectable emissions under the provisions of § 60.482–4a(a) and those

pressure relief devices complying with § 60.482–4a(c).

(c) An owner or operator must include the information specified in paragraphs (c)(1) and (2) of this section in all semiannual reports in addition to the information required in § 60.487a(c)(2)(i) through (iv) and (vii) through (viii):

* * * * *

■ 25. Section 60.5423a is amended by revising the section heading and paragraph (b) introductory text and adding paragraph (b)(3) to read as follows:

**§ 60.5423a What additional recordkeeping and reporting requirements apply to my sweetening unit affected facilities?**

* * * * *

(b) You must submit a report of excess emissions to the Administrator in your annual report if you had excess emissions during the reporting period. The procedures for submitting annual reports are located in § 60.5420a(b). For the purpose of these reports, excess emissions are defined as specified in paragraphs (b)(1) and (2) of this section. The report must contain the information specified in paragraph (b)(3) of this section.

* * * * *

(3) For each period of excess emissions during the reporting period, include the following information in your report:

(i) The date and time of commencement and completion of each period of excess emissions;

(ii) The required minimum efficiency (Z) and the actual average sulfur emissions reduction (R) for periods defined in paragraph (b)(1) of this section; and

(iii) The appropriate operating temperature and the actual average temperature of the gases leaving the combustion zone for periods defined in paragraph (b)(2) of this section.

* * * * *

■ 26. Section 60.5430a is amended by:

■ a. Revising the definitions for ''Capital expenditure'' and ''Certifying official'';

■ b. Adding in alphabetical order the definitions for ''Coil tubing cleanout,'' ''Custody meter,'' ''Custody meter assembly,'' and ''First attempt at repair'';

■ c. Revising the definitions for ''Flowback'' and ''Fugitive emissions component'';

■ d. Removing the definitions for ''Gas processing plant process unit'' and ''Greenfield site'';

■ e. Revising the definition of ''Low pressure well'';

■ f. Adding in alphabetical order the definition for ''Major production and processing equipment'';

■ g. Revising the definition for ''Maximum average daily throughput'';

■ h. Adding in alphabetical order the definitions for ''Plug drill-out,'' ''Repaired,'' and ''Screenout'';

■ i. Revising the definition for ''Startup of production'';

■ j. Adding in alphabetical order the definitions for ''UIC Class I oilfield disposal well'' and ''UIC Class II oilfield disposal well'';

■ k. Revising the definition for ''Well site''; and

■ l. Adding in alphabetical order the definition for ''Wellhead only well site''.

The revisions and additions read as follows:

**§ 60.5430a What definitions apply to this subpart?**

* * * * *

*Capital expenditure* means, in addition to the definition in 40 CFR 60.2, an expenditure for a physical or operational change to an existing facility that:

(1) Exceeds P, the product of the facility's replacement cost, R, and an adjusted annual asset guideline repair allowance, A, as reflected by the following equation: $P = R \times A$, where:

(i) The adjusted annual asset guideline repair allowance, A, is the product of the percent of the replacement cost, Y, and the applicable basic annual asset guideline repair allowance, B, divided by 100 as reflected by the following equation: $A = Y \times (B \div 100)$;

(ii) The percent Y is determined from the following equation: Y = (CPI of date of construction/most recently available CPI of date of project), where the ''CPI–U, U.S. city average, all items'' must be used for each CPI value; and

(iii) The applicable basic annual asset guideline repair allowance, B, is 4.5.

* * * * *

*Certifying official* means one of the following:

(1) For a corporation: A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities with an affected facility subject to this subpart and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) The Administrator is notified of such delegation of authority prior to the exercise of that authority. The Administrator reserves the right to evaluate such delegation;

(2) For a partnership (including but not limited to general partnerships, limited partnerships, and limited liability partnerships) or sole proprietorship: A general partner or the proprietor, respectively. If a general partner is a corporation, the provisions of paragraph (1) of this definition apply;

(3) For a municipality, State, Federal, or other public agency: Either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (*e.g.,* a Regional Administrator of EPA); or

(4) For affected facilities:

(i) The designated representative in so far as actions, standards, requirements, or prohibitions under title IV of the CAA or the regulations promulgated thereunder are concerned; or

(ii) The designated representative for any other purposes under this part.

*Coil tubing cleanout* means the process where an operator runs a string of coil tubing to the packed proppant within a well and jets the well to dislodge the proppant and provide sufficient lift energy to flow it to the surface. Coil tubing cleanout includes mechanical methods to remove solids and/or debris from a wellbore.

* * * * *

*Custody meter* means the meter where natural gas or hydrocarbon liquids are measured for sales, transfers, and/or royalty determination.

*Custody meter assembly* means an assembly of fugitive emissions components, including the custody meter, valves, flanges, and connectors necessary for the proper operation of the custody meter.

* * * * *

*First attempt at repair* means, for the purposes of fugitive emissions components, an action taken for the purpose of stopping or reducing fugitive emissions to the atmosphere. First attempts at repair include, but are not limited to, the following practices where practicable and appropriate: Tightening bonnet bolts; replacing bonnet bolts; tightening packing gland nuts; or injecting lubricant into lubricated packing.

* * * * *

*Flowback* means the process of allowing fluids and entrained solids to flow from a well following a treatment,

either in preparation for a subsequent phase of treatment or in preparation for cleanup and returning the well to production. The term flowback also means the fluids and entrained solids that emerge from a well during the flowback process. The flowback period begins when material introduced into the well during the treatment returns to the surface following hydraulic fracturing or refracturing. The flowback period ends when either the well is shut in and permanently disconnected from the flowback equipment or at the startup of production. The flowback period includes the initial flowback stage and the separation flowback stage. Screenouts, coil tubing cleanouts, and plug drill-outs are not considered part of the flowback process.

*Fugitive emissions component* means any component that has the potential to emit fugitive emissions of VOC at a well site or compressor station, including valves, connectors, pressure relief devices, open-ended lines, flanges, covers and closed vent systems not subject to § 60.5411 or § 60.5411a, thief hatches or other openings on a controlled storage vessel not subject to § 60.5395 or § 60.5395a, compressors, instruments, and meters. Devices that vent as part of normal operations, such as natural gas-driven pneumatic controllers or natural gas-driven pumps, are not fugitive emissions components, insofar as the natural gas discharged from the device's vent is not considered a fugitive emission. Emissions originating from other than the device's vent, such as the thief hatch on a controlled storage vessel, would be considered fugitive emissions.

* * * * *

*Low pressure well* means a well that satisfies at least one of the following conditions:

(1) The static pressure at the wellhead following fracturing but prior to the onset of flowback is less than the flow line pressure;

(2) The pressure of flowback fluid immediately before it enters the flow line, as determined under § 60.5432a, is less than the flow line pressure; or

(3) Flowback of the fracture fluids will not occur without the use of artificial lift equipment.

*Major production and processing equipment* means reciprocating or centrifugal compressors, glycol dehydrators, heater/treaters, separators, and storage vessels collecting crude oil, condensate, intermediate hydrocarbon liquids, or produced water, for the purpose of determining whether a well site is a wellhead only well site.

*Maximum average daily throughput* means the following:

(1) For storage vessels that commenced construction, reconstruction, or modification after September 18, 2015, and on and before November 16, 2020, *maximum average daily throughput* means the earliest calculation of daily average throughput during the 30-day PTE evaluation period employing generally accepted methods.

(2) For storage vessels that commenced construction, reconstruction, or modification after November 16, 2020, *maximum average daily throughput* means the earliest calculation of daily average throughput, determined as described in paragraph (3) or (4) of this definition, to an individual storage vessel over the days that production is routed to that storage vessel during the 30-day PTE evaluation period employing generally accepted methods specified in § 60.5365a(e)(1).

(3) If throughput to the individual storage vessel is measured on a daily basis (*e.g.,* via level gauge automation or daily manual gauging), the maximum average daily throughput is the average of all daily throughputs for days on which throughput was routed to that storage vessel during the 30-day evaluation period; or

(4) If throughput to the individual storage vessel is not measured on a daily basis (*e.g.,* via manual gauging at the start and end of loadouts), the maximum average daily throughput is the highest, of the average daily throughputs, determined for any production period to that storage vessel during the 30-day evaluation period, as determined by averaging total throughput to that storage vessel over each production period. A production period begins when production begins to be routed to a storage vessel and ends either when throughput is routed away from that storage vessel or when a loadout occurs from that storage vessel, whichever happens first. Regardless of the determination methodology, operators must not include days during which throughput is not routed to an individual storage vessel when calculating maximum average daily throughput for that storage vessel.

* * * * *

*Plug drill-out* means the removal of a plug (or plugs) that was used to isolate different sections of the well.

* * * * *

*Repaired* means, for the purposes of fugitive emissions components, that fugitive emissions components are adjusted, replaced, or otherwise altered, in order to eliminate fugitive emissions as defined in § 60.5397a and resurveyed as specified in § 60.5397a(h)(4) and it is verified that emissions from the fugitive emissions components are below the applicable fugitive emissions definition.

* * * * *

*Screenout* means an attempt to clear proppant from the wellbore to dislodge the proppant out of the well.

* * * * *

*Startup of production* means the beginning of initial flow following the end of flowback when there is continuous recovery of salable quality gas and separation and recovery of any crude oil, condensate, or produced water, except as otherwise provided in this definition. For the purposes of the fugitive monitoring requirements of § 60.5397a, *startup of production* means the beginning of the continuous recovery of salable quality gas and separation and recovery of any crude oil, condensate, or produced water.

* * * * *

*UIC Class I oilfield disposal well* means a well with a UIC Class I permit that meets the definition in 40 CFR 144.6(a)(2) and receives eligible fluids from oil and natural gas exploration and production operations.

*UIC Class II oilfield disposal well* means a well with a UIC Class II permit where wastewater resulting from oil and natural gas production operations is injected into underground porous rock formations not productive of oil or gas, and sealed above and below by unbroken, impermeable strata.

* * * * *

*Well site* means one or more surface sites that are constructed for the drilling and subsequent operation of any oil well, natural gas well, or injection well. For purposes of the fugitive emissions standards at § 60.5397a, well site also means a separate tank battery surface site collecting crude oil, condensate, intermediate hydrocarbon liquids, or produced water from wells not located at the well site (*e.g.,* centralized tank batteries). Also, for the purposes of the fugitive emissions standards at § 60.5397a, a well site does not include:

(1) UIC Class II oilfield disposal wells and disposal facilities;

(2) UIC Class I oilfield disposal wells; and

(3) The flange immediately upstream of the custody meter assembly and equipment, including fugitive emissions components, located downstream of this flange.

* * * * *

*Wellhead only well site* means, for the purposes of the fugitive emissions standards at § 60.5397a, a well site that contains one or more wellheads and no

major production and processing equipment.

* * * * *

■ 27. Table 3 to subpart OOOOa of part 60 is amended by revising the entries for §§ 60.8 and 60.15 to read as follows:

TABLE 3 TO SUBPART OOOOa OF PART 60—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART OOOOa

| General provisions citation | Subject of citation | Applies to subpart? | Explanation |
|---|---|---|---|
| * | * | * | * * * * |
| § 60.8 | Performance tests | Yes | Except that the format of performance test reports is described in § 60.5420a(b). Performance testing is required for control devices used on storage vessels, centrifugal compressors, and pneumatic pumps, except that performance testing is not required for a control device used solely on pneumatic pump(s). |
| * | * | * | * * * * |
| § 60.15 | Reconstruction | Yes | Except that § 60.15(d) does not apply to wells, pneumatic controllers, pneumatic pumps, centrifugal compressors, reciprocating compressors, storage vessels, or the collection of fugitive emissions components at a well site or the collection of fugitive emissions components at a compressor station. |
| * | * | * | * * * * |

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Part IV

## Commodity Futures Trading Commission

17 CFR Parts 1, 23, and 140

Capital Requirements of Swap Dealers and Major Swap Participants; Final Rule

**COMMODITY FUTURES TRADING COMMISSION**

**17 CFR Parts 1, 23, and 140**

**RIN 3038–AD54**

## Capital Requirements of Swap Dealers and Major Swap Participants

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is adopting new regulations imposing minimum capital requirements and financial reporting requirements on swap dealers (''SDs'') and major swap participants (''MSPs'') that are not subject to a prudential regulator. The Commission is also amending existing capital requirements for futures commission merchants (''FCMs'') to provide specific capital deductions for market risk and credit risk for swaps and security-based swaps entered into by an FCM. The Commission is further adopting amendments to its regulations to permit certain entities dually-registered with the Securities and Exchange Commission (''SEC'') to file an SEC Financial and Operational Combined Uniform Single Report in lieu of CFTC financial reports, to require certain Commission registrants to file notices of certain defined events, and to require notices of bulk transfers to be filed with the Commission electronically and within a defined period of time.

**DATES:**

*Effective date:* November 16, 2020.

*Compliance date:* October 6, 2021

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## I. Introduction

### *A. Background and Statutory Authority*

The Commission is adopting capital and financial reporting requirements for SDs and MSPs, and is amending existing capital rules for FCMs to provide explicit capital requirements for proprietary positions in swaps and security-based swaps that are not cleared by a clearing organization. The adoption of the capital requirements for SDs and MSPs completes the Congressional mandate directing the Commission to adopt rules imposing both capital requirements on SDs and MSPs that are not subject to a prudential regulator, and imposing initial and variation margin on uncleared swaps entered into by SDs and MSPs that are not subject to a prudential regulator.[1]

Title VII of the Dodd-Frank Act established a new regulatory framework for swap and security-based swap transactions.[2] The legislation was enacted, among other reasons, to reduce risk, increase transparency, and promote market integrity within the financial system, including by: (i) Providing for the registration and comprehensive regulation of SDs, security-based swap dealers (''SBSDs''), MSPs and major security-based swap participants (''MSBSPs''); (ii) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (iii) creating rigorous recordkeeping and real-time reporting regimes; and (iv) enhancing the rulemaking and enforcement authorities of the Commissions with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight. The Dodd-Frank Act further established a jurisdictional boundary by authorizing the Commission to regulate ''swaps,'' and granting the SEC authority to regulate ''security-based swaps.''[3] Sections 721 and 761 of the Dodd-Frank Act also added definitions of the terms ''swap dealer,'' ''security-based swap dealer,'' ''major swap participant,'' and ''major security-based swap participant'' to the CEA and Exchange Act.[4]

An additional provision of the new swap regulatory framework, section 731 of the Dodd-Frank Act, amended the CEA[5] by adding section 4s, which requires an entity meeting the definition of an SD or an MSP to register with the Commission.[6] Section 4s authorizes the Commission to adopt rules requiring such SDs and MSPs to maintain daily trading records of their swaps and all related records (including related cash or forward transactions) and recorded communications.[7] Section 4s further requires each SD or MSP to conform with the business conduct standards prescribed by the Commission that relate to: (i) Fraud, manipulation, and other abusive practices involving swaps; (ii) diligent supervision of the business of the SD or MSP; (iii) adherence to applicable position limits; and (iv) such other matters as the Commission determines appropriate.[8]

Section 4s(e) also addresses minimum capital requirements for SDs and MSPs, and imposes initial and variation margin obligations on swaps entered into by SDs and MSPs that are not cleared by a registered derivatives clearing organization.[9] Section 4s(e) applies a bifurcated approach with respect to capital and margin by requiring each SD and MSP subject to regulation by a prudential regulator to meet the minimum capital and margin requirements adopted by the applicable prudential regulator, and requiring each SD and MSP not subject to regulation by a prudential regulator to meet the minimum capital and margin requirements adopted by the Commission.[10] Therefore, the Commission's authority to impose capital and margin requirements extends to SDs and MSPs that are non-banking entities that are not subject to a prudential regulator, including non-banking subsidiaries of bank holding companies regulated by the Federal Reserve Board. SDs and MSPs subject to the Commission's capital and margin requirements are referred to in this document as ''covered SDs'' and ''covered MSPs,'' respectively. SDs and MSPs subject to the margin and capital requirements of a prudential regulator are referred to in this document as ''bank SDs'' and ''bank MSPs,'' respectively.

The Commission previously adopted rules imposing margin requirements for uncleared swap transactions entered into by covered SDs and covered MSPs as required by section 4s(e).[11] The prudential regulators also adopted rules imposing margin requirements for uncleared swap and security-based swap transactions entered into by bank SDs or bank MSPs.[12] The prudential regulators further adopted capital requirements applicable to bank SDs

[1] The term ''prudential regulator'' is defined for purposes of the section 4s(e) capital and margin requirements to mean the Board of Governors of the Federal Reserve System (''Federal Reserve Board''); the Office of the Comptroller of the Currency (''OCC''); the Federal Deposit Insurance Corporation (''FDIC''); the Farm Credit Administration; and the Federal Housing Finance Agency. *See* section 1a(39) of CEA (7 U.S.C. 1 *et. seq.*).

[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[3] The term ''swap'' is defined in section 1a(47) of the CEA (7 U.S.C. 1a(47)) and Commission regulation § 1.3 (17 CFR 1.3). The term ''security-based swap'' is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)). Commission regulations referred to in this release are found at 17 CFR chapter I (2019), and are accessible on the Commission's website at *https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm.*

[4] *See* CEA sections 1a(33) and (49) (7 U.S.C. 1a(33) and (49)) for the definition of the terms ''major swap participant'' and ''swap dealer,'' respectively; *See* Exchange Act section 3(a)(67) and (71) (15 U.S.C. 3(a)(67) and (71)) for the definition of the terms ''major security-based swap participant'' and ''security-based swap dealer,'' respectively.

[5] 7 U.S.C. 1 *et seq.*

[6] 7 U.S.C. 6s(a).

[7] 7 U.S.C. 6s(g).

[8] 7 U.S.C. 6s(h).

[9] 7 U.S.C. 6s(e).

[10] 7 U.S.C. 6s(e)(1).

[11] The Commission adopted final rules on December 18, 2015 imposing initial and variation margin requirements on covered SDs and covered MSPs for swap transactions that are not cleared by a registered derivatives clearing organization (''DCO''). *See, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants,* 81 FR 636 (Jan. 6, 2016). The margin rules, which became effective on April 1, 2016, are codified in part 23 of the Commission's regulations (17 CFR 23.150–23.159, 23.161). In May 2016, the Commission amended the margin rules to add Commission regulation § 23.160, providing rules on the cross-border application of the margin rules. *See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements,* 81 FR 34818 (May 31, 2016).

[12] The prudential regulators published final margin requirements in November 2015. *See Margin and Capital Requirements for Covered Swap Entities,* 80 FR 74840 (Nov. 30, 2015).

and bank MSPs that incorporate swap and security-based swap transactions into the capital framework.[13]

Furthermore, section 764 of the Dodd-Frank Act added section 15F to the Exchange Act to address capital and margin requirements associated with security-based swaps. Section 15F(e)(1)(B) directs the SEC to adopt capital and margin requirements for SBSDs and MSBSPs that do not have a prudential regulator (''nonbank SBSDs'' and ''nonbank MSBSPs''). The SEC adopted final capital rules for nonbank SBSDs and nonbank MSBSPs, as well as final margin rules for security-based swaps entered into by nonbank SBSDs and nonbank MSBSPs, in June 2019.[14]

In addition to the new capital authority over covered SDs and covered MSPs, the Commission also has separate statutory authority to adopt rules imposing minimum capital requirements on FCMs.[15] The Commission expects that certain FCMs will engage in a level of swap dealing activity that will require their registration as SDs with the Commission. Such FCMs that are dually-registered as SDs (''FCM–SDs'') will be subject to the Commission's long-standing FCM capital rules. In addition, other FCMs may engage in a level of swap dealing activity that is less than what is required to register as an SD; FCMs may engage in swaps and security-based swaps as part of their business to, for example, hedge financial and commercial risks (''stand-alone FCMs''). Although the general capital treatment of unsecured market gains as non-current assets and the capital charges for inventory and fixed price commitments have been applied as applicable to the market and credit risk of swap positions for FCMs, to now explicitly address both the market and credit risk of these positions for FCM–SDs and stand-alone FCMs, the Commission is adopting rules to specifically incorporate uncleared swaps and security-based swaps into the existing FCM capital framework by defining specific market risk charges and credit risk charges for such transactions. The Commission's FCM regulations are consistent with its authority under section 4f(b) of the CEA, which authorizes the Commission to impose minimum financial requirements, including capital requirements, on FCMs. This authority extends to establishing capital requirements with respect to all of an FCM's activities, including activities involving swaps and security-based swaps.[16] Under the Commission's final rules, an FCM–SD and a stand-alone FCM are subject to the FCM capital requirements set forth in regulation 1.17.

The Commission also is adopting financial reporting and recordkeeping requirements for SDs and MSPs. Section 4s(f)(2) of the CEA directs the Commission to adopt rules governing financial condition reporting and recordkeeping for SDs and MSPs, and section 4s(f)(1)(A) requires each registered SD and MSP to make such reports as are required by Commission rule or regulation regarding the SD's or MSP's financial condition.[17] The Commission also is adopting record retention and inspection requirements consistent with the provisions of section 4s(f)(1)(B).[18]

The final reporting requirements require covered SDs and covered MSPs to file periodic unaudited financial statements and an annual audited financial report with the Commission and with the registered futures association (''RFA'') of which they are a member.[19] The final regulations further require covered SDs and covered MSPs to file certain regulatory notices with the Commission and with the RFA of which they are a member. The notices are comparable to the existing FCM notices, and are intended to alert the Commission and RFA to scenarios that may indicate potential financial or operational issues, including instances of undercapitalization and failure to maintain current books and records. Covered SDs and covered MSPs are also required to file notice if certain triggering events regarding the failure to post or collect initial or variation margin with swap counterparties occur.

The Commission also is adopting a program for non-U.S. domiciled covered SDs or covered MSPs to petition the Commission for a program of substituted compliance. Non-U.S. domiciled covered SDs or covered MSPs may seek a determination from the Commission that they operate in a jurisdiction that has comparable capital adequacy and financial reporting objectives and goals as set forth by the Commission in the final regulations. Non-U.S. domiciled covered SDs or MSPs that operate in a jurisdiction that the Commission has determined meets the capital adequacy and financial reporting objectives of the CEA and the Commission's regulations may meet some or all of their capital and financial reporting requirements by complying with their home country jurisdiction requirements.

The Commission is also adopting several amendments to existing regulations as part of the proposed capital and financial recordkeeping and reporting requirements. The Commission is amending regulation 1.12 to require an FCM or an introducing broker (''IB'') that is subject to the capital rules of both the Commission and the SEC to file a notice with the Commission if the FCM or IB fails to meet the SEC's minimum capital requirement. The Commission is also adopting amendments to regulation 1.12 to require an FCM or an IB that is also registered with the SEC as an SBSD or an MSBSP to file a notice if the SBSD's or MSBSP's net capital falls below the ''early warning level'' established in the rules of the SEC.[20] The Commission is also adopting amendments to the bulk

[13] The prudential regulators have adopted capital rules addressing capital requirements for swap and security-based swap transactions. In this regard, the Federal Reserve Board and OCC have adopted revised capital rules to incorporate Basel III capital adequacy requirements. *See, Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule,* 78 FR 62018 (Oct. 11, 2013).

[14] *Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers,* Exchange Act Release No. 86175 (Jun. 21, 2019), 84 FR 43872 (Aug. 22, 2019) (''*2019 SEC Final Capital Rule*''). The compliance date for these rules is October 6, 2021.

[15] Section 4f(b) of the CEA (7 U.S.C. 6f(b)) authorizes the Commission to establish minimum financial requirements for FCMs. The Commission previously adopted minimum capital requirements for FCMs, which are set forth in Commission regulation § 1.17 (17 CFR 1.17).

[16] Section 4s(e)(3)(B) (7 U.S.C. 6s(e)(3)(B)) of the CEA provides that the nothing in section 4s shall limit, or be construed to limit, the authority of the Commission to set financial responsibility rules for an FCM.

[17] *See* 7 U.S.C. 6s(f)(1) and (2).

[18] The Commission previously finalized certain record retention requirements for SDs and MSPs regarding their swap activities. *See, Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants,* 76 FR 20128 (Apr. 3, 2012).

[19] Section 3 of the CEA states that a purpose of the CEA is to establish a system of effective self-regulation under the oversight of the Commission. Consistent with the self-regulatory concept established under section 3, section 17 of the CEA provides a process whereby an association of persons may register with the Commission as an RFA. Currently, the National Futures Association (''NFA'') is the only RFA under section 17 of the CEA.

[20] The SEC requires each SBSD for which there is no prudential regulator to provide notice within 24 hours if the SBSD's net capital or tentative net capital (as applicable) falls below 120% of the SBSD's minimum net capital or tentative net capital requirement. An MSBSP is required to provide notice within 24 hours if its tangible net worth falls below $20 million. *See* 17 CFR 240.18–8(b).

transfer provisions of regulation 1.65 by expanding from 5 to 10 days the advance notice that an FCM or an IB must provide to the Commission prior to the transfer. The Commission is further revising the bulk transfer rules to provide that the notice of the bulk transfer must be filed with the Commission electronically, and delegating the authority to accept delivery of such notice in a period shorter than 10 days to the Director of the Division of Swap Dealer and Intermediary Oversight, provided that the notice must be provided as soon as practicable and in no event later than the day of the transfer.

The Commission also proposed specific quantitative liquidity requirements for certain SDs. As discussed in section II.C.8. below, the Commission has determined to defer consideration of the proposed liquidity requirements at this time. Accordingly, the Commission is not adopting the proposed liquidity requirements in this final rulemaking. SDs will continue to be subject to the existing risk management program requirements, including the liquidity requirements, set forth in regulation 23.600.

The Commission intends to monitor the impact of the capital and financial reporting requirements being adopted today using data received from covered SDs and covered MSPs once they are subject to these capital and financial reporting requirements. Information that the Commission will receive and observe includes data regarding the level of capital that the covered SDs and covered MSPs are required to maintain, the level of capital actually maintained, the liquidity that the firms maintain, the leverage the firms employ, and the scale and types of swaps and other transactions that they are engaged in. The Commission also will continue to consult with the prudential regulators and the SEC to assess the capital adequacy of SDs, MSPs, SBSDs, and MSBSPs. The Commission will monitor the data resulting from the adoption of today's rules and general market events and consider modifications to the capital and financial reporting requirements in light of this information. The Commission also will monitor the information that it receives to assess the adequacy of the liquidity of SDs and, if appropriate, will consider proposing additional liquidity requirements as necessary.

### *B. Proposed Rulemakings and Reopening of the Comment Period*

The Commission initially proposed capital and financial reporting requirements for covered SDs and covered MSPs in 2011.[21] The Commission received comments from a broad spectrum of market participants, industry representatives, and other interested parties. The commenters addressed numerous topics including the permissible use of models for computing market risk and credit risk capital charges and the need for harmonization of the Commission's capital and financial reporting requirements for covered SDs with the capital and financial reporting rules of the prudential regulators for bank SDs and with the rules of the SEC for nonbank SBSDs. Commenters particularly emphasized a need for the harmonization of regulatory requirements for covered SDs that also are registered with the SEC as SBSDs.

Shortly after the Commission issued the *2011 Capital Proposal,* the Basel Committee on Banking Supervision (''BCBS'') and the International Organization of Securities Commissions, in consultation with the Committee on Payment and Settlement Systems and the Committee on Global Financial Systems, formed a working group (the ''WGMR'') to develop internationally harmonized standards for margin requirements for uncleared swaps. Representatives of more than 20 regulatory authorities participated in the WGMR including the Commission, the SEC, Federal Reserve Board, OCC, FDIC, and the Federal Reserve Bank of New York. The Commission elected to defer consideration of the SD and MSP capital and financial reporting rules until the WGMR had completed its work and the Commission had adopted margin requirements for uncleared swap transactions. As noted above, the Commission subsequently adopted final margin requirements for uncleared swaps in December 2015, and the compliance period for the final rules is being phased-in through 2021.[22]

In 2016, in consideration of the substantial amount of time that had passed since the *2011 Capital Proposal,* the Commission re-proposed the capital and financial reporting rules for SDs and MSPs to provide commenters with an opportunity to provide further comment in recognition of the significant developments in the swaps marketplace since the *2011 Capital Proposal.*[23] These marketplace developments included more than 100 entities provisionally registering with the Commission as SDs, the Commission adopting final margin rules for uncleared swaps, the prudential regulators adopting final capital and margin rules for swap and security-based swap transactions, and the SEC proposing capital, margin, segregation and financial reporting requirements for SBSDs and MSBSPs.

The Commission again received comments from a broad spectrum of market participants and other interested parties. The commenters raised several issues with regards to the *2016 Capital Proposal,* including the appropriateness of basing a capital requirement on initial margin requirements, the appropriateness of a liquidity requirement for covered SDs, the use of models to compute market risk and credit risk capital charges, and the need for harmonization of the Commission's rules with the rules of the prudential regulators and the SEC. Commenters also requested that the Commission provide an additional opportunity for public comment on the *2016 Capital Proposal* once the SEC finalized its capital, margin, and financial reporting requirements for SBSDs and MSBSPs. The commenters noted the particular necessity for an opportunity to provide further comment on the *2016 Capital Proposal* as the Commission's Proposal would permit a covered SD to compute its capital as if it were a SBSD subject to the SEC's SBSD capital requirements. The commenters noted that the SEC had received many substantial comments on its proposed nonbank SBSD and nonbank MSBSP capital requirements. The commenters further stated that they would need to review the SEC's final capital, margin and financial reporting rules, including the SEC's response to the many comments on its proposal, in order to provide full comments on the *2016 Capital Proposal.*

The Commission ultimately reopened the comment period for the *2016 Capital Proposal.*[24] The *2019 Capital Reopening*

[21] *See Capital Requirements of Swap Dealers and Major Swap Participants,* 76 FR 27802 (May 12, 2011) (the ''*2011 Capital Proposal*'').

[22] *See* 81 FR 636 (Jan. 6, 2016) and Commission regulation § 23.161 (17 CFR 23.161)). The Commission also has proposed to extend the compliance date for the final phase-in period to September 1, 2022. *See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants,* 85 FR 41463 (July 10, 2020).

[23] *Capital Requirements of Swap Dealers and Major Swap Participants,* 81 FR 91252 (Dec. 16, 2016) (the ''*2016 Capital Proposal*'' or the ''Proposal''). The comment letters for the *2016 Capital Proposal* are available at: *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1769* (the public comment file). Commenters included financial services associations, agricultural associations, energy associations, insurance associations, banks, brokerage firms, investment managers, insurance companies, pension funds, commercial end users, law firms, public interest organizations, and other members of the public.

[24] *See Capital Requirements of Swap Dealers and Major Swap Participants,* 84 FR 69664 (Dec. 16,

Continued

was published after the SEC had adopted final capital, margin, segregation, and financial reporting requirements for SBSD and MSBSPs. Accordingly, the *2019 Capital Reopening* provided interested parties with an additional opportunity to provide comments on the *2016 Capital Proposal* after the SEC finalized its capital and financial reporting rules.

One commenter stated that the Commission could not finalize the *2016 Capital Proposal* due to the lack of cost benefit analysis related to additional questions contained in the *2019 Capital Reopening* and was unable to fully assess the potential modifications to the proposed rules without re-proposal.[25] The commenter further argued that the *2019 Capital Reopening* contained only questions and requests for comment with no specific rule text or accompanying explanation, including evaluation of costs and benefits as the commenter believed required. As a result of this, the commenter posited any final rulemaking following the *2019 Capital Reopening* failed to provide adequate notice of identifiable regulatory outcomes to commenters and therefore, would not satisfy APA considerations for notice and comment rulemaking.[26] The Commission disagrees. The *2019 Capital Reopening* provided an additional opportunity for commenters to address aspects of the *2016 Capital Proposal* in light of the SEC's final capital rule for SBSDs and MSBSPs, which was itself incorporated by reference into the *2016 Capital Proposal.*

In 2016, the Commission re-proposed the SD Capital rules for a second time.[27] In that release, the Commission specifically noted that it had considered the comments from the 2011 proposal in developing the *2016 Capital Proposal.*[28] The *2016 Capital Proposal* again proposed complementary financial reporting rules and recognized the expected use of models. Further, the Commission stated at the time that it had also considered capital rules adopted by the prudential regulators and capital rules proposed by the SEC for security-based swap dealers and major security-based swap participants.[29] As such, the Commission specifically said that it had to a great extent drawn upon the SEC capital rules in developing the proposed capital requirements.[30] The *2019 Capital Reopening* did not change the 2016 proposed framework, which has largely remained intact since the original proposal in 2011—such as, what method an entity could use to calculate its required capital and the various capital minimums dependent upon the characteristics of the registered entity, while seeking to maintain comparability to the other capital regimes of the Prudential Regulators and the SEC, as statutorily required. The *2019 Capital Reopening* sought to specifically respond to commenters who had asked for an additional opportunity to comment on the *2016 Capital Proposal* following the finalization of capital rules for SBSDs by the SEC. It gave commenters the opportunity to provide their views on whether certain items should be included or how the process should account for them.[31] Each of the areas addressed in the *2019 Capital Reopening* signaled potential modifications that the Commission was considering in light of comments received, including modifications adopted by the SEC.[32] Modifications in the final rule, including a discussion and specific inclusion of various approaches, are therefore the logical outgrowth of the *2016 Capital Proposal.*

In addition, the *2016 Capital Proposal* included a comprehensive cost benefit consideration section, addressing the Section 15(a) factors in detail. The cost-benefit analysis discussed an elective approach utilizing similar tailored minimums depending on the characteristics of the registered entity—a net liquid asset approach incorporating the traditional FCM and SEC registered broker or dealer (''BD'') capital framework, a bank-based approach incorporating again the risk-weighted assets framework from banking rules, and again a tangible net worth approach for certain eligible firms. The *2016 Capital Proposal* again proposed complementary financial reporting rules and recognized the expected use of models. The public was asked to comment on all aspects of the proposal, and several comments were received in response. A more fulsome discussion is in the Cost-Benefit Consideration section of this document; however, as noted above, the potential modifications described in the *2019 Capital Reopening,* including a discussion and specific inclusion of potential rule language, were logical outgrowths of the *2016 Capital Proposal.*

### *C. Consultation With U.S. Securities and Exchange Commission and Prudential Regulators*

The Dodd-Frank Act amended the CEA and the Exchange Act to require the Commission, SEC, and prudential regulators to coordinate and develop comparable capital requirements for SDs and SBSDs, and for MSPs and MSBSPs. Section 4s(e)(3)(D) of the CEA (7 U.S.C. 6s(e)(3)(D), in conjunction with section 15F(e)(3)(D) of the Exchange Act (15 U.S.C. 78o–10(e)(3)(D)), provides that, to the maximum extent practicable, the Commission, SEC and the prudential regulators shall establish and maintain comparable minimum capital requirements for SDs and SBSDs, and for MSPs and MSBSPs. Further, section 4s(e)(3)(D) and section 15F(e)(3)(D) provide that staff of the CFTC, SEC, and prudential regulators shall meet periodically, but no less frequently than annually, to consult on minimum capital requirements. Consistent with this Congressional mandate, the respective staffs of the Commission, SEC, and the prudential regulators have regularly shared drafts of proposed and final rulemakings with staffs of the other agencies for review and comment before taking final action with respect to the proposed or final rulemakings. Consistent with this approach, the Commission provided the SEC and prudential regulators with drafts of the final rules for review and comment, and the final rulemaking reflects comments received from the SEC and prudential regulators.

## II. Final Regulations and Amendments to Existing Regulations

### *A. Capital Framework for FCMs, Covered SDs, and Covered MSPs*

FCMs are subject to existing capital requirements set forth in regulation 1.17. The Commission is amending regulation 1.17 to establish capital requirements explicitly for swap and security-based swap transactions entered into by FCMs. The Commission is also amending regulation 1.17 to require an FCM–SD to comply with the amended FCM capital requirements. A discussion of the amendments to

2019) (the ''*2019 Capital Reopening*''). The comment letters for the *2019 Capital Reopening* are available at: *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1769* (the public comment file). Commenters included financial services associations, agricultural associations, energy associations, insurance associations, banks, brokerage firms, investment managers, insurance companies, pension funds, commercial end users, law firms, public interest organizations, and other members of the public.

[25] *See* Letter From Dennis M. Kelleher, President and CEO, Better Markets Inc. (March 3, 2020) (Better Markets 3/3/2020 Letter).

[26] *Id.* at page 7.

[27] 81 FR 91252 (Dec. 16, 2016).

[28] *Id.* at 91254.

[29] *Id.* In this regard, Section 4s(e)(3)(D) of the CEA provides that the CFTC, SEC, and prudential regulators shall, to the maximum extent practicable, establish and maintain comparable minimum capital requirements for SDs and MSPs.

[30] *Id.*

[31] *See* 84 FR 69665.

[32] *Id.*

regulation 1.17 for FCMs and FCM–SDs is contained in section II.B. of this release.

The Commission is also adopting final capital rules for covered SDs that are not FCM–SDs, and is adopting final capital rules for covered MSPs. The Commission is adopting a flexible approach that allows covered SDs to elect one of three alternative capital frameworks for establishing their minimum capital requirements and for computing their regulatory capital. The three alternative approaches draw to a great extent on the existing CFTC capital requirements for FCMs contained in regulation 1.17, as well as the SEC's capital requirements for BDs and nonbank SBSDs, and the prudential regulators' capital requirements for bank SDs. Specifically, the Commission's final capital rules, depending on the characteristics of a covered SD, permit such SD to elect: (i) A capital requirement consistent with the SEC's final capital requirements for SBSDs, as well as the existing CFTC capital rules for FCMs and the existing SEC capital rules for BDs (the ''Net Liquid Assets Capital Approach''); (ii) a capital requirement consistent with the prudential regulators' capital requirements for bank SDs, and that is based on existing Federal Reserve Board capital requirements for bank holding companies (the ''Bank-Based Capital Approach''); or (iii) a capital requirement based on the covered SD's tangible net worth, provided that the covered SD or its parent entity is predominantly engaged in non-financial activities as defined in the rule (the ''Tangible Net Worth Capital Approach''). Each of the approaches is discussed in section II. below.

With respect to covered MSPs, the Commission is adopting a minimum regulatory capital requirement based upon the tangible net worth of the MSP. While there currently are no provisionally-registered MSPs or entities pending registration as MSPs, the Commission is adopting final capital requirements in the event that entities seek registration in the future. A capital requirement based upon the tangible net worth of the MSP is consistent with the approach adopted by the SEC for nonbank MSBSPs, as discussed in section II.C.5. of this release.

Broadly speaking, in developing the proposed capital requirements, the Commission strived to advance the statutory goal of helping to protect the safety and soundness of covered SDs and covered MSPs, while also taking into account the diverse nature of the entities registered as SDs, and the existing capital regimes that apply to covered SDs and/or their financial group. In this regard, as of June 30, 2020, there were 108 provisionally registered SDs. Fifty-two of the provisionally registered SDs are bank SDs, subject to a prudential regulator. The remaining 56 SDs are covered SDs, subject to the Commission's capital rules. While each of the 56 covered SDs is registered with the Commission as a result of their swap dealing activities, the SDs represent a broad range of business activities and a diverse population of swap counterparties. Several of the covered SDs are primarily engaged in commodity-focused swap transactions with commercial counterparties, while other covered SDs are focused primarily with financial related swaps, including interest rate, foreign currency, and credit default swaps, and have a broad range of swaps counterparties that includes both commercial and financial counterparties.

The 56 covered SDs subject to the Commission's capital requirements are associated with 21 corporate families, with several families having more than 1 provisionally-registered covered SD. Many of these corporate families are part of U.S. bank or foreign bank holding companies that offer global financial services and are subject to prudential capital regulation, including BCBS-based capital requirements that may extend to some of the provisionally-registered covered SDs. The alternative capital approaches adopted by the Commission are intended to mitigate potential competitive disadvantages and unnecessary costs that might otherwise arise if the Commission were to impose a single capital approach in light of the existing different operating and corporate structures of the covered SDs. The Commission further believes that the flexibility of the capital approaches will potentially benefit market participants by providing a tailored capital regime that encourages SDs that are not part of global financial firms to continue to provide liquidity in the swaps market, particularly to smaller financial or commercial end users that do not have relationships with the large financial SDs.

As mentioned above, FCM–SDs are subject to the FCM capital requirements set forth in regulation 1.17. Covered SDs that are not FCM–SDs and covered MSPs that are not FCM–MSPs are subject to the final capital requirements set forth in regulation 23.101. Regulation 23.101 details the minimum capital requirements for each of the three capital approaches for covered SDs and the eligibility criteria (as applicable), and further defines the capital computations for each approach, including various market risk and credit risk capital charges. Regulation 23.101 also defines the minimum capital requirements for covered MSPs and defines the capital computation for covered MSPs. Each of these capital approaches is discussed below.

### *B. Capital Requirements for Stand-Alone FCMs and FCM–SDs*

#### 1. Introduction to General Capital Requirements for Stand-Alone FCMs and FCM–SDs

The capital requirements for FCMs are set forth in regulation 1.17 and require each FCM to maintain a minimum level of ''liquid assets'' in excess of the firm's liabilities to provide resources for the FCM to meet its financial obligations as a market intermediary in the regulated futures and cleared swaps markets. As a market intermediary, an FCM provides services to its customers and the marketplace, including, in the event of a customer default, guaranteeing the financial performance of each customer to clearing organizations that clear the customers' futures and cleared swap transactions. To ensure that an FCM is capable of meeting its financial obligations, regulation 1.17 requires an FCM to hold at all times more than one dollar of highly liquid assets for each dollar of liabilities (*e.g.,* money owed to customers, counterparties and creditors), excluding certain subordinated debt.[33] The FCM capital requirements also are intended to ensure that an FCM maintains a sufficient level of liquid assets in excess of its liabilities in order to effectively and efficiently wind-down its operations by transferring customer positions and funds to other FCMs in the event that the FCM voluntarily or involuntarily ceases operations.

The FCM capital requirement contains two components. The first component is a minimum level of ''adjusted net capital'' that an FCM is required to maintain at any given time. The minimum adjusted net capital requirement is generally the greater of the following: (i) A fixed-dollar amount; (ii) an amount computed based upon the clearing organization margin imposed on customer and noncustomer futures, foreign futures, and cleared swap

[33] Commission regulation § 1.17(h) (17 CFR 1.17(h)) permits an FCM to exclude certain qualifying subordinated debt from its liabilities in computing its net capital. In order to qualify, the person lending cash to the FCM must subordinate its claim against the FCM to all other creditors of the FCM in addition to agreeing to other conditions, including potential restrictions associated with scheduled repayments of the debt.

positions carried by the FCM; (iii) the amount of net capital required by the SEC for FCMs that are dually-registered as BDs (''FCM/BDs''); or, (iv) the amount of adjusted net capital required by an RFA of which the FCM is a member.[34]

The second component of the FCM capital requirement is the amount of adjusted net capital that an FCM actually maintains based upon the assets and liabilities of the firm. In determining its adjusted net capital, an FCM is first required to compute its net worth under generally accepted accounting principles (''GAAP'') as adopted in the United States, and then is required to apply certain rule-based adjustments to reduce its net worth to the extent it contains illiquid assets such as fixed assets and unsecured receivables. The resulting calculation reflects the FCM's ''net capital.'' The FCM is then required to apply certain rule-based capital charges or haircuts to reflect market risk associated with its liquid assets. The resulting calculation reflects the FCM's ''adjusted net capital.'' The calculation of adjusted net capital in this manner is intended, as noted above, to ensure that the FCM holds at least one dollar of highly liquid assets to meet each dollar of liabilities, excluding certain qualifying subordinated liabilities.

The Commission proposed several amendments to regulation 1.17 in recognition that the current capital requirements do not explicitly reflect FCMs transacting in uncleared swap or security-based swap transactions, or engaging in swap dealing activities. The Commission also proposed to require FCM–SDs to comply with the FCM capital requirements.[35] The Commission proposed to require FCM–SDs to comply with regulation 1.17 due to the Commission's experience regulating FCMs and its belief that the FCM capital requirements, with its emphasis on liquidity, are well-designed to ensure that an FCM will be able to continue to perform its critical functions in the futures and cleared swaps marketplace. As noted above, FCMs are market intermediaries that provide customers with access to the futures and cleared swaps markets. As market intermediaries, FCMs play a central role in the daily settlement process at derivatives clearing organizations by paying or collecting their customers' initial and variation margin obligations. FCMs also guarantee their customers' financial performance to each DCO, and contribute to DCO guarantee funds. FCMs also provide numerous services for their customers, including providing confirmations of each transaction and periodic account statements. Based on its experience with FCMs, the Commission believes that the FCM capital rule, which is a liquidity-based capital rule, is appropriate for FCM–SDs.

2. Minimum Capital Requirement for FCMs and FCM–SDs

a. Minimum Fixed-Dollar Amount of Net Capital

Regulation 1.17(a)(1)(i) requires an FCM to maintain a minimum amount of adjusted net capital that is equal to or greater than the highest of: (i) $1 million; (ii) for an FCM that engages in off-exchange foreign currency transactions with retail forex customers,[36] $20 million, plus 5% percent of the FCM's liabilities to the retail forex customers that exceed $10 million; (iii) 8% percent of the sum of the risk margin of futures, options on futures, foreign futures, and swap positions cleared by a clearing organization and carried by the FCM in customer and noncustomer accounts; (iv) the amount of adjusted net capital required by the RFA of which the FCM is a member; and (v) for an FCM that is also registered with the SEC as a BD, the amount of net capital required by the rules of the SEC.[37]

The term ''risk margin'' is defined in regulation 1.17(b)(8) as the level of maintenance margin or performance bond required for the customer or noncustomer positions by the applicable exchanges or clearing organizations, and, where margin or performance bond is required only for accounts at the clearing organization, for purposes of the FCM's risk-based capital calculations applying the same margin or performance bond requirements to customer and noncustomer positions in accounts carried by the FCM, subject to the following: (i) Risk margin does not include the equity component of short or long option positions maintained in an account; (ii) the maintenance margin or performance bond requirement associated with a long option position may be excluded from risk margin to the extent that the value of such long option position does not reduce the total risk maintenance or performance bond requirement of the account that holds the long option position; (iii) the risk margin for an account carried by an FCM which is not a member of the exchange or the clearing organization that requires collection of such margin should be calculated as if the FCM were such a member; and (iv) if an FCM does not possess sufficient information to determine what portion of an account's total margin requirement represents risk margin, all of the margin required by the exchange or the clearing organization that requires collection of such margin for that account, shall be treated as risk margin.[38]

The Commission proposed amending regulation 1.17(a)(1)(i)(A) to increase the minimum fixed-dollar amount of adjusted net capital from $1 million to $20 million for FCM–SDs. The Commission did not propose to amend the required minimum fixed-dollar amount of adjusted net capital for stand-alone FCMs that may engage in swap activities at a level that does not require registration as an SD, as the Commission believed that the existing minimum fixed-dollar amount of required adjusted net capital was properly calibrated for such firms.

The Commission believes that the proposed higher minimum dollar amount of adjusted net capital for FCM–SDs is appropriate given the enhanced risk that an FCM–SD assumes in engaging in swap dealing activities, while also continuing to carry futures and cleared swaps customers.[39] As noted above, FCMs act primarily as market intermediaries for futures and cleared swaps customers and typically do not use their balance sheet to facilitate customer transactions. Absent a customer default, an FCM does not take on market risk of its customers' positions in performing this market intermediary function. FCMs that are FCM–SDs, however, are engaging in swap dealing activities. As dealers, FCM–SDs use their balance sheet to facilitate customer transactions as they are counterparties on swap positions in addition to performing market intermediary functions for their customers. Dealing activities present additional risks to FCM–SDs. As dealers, an FCM–SD is potentially exposed to market risks on uncleared

[34] *See* Commission regulation § 1.17(a)(1)(i) (17 CFR 1.17(a)(1)(i)).

[35] Section 4s(e)(3)(B)(i) of the CEA (7 U.S.C. 6s(e)(3)(B)(i)) states that nothing in section 4s(e) imposing capital and margin requirement on SDs and MSPs limits, or shall be construed to limit, the authority of the Commission to set financial responsibility rules for FCMs pursuant to section 4f(a).

[36] Commission regulation § 5.1(k) (17 CFR 5.1(k)) defines the term ''retail forex customer'' as a person, other than an eligible contract participant as defined in section 1a(18) of the CEA, acting on its own behalf in any account agreement, contract or transaction described in section 2(c)(2)(B) or 2(c)(2)(C) of the CEA (7 U.S.C. 2(c)(2)(B) or 2(c)(2)(C)).

[37] *See* Commission regulation § 1.17(a)(1)(i) (17 CFR 1.17(a)(1)(i)).

[38] Commission regulation § 1.17(b)(8) (17 CFR 1.17(b)(8)).

[39] *2016 Capital Proposal,* 81 FR 91252.

swap positions, and is exposed to counterparty credit risk from swap counterparties. FCM–SDs also may be required to post initial margin and pay variation margin to swap counterparties on a daily basis for their proprietary uncleared swap positions. The proposed increase in the fixed-dollar amount of the minimum adjusted net capital was intended to address the potential increase in risks posed to FCM–SDs from dealing activities, including the impact that dealing may have on the liquidity of FCM–SDs. The proposed increase in the minimum capital requirement also was intended to otherwise help ensure the safety and soundness of the FCM–SD, as the insolvency of an FCM–SD could have potential adverse consequences to the efficient operation of the market, particularly as the insolvency impacts the futures and cleared swaps customers of the FCM–SD. The Commission further noted that the proposed $20 million minimum adjusted net capital requirement was consistent with the $20 million minimum dollar amount of adjusted net capital imposed by Congress and the Commission on retail foreign exchange dealers (''RFEDs'') or FCMs that enter into off-exchange foreign currency transactions with retail persons under section 2(c)(2)(C) of the CEA and regulation 5.7(a).

The Commission also proposed amending regulation 1.17(a)(1)(ii) to require an FCM–SD that receives approval from the Commission or from an RFA of which it is a member to use internal market risk or credit risk models to compute capital charges in lieu of the standardized capital charges or deductions to maintain net capital equal to or in excess of $100 million, and adjusted net capital equal to or in excess of $20 million. The requirement to maintain a minimum $100 million fixed-dollar amount of net capital was intended to address the issue that while models are more risk sensitive and generally result in substantially lower market risk and credit risk capital charges than standardized charges, models may not capture all risks, including extreme market losses (*i.e.,* tail risk) or liquidity concerns. The requirement for an FCM–SD that is approved to use capital models to maintain a minimum of $100 million of net capital and $20 million of adjusted net capital is consistent with the SEC's final capital rule for SBSDs that are not registered BDs (''stand-alone SBSDs'') and that are approved to use internal models to compute market risk and credit risk capital charges. These entities are required to maintain fixed-dollar tentative net capital of $100 million and fixed-dollar net capital of $20 million.[40]

The Commission did not receive comment on the proposed $20 million fixed-dollar amount of adjusted net capital required of FCM–SDs. The Commission received a comment stating that the proposed $100 million net capital requirement for FCM–SDs that have approval to use internal models to compute market risk or credit risk capital charges in lieu of the standardized capital charges would create an unnecessary barrier to entry.[41]

The Commission has considered the proposed amendments of the minimum fixed-dollar amount of net capital and adjusted net capital that FCM–SDs would be required to maintain and is adopting the amendments as proposed.[42] As noted above, FCMs play a central role as market intermediaries for futures and cleared swaps transactions, including guaranteeing each customer's financial performance to clearing organizations or carrying FCMs. An adequate level of capital is necessary to ensure that FCMs meet their financial obligations, which in turn promotes customer protection and helps ensure the cleared futures and cleared swaps markets operate efficiently. The increase in adjusted net capital for FCM–SDs to $20 million is also necessary to address the additional risk that is inherent in an SD's dealing activities. As a dealer, an FCM–SD uses its balance sheet to facilitate customer swap transactions, is a counterparty in swap transactions, and is obligated to post and collect initial margin and settle variation margin with swap counterparties. Furthermore, the final requirement for an FCM–SD to maintain a minimum of $20 million of adjusted net capital is consistent with the Commission's required minimum adjusted net capital of $20 million for RFEDs, and is consistent with the SEC's final minimum capital requirements for SBSDs.

With respect to the comment that a $100 million minimum net capital requirement for FCM–SD's seeking approval to use capital models may act as a barrier to entry, the Commission notes that the regulation was designed to account for the fact that model-based market risk and credit risk capital charges, while more risk sensitive than standardized capital charges, tend to be substantially lower than standardized charges. The $100 million of net capital is intended to address potential model errors and tail risk and other factors that may not be fully or accurately captured in the models. The Commission further notes that currently the only FCM–SDs provisionally registered are four BD/FCMs that are subject to substantially higher minimum capital requirements under SEC and CFTC rules as discussed in section II.B.3.c.(i). below. Accordingly, no provisionally-registered FCM–SD will be subject to the $100 million minimum net capital requirement based on the current list of provisionally registered SDs.

b. Minimum Capital Requirement Based on 8% Risk Margin Amount

Another component of the minimum capital requirements in regulation 1.17 provides that each FCM must maintain adjusted net capital equal to or greater than 8% of the risk margin amount associated with the futures, foreign futures, and cleared swaps positions carried by the FCM in customer and noncustomer accounts.[43] As discussed in section II.B.2.a. above, the term ''risk margin'' for an account generally means the level of maintenance margin or performance bond required for customer and noncustomer positions by the applicable exchanges or clearing organizations.[44] Clearing organizations generally set initial margin requirements for futures, foreign futures, and cleared swap positons at a level to cover one-day market moves with a 99% level of confidence.[45]

In computing the 8% risk margin amount, an FCM is required to compute risk margin on the positions of each customer on a customer-by-customer basis, and multiply the resulting aggregate risk margin amount by 8%. The 8% risk margin amount is a risk

[40] *See* SEC rule 18a–1(a)(2) (17 CFR 240.18a–1(a)(2)).

[41] *See* Letter from Joanna Mallers, FIA Principal Traders Group (May 24, 2017) (FIA–PTG 5/24/2017 Letter).

[42] The *2019 SEC Final Capital Rule* requires BDs that use internal models to compute market risk and credit risk capital charges in lieu of standardized capital charges to maintain $5 billion of net capital and $1 billion of adjusted net capital. FCM/SDs that also are registered with the SEC as BDs are required to comply with the SEC's capital requirements in meeting the Commission's minimum capital requirement.

[43] A noncustomer account is an account that an FCM carries for persons that generally are officers or employees of the FCM (*i.e.,* the persons are not customers of the FCM and the account is not the proprietary account of the FCM). *See* Commission regulation § 1.17(b)(4) (17 CFR 1.17(b)(4)).

[44] *See* Commission regulation § 1.17(b)(8) (17 CFR 1.17(b)(8)).

[45] *See,* for example, Commission regulation § 39.13(g) (17 CFR 39.13(g)) which provides that a derivatives clearing organization must set margin for futures and swaps on agricultural commodities, energy commodities, and metals using a one-tailed 99% confidence interval with a minimum one-day liquidation period, and must set margin for all other swaps using a one-tailed 99% confidence interval with a minimum five-day liquidation period.

sensitive calculation in that an FCM's minimum capital requirement is tied to the level of exchange or clearing organization margin associated with each customer's and noncustomer's account. Accordingly, an FCM's minimum capital requirement increases or decreases as the aggregate of its customer and noncustomer risk margin increases or decreases. The 8% risk margin amount is also a volume-based metric as it requires an FCM to compute the risk margin amount on each individual customer and noncustomer account, with no offsets between accounts to reflect offsetting positions or to reflect margin collected on the accounts. As a volume-based metric, an FCM's minimum capital requirement increases or decreases based upon the aggregate amount of risk margin required of each customer and noncustomer account carried by the FCM.

The Commission proposed amending the minimum capital requirement in regulation 1.17(a)(1)(i)(B) by expanding the types of positions that an FCM–SD must include in the 8% risk margin amount calculation. The Commission did not propose to expand the types of positions that must be included in the risk margin amount calculation for stand-alone FCMs. An FCM that is not an FCM–SD must continue to calculate the 8% risk margin amount based upon the customer and noncustomer futures, foreign futures, and cleared swap positions carried by the FCM.[46]

Regulation 1.17(a)(1)(i)(B) currently requires an FCM, as noted above, to include the risk margin associated with the futures, foreign futures, and cleared swap positions carried in customer and noncustomer accounts in the 8% risk margin amount calculation. The *2016 Capital Proposal* expanded the list of products that an FCM–SD must include in the 8% risk margin amount calculation to further include the cleared security-based swap positions carried for customers and noncustomers, as well as the FCM–SD's proprietary cleared swaps and proprietary cleared security-based swap positions. The positions in the risk margin amount calculation was proposed to be further extended to include the FCM–SD's uncleared swap and uncleared security-based swap positions.

The Proposal required an FCM–SD to include all swaps and security-based swaps in the risk margin amount calculation, including swaps that are excluded from the Commission's margin rules for uncleared swaps and any security-based swaps that the SEC excluded from its margin rules. Specifically, the proposal provided that an FCM–SD must include in its computation of the risk margin amount each outstanding uncleared swap, including swaps exempt from the scope of the Commission's uncleared swaps margin rules by regulation 23.150 (''TRIPRA Exemption),[47] legacy swaps, foreign exchange swaps as the term is defined in regulation 23.151, or netting set of swaps or foreign exchange swaps, for each counterparty, as if the counterparty were an unaffiliated SD. The Proposal further required an FCM–SD to include the initial margin for all uncleared swaps that would otherwise fall below the $50 million initial margin threshold amount or the $500,000 minimum transfer amount, as defined in regulation 23.151, for purposes of computing the uncleared swap margin amount.[48]

The Commission received comments on various aspects of the proposed 8% risk margin amount calculation for FCM–SDs. Commenters to the *2016 Capital Proposal* and the *2019 Capital Reopening* objected to including cleared and uncleared security-based swaps in the 8% risk margin amount calculation for FCM–SDs.[49] Commenters stated that the Commission should not include security-based swaps in the 8% risk margin amount calculation as security-based swaps are products regulated by the SEC, and that including SEC-regulated products in the Commission's minimum capital requirement is inconsistent with long-standing CFTC and SEC capital requirements for FCMs and BDs.[50]

A commenter noted that a dually-registered FCM/BD is generally required to maintain adjusted net capital equal to the greater of (i) 8% of the margin required for futures, foreign futures, and cleared swaps carried by the FCM for customers and noncustomers, or (ii) 2% of the debit items calculated in respect of the BD's customer securities positions.[51] The commenter further stated that the approach of setting separate, as opposed to aggregate, requirements for Commission and SEC regulated products allows the agency that Congress selected to regulate a given product to determine the appropriate balance between robust capital cushions and robust market liquidity.[52]

The commenter further noted that the *2019 SEC Final Capital Rule* continued this historical approach as the SEC elected to include in its minimum capital requirement the initial margin associated only with customer and noncustomer cleared security-based swaps and the SBSD's uncleared security-based swaps.[53] The SEC's final rule did not incorporate initial margin associated with customer cleared swap positions or uncleared swap positions, or otherwise include positions that are not subject to the SEC's jurisdiction.

One commenter stated that FX forwards and swaps should be excluded from the 8% risk margin amount calculation as Congress gave the United States Treasury Department the authority over these products.[54]

The Commission has considered the proposal and the comments received, and is adopting a minimum capital requirement based upon a percentage of the risk margin amount. The Commission is modifying the final rule, however, to exclude cleared security-based swap and uncleared security-based swap positions from the risk margin amount calculation. The Commission acknowledges that in setting minimum capital requirements for FCMs, including FCMs that are dually-registered as FCM/BDs, it has historically considered only the futures related activities of an FCM. In this regard, the Commission's initial minimum capital requirement was based upon a percentage of futures customer and noncustomer funds held by an FCM, and was subsequently

[46] A commenter noted an ambiguity in the *2016 Capital Proposal* in that the Commission stated in the preamble that the proposed increases in the minimum capital requirements would be applicable only to FCM–SDs and not to stand-alone FCMs, but that the proposed rule text in Commission regulation § 1.17 did not clearly draw that distinction. *See* Letter from Walt Lukken, Futures Industry Association, March 3, 2020 (FIA 3/3/2020 Letter). The Commission confirms that the proposed increases in the minimum capital requirements were only applicable to FCM–SDs, and has modified the final rule text to clarify this point.

[47] Title III of the Terrorism Risk Insurance Program Reauthorization Act of 2015 amended sections 731 and 764 of the Dodd-Frank Act to provide that the Commission's margin requirements shall not apply to a swap in which a counterparty: (i) Qualifies for an exception under section 2(h)(7)(A) of the CEA; (ii) qualifies for an exemption issued under section 4(c)(1) of the CEA for cooperative entities as defined in such exemption; and (iii) satisfies the criteria in section in section 2(h)(7)(D) of the CEA. *See* Public Law 114–1, 129 Stat. 3.

[48] *2016 Capital Proposal,* 81 FR 91252 at 91258.

[49] *See* FIA 3/3/2020 Letter; Letter from Briget Polichene, Institute of International Bankers, Scott O'Malia, International Swaps and Derivatives Association, and Kenneth Bentsen, Jr., Securities Industry and Financial Markets Association (March 3, 2020) (IIB/ISDA/SIFMA 3/3/2020 Letter).

[50] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *See* Letter from Joanna Mallers, FIA Principal Traders Group (March 3, 2020) (FIA–PTG 3/3/2020 Letter).

amended to be based upon a percentage of the risk margin associated with futures and cleared swaps customer and noncustomer positions carried by an FCM.[55] The Commission has not historically required an FCM/BD to maintain a level of minimum capital necessary to meet the aggregate of the CFTC's minimum requirement and the SEC's minimum requirement, which is based on the FCM/BD's securities activities.

The Commission believes that the overall adequacy of the minimum capital requirement at an FCM–SD should be based upon the activities of the FCM–SD in CFTC-regulated markets. This allows the Commission to monitor the adequacy of the minimum capital requirements based upon its expertise and experience with Commission-regulated products and markets. In addition, an FCM–SD that is also registered as a BD would continue to be subject to the minimum capital requirements established by the SEC for BDs in addition to the minimum capital requirements established by the Commission for FCM–SDs. The Commission's current capital rule requires an FCM/BD to maintain a minimum level of capital that is greater than the higher of the CFTC minimum requirement for FCMs or the SEC minimum requirement for BDs.[56] Therefore, an FCM–SD that is registered as a BD will have to maintain minimum capital in an amount based upon the greater of the CFTC or SEC minimum requirement. This would help ensure the safety and soundness of the FCM–SD by providing readily available financial resources to address operational, legal, compliance, or other risks, and, if necessary, by providing financial resources to assist with the orderly liquidation of the FCM–SD in the event of its insolvency.

Commenters also stated that the Commission's proposed inclusion of the proprietary futures and proprietary cleared swap positions in an FCM–SD's 8% risk margin amount calculation would duplicate existing capital charges required under regulation 1.17.[57] The commenters noted that regulation 1.17(c)(5)(x) currently requires an FCM to take a capital charge in an amount equal to 100% or 150% of the margin required by a clearing organization for proprietary futures and cleared swap positions[58] in computing its adjusted net capital.[59] Another commenter stated that including margin associated with proprietary cleared swaps in the 8% risk margin amount was not necessary as proprietary cleared positions present minimal credit risk to an FCM–SD as the only credit exposure is to a clearing organization or broker.[60] The proprietary futures and cleared swaps capital charge also would apply to FCM–SDs under the Commission's Proposal, as FCM–SDs are required to comply with regulation 1.17. One commenter also stated that the SEC in its final rules requires a BD or SBSD to take a standardized capital charge for cleared security-based swaps equal to 100% of the margin required by a clearing agency, and does not impose a 150% charge for positions held by non-clearing BDs or SBSDs.[61] The commenter stated that if the Commission adopts this capital charge, it should do so in a manner that is consistent with the SEC's final rule.

The Commission has reconsidered the Proposal and the comments received and is modifying final regulation 1.17(a)(1)(i)(B) to not include proprietary futures, foreign futures, and proprietary cleared swaps from the risk margin amount calculation. The Commission believes that the requirement for an FCM–SD to take a capital charge equal to 100% or 150% of the required initial margin or required maintenance margin, as applicable, on its proprietary cleared positions adequately accounts for the risk associated with those positions, as it reflects the potential market risk presented by the positions as determined by a clearing organization or broker and further recognizes that the initial margin posted with the clearing organization or broker is no longer available for use in the FCM–SD's business and, thus, warrants at least a 100% capital charge. The market risk capital charge imposed on proprietary futures and cleared swaps for FCM–SDs approved to use capital models for market risk would be model-based and not the margin imposed by a clearing organization. Since a market risk charge would reduce the FCM–SD's capital, the Commission believes that it is appropriate to exclude the proprietary cleared positions from the 8% risk margin amount calculation.

The Commission believes that under such circumstances it is not necessary to impose an additional capital requirement in the form of an increase in the minimum capital requirement equal to 8% of the margin associated with the FCM–SD's proprietary cleared futures, foreign futures, and swaps positions. In this regard, the Commission notes that an FCM–SD's credit exposure is limited on cleared positions to either a clearing organization or to an FCM that carries the FCM–SD's account (or in the case of foreign futures, a foreign broker that carries the FCM–SD's account). The credit exposure on such cleared positions is limited as clearing organizations and FCMs/foreign brokers are regulated entities that are generally subject to financial requirements, including capital, margining, and financial reporting requirements. Clearing organizations and FCMs/foreign brokers are also subject to regulations regarding the holding of customer funds to ensure that such funds are used solely for the benefit of the customer and not for the benefit of other customers or of the clearing organization or FCM/foreign broker.[62] Furthermore, as noted above, an FCM–SD will be required to maintain a level of net capital that is sufficient to cover the market risk charges associated with the proprietary cleared futures, foreign futures, and cleared swap positions.

The Commission is also modifying the final regulation to set the risk margin amount multiplier for uncleared swaps at 2% of the ''uncleared swap margin'' amount required on such positions. The term ''uncleared swap margin'' is defined in regulation 1.17(b)(11) to mean the amount of initial margin that the FCM–SD would compute on each uncleared swap position pursuant to the calculation requirements of regulation 23.154. The FCM–SD must include all uncleared swap positions in the

[55] *See Minimum Financial and Related Reporting Requirements for Futures Commission Merchants and Introducing Brokers,* 69 FR 49784 (Aug. 12, 2004).

[56] *See* Commission regulation § 1.17(a)(1)(i)(D) (17 CFR 1.17(a)(1)(i)(D)).

[57] *See* FIA 3/3/2020 Letter.

[58] Commission regulation § 1.17(c)(5)(x) (17 CFR 1.17(c)(5)(x)) currently requires an FCM that is a clearing member of a clearing organization to take a capital charge equal to 100% of the margin required by the clearing organization for the cleared positions. FCMs that are not clearing members are required to take a capital charge equal to 150% of the maintenance margin required by the applicable clearing organization for the cleared positions.

[59] *See* Letter from Stephen Berger, Citadel Securities (May 15, 2017) (Citadel 5/15/2017 Letter); Letter from Mary Kay Scucci, Securities Industry and Financial Markets Association (May 15, 2017) (SIFMA 5/15/2017 Letter); Letter from Walter Lukken, Futures Industry Association (May 15, 2017) (FIA 5/15/2017 Letter); FIA–PTG 5/24/2017 Letter; FIA 3/3/2020 Letter; FIA–PTG 3/3/2020 Letter.

[60] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[61] *See* IIB/ISDA/SIFMA 3/3/2020 Letter. *See also,* SEC rule 15c3–1(c)(2)(vi)(O) (17 CFR 240.15c3–1(c)(2)(vi)(O)) which provides that capital charge for a proprietary cleared security-based swaps is the margin amount of the clearing agency or, if the security-based swap references an equity security, the broker or dealer may take a deduction using the method specified in rule 15c3–1a (17 CFR 240.15c3–1a).

[62] *See, e.g.,* Commission regulations §§ 1.20, 1.22, and 39.15 (17 CFR 1.20, 1.22 and 39.15).

calculation of the uncleared swap margin amount, including uncleared swaps that are exempt from the scope of the Commission's margin regulations for uncleared swaps pursuant to regulation 23.150, exempt foreign exchange swaps or foreign exchange forwards, or netting set of swaps or foreign exchange swaps, for each counterparty, as if the counterparty was an unaffiliated swap dealer. Furthermore, in computing the uncleared swap margin amount, an FCM–SD may not reduce the uncleared swap margin amount to reflect the *initial margin threshold amount* or the *minimum transfer amount* as such terms are defined in regulation 23.151.[63]

The Commission is modifying the risk margin amount multiplier in recognition that the Commission's margin requirements generally impose a higher margin requirement on uncleared swap positions relative to cleared swaps and futures positions. Minimum initial margin requirements for cleared futures and swap transactions are generally set by clearing organizations. In this regard, the FCM minimum capital requirement of 8% of the risk margin amount on futures and cleared swaps is based upon margin calculations using clearing organization models that require a 99% one-tailed confidence interval over a minimum liquidation period of one day for futures, agricultural swaps, energy swaps, and metal swaps, and a minimum liquidation period of five days for all other swaps, including financial swaps such as interest rate swaps.[64] In contrast, initial margin for uncleared swaps is required to be calculated at a 99% one-tailed confidence interval over minimum liquidation period of 10 business days (or the maturity of the swap if shorter).[65] The greater margin period of risk for uncleared swaps generally requires a higher level of initial margin, which would increase the FCM–SD's minimum capital requirement for uncleared swaps relative to cleared transactions. The modification of the final rule to set the risk margin amount multiplier at 2% for uncleared swap positions is appropriate given the generally higher initial margin requirements imposed on such positions under the Commission's regulations relative to cleared positions. In addition, as noted above, FCM–SD's will also be required to take market risk charges for each of its proprietary positions, including uncleared swaps, in computing its adjusted net capital.

As noted by a commenter, the 8% risk margin amount was proposed in 2003, and subsequently adopted in 2004, based upon an analysis and comparison of the then existing FCM capital regime that was based on a percentage of the customer funds held by an FCM, with a minimum capital requirement based upon risk margin associated with the customer positions carried by the FCM.[66] Staff also had the benefit of observing data of the actual performance of the two capital regimes for an extended period of time as each FCM was required to calculate its minimum capital requirement based on customer funds and its capital requirement based on a percentage of its risk margin amount for approximately two years as part of a pilot program.[67]

The Commission does not have the benefit of similar comprehensive data regarding the multiplier for the uncleared swaps risk margin amount at this time. However, the Commission's decision to modify the final rule by removing cleared and uncleared security-based swaps, as well as proprietary futures, foreign futures, and cleared swaps positions from the risk margin amount calculation, and to set the multiplier at 2% should mitigate many of the commenters' concerns that the proposed 8% risk margin amount calculation was over inclusive of the types of positions included in the calculation and was set at a percentage that was too high.

The modification to remove proprietary futures, foreign futures, cleared swap, and cleared and uncleared security-based swap positions from the risk margin amount calculation also mitigates concerns raised by commenters that the capital rule ''double counts'' positions by requiring an FCM–SD to include such positions in its minimum capital requirement while also requiring the FCM–SD to take market risk and credit risk charges in computing its adjusted net capital. The modifications to the final rule also more closely aligns the Commission's minimum capital requirement for FCM–SDs with the approach adopted by the SEC for setting minimum capital requirements for BDs that are SBSDs and stand-alone SBSDs.

The Commission will review within five years of the effective date of this rule, the impact that the 2% risk margin amount has on the level of minimum capital required of FCM–SDs after the compliance date of the rules. The Commission will use the financial statements and other information that it will receive from FCM–SDs under existing FCM financial reporting requirements to assess whether the minimum capital requirements for FCM–SDs are adequately calibrated to ensure their safety and soundness. The information that the Commission will receive will allow it to determine if it would be appropriate to propose amending the minimum capital requirement by, among other things, increasing or decreasing the risk margin amount multiplier.

3. Stand-Alone FCM and FCM–SD Calculation of Net Capital and Adjusted Net Capital

As previously noted, the second component of the FCM and FCM–SD capital requirement is the computation of the firm's adjusted net capital based upon the assets and liabilities of the firm. Regulation 1.17(c)(5) defines the term ''adjusted net capital'' as an FCM's ''current assets'' (*i.e.,* current, liquid assets excluding, however, most unsecured receivables), less all of the FCM's liabilities (except certain qualifying subordinated debt). An FCM is further required to impose certain prescribed capital deductions (''capital charges'' or ''haircuts'') from the current market value of the FCM's proprietary positions (*e.g.,* futures, securities, debt instruments, money market instruments, and commodities) in computing its adjusted net capital to reflect potential market risk associated with the firm's proprietary positions, as well as to provide a capital cushion against other potential risks, including liquidity, legal, and operational risk.

Regulation 1.17(c)(5) establishes specific standardized capital charges for market risk for an FCM's proprietary positions in physical inventory, forward contracts, fixed price commitments, and securities. Regulation 1.17(c)(5), however, did not explicitly address market risk capital charges for uncleared swap or security-based swap positions. While FCMs have not historically engaged in a significant level of swaps or security-based swap transactions, the Commission has required FCMs to use the standardized market risk capital charges specified in regulation

[63] The Commission is modifying the definition of the term ''uncleared swap margin'' in final paragraph (b)(11) of Commission regulation 1.17 (17 CFR 1.17(b)(11)) to align the wording of the regulation to be consistent with the definition of the term ''uncleared swap margin'' in regulation 23.100 for SDs that are not also registered FCMs.

[64] *See* Commission regulation § 39.13(g) (17 CFR 39.13(g)).

[65] *See* Commission regulation § 23.154(b)(2) (17 CFR 23.154(b)(2)).

[66] *See Minimum Financial and Related Reporting Requirements for Futures Commission Merchants and Introducing Brokers,* 68 FR 40835 (July 9, 2003) and 69 FR 49784 (Aug. 12, 2004). *See also, CFTC Division of Trading and Markets, Review of Standard Portfolio Analysis of Risk Margining System Implemented by the Chicago Mercantile Exchange, Board of Trade Clearing Corporation, and the Chicago Board of Trade (Apr. 2001) (''T&M 2001 Report''). See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[67] *See T&M 2001 Report.*

1.17(c)(5)(ii), or the standardized market risk capital charges established by SEC rule 15c3–1 (17 CFR 240.15c3–1) (''SEC rule 15c3–1'') for dually-registered FCM–BDs, to compute market risk capital charges for uncleared swap and security-based swap positions.[68]

The Commission proposed amendments to regulation 1.17(c)(5) to more explicitly provide for specific standardized market risk capital charges for an FCM's or FCM–SD's proprietary positions in uncleared swaps and security-based swaps.[69] The Proposal further provided that an FCM or FCM–SD that obtained approval to use internal market risk capital models could use such models in lieu of the standardized market risk charges. In order to use capital models, an FCM–BD must have obtained SEC approval to use capital models. These dually-registered FCM–BDs are referred to as ''Alternative Net Capital Firms'' (''ANC Firms''), and are subject to enhanced minimum capital requirements as discussed below. An FCM which is not a BD, but also is registered as an SBSD would also be subject to the approval of both the Commission and the SEC to use models, but with lesser applicable fixed dollar net capital and adjusted net capital thresholds. The proposed standardized market risk charges and model-based charges are also discussed below.

a. Stand-Alone FCM and FCM–SD Standardized Market Risk Capital Charges

FCMs currently are required to take standardized market risk charges for proprietary positions in computing their adjusted net capital under regulation 1.17. The current standardized market risk charges are aligned with the SEC's market risk capital charges for BDs, and reflect the two agencies' long-standing efforts of maintaining a uniform capital rule for FCMs and BDs as most FCMs are dually-registered as BDs. In this regard, regulation 1.17 requires FCMs that hold positions in securities and securities-related products, such as U.S. Government securities, equity securities and options, municipal securities, commercial paper, and certificates of deposit, to take market risk capital charges on such positions in the manner and amount specified by SEC rule 15c3–1 and rule 15c3–1a (17 CFR 240.15c3–1a) (''SEC rule 15c3–1a''). FCMs that hold positions in commodities, including foreign currency and physical commodities, are required to take market risk capital charges set forth in Commission regulation 1.17(c)(5). For example, regulation 1.17(c)(5) requires an FCM to take a capital charge equal to 0% to 20% of the market value of inventory depending on whether the FCM's inventory position is adequately offset (or ''covered'') by proprietary futures positions.[70] The standardized Commission and SEC market risk capital charges are generally computed based upon the market value of the position multiplied by a percentage factor set forth in the rule or regulation.

Regulation 1.17 and SEC rules, however, did not provide explicit market risk capital charges for swaps or security-based swaps. To the extent an FCM engages in uncleared swap or security-based swap transactions, the FCM is required to take a market risk capital charge based upon the standardized capital charges contained in SEC rules 15c3–1, 15c3–1a, or Commission regulation 1.17(c)(5) that are applicable to proprietary positions in securities, inventory, foreign currency, fixed price commitments, or forward contracts. For example, an energy swap is treated as a fixed price commitment under regulation 1.17(c)(5), and an FCM is required to take a market risk capital charge equal to 20 percent of the notional value of the swap.[71] The purpose of the market risk capital charge is to require an FCM, in computing its adjusted net capital, to reserve a minimum level of capital to cover potential future losses in the value of the swap.

The *2016 Capital Proposal* proposed amending the standardized market risk capital charges to explicitly reflect uncleared swap and security-based swap positions. The Commission proposed to amend regulation 1.17(c)(5)(iii) to provide a schedule of standardized market risk capital charges for positions in uncleared credit default swaps, interest rate swaps, foreign exchange swaps, commodity swaps, and all other uncleared swaps.[72] The Commission also proposed that an FCM or an FCM–SD must take the applicable standardized capital charge in SEC rule 15c3–1, as such rule was proposed to be amended, for proprietary positions in uncleared security-based swaps, including uncleared security-based credit default swaps and equity swaps.[73]

Credit default swaps are generally defined by the reference asset or entity, the notional amount, the duration of the contract, and credit events. The Commission proposed standardized market risk capital charges for credit default swaps using maturity grids. The ''maturity grid'' was based on a ''maturity grid'' approach that was proposed and subsequently adopted by the SEC for credit default swaps and security-credit default swaps.[74] Market risk capital charges for uncleared credit default swaps were proposed to be based on two variables under the *2016 Capital Proposal:* (i) The length of time to maturity of the credit default swap; and (ii) the amount of the current offered basis point spread on the uncleared credit default swap. The standardized market risk charge for an unhedged short position in a credit default swap was the applicable percentage specified in the grid. The deduction for an unhedged long position was 50% of the applicable deduction specified in the grid.[75]

The *2016 Capital Proposal* also permitted an FCM to net long and short positions where the uncleared credit default swaps reference the same entity or obligation, reference the same credit events that would trigger payment by the seller of the protection, reference the same basket of obligations that would determine the amount of payment by the seller of protection upon the occurrence of a credit event, and are in the same or adjacent maturity and spread categories (as long as the long and short positions each have maturities within three months of the other maturity category). In this case, the FCM was required to take the specified market risk percentage deduction only

[68] For example, existing Commission regulation § 1.17(c)(5)(ii)(C) (17 CFR 1.17(c)(5)(ii)(C)) imposes a market risk capital charge on inventory positions held by an FCM equal to 20% of the market value of the inventory, and § 1.17(c)(5)(ii)(G) (17 CFR 1.17(c)(5)(ii)(G)) imposes the same market risk capital charge of 20% on the value of fixed price commitments and forward contracts. FCMs holding agricultural swaps or energy swaps have been required to take a market risk capital charge equal to 20% of the notional value of the swap under the application of either of these two provisions.

[69] *2016 Capital Proposal,* 81 FR 91252 at 91266–67.

[70] *See* Commission regulation § 1.17(j) (17 CFR 1.17(j)) for the definition of the term ''cover.''

[71] For example, swaps with a reference asset of a physical commodity are subject to a capital charge equal to 20% of the notional value of the contract (*See* Commission regulation § 1.17(c)(5)(ii)(G) (17 CFR 1.17(c)(5)(ii)(G)).

[72] *See 2016 Capital Proposal,* 81 FR 91252 at 91266–67.

[73] The SEC proposed amending rules 15c3–1 and 15c3–1b to establish standardized capital charges for security-based swaps and swaps that would apply to stand-alone BDs and BDs that are also registered SBSDs. *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* 77 FR 70214 (Nov. 23, 2012) (''*SEC 2012 Proposed Capital Rule*'').

[74] SEC rule 15c3–1(c)(2)(vi)(P)(*1*) (17 CFR 240.15c3–1(c)(2)(vi)(P)(*1*)).

[75] *See* proposed paragraph (c)(5)(iii)(A) of Commission regulation § 1.17; *2016 Capital Proposal,* 81 FR 91252 at 91307.

on the notional amount of the excess long or short position.[76]

For uncleared interest rate swaps, the Commission proposed a standardized market risk capital charge approach that required multiplying the notional amount of the swap by a stated percent.[77] The percentage that applied to the notional amount was determined by referencing the standardized haircuts in SEC rule 15c3–1(c)(2)(vi)(A) for U.S. government securities with comparable maturities to the interest rate swaps maturities, and would range from 0% (for interest rate swaps with a remaining time to maturity of less than 3 months) to 6% (for interest rate swaps with a remaining time to maturity of 25 years or more). The *2016 Capital Proposal* further provided that an FCM may net certain long and short uncleared interest rate swaps to reduce the net notional amount of the interest rate swaps subject to the market risk capital charge. The net amount of the long and short interest rate swaps was determined based upon the existing SEC netting schedule for government securities, which is based upon the time to maturity of the interest rate swaps. For example, long and short interest rate swaps with maturity dates ranging between 3 years to less than 5 years are subject to market risk capital charge equal to 3% on the net long or short interest rate swap position.

The Proposal further provided that the market risk capital charge for interest rate swaps must not be less than 0.5% of the amount of the long position that was netted against a short position, notwithstanding that the netting provisions contained in SEC rule 15c3–1 does not impose a market risk capital charge on U.S. government securities with less than 3 months to maturity.[78] The 0.5% floor on the total amount of the long interest rate swaps netted against the short interest rate swaps was designed to account for potential differences between the movement of interest rates on U.S. government securities and interest rates upon which swap payments are based.

The Commission also proposed specific market risk capital charges for foreign currency swaps, commodity swaps, security-based swaps, and all other uncleared swaps. The Proposal requires FCM and FCM–SDs to take a market risk capital charge for foreign currencies swaps that is consistent with the standardized market risk charges for foreign currency positions and foreign currency forwards contained in regulation 1.17(c)(5). Specifically, the Commission proposed market risk charges equal to 6% of the notional value of a foreign currency swap that references euros, British pounds, Canadian dollars, Japanese yen, or Swiss francs. Foreign currency swaps that reference any other currency are subject to a market risk capital charge equal to 20% of the notional value of the respective swap.

With respect to swaps referencing a physical commodity, the Proposal required FCM and FCM–SDs to take a market risk capital charge equal to 20% of the market value of the relevant commodity underlying a commodity swap. Consistent with the foreign currency and interest rate swaps, the proposed commodity swap market risk capital charge was based upon the existing capital charges for physical commodities set forth in regulation 1.17(c)(5). The Proposal further required an FCM or FCM–SD to take the market risk capital charges specified in SEC rules for security-based swaps, which would include equity swaps, and for any swap that has a reference asset that is subject to specific SEC market risk capital charges and is not otherwise subject to a Commission imposed capital charge.

Commenters objected to the proposed standardized market risk capital charges as being too punitive and not tailored to the risk posed by the relevant portfolios of positions.[79] Specifically, commenters noted that the proposed standardized market risk charges for interest rate swaps are substantially higher than the capital charges based on clearing house maintenance margin requirements for cleared interest rate futures contracts.[80] One commenter provided a sample matched book portfolio of interest rate swaps demonstrating that an FCM would have substantially higher capital charges under the proposed standardized approach as compared to the model approach or as compared to clearing house maintenance margin requirements.[81] These commenters indicated that the excessive capital requirements derived from the proposed standardized market risk capital charges would particularly impact small to mid-sized SDs that are not approved or otherwise do not use internal market risk capital models.[82]

Commenters also requested that the Commission reconsider the standardized capital charge on currency swaps.[83] The commenters noted that an FCM or FCM–SD would have to take a market risk capital charge equal to 20% of the notional amount of an uncleared foreign currency non-deliverable forward contract, while the standardized (or grid-based) initial margin requirements on such a contact is 6% of the notional amount.[84] One commenter recommended that the final rule align the capital charge with the volatility and liquidity conditions of the relevant currency pair.[85] Another commenter stated that the standardized capital charge is too high for a product that is highly liquid and recommended that the capital charge be aligned with the standardized initial margin requirement of 6% under the uncleared margin rules.[86]

Another commenter stated that a covered SD that enters into a swap with uncleared swap contracts containing a flip-clause should require a charge for required margin on such contract plus market risk.[87]

The Commission acknowledged in the *2019 Capital Reopening* that the proposed standardized market risk charges would impact FCMs, FCM–SDs, and covered SDs that do not have approval to use internal market risk capital models, which are more likely to be smaller to mid-sized firms that may not be part of a financial group that has the approval of the SEC, a prudential regulator, or a foreign regulator to use internal capital models. The Commission further believed that establishing a more appropriate market risk capital charge for uncleared interest

[76] *See 2016 Capital Proposal,* 81 FR 91252 at 91267.

[77] *Id.*

[78] The SEC proposed minimum standardized market risk charge of 1% of the net notional value of the interest rate swaps for SBSDs and 0.5% for BDs. *See SEC Proposed Capital Rule,* 77 FR 70214 at 70345; Proposed rule 18a–1b(b)(2)(C) for SBSDs and proposed rule 15c3–1b(2)(ii)(C).

[79] *See* SIFMA 5/15/2017 Letter; Letter from Michael Sharp, Jefferies Group LLC (May 12, 2017) (Jefferies 5/12/2017 Letter).

[80] SIFMA and Jefferies each estimated that the proposed standardized market risk charges for uncleared interest rate swaps would be substantially higher than the clearing house margin requirements. *See Id.*

[81] *See* Jefferies 5/12/2017 Letter.

[82] *See* proposed Commission regulation § 23.101(a)(1), *2016 Capital Proposal,* 81 FR 91252 at 91310–11. *See* SIFMA 5/15/2017 Letter; Letter from Ryan Hayden, ED&F Man Derivative Products, Inc./INTL FCStone Markets, LLC (March 3, 2020) (ED&F Man/INTL FCStone 3/3/2020 Letter); IIB/ISDA/SIFMA 3/3/2020 Letter; FIA 3/3/2020 Letter; Letter from Alexander Lange, ABN AMRO Securities (USA) LLC; Michael Bando, ING Capital Markets LLC; Adam Hopkins, Mizuho Capital Markets LLC; David Moser, Nomura Holding America Inc. (January 29, 2018) (ABN/ING/Mizuho/Nomura 1/29/2018 Letter).

[83] Letter from Stephen John Berger, Citadel Securities, March 3, 2020 (Citadel 3/3/2020 Letter); FIA–PTG 3/3/2020 Letter.

[84] IIB/ISDA/SIFMA 3/3/2020 Letter; Citadel 3/3/2020 Letter.

[85] Citadel 3/3/2020 Letter.

[86] FIA–PTG 3/3/2020 Letter.

[87] Letter from William Harrington (3/3/2020) (Harrington 3/3/2020 Letter).

rates swaps, in particular, given the relatively high market risk capital charge would benefit market participants by encouraging smaller to mid-sized FCMs, FCM–SDs, and covered SDs to remain in the market or to enter the market. Accordingly, the Commission requested further comment on the proposed standardized market risk charge for uncleared interest rate swaps. The Commission also noted that the SEC's final capital rule for BDs and SBSDs imposed a minimum capital requirement for uncleared interest rate swaps equal to ⅛ of one percent (0.125%) and only applicable to the matched long position that is netted against a short position in the case of a uncleared interest rate swap with a maturity of three months or more.[88]

The Commission has considered the comments and is adopting the proposed standardized market risk charges for uncleared swaps and uncleared security-based swaps as proposed, with several modifications that are discussed below. The standardized market risk capital charges being adopted are generally based on existing Commission and SEC standardized market risk charges for positions in foreign currencies, commodities, U.S. treasuries, equities and other instruments, which, in the Commission's long experience, have generally proven to be effective and appropriately calibrated to address potential market risk in the positions. The Commission believes at this time that this approach, in conjunction with other charges discussed herein, appropriately accounts for the wide variety of possible uncleared swap transactions that FCMs, FCM–SDs, and covered SDs may engage in, including bespoke swap transactions involving flip-clauses or other unique features. Overtime, the Commission may consider adjusting these charges as a result of experience with their impacts on required capital in these firms and as market developments may warrant.

In response to several commenters, the Commission recognizes that standardized market risk charges are not as risk sensitive as market risk models, and generally result in higher market risk capital charges than internal models. The Commission notes, however, the lower capital charges for firm's approved to use market risk model is one of the reasons that model approved firms are subject to the higher minimum capital requirements. As noted in section II.B.2.a. above, FCM–SDs that are approved to use internal market risk models are required to maintain net capital of at least $100 million and adjusted net capital of $20 million, while FCM–SDs that are not approved to use internal market risk models are required to maintain $20 million of adjusted net capital, but are not subject to the $100 million dollar net capital requirement. The imposition of $100 million net capital requirement is to provide protection for potential model errors or the failure of the models to address all applicable risks. The Commission believes that it is appropriate to require FCM–SDs that do not use internal models and therefore have a lower capital requirement to be subject to the higher standardized market risk capital charges. The approach is also consistent with the approach adopted by both the Commission and SEC with respect to ANC Firms that have been approved to use internal capital models and, which under the *2019 SEC Final Capital Rule,* are subject to a minimum capital requirement of $5 billion of tentative net capital and $1 billion of net capital.[89]

In addition, the Commission believes that FCM–SDs will seek approval to use model-based market risk charges. There currently are four FCM–SDs provisionally-registered with the Commission. Each of the FCM–SDs is an ANC Firm that is approved to use market risk capital models and, which under the *2019 SEC Final Capital Rule,* is subject to the SEC's minimum capital requirement of $5 billion of tentative net capital and $1 billion of net capital. In order to effectively compete with the existing FCM–SDs and other covered SDs, any new FCM–SD registrant would need to obtain model approval.

The Commission is also modifying the final regulation by reducing the minimum capital charge for a portfolio of interest rate swaps to align with the SEC's final capital requirement for BD's and SBSD's using standardized capital charges. In reviewing the comments, the Commission realizes that the standardized market risk charges for interest rate swaps that it proposed in its *2016 Capital Proposal* was too high relative to the market risk of the positions. The Proposal's imposition of a minimum market risk capital charge of .5% of the notional amount of the matched long interest rate swaps has been shown by commenters to be poorly calibrated to the market risk of the positions. Therefore, under the final regulation, an FCM–SD or FCM is required to take a capital charge of at least ⅛ of one percent (0.125%) of the matched long interest rate swap positions that is netted against a short interest rate swap positions with a maturity of three months or more. The Commission believes that in making this change, the overall effect on the amount of capital held by an FCM or an FCM–SD will not have a substantial adverse impact on the safety and soundness of these entities. The Commission, however, will monitor the standardized capital charges and refine the percentages as it obtains experience with the level of interest rate swaps transactions entered into by stand-alone FCMs and FCM–SDs and magnitude of the market risk charges on such positions.

The Commission is also making a technical modification to the final capital rule for credit default swaps. As noted in the *2019 Capital Reopening,* the *2019 SEC Final Capital Rule* includes the same standardized capital charges for credit default swaps for BDs and SBSDs as proposed by the Commission for FCMs, FCM–SDs, and covered SDs. There is a slight difference between the Commission's Proposal and the SEC's final rule, however, in applying the capital charges based upon the time to maturity. Specifically, the maturity grids differ by one month, and there are some slight changes to the rule text. The Commissions is modifying the time to maturity grids and the wording in the final rule to align with the SEC's final rule to avoid having dually-registered entities being subject to slightly different regulatory requirements with respect to market risk charges for credit default swaps. The Commission believes that this modification will have no material impact on its capital requirements.

The Commission is also modifying the final rule to provide that an FCM or FCM–SD may reduce market risk charges for uncleared swap positions, other than credit default swaps which as proposed provided for netting, to account for comparable offsetting positions.[90] The Commission noted in the *2019 Capital Reopening* that the SEC adopted a netting proviso applicable to both BDs and SBSDs, permitting a reduction of the resulting market risk capital charge by an amount equal to any reduction recognized for comparable long or short positions in the reference asset or interest rate under

[88] *See 2019 SEC Final Capital Rule,* rule 18a–1b(b)(2)(ii)(A)(*3*) (17 CFR 240.18a–1b(b)(2)(ii)(A)(*3*) for SBSDs and rule 15c3–1b(b)(2)(ii)(A)(*3*) (17 CFR 240.15c3–1b(b)(2)(ii)(A)(*3*)) for BDs.

[89] SEC rule 15c3–1(a)(7) (17 CFR 240.15c3–1(a)(7)).

[90] *See* paragraph (c)(5)(iii)(D) of Commission regulation § 1.17, as amended (17 CFR 1.17(c)(5)(iii)(D)).

regulation 1.17 or SEC rule 15c3–1.[91] For example, an FCM or FCM–SD that is required to take market risk charges on equal and opposite legs of a portfolio of foreign currency swaps is permitted to net the market risk charges on the long and short positions to the extent that the positions are comparable.

The Commission stated in the *2019 Capital Reopening* that it intended to maintain consistency with the *2019 SEC Final Capital Rule* with respect to the applicability of the standardized market risk charges for uncleared currency and commodity swaps, and requested comment on including the same netting proviso to regulation 1.17(c)(5)(iii).[92] Commenters to the *2019 Capital Reopening* generally supported the netting provision.[93] One commenter stated that such an approach would be consistent with common and current risk management practices and would allow non-financial SDs to be more responsive to customer needs.[94]

The Commission believes that it is appropriate that an FCM or an FCM–SD be permitted to net offsetting swap positions in computing the market risk on the portfolio of swap positions in an identical fashion as the SEC has adopted for BDs and SBSDs. Otherwise, the capital rule would require individual capital charges on each swap position without any consideration of the actual risk of the positions. Such an approach would discourage FCMs or FCM–SDs from hedging their exposures and from participating in the swaps market. The ability to net offsetting positions in computing market risk is also a fundamental approach that has been adopted by other regulators including the SEC, prudential regulators, and others. Therefore the Commission is adopting the netting provision as set forth at regulation 1.17(c)(5)(iii)(D).

FCMs currently are required by regulation 1.17(c)(5)(x) to take standardized capital charges on proprietary cleared futures and cleared swap positions. The capital charge is equal to 100% of the margin requirement imposed by the clearing organization on the positions if the FCM is a clearing member of such clearing organization. For FCMs that are not clearing members of the clearing organization that clears the positions, the capital charge is equal to 150% of the applicable maintenance margin requirement of the applicable board of trade or clearing organization, whichever is greater. FCM–SDs also are subject to these capital charges as such firms must comply with the FCM capital requirements set forth in regulation 1.17.

Several commenters requested that the Commission eliminate the requirement for an FCM to take capital charges equal to 150% of the margin for proprietary futures or cleared swap positions. One commenter stated that there is no justification for a higher capital charge as market risk is independent of whether the firm is or is not a clearing firm.[95] This commenter also noted that the SEC's final capital rules for SBSDs impose a capital requirement for proprietary cleared positions equal to 100% of the required clearing organization margin, and do not require a non-clearing SBSD to take a higher capital charge of 150% of required margin.[96] Another commenter stated that there is no justification for assessing covered SDs that are non-clearing members the higher 150% charge and imposing such a requirement is placing the SDs at an unnecessary competitive disadvantage. The commenter recommended that all SDs should be able to take a standardized market risk charge equal to the clearing organizations' margin requirement.[97]

The Commission has considered the Proposal and comments and is not revising regulation 1.17(c)(5)(x). The capital requirement for FCMs to take a capital charge for cleared proprietary positions has been in place for many years. The higher capital charge for non-clearing FCMs takes into consideration that such firms are not subject to heightened capital and other requirements that are imposed by clearing organizations on clearing members. FCM clearing members also are required to post guarantee fund contributions to clearing organizations to support their financial obligations, and are subject to clearing organization assessment authority in the event that a shortfall results from the default of a fellow clearing member. The higher capital charge for non-clearing FCMs and FCM–SDs is intended to ensure that such firms retain an appropriate level of capital and liquid resources to meet their financial obligations, including to their carrying FCMs and ultimately to clearing organizations, and the Commission believes that the 150% capital charge is appropriate to help ensure the safety and soundness of the FCM or FCM–SD.

b. FCM and FCM–SD Standardized Counterparty Credit Risk Capital Charges

FCMs currently are required to take standardized capital charges to reflect counterparty credit risk associated with uncleared swap and security-based swap positions. The Commission's capital rule requires an FCM that holds swap or security-based swap positions to mark the positions to their respective fair market values in their financial records.[98] Swap and security-based swap positions that have mark-to-market losses result in the FCM recognizing variation margin payables to swap and security-based swap counterparties. Such losses reduce the FCM's capital either by the payment of variation margin or the recognition of a liability. Swap and security-based swap positions that have mark-to-market gains result in the FCM recognizing variation margin receivables from the swap and security-based swap counterparties. The variation margin receivables, however, are subject to a 100% counterparty credit risk capital charge unless the receivables are secured by readily marketable collateral.[99]

The Commission proposed to retain the 100% counterparty credit risk charges for unsecured receivables from swap and security-based swap counterparties in the Proposal, and further proposed extending this treatment to FCM–SDs. The Proposal further imposed the 100% counterparty credit risk treatment applied to all swap and security-based swap counterparties of the FCM or FCM–SD, including commercial end users, that are exempt from the requirement to exchange variation margin.[100] The FCM or FCM–SD also would be required to take a 100% capital charge on unsecured receivables resulting from transactions that are exempt from the margin requirements, including legacy swap and security-based swap transactions and foreign exchange forward and swap

[91] SEC rule 15c3–1b(b)(2)(ii)(B) (17 CFR 240.15c3–1b(b)(2)(ii)(B)) for BDs and rule 18a–1b(b)(2)(ii)(B) (17 CFR 240.18a–1b(b)(2)(ii)(B)) for SBSDs.

[92] *See 2019 Capital Reopening,* 84 FR 69664 at 69672.

[93] *See* Citadel 3/3/2020 Letter; IIB/ISDA/SIFMA 3/3/2020 Letter; Letter from Alexander Holtan, Commercial Energy Working Group (March 3, 2020) (CEWG 3/3/2020 Letter); Letter from Sebastian Crapanzano and Soo-Mi Lee, Morgan Stanley (March 3, 2020) (MS 3/3/2020 Letter).

[94] *See* Citadel 3/3/2020 Letter page 5.

[95] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[96] *Id.*

[97] *See* FIA–PTG 3/3/2020 Letter.

[98] Commission regulation § 1.17(c)(1) (17 CFR 1.17(c)(1)).

[99] *See* Commission regulation § 1.17(c)(1) and (2) (17 CFR 1.17(c)(1) and (2)), which defines the term ''net capital'' and requires an FCM to include unrealized gains and losses in the computation of net capital, and further provides that an FCM must generally exclude unsecured receivables (including unsecured receivables from swap and security-based swap counterparties).

[100] *See* Commission regulation § 23.150 (17 CFR 23.150).

transactions, as well as any receivables from counterparties that are subject to a $500,000 minimum transfer amount.[101]

The Commission proposed the 100% capital charge on unsecured receivables from swap and security-based swap counterparties as it is was consistent with the Commission's general approach of requiring an FCM to exclude unsecured receivables from its adjusted net capital. As noted above, the Commission's capital rule focuses on the liquidity of the FCM and unsecured receivables do not reflect a liquid asset to the FCM that it may use in order to meet its own financial obligations.

The Proposal effectively required an FCM or FCM–SD that did not have approval to use models to compute counterparty credit risk to take a 100% capital charge for unsecured receivables due from swap and security-based swap counterparties. This would include counterparties that are not obligated to exchange variation margin with the FCM or FCM–SD, including commercial end users, affiliates, and counterparties engaging foreign exchange swaps as the term is defined in regulation 23.151.

FCM–SDs are also subject to the Commission's margin rules for uncleared swap transactions and may be directly or indirectly subject to the SEC's margin rules for uncleared security-based swaps. Under the Commission's margin rules, an FCM–SD is generally required to post initial margin for uncleared swap transactions entered into with other SDs or financial end users with a third-party custodian and may post initial margin with the custodian for security-based swaps. Stand-alone FCMs that engage in swaps and security-based swaps also may be obligated or elect to post initial margin for such transactions with a third-party custodian in accordance with the Commission's or the SEC's respective uncleared swap and security-based swap margin rules. Such deposits would generally be treated under the Commission's capital rule as an unsecured receivable from the third-party custodian, and subject to a 100% capital charge.

The Commission proposed to amend regulation 1.17(c)(2)(ii)(G) to permit an FCM or an FCM–SD to include initial margin funds it deposited with third-party custodians for uncleared swaps and uncleared security-based swaps in its capital computation, provided that the margin is held in accordance with the requirements established by the applicable Commission or SEC margin rules.[102] The Commission proposed to permit FCMs and FCM–SDs to include initial margin posted with third-party custodians as capital in recognition that the Commission's capital rules require an FCM–SD or stand-alone FCM to post initial margin for their uncleared swap transactions with third-party custodians to ensure that the FCM–SD or FCM meets its financial obligations to swap counterparties. The Commission also believes that the FCM–SD has minimal credit risk from the third-party custodian as the Commission's margin regulations require that the FCM–SD enter into a custodial agreement with the third-party custodian that prohibits the custodian from rehypothecating, repledging, reusing, or otherwise transferring (including though repurchase agreements) the collateral held by the custodian.[103] The custodial agreement also must be a legal, valid, binding, and enforceable agreement under the laws of all relevant jurisdictions including in the event of a bankruptcy, insolvency, or similar proceeding.[104]

The Commission is adopting the amendment to regulation 1.17(c)(2)(ii)(G) to permit FCMs and FCM–SDs to recognize margin posted with a third-party custodian for swap and security-based swap transactions as a current asset in computing their adjusted net capital. In order to qualify as a current asset, the initial margin must be deposited by the FCM or FCM–SD with a third-party custodian in accordance with the requirements specified in the Commission's uncleared swap margin rules set forth in regulations 23.150 through 23.161, or the SEC's uncleared security-based swap margin rules. The Commission is modifying the final regulation to clarify that initial margin posted by an FCM or FCM–SD with third-party custodians for uncleared swaps or uncleared security-based swaps entered into with bank SDs subject to the margin rules of a prudential regulator and entered into with foreign registered SDs that operate in a jurisdiction that has received a margin Comparability Determination by the Commission under regulation 23.160 also may be recognized as a current asset in computing adjusted net capital.

The Commission also proposed to require an FCM–SD to take a capital charge to reflect undermargined uncleared swap positions with a counterparty.[105] A capital charge for undermargined positions protects the FCM–SD by ensuring that it maintains capital to cover potential future credit exposure to swap counterparties, which is consistent with the statutory objective of ensuring the safety and soundness of the FCM–SD. The proposed undermargined capital charge further provided that an FCM–SD could reduce the amount of the capital charge by any amount owed by the FCM–SD to the counterparty resulting from uncleared swap transactions. The undermargined capital charge for uncleared swap positions is consistent with existing Commission undermargined capital charges for customer and noncustomer futures, foreign futures, and cleared swap accounts carried by an FCM.[106] The Commission did not receive comments on the proposed capital charges, and is adopting the undermargined capital charges with modifications as discussed below.

The Commission is modifying final paragraph (c)(5)(xv) of regulation 1.17 by adopting two separate paragraphs. Final regulation 1.17(c)(5)(xv) requires an FCM–SD to take a capital charge in an amount necessary for a swap counterparty or security-based swap counterparty to meet its respective Commission margin requirement for uncleared swap positions and the SEC margin requirement for uncleared security-based swap transactions to the SD. The final regulation would apply only to uncleared swaps and uncleared security-based swaps that are subject to the Commission's or SECs' margin requirements under applicable regulations. The final regulation further provides that the FCM–SD may reduce the amount of the undermargined charge to reflect calls for margin issued by the FCM–SD to the counterparty that are outstanding within the respective time frames established in the margin rules of the Commission and SEC, as applicable, to collect margin from a counterparty. This provision replaces

[101] Commission regulation § 23.153 (17 CFR 23.153), provides that a covered SD is not required to collect or post variation margin with a particular swaps counterparty until the combined initial and variation margin required to be exchanged with the counterparty exceeds $500,000.

[102] *See 2016 Capital Proposal,* 81 FR 91252 at 91306–07, proposed paragraph (c)(2)(ii)(G) of Commission regulation § 1.17.

[103] *See* Commission regulation § 23.157 (17 CFR 23.157).

[104] *Id.*

[105] Proposed paragraph (c)(5)(xv) of Commission regulation § 1.17 did not specifically impose undermargined capital charges for security-based swaps. *See 2016 Capital Proposal,* 81 FR 91252 at 91308. Such charges, however, are applicable to an FCM–SD under Commission regulation § 1.17(b)(1) (17 CFR 1.17(b)(1)), which provides that an FCM (including an FCM–SD) that has an asset or liability defined in the capital rules of the SEC shall treat such assets or liabilities for capital purposes in accordance with the rules of the SEC, provided that the Commission did not define a specific capital treatment in regulation 1.17.

[106] *See* Commission regulation § 1.17(c)(5)(viii) and (ix) for undermargined capital charges for customer and noncustomer futures, foreign futures, and cleared swap accounts.

the proposed language in regulation 1.17(c)(5)(xv) that would have permitted a covered SD to reduce the undermargined capital charge by any amount owed by the counterparty to the SD. The modified provision more accurately reflects the process of an SD calling for outstanding margin and is consistent with the undermargined capital charges for an FCM carrying customer and noncustomer accounts and the undermargined capital charge adopted by the SEC for SBSDs.

Final regulation 1.17(c)(5)(xvi) requires an FCM–SD to take a capital charge for uncleared swaps and uncleared security-based swaps that are exempt or excluded from the Commission's or SEC's margin requirements, such as commercial end users and transactions entered into prior to the compliance date of the margin regulations (*i.e.,* legacy swaps). In this regard, swaps entered into prior to the Phase 6 uncleared margin compliance date or with excluded counterparties for which no margin has been collected are treated no differently than other uncollateralized exposures under the Commission's rules. Such treatment for capital purposes of these counterparty exposures is consistent with the capital rules of both the SEC and prudential regulators as applied to their respective registrants.[107] The final regulation further provides that the FCM–SD may reduce the amount of the undermargined capital charge by any funds deposited by the counterparty to margin its swaps or security-based swap positions. These deposits would include funds deposited by the counterparty and held by third-party custodians or held by the FCM directly.

The Commission also modified the final rule text to clarify that the undermargined swap capital charges in regulation 1.17(c)(5)(xv) and (xvi) are applicable only to FCM–SDs and not FCMs, as FCM–SDs are subject to the Commission's margin requirements for uncleared swap transactions. Stand-alone FCMs, however, are not directly subject to the Commission's uncleared swap margin requirements as they are not SDs. Final regulations 1.17(c)(5)(xv) and (xvi) also have been modified to align the regulatory text more closely with the comparable SEC rule text requiring SBSDs to take capital charges for undermargined uncleared security-based swap and uncleared swaps positions from counterparties.[108] As noted above, the final regulation is designed to help ensure the safety and soundness of the FCM–SD by requiring the firm to reserve capital in the event a counterparty defaults on its swaps and security-based positions that are undermargined.

The Commission also requested comment on whether FCM–SD's or covered SD's should be permitted to recognize alternative forms of collateral (*e.g.,* letters of credit and liens) provided by commercial end-users that are exempt from clearing and from the uncleared margin requirements in computing the FCM–SD's or SD's counterparty credit risk charges for uncleared swap transactions.[109] Several commenters supported such alternative or non-financial collateral. One commenter stated that alternative forms of collateral, such as parent guarantees, letters of credit, or liens on assets are frequently used by SDs as credit risk mitigants when non-financial end-users do not post cash collateral on uncleared derivatives.[110] The commenter stated that allowing FCM–SDs to recognize alternative forms of collateral in computing credit risk charges is consistent with Congressional intent that FCM–SD capital requirements should not be punitive to end-users. This commenter further stated that permitting FCM–SDs to recognize non-cash collateral as a credit risk mitigant is consistent with the prudential regulators' final rule on the standardized approach to counterparty credit risk (''SA–CCR''), which provides that banks may take into account non-cash collateral in computing credit risk charges for OTC derivatives. Another commenter stated that non-cash collateral allows for the value of the commercial market participant's assets making it an effective method for satisfying credit requirements without unnecessarily setting aside capital from a productive use.[111] One commenter also stated that the Commission could require FCM–SD's to appropriately haircut non-cash collateral to address the general illiquid nature of non-cash collateral.[112]

The Commission has considered the comments and is not modifying the credit risk charges to recognize non-cash collateral. Margin provides an FCM–SD or a covered SD with protection from a potential counterparty default. In a default situation, non-financial collateral may not be immediately available, or the collateral may be available but may take time to liquidate. This may exacerbate potential losses to the FCM–SD or covered SD or expose such firms to additional risk by, for example, leaving them exposed to the market risk of cash market positions that were being hedged by the swap. While the Commission is not modifying the final rules to reflect non-cash collateral, it will continue to monitor and assess FCM–SD's and covered SD's acceptance of non-cash collateral from commercial end-users and consider possible revisions to its rules after it gains further experience with the capital condition of such firms.

c. Model-Based Market Risk and Counterparty Credit Risk Capital Charges

(i) FCMs That Are SEC-Registered ANC Firms

Commission regulation 1.17(c)(6) permits an FCM that is dually-registered with the SEC as a BD to use internal models to compute market risk and credit risk capital charges in lieu of standardized capital charges in computing its adjusted net capital under Commission regulation 1.17 provided that the SEC has approved the FCM/BD's use of such models for computing net capital under SEC rule 15c3–1. The SEC has approved certain FCM/BDs to use internal models to compute market risk capital charges for proprietary positions in securities, debt instruments, futures, security-based swaps and swaps in lieu of standardized capital charges contained in SEC rules 15c3–1 or 15c3–1b. The SEC also has approved the use of internal models to compute credit risk charges associated with exposures from swap and security-based swap counterparties in lieu of the standardized 100% unsecured receivable capital charges. As noted in section II.B.3. above, these FCM/BDs are referred to as ANC Firms. Five FCMs currently are ANC Firms, with four of the firms also provisionally-registered SDs.

Regulation 1.17(c)(6) requires an ANC Firm to file a notice with the Commission in order to use the SEC's approved capital models. The notice must include the SEC's approval order and other information, including: (i) A list of the categories of positions that the ANC Firm holds in its proprietary accounts, and, for each such category, a description of the methods that the ANC Firm will use to calculate its deductions for market risk and credit risk, and also, if calculated separately, deductions for specific risk; (ii) a description of the value at risk (VaR) models to be used for its market risk and credit risk

[107] *See, e.g.,* SEC rule 18a–1(c)(1)(viii) (17 CFR 240.18a–1(c)(1)(viii)).

[108] *See* SEC rule 18a–1(c)(viii) (17 CFR 240.18a–1(c)(1)(viii)).

[109] *See 2019 Capital Reopening,* at 69681.

[110] *See* CEWG 3/3/2020 Letter; NCGA/NGSA 3/3/2020 Letter; Shell 3/3/2020 Letter.

[111] *See* NCGA/NGSA 3/3/2020 Letter.

[112] *See* Shell 3/3/2020 Letter.

deductions, and an overview of the integration of the models into the internal risk management control system of the ANC Firm; (iii) a description of how the ANC Firm will calculate current exposure and maximum potential exposure for its deductions for credit risk; (iv) a description of how the futures commission merchant will determine internal credit ratings of counterparties and internal credit risk weights of counterparties, if applicable; and (v) a description of the estimated effect of the alternative market risk and credit risk deductions on the amounts reported by the ANC Firm as net capital and adjusted net capital. Further qualitative and quantitative requirements for such market risk and credit risk models are discussed in section II.C.6. of this release.

ANC Firms also are subject to heightened SEC capital requirements as a condition of using the capital models. The *2019 SEC Final Capital* rule requires an ANC Firm, including an FCM that is dually-registered as an ANC Firm, to maintain tentative net capital of at least $5 billion and net capital of not less than the greatest of $1 billion or the sum of (i) 2% of the risk margin amount associated with customer cleared security-based swaps and uncleared security-based swaps and (ii) the aggregate indebtedness of the ANC Firm or 2% of the aggregate debit items computed in accordance with the Formula for Determination of Reserve Requirements for Brokers and Dealers (Exhibit A to rule 15c3–3).[113] The *2019 SEC Final Capital* rule also requires an ANC Firm to provide the SEC, and CFTC if dually-registered as an FCM, with a written notice if its tentative net capital falls below $6 billion.[114]

The Commission proposed to retain the above notice and filing process to permit ANC Firms that register as FCMs or FCM–SDs to use the SEC-approved internal capital models in lieu of the standardized market risk and credit risk capital charges in computing their adjusted net capital under regulation 1.17. Currently, only four of the 56 provisionally-registered covered SDs are FCMs, and each of the FCM–SDs is an ANC Firm with capital model approval from the SEC. Accordingly, such FCM–SDs will be required to maintain tentative net capital of no less than $5 billion and net capital of no less than $1 billion upon the compliance date of the *2019 SEC Final Capital Rule.*[115] The Commission is electing to retain regulation 1.17(c)(6) to permit ANC Firms to engage in swap and security-based swap transactions under the existing regulatory structure, including the SEC's revised minimum capital requirements, as it believes that the minimum capital requirements are adequately designed to help ensure the safety and soundness of the FCM–SD.

(ii) Market Risk and Credit Risk Capital Models for FCM–SDs That Are Not SEC-Registered BDs

The Commission proposed amending regulation 1.17(c)(6) to permit FCM–SDs that are not SEC registered BDs to apply to the Commission, or an RFA of which the FCM–SD is a member, for approval to use internal market risk or credit risk models in lieu of the standardized capital charges. If an FCM or covered SD is also a registered BD, it may only use market risk and credit risk capital models if the SEC has approved such firm to use such models and the firm meets the capital requirements of an ANC Firm. Therefore, the Commission's proposal to extend the use of capital models to FCM–SDs is only applicable to FCM–SDs that are not registered with the SEC as BDs. The purpose of the amendment proposed in regulation 1.17(c)(6) was to provide FCM–SDs that were not dually-registered as BDs with the ability to use internal capital models in lieu of the standardized capital charges and to establish a mechanism for the FCM–SDs to obtain approval for such models. FCM–SDs that may also be registered as SBSDs or OTC Derivatives Dealers but not BDs would also be able to use this provision with respect to the use of models; however, they would separately need to obtain the SEC's approval to use models as registered SBSDs and OTC Derivatives Dealers. While currently the only FCMs that are provisionally-registered as SDs are the four ANC Firms, the Commission believed that other stand-alone FCMs may register as SDs and that the regulations should provide an opportunity for such firms to use capital models to compute market and credit risk.

Proposed regulation 1.17(c)(6)(v) required an FCM–SD to apply in writing, and further required that the market risk and credit risk models contain specified qualitative and quantitative requirements proposed to be established by the Commission in new regulation 23.102 and Appendix A to regulation 23.102.[116] The qualitative and quantitative requirements for the FCM–SD's models are comparable to the existing SEC model requirements for ANC Firms and non-BD SBSDs, and the Commission's proposed model requirements for covered SDs. The qualitative and quantitative requirements for the capital models are discussed in detail in section II.C.6. of this release.

The Commission also proposed enhanced fixed-dollar minimum capital requirements as a condition for an FCM–SD to obtain capital model approval. Specifically, the Commission proposed that FCM–SDs must maintain net capital of no less than $100 million and adjusted net capital of no less than $20 million in order to use capital models. The $100 million net capital requirement was in recognition that model-based capital charges are generally substantially lower than the Commission's standardized capital charges, and that models may not fully capture all risks at all times.[117] The minimum fixed-dollar capital requirement is also consistent with the Commission's proposed minimum fixed-dollar capital requirement for covered SDs, and is consistent with the SEC's minimum fixed-dollar capital requirement for OTC derivative dealers and non-BD SBSDs.[118]

The proposed $100 minimum fixed-dollar amount of net capital for FCM/SDs, however, is not consistent with the SEC's current approach for ANC Firms or SBSDs/ANC Firms approved to use internal models. As noted above, ANC Firms are subject to minimum fixed-dollar tentative net capital requirement of $5 billion, and a minimum fixed-dollar net capital requirement of $1 billion. The Commission stated in the Proposal that it believed that FCM/SDs that are not BDs do not raise the same types of risks as ANC Firms that would

[113] *See 2019 SEC Final Capital Rule,* 84 FR 43872 at 43874; 17 CFR 240.15c3–1(a)(7). All ANC firms currently use the 2% aggregate debit item financial ratio (the ''alternative standard'') under rule 15c3–1(a)(1)(ii).

[114] *Id.*

[115] The Commission's term ''net capital'' is equivalent to the SEC's term ''tentative net capital'' and the Commission's term ''adjusted net capital'' is equivalent to the SEC's term ''net capital.'' The term ''tentative net capital'' is generally defined as an entity's assets less liabilities (excluding certain qualifying subordinated debt), and ''net capital'' as tentative net capital less certain capital deductions such as market risk and credit risk deductions. *See* 17 CFR 240.18a–1.

[116] Please note that due to changes in **Federal Register** publication requirements, the appendix that had been referred to as Appendix A to section 23.102 in previous documents is being published in this final rule as Appendix A to Subpart E of Part 23.

[117] *See* section II.B.2.a. above for a discussion of the fixed-dollar minimum capital requirements for FCM–SDs.

[118] *See* sections II.C.2.a. and II.C.3.a. of this release for a discussion of the Commission's minimum capital requirements for covered SDs. *See* SEC rule 15c3–1(a)(5) (17 CFR 240.15c3–1(a)(5)) for minimum capital requirements for OTC Derivative Dealers that are not SBSDs and rule 18a–1(a)(2) (17 CFR 240.18a–1(a)(2)) for SBSDs that are not BDs, other than OTC Derivatives Dealers.

warrant a $5 billion minimum tentative net capital requirement. The Commission noted that ANC firms represent the largest BDs and are engaged in significant brokerage businesses including providing customer financing for securities transactions, engaging in repurchase transactions and other activities. FCMs generally have limited proprietary futures trading and operate primarily as market intermediaries for customers trading futures and foreign futures transactions. In this capacity, FCMs receive and hold customer funds in segregated accounts that are used to satisfy the customers' financial obligations to clearing organizations. Even in their capacity as SDs, the margin regulations mitigate the risks to and from the FCM as they generally are required to exchange variation margin on swaps on a daily basis with all other SDs and financial end users, and to post and collect initial margin with counterparties that are SDs and financial end users.

The Commission did not receive specific comments on the use of models by FCM–SDs that are not ANC Firms. The Commission has considered the issue and is adopting the proposed amendment to regulation 1.17(c)(6) to provide a model approval process for FCM–SDs that are not BDs substantially as proposed, but with a modification to not adopt the proposed liquidity requirement and also to comport with the final model process requirements for covered SDs.[119] While the four FCM–SDs provisionally-registered with the Commission are ANC Firms and already approved to use models, the Commission believes that other, non-BD FCM–SDs have the potential to enhance market liquidity in certain sections of the swaps market, particularly with smaller counterparties and less frequently traded products. The Commission believes that it is important to provide an opportunity for such firms to potentially enter the market and service counterparties that may not have significant choice in selecting SDs. For example, FCM–SDs may be more willing to make markets in commodity swaps to agricultural firms and smaller commercial end users such as farmers and ranchers that might not otherwise be able to use such markets to manage risks in their businesses or might have to pay higher fees to engage in swaps if the number of SDs was limited. The Commission further believes that given the nature of the business operations of FCM–SDs, the proposed minimum capital requirement of $100 million of adjusted net capital is consistent with the objective of section 4s(e) of the CEA of helping to ensure the safety and soundness of the FCM–SD.

*C. Capital Requirements for Swap Dealers and Major Swap Participants*

1. Introduction to Covered SD and Covered MSP Capital Requirements

The Commission is adopting final capital requirements for covered SDs and covered MSPs in order to help ensure the safety and soundness of the SDs and MSPs by requiring such firms to maintain a minimum level of financial resources that is based upon the level of margin associated with the uncleared swaps entered into by the firms. The appropriate setting of minimum capital requirements will help ensure that covered SDs and covered MSPs are able to meet their respective financial obligations to swap and security-based swap counterparties, and to creditors generally. The ability of the covered SDs and covered MSPs to meet their financial obligations will provide for a more efficient and effective swaps marketplace for participants by reducing the potential for covered SDs or covered MSPs to default on their obligations to swap and security-based swap counterparties.

There are currently 56 covered SDs subject to the Commission's capital requirements. As noted in section II.A. above, these 56 covered SDs represent a diverse group of corporate entities, ranging from subsidiaries of major global financial and banking institutions to entities that are primarily engaged in physical commodities such as agriculture and energy. The Commission also understands that these 56 covered SDs have a significant level of diversity in swap counterparties, ranging from financial end users to commercial enterprises.

The Commission is providing flexibility to address the diversity of the business models of the covered SDs by permitting each SD that is not also a registered FCM to elect one of two possible capital alternatives.[120] The first alternative is the Net Liquid Assets Capital Approach, which is based on the liquidity-based capital rule for FCMs in regulation 1.17, as well as the liquidity-based capital requirements imposed on BDs and SBSDs by the SEC. The second alternative is the Bank-Based Capital Approach, which is based on the capital requirements established by the Federal Reserve Board for bank holding companies and is generally consistent with the prudential regulators' capital rules applicable to bank SDs. The flexibility provided by the Commission's covered SD capital rules is consistent with the Congressional mandate in the Dodd-Frank Act directing the Commission, SEC, and prudential regulators to adopt, to the maximum extent practicable, comparable minimum capital requirements for SDs and SBSDs.[121]

The Commission's final rule further allows certain eligible covered SDs to elect to compute their regulatory capital under the Tangible Net Worth Capital Approach. The Tangible Net Worth Capital Approach requires a covered SD to maintain a tangible net worth, computed in accordance with GAAP, equal to or greater than the highest of: (i) $20 million, plus the market risk and credit risk exposures associated with its swap and related hedge positions that are part of the covered SD's dealing activities; (ii) 8% uncleared swap margin associated with the covered SD's swaps positions; and (iii) the amount of capital required by an RFA of which the covered SD is a member.

To use the Tangible Net Worth Capital Approach, a covered SD must be predominantly engaged in non-financial activities, or be part of a corporate parent entity that is predominantly engaged in non-financial activities. The Commission is adopting the Tangible Net Worth Capital Approach as it would be available only for covered SDs that, either directly or at their corporate parent level, are primarily involved in non-financial, commercial activities. As the Commission has previously noted, financial firms generally present a higher level of systemic risk to the financial system than commercial firms as the profitability and viability of financial firms are more tightly linked to the health of the financial system than commercial firms.[122]

The Commission's final capital requirements for covered MSPs require such firms to maintain a positive

[119] Commission regulation § 1.17(c)(6) (17 CFR 1.17(c)(6)) provides that an FCM–SD may apply for model approval with the Commission or with an RFA of which it is a member. *See* section II.C.7. below for a discussion of model approvals, including the Commission's standards and process for reviewing and approving capital models, and the process that the Commission will use in determining whether NFA's approval of an FCM–SD's capital models may serve as an alternative means of complying with the Commission's model approval requirement.

[120] SDs that are FCM–SDs are required to comply with the FCM capital requirements contained in Commission regulation § 1.17 (17 CFR 1.17), as amended by this final rulemaking. *See* section II.B. above for a further discussion.

[121] *See* section 4s(e)(3)(D) of the CEA (7 U.S.C. 6s(e)(3)(D)) and section 15F(e)(3)(D)(ii) of the Exchange Act (15 U.S.C. 78o–10(e)(3)(D)(ii)).

[122] *See 2016 Capital Proposal,* 81 FR 91252 at 91255.

tangible net worth. The final MSP capital requirements are discussed in section II.C.5. below.

2. Capital Requirement for Covered SDs Electing the Net Liquid Assets Capital Approach

a. Computation of Minimum Capital Requirement

The Commission's capital requirements for covered SDs electing the Net Liquid Assets Capital Approach generally incorporate by reference the SEC's capital requirements contained in rule 18a–1 for SBSDs that are not also registered as BDs.[123] The capital requirements are set forth in regulation 23.101, and are comprised of two components. The first component of the capital rule requires a covered SD to compute the minimum amount of capital that the SD is required to hold at any given point in time. The second component of the capital rules requires a covered SD to compute, based upon its balance sheet and certain adjustments including market risk and credit risk capital charges to its swaps, security-based swaps, and other proprietary positions, the actual amount of capital that the covered SD maintains. The covered SD's actual capital must be equal to or greater than its minimum capital requirement at all times in order for the covered SD to be in compliance with the rules.

The *2016 Capital Proposal* required a covered SD electing the Net Liquid Assets Capital Approach to maintain a minimum level of net capital[124] equal to or greater than the highest of the following criteria:

(1) $20 million; or

(2) Net capital equal to or greater than 8% of the sum of:

(a) The amount of ''uncleared swap margin'' (as that term was proposed to be defined in regulation 23.100)[125] for each uncleared swap position open on the books of the covered SD, computed on a counterparty-by-counterparty basis pursuant to Commission regulation 23.154 (17 CFR 23.154);

(b) The amount of initial margin required for each uncleared security-based swap position open on the books of the covered SD, computed on a counterparty-by-counterparty basis pursuant to SEC Rule 18a–3(c)(1)(i)(B) (17 CFR 240.18a–3(c)(1)(i)(B)), without regard for any amounts that may be excluded or exempted under the SEC's rules;

(c) The amount of ''risk margin requirement'' (as that term is defined in Commission regulation 1.17(b)(8) (17 CFR 1.17(b)(8))) for the covered SD's cleared futures, foreign futures, and swaps positions open on the books of the covered SD; and

(d) The amount of initial margin required by a clearing organization for proprietary cleared security-based swaps positions open on the books of the covered SD; or

(3) The capital required by the RFA of which the covered SD is a member.[126] The *2016 Capital Proposal* also required a covered SD that received approval from the Commission, or from an RFA of which the covered SD was a member, to use internal models to compute market risk and credit risk capital charges for its swaps, security-based swaps, and other proprietary positions when computing its capital, as described in section II.C.2.a. of this release, to maintain a minimum level of tentative net capital equal to $100 million.

Fixed-Dollar Capital Requirement for Net Liquid Assets Capital Approach

The first criterion under the Net Liquid Assets Capital Approach required a covered SD to maintain a minimum of $20 million of net capital and, if the covered SD was approved to use market risk or credit risk models, $100 million of tentative net capital and $20 million of net capital.[127] The Commission requested comment in the *2016 Capital Proposal* on the appropriateness of the fixed-dollar capital requirements of $100 million of tentative net capital and $20 million of net capital.[128] The Commission received one comment regarding the proposed requirement that covered SDs must maintain a minimum of $20 million of net capital, and a minimum of $100 million of tentative net capital and $20 million of net capital if approved to use market risk or credit risk models.[129] The commenter stated that the requirement that SDs using internal models must have $100 million in tentative net capital would create an unnecessary barrier to entry.[130] The Commission recognizes the commenter's concern but believes that covered SDs must maintain a minimum of $100 million of tentative net capital if approved to use models in order to provide an appropriate buffer of capital to protect against model errors and to protect against the models not recognizing all types of risk, such as operational risk, compliance risk, legal risk, and liquidity risk. Models will result in substantially lower market risk charges than the standardized market risk charges, which will allow a covered SD to engage in more of the transactions than they otherwise would be able to enter into at the same level of capital. In order to protect against model errors, the Commission believes that it is necessary to have an enhanced minimum capital requirement.

The Commission has considered the Proposal further and is adopting the requirements as proposed. The Commission believes, given the role that covered SDs play in the financial markets by engaging in swap dealing activities, it is appropriate to require all covered SDs to maintain a minimum level of net capital, stated as an absolute fixed-dollar amount, that does not fluctuate with the level of the firms' dealing activities to help ensure the safety and soundness of the covered SDs. The $20 million minimum net capital requirement also is consistent with the minimum regulatory capital requirements adopted for covered SDs that elect the Bank-Based Capital Approach or the Tangible Net Worth Capital Approach, as discussed in sections II.C.3. and II.C.4., respectively, of this release. Furthermore, the $20

[123] Rule 18a–1 (17 CFR 240.18a–1) (''rule 18a–1'') also applies to SBSDs that are OTC derivatives dealers, as that term is defined in SEC Rule 3b–12 (17 CFR 240.3b–12).

[124] As noted above, covered SDs electing the Net Liquid Assets Capital Approach are subject to the SEC's capital requirements for SBSDs set forth in SEC rule 18a–1, which has been incorporated into the Commission's rules by reference. The Commission and SEC use different terms to express capital requirements. The Commission's term ''net capital'' is equivalent to the SEC's term ''tentative net capital'' and the Commission's term ''adjusted net capital'' is equivalent to the SEC's term ''net capital.'' The term ''tentative net capital'' is generally defined as an entity's assets less liabilities (excluding certain qualifying subordinated debt), and ''net capital'' as tentative net capital less certain capital deductions such as market risk and credit risk deductions. *See* 17 CFR 240.18a–1. This document will use the SEC defined terms for purposes of the discussion of the Net Liquid Assets Capital Approach.

[125] The term ''uncleared swap margin'' is defined in Commission regulation § 23.100 to mean the amount of initial margin that a swap dealer would be required to collect from each swap counterparty pursuant to the margin rules for uncleared swap transactions (Commission regulation § 23.154 (17 CFR 23.154)). The term ''uncleared swap margin'' includes all uncleared swaps that an SD is required to collect margin for under the margin regulations, and also includes all uncleared swaps that are exempt or excluded from the margin requirements including swaps with commercial end users, swaps entered into prior to the respective compliance dates of the Commission's margin requirements set forth in Commission regulation § 23.161 (17 CFR 23.161) (*i.e.,* legacy swaps), and excluded swaps with an affiliated entity.

[126] *See 2016 Capital Proposal,* 81 FR 91252 at 91260–61.

[127] *See 2016 Capital Proposal,* 81 FR 91252 at 91261.

[128] *See 2016 Capital Proposal,* 81 FR 91252 at 91262.

[129] *See* FIA–PTG 5/24/2017 Letter.

[130] *Id.* at 3–4.

million minimum net capital requirement for covered SDs that elect the Net Liquid Assets Capital Approach is consistent with the minimum capital requirements adopted by the SEC for SBSDs.[131] In addition, the requirement for a covered SD to maintain a minimum of $100 million of tentative net capital if approved to use models is consistent with the SEC minimum capital requirement for stand-alone SBSDs approved to use capital models.[132]

Risk Margin Amount Calculation Under Net Liquid Assets Capital Approach

The second criterion under the proposed Net Liquid Assets Capital Approach required a covered SD to maintain a minimum level of net capital equal to or greater than 8% of the sum of: (i) The amount of ''uncleared swap margin'' (as that term was proposed to be defined in regulation 23.100) for each uncleared swap position open on the books of the covered SD, computed on a counterparty-by-counterparty basis pursuant to Commission regulation 23.154; (ii) the amount of initial margin required for each uncleared security-based swap position open on the books of the covered SD, computed on a counterparty-by-counterparty basis pursuant to SEC rule 18a–3(c)(1)(i)(B) without regard to any initial margin exemptions or exclusions that the rules of the SEC may provide to such security-based swap positons; (iii) the amount of ''risk margin'' (as defined in Commission regulation 1.17(b)(8)) required by a clearing organization for the covered SD's futures, swaps, and foreign futures positions that are open on the books of the covered SD; and (iv) the amount of initial margin required by a clearing organization for security-based swaps that are open on the books of the covered SD.[133] The proposed 8% risk margin amount required a covered SD to include all swaps and security-based swaps in its computation of the margin for uncleared swaps and security-based swaps subject to the 8% risk margin amount calculation, including any swaps positions that are not included in the margin requirements under Commission regulations 23.150 through 23.161, and any security-based swaps positions that are exempt or excluded from the SEC's margin requirements in rule 18a–3(c)(1)(i)(B).

The proposed 8% risk margin amount was based on the Commission's minimum capital requirements for FCMs, which includes a requirement that each FCM must maintain a level of adjusted net capital that is equal to or greater than 8% of the risk margin amount associated with the futures, foreign futures, and cleared swap positions carried in customer and noncustomer accounts.[134] This requirement was intended to ensure that a covered SD electing the Net Liquid Assets Capital Approach maintains a minimum level of capital that is proportionate to all risks associated with the SD's operations and activities. The Commission believed that the proposed 8% risk margin amount was an appropriate approach as the minimum capital requirement was correlated with the ''risk'' of the SD's futures, foreign futures, swaps, and security-based swaps positions as measured by the margin required on the positions. Specifically, a covered SD's minimum capital requirement would increase or decrease in proportion to the number, size, complexity, and market risk inherent in the SD's derivatives business.[135]

The proposed 8% risk margin amount also was consistent with the proposed minimum capital requirements for covered SDs that elect the Bank-Based Capital Approach, as discussed in section II.C.3. below, and was consistent with the capital requirements of the Tangible Net Worth Capital Approach, discussed in section II.C.4. below. The proposed 8% risk margin amount also was comparable with the SEC's capital requirements for SBSDs, with the exception that the SEC's proposal required a SBSD to include a significantly more limited set of positions in the 8% risk margin amount calculation. Specifically, a SBSD's risk margin amount would include only customer cleared security-based swaps and uncleared security-based swaps.[136]

The Commission received numerous comments regarding the proposed 8% risk margin amount in response to the *2016 Capital Proposal.* One commenter strongly supported the 8% risk margin amount threshold on a comprehensive basis.[137] The commenter noted a concern that basing capital requirements on internal models could be manipulated, and that a floor based on 8% of initial margin of a covered SDs positions was appropriate as a counterbalance to ensure that internal modelling does not reduce loss absorbency.[138]

Commenters, however, raised concerns with the proposed 8% risk margin amount.[139] Commenters stated that the proposed 8% risk margin amount has a limited relationship to the actual risk of the covered SD's swaps, SBS, futures, and foreign futures positions.[140] Commenters noted that the 8% risk margin amount is computed on a counterparty-by-counterparty basis and not on the aggregate of all of the covered SD's positions across all counterparties, which may overstate the covered SD's risk by not taking into account offsetting positions across multiple counterparties, including hedging positions.[141] A commenter also noted that the 8% risk margin amount did not reflect the actual risk of a covered SD's proprietary cleared swap, cleared security-based swaps, futures, and foreign futures positions, as the risk margin amount is required to be computed on a clearing organization-by-clearing organization basis and, therefore, does not recognize hedging and risk-reducing portfolio margin across multiple clearing organizations.[142]

Commenters further noted that the Net Liquid Assets Capital Approach double counts the risks of various positions held by a covered SD.[143] The commenters stated that the 8% risk

[131] *See* SEC rule 18a–1(a)(2) (17 CFR 240.18a–1(a)(1)).

[132] *See* SEC rule 18a–1(a)(2) (17 CFR 240.18a–1(a)(2)).

[133] *See* paragraph (a)(1)(ii)(A)(*1*) of proposed Commission regulation § 23.101. *See 2016 Capital Proposal,* 81 FR 91252 at 91310.

[134] *See* section II.B. above for a discussion of the minimum capital requirements for FCMs.

[135] *See* 2016 Capital Proposal, 81 FR 91252 at 91258.

[136] *See SEC 2012 Proposed Capital Rule,* 77 FR 70214 at 70223. The SEC modified the capital requirement in the final rule to require a SBSD to maintain net capital in excess of 2% of the risk margin amount, with the possibility of the SEC increasing the percentage amount to 4% or less after the third anniversary of the rule's compliance date, and then to 8% or less after the fifth anniversary of the rule's compliance date. The rule further provides that the SEC will only raise the 2% risk margin amount multiplier after publishing a notice of the potential change. *See* rule 18a–1(a)(1) (17 CFR 240.18a–1(a)(1)).

[137] *See* Letter from Marcus Stanley, Americans for Financial Reform (May 15, 2017) (AFR 5/15/2017 Letter).

[138] *Id.*

[139] *See, e.g.,* SIFMA 5/15/2017 Letter; FIA 5/15/2017 Letter; Citadel 5/15/2017 Letter); Letter from William Dunaway, INTL FCStone Markets, LLC (May 15, 2017) (IFM 5/15/2017 Letter); Letter from Sebastien Crapanzano and Soo-Mi Lee, Morgan Stanley (May 15, 2017) (MS 5/15/2017 Letter); Letter from Christine Stevenson, BP Energy Company (May 15, 2017) (BPE 5/15/2017 Letter); Letter from Steven Kennedy, International Swaps and Derivatives Association (May 15, 2017) (ISDA 5/15/2017 Letter); Letter from the Japanese Bankers Association (March 14, 2017) (JBA 3/14/2017 Letter); and, FIA–PTG 5/24/2017 Letter.

[140] *Id.*

[141] *See, e.g.,* ISDA 5/15/2017 Letter; JBA 3/14/2017 Letter; SIFMA 5/15/2017 Letter.

[142] *See* FIA–PTG 5/24/2017 Letter.

[143] *See* SIFMA 5/15/2017 Letter; ISDA 5/15/2017 Letter; FIA 5/15/2017 Letter; FIA–PTG 5/24/2017 Letter; JBA 3/14/2017 Letter; Letter from Sunhil Cutinho, CME Group, Inc. (May 15, 2017) (CME 5/15/2017 Letter); and Citadel 5/15/2017 Letter.

margin amount requires a covered SD to hold net capital equal to or in excess of the 8% risk margin amount, while also requiring the covered SD to reduce the amount of capital it actually holds by the amount of market risk and credit risk charges associated with the covered SD's positions.[144] The commenters noted that including these positions in the 8% risk margin amount effectively results in both an increase in the amount of capital that a covered SD is required to hold to meet its minimum requirement and a decrease to the amount of capital the covered SD actually maintains due to the market risk and credit risk charges.

Several commenters also generally stated that the 8% risk margin amount was both too high of a percentage and over-inclusive of the various types of business activities engaged in by covered SDs.[145] One commenter suggested that the Commission consider limiting the 8% risk margin amount solely to uncleared swaps subject to the Commission's uncleared margin rules,[146] and another commenter requested the Commission to reconsider the application of the 8% risk margin threshold to cleared swaps.[147]

Several commenters also stated that if the Commission were to retain the 8% risk margin amount as a component of the minimum capital requirement for covered SDs, that the Commission adjust the 8% to a lower multiplier, such as 2%, for a period of time to allow the Commission to gather empirical data in order to determine an appropriate level.[148]

The Commission acknowledged in the *2019 Capital Reopening* the receipt of a significant number of comments concerning the proposed 8% risk margin amount and the potential impact that it may have on driving a covered SD's minimum capital requirement, and, consequently, the funding and business activities of the covered SD. The *2019 Capital Reopening* invited interested parties to comment on all aspects of the proposed 8% risk margin amount. The Commission also requested comment and supporting data on the quantification of the potential minimum capital requirements required of covered SDs electing the Net Liquid Assets Capital Approach as a result of the proposed 8% risk margin amount threshold. The Commission further requested comment and supporting data on how the amount of potential minimum capital based upon the 8% risk margin requirement compared with the amount of capital currently maintained by entities that are provisionally registered as covered SDs, and how such amounts compared with the amounts of capital required of SBSDs under the *2019 SEC Final Capital Rule.*[149]

The *2019 Capital Reopening* also requested comment and supporting data on whether the proposed 8% risk margin amount should be modified for covered SDs electing the Net Liquid Assets Capital Approach to a lower percentage requirement, such as 4%, or to another percentage, and requested that commenters state why the suggested percentage was an appropriate percentage properly calibrated to the inherent risk of a covered SD and the activities that it engages in.[150] The Commission further requested commenters to quantify the difference in the amount of capital that would be required of a covered SD pursuant to the proposed 8% risk margin amount and 4%, or any other suggested lower percentage, of risk margin amount, and to the extent possible to model the impact of different percentages of risk margin on the minimum capital requirements for an actual or hypothetical portfolio of positions.[151]

The *2019 Capital Reopening* also requested comment on whether the proposed 8% risk margin amount should be harmonized with the approach adopted by the SEC for SBSDs in the *2019 SEC Final Capital Rule.*[152] Specifically, the Commission requested comment on whether the proposed regulation should be revised to lower the risk margin amount percentage from 8% to 2%, and whether the regulation should be further modified to authorize the Commission by order to increase the risk margin amount percentage in stages from 2% to 4% or less, and from 4% to 8% or less based upon the Commission's future experience with covered SD capital levels after the implementation of the final regulations.[153]

The Commission received several comments in response to the *2019 Capital Reopening* addressing the 8% risk margin amount. One commenter stated that the Commission should eliminate the 8% risk margin amount requirement for covered SDs from the Net Liquid Assets Capital Approach.[154] This commenter stated that while the Commission based the 8% risk margin amount on an existing requirement of an FCM to maintain adjusted net capital in excess of 8% of the risk margin amount for futures, foreign futures, and cleared swap positions carried by the FCM in customer and noncustomer (*i.e.,* affiliates) accounts, there are fundamental differences between the business activities of FCMs and covered SDs that makes the application of the 8% risk margin amount requirement to covered SDs illogical.[155] This commenter further stated that the 8% risk margin amount is not necessary to ensure that covered SDs maintain appropriate capital levels, noting that market risk and credit risk charges will apply to all of the covered SD's derivatives positions under the proposed Net Liquid Assets Capital Approach, and noting that other applicable regulatory authorities do not impose a requirement similar to the 8% risk margin amount, which indicates that it is not necessary for a robust capital framework.[156]

The commenter also stated that the 8% risk margin requirement would discourage covered SDs from hedging market risk.[157] This commenter noted that a covered SD enters into swaps and other derivatives transactions as a counterparty, which exposes the derivative positions to market risk. The commenter further noted that the covered SD may hedge this market risk by entering into offsetting positions with other counterparties. The commenter stated that instead of recognizing the risk-mitigating effects of entering into hedged positions, the Proposal penalizes the covered SD by requiring the initial margin of both the original and hedge positions to be subject to the 8% risk margin amount, which increases costs to the covered SD and discourages risk management.[158]

Commenters also stated that the 8% risk margin amount fails to recognize the risk-reducing effects resulting from

[144] *Id.* See also IIB/ISDA/SIFMA 3/3/2020 Letter.

[145] *Id.*

[146] *See* IFM 5/15/2017 Letter.

[147] *See* ISDA 5/15/2017 Letter.

[148] *See* SIFMA 5/15/2017 Letter; MS 5/15/2017 Letter.

[149] *See 2019 Capital Reopening,* 84 FR 69664 at 69668–69 (Dec. 19, 2019).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[155] *Id.*

[156] *Id.* The commenter noted that the capital rules of the prudential regulators rely on setting a minimum capital requirement based on the risk-weighted assets of prudentially-regulated institutions, including bank SDs, without any 8% risk margin amount add-on. The commenter stated that the Commission did not articulate a rationale for departing from the approaches of other regulators, and that the CEA requires the Commission, SEC, and prudential regulators to maintain comparable minimum capital requirements to the maximum extent practicable.

[157] *Id.*

[158] *Id.*

the collection of initial margin.[159] One commenter noted that the proposed 8% risk margin amount would impose the same minimum capital requirement on a covered SD regardless of whether the SD collected initial margin from the counterparty.[160] Another commenter stated that the 8% risk margin amount would be improved through the recognition of initial margin that is collected by the covered SD and held by an independent custodian as required by the Commission's margin rules.[161] The commenter stated that the collection of initial margin reduces the potential credit risk exposure that a covered SD has from a counterparty, which should be reflected in the minimum capital requirements.[162]

One commenter stated that the 8% risk margin amount would impose significant and expensive operational burdens on covered SDs.[163] The commenter noted that proposed 8% risk margin amount requires a covered SD to include positions in the calculation that are not subject to the Commission's uncleared swap margin rules. The commenter stated that the requirement to include positions, such as certain foreign currency forwards and foreign currency swaps, legacy swaps and other swaps and security-based swaps that are excluded from the Commission's or SEC's uncleared margin rules in the 8% risk margin amount calculation will potentially require a covered SD to obtain approval from NFA to use a model to compute initial margin for these positions in order to avoid having to include the initial margin requirements based upon the standardized table in the Commission's margin rules. The commenter further noted that notwithstanding the burden and potential costs associated with obtaining model approval for these positions that are otherwise exempt from uncleared margin requirements, there is a burden and cost associated with computing margin for swaps and security-based swaps that are not subject to the Commission's or SEC's margin requirements. The commenter also noted that the traditional 8% risk margin amount under the FCM capital rules does not present the same challenges and costs as the traditional FCM rule applies only to cleared customer and noncustomer transactions where clearing organizations provide the relevant initial margin requirements.[164]

This commenter also stated that the proposed 8% risk margin amount could make it difficult for covered SDs and other market participants to enter into swaps that facilitate the transition from interbank offered rates (''IBORs'') to other risk-free rates.[165] The commenter stated that the Commission has previously recognized that market participants may seek to transition swap or other portfolios that reference IBORs to an alternative reference rate by means of a basis swap that swaps the entire IBOR basis of a portfolio with an alternative reference rate basis.[166] The commenter note that the basis swaps and other similar transactions serve to reduce risk, both to covered SDs and to their counterparties. The transactions, however, may also increase the aggregate gross notional amount of a covered SD's swaps as well as the initial margin that a covered SD is required to collect, and that absent a revision in the final rule, the transactions may also increase the minimum capital requirement under the 8% risk margin amount.[167]

The commenter also stated that the 8% risk margin amount would exacerbate the impacts resulting from the current limited availability of portfolio margining.[168] The commenter noted that under current Commission and SEC margin rules, a dually-registered SD/SBSD is required to compute initial margin separately for uncleared swaps and security-based swaps with a single counterparty, which prevents the SD/SBSD from recognizing the risk-reducing impacts of offsetting swaps and security-based swap positions. The commenter stated the Commission was distorting the minimum capital requirement by establishing an 8% risk margin amount that scaled up with the initial margin requirements and not the actual risk of the positions viewed from a portfolio basis.[169]

Several commenters stated that certain elements of the 8% risk margin amount calculation should be revised if the Commission were to adopt it as part of a covered SD's minimum capital requirements. Commenters stated that the Commission should revise the 8% risk margin amount contained in the Net Liquid Assets Capital Approach to eliminate the ''double-counting'' of a covered SD's positions.[170] These commenters noted that under the proposed Net Liquid Assets Capital Approach, a covered SD is required to maintain capital equal to 8% of the risk margin amount computed on the covered SD's futures, foreign futures, cleared and uncleared swaps, and cleared and uncleared security-based swaps positions. The covered SD is also required to subtract the amount of the market risk and credit risk associated with its proprietary positions in futures, foreign futures, cleared and uncleared swaps, and cleared and uncleared security-based swaps in determining the amount of capital that the covered SD has in order to meet the minimum capital requirement. The commenters stated that the proposed Net Liquid Assets Capital Approach double counts a covered SD's proprietary positions as the approach both reduces the covered SD's net capital (through the proposed market and credit risk charges) and increases the covered SD's minimum capital requirement (through the proposed 8% risk margin amount). The commenters stated that the Net Liquid Assets Capital Approach's double-counting overstates the risk that swaps present to the covered SD, and places the covered SD at a competitive disadvantage relative to covered SDs that elect the Bank-Based Capital Approach, which does not double-count a covered SD's proprietary positions.[171]

Commenters stated that the Commission should address the ''double-counting'' issue by revising the final Net Liquid Assets Capital Approach to impose the 8% risk margin amount as a capital requirement prior to the imposition of proprietary market and credit risk charges.[172] Under this approach, a covered SD electing the Net Liquid Assets Capital Approach would be required to maintain minimum tentative net capital equal to or greater than 8% of the risk margin amount.

Commenters also stated that the Commission should reduce the multiplier if it adopts the 8% risk margin amount.[173] Commenters noted

[159] *See* IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter.

[160] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[161] *See* MS 3/3/2020 Letter.

[162] *Id.*

[163] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[164] *Id.*

[165] *Id.*

[166] *See* Letter No. 19–28 (Dec. 17, 2019); Letter No. 19–27 (Dec. 17, 2019); Letter 19–26 (Dec. 17, 2019).

[167] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[168] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[169] *Id.*

[170] *See* FIA–PTG 3/3/2020 Letter.

[171] Supra fn 143. *See* also IIB/ISDA/SIFMA 3/3/2020 Letter. As discussed further in section II.C.3.a. below, under the Bank-Based Capital Approach, a covered SD is required to maintain a minimum amount of regulatory capital that is equal to or in excess of the greater of 8% of (i) the risk margin amount or (ii) the SD's risk-weighted assets. A covered SD that elects the Bank-Based Capital Approach is not required to deduct the market risk or credit risk associated with its proprietary positions in computing its regulatory capital necessary to meet the above to minimum standards.

[172] *Id.*

[173] *Id.*

that the 8% risk margin amount was based upon the Commission's capital requirements for FCMs, which imposes an obligation on FCMs to maintain adjusted net capital of at least 8% of the margin required on customer and noncustomer futures, foreign futures, and cleared swaps positions.[174] One commenter stated that there is no evidence to support a conclusion that an 8% calibration is appropriate in the context of non-cleared swaps markets, with fundamentally different regulatory standards and risk management principles than FCM's customers and noncustomer clearing activities.[175]

Another commenter stated that the FCM capital requirement based on 8% of customer and noncustomer margin was never intended to apply broadly to the uncleared swaps market.[176] This commenter stated that data collected almost two decades ago in the context of futures positions does not provide a logical foundation for the adoption of the 8% risk margin requirement, as it does not reflect appropriately the risks faced by covered SDs on their positions, particularly their uncleared positions, which are subject to higher margin requirements based on a 10-day liquidation horizon as opposed to a 1-day horizon common for futures.

The commenter also stated that if the Commission did not modify the 8% risk margin amount requirement to reflect the ''double-counting'' discussed above, then reducing the 8% risk margin amount multiplier would be necessary to prevent competitive disparities. The commenter also stated that based on data it had compiled, an 8% multiplier for the risk margin amount would be high for covered SDs that elect the Net Liquid Assets Capital Approach.[177]

Such a requirement would dramatically increase the amount of capital required to support the derivatives activities well beyond any current capital requirements applicable to such SDs.[178] Further, this same higher required capital would occur on covered SDs regardless of the elected approach under the Commission's proposed framework or relative to capital requirements for bank SDs on portfolios of similar positions.[179]

Commenters also explicitly stated that if the Commission adopts a minimum capital requirement based upon the initial margin of a covered SD's proprietary positions, the multiplier should be reduced from 8% to 2%.[180] The commenters further stated that a 2% risk margin amount would be consistent with the *2019 SEC Final Capital Rule.* One of the commenters also stated that consistency with the SEC's 2% calibration is particularly important for dually-registered SD/SBSDs, otherwise the Commission would be setting the risk margin multiplier for security-based swaps, which effectively undermines the SEC's capital approach to SBSDs that are also covered SDs.[181]

Commenters also stated that the Commission should exclude proprietary futures, cleared swaps and cleared security-based swaps from the calculation if the Commission adopts the 8% risk margin amount.[182] One commenter stated that including proprietary futures, cleared swaps and cleared security-based swaps in the 8% risk margin amount fails to recognize the limited risks and leverage associated with proprietary cleared positions. Unlike customer cleared positions or proprietary uncleared swaps and security-based swaps, proprietary positions present minimal credit risk as the covered SD's only exposure is to clearing organizations. The commenter further noted that centrally cleared transactions present limited leverage since the initial margin associated with such transactions is not reused, but maintained at the clearing organization or custodian. The commenter further stated that the proposed 8% risk margin amount would treat proprietary cleared positions no differently from uncleared swaps, thereby eliminating the incentive to clear transactions and subjecting product types that present markedly different risks to the same capital treatment.[183] Another commenter stated that including a covered SD's cleared futures, swap and security-based swap positions in the 8% risk margin amount fails to recognize the risk mitigating nature of centralized clearing.[184]

The Commission has considered the comments on the 8% risk margin amount and continues to believe that a minimum capital requirement based on initial margin is an appropriate component of a covered SD's minimum capital requirement under the Net Liquid Assets Capital Approach. The Commission acknowledges commenters' views that the risk margin amount could more precisely measure portfolio-related risks if it were to recognize the risk mitigating effects of margin collateral received from counterparties or if it was computed on a total portfolio basis as opposed to being computed on a counterparty-by-counterparty basis. However, the intent of the risk margin amount requirement was to establish a method of developing a minimum amount of capital for a covered SD to meet all of its obligations as a SD to market participants, and to cover potential operational risk, legal risk, and liquidity risk, and not just the risks of its trading portfolio.

The Commission believes that the risk margin amount is a minimum capital requirement that provides a floor based on a measure of the risk of the positions, the volume of positions, the number of counterparties and the complexity of operations of the covered SD. Initial margin reflects the degree of risk associated with the positions, with lower risk positions having lower initial margin requirements and higher risk positions having higher initial margin requirements. Therefore, the amount of the minimum capital required of a covered SD under the risk margin amount calculation is directly related to the volume, size, complexity and risk of the covered SD's positions, however, the minimum capital requirement is intended to cover a multitude of potential risks faced by the SD. This concept is generally consistent with the FCM capital rule, which bases the minimum capital requirement on margin associated with customer and noncustomer futures, foreign futures and cleared swaps transactions, but is intended to address the general risks of operating an FCM such as operational, legal, liquidity and other risks in addition to risks arising from carrying customer accounts. Therefore, the Commission believes that it is appropriate to set a minimum capital requirement for covered SDs that is a floor that reflects the risk margin associated with the SD's uncleared swap positions.

The Commission, however, is modifying the final rule in response to its reconsideration of the issues and the comments received. The Commission is modifying the proposed risk margin amount by removing cleared and uncleared security-based swap positions from the calculation. As noted in section II.B.2.b. above, the Commission believes that a registrants' minimum capital requirements should be based upon the transactions that are within

[174] *See* Commission regulation § 1.17(a)(1)(i) (17 CFR 1.17(a)(1)(i)).

[175] *See* MS 3/3/2020 Letter. The commenter further noted, for instance, that SDs act as counterparties to market participants, and not as financial guarantors of their customers.

[176] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[177] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[178] *Id.*

[179] *Id.*

[180] *See* IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter; FIA–PTG 3/3/2020 Letter.

[181] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[182] *See* IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter; FIA–PTG 3/3/2020 Letter.

[183] *See* IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter.

[184] *See* FIA–PTG 3/3/2020 Letter.

the Commission's jurisdiction and not the jurisdiction of another regulatory agency. This allows the Commission to set minimum capital requirements for registrants, including covered SDs, based upon markets and products that the Commission regulates and for which it has expertise.

Modifying the proposed risk margin amount by removing security-based swaps also maintains a consistency with the long-standing historical approach that the Commission and SEC have followed with respect to dually-registered FCM/BDs. Under the existing FCM/BD capital rules, the Commission sets minimum capital requirements for FCMs based upon the firm's futures and cleared swaps activities, and the SEC sets the minimum capital requirements based upon the firm's securities activities.[185] As noted by commenters above, the proposed inclusion of security-based swap positions in the Commission's minimum capital requirement for dually-registered SD/SBSDs not only goes against this historical approach, it also effectively overrides the SEC's decision regarding the appropriate level of capital that should be imposed on SBSDs with respect to SEC-regulated security-based swap products, particularly if the Commission's and SEC's multiplier are different. In addition, the Commission notes that security-based swaps have only been excluded from the risk margin amount, which establishes the minimum capital requirement. To the extent that a covered SD engages in security-based swaps or other proprietary transactions, including equities, foreign currencies, physical commodities, futures, and swaps, the covered SD is required to reflect these transactions in its capital in the form of market risk and, as appropriate, credit risk charges, and the SD is required to hold capital in an amount sufficient to cover such charges. The exclusion of the security-based swaps from the risk margin amount addresses commenters concern that the proposed Net Liquid Assets Capital Approach ''double counts'' the covered SD's security-based swap positions in the capital computation by including such positions in the both the computation of net capital and in the calculation of the minimum capital requirement. The Commission also notes that to the extent a covered SD is also a registered SBSD, it will be subject to a minimum capital requirement established by the SEC, which requires the SBSD to maintain minimum net capital equal to the greater of $20 million or 2% of the risk margin amount associated with the SBSD's uncleared security-based swaps and customer cleared security-based swaps. Therefore, to the extent a covered SD that is dually-registered as a SBSD engages in a substantial amount of security-based swaps such that its SEC minimum capital requirement is greater than the CFTC minimum capital requirement, the SD would have to maintain compliance with the higher SEC minimum capital requirement in order to comply with the SEC rules.

The Commission is also modifying the proposed risk margin amount calculation to exclude proprietary futures, foreign futures, and cleared swap transactions. The Commission believes that it is appropriate to revise the proposed risk margin amount to exclude proprietary cleared positions from the minimum capital requirement as the covered SD's credit exposure is limited on such positions to either a clearing organization or to an FCM that carries the SD's account (or in the case of foreign futures, a foreign broker that carries the SD's account). The credit exposure on such cleared positions is limited relative to swap counterparties as clearing organizations and FCM/foreign brokers are regulated entities that are generally subject to financial requirements, including capital, margining, and financial reporting requirements. Clearing organizations and FCM/foreign brokers are also subject to regulations regarding the holding of customer funds to ensure that such funds are used solely for the benefit of the customer and not for the benefit of other customers or of the clearing organization or FCM/foreign broker.[186] The clearing of the positions also ensures that the potential default by the SD is reduced as it is obligated to post initial margin with an FCM/foreign broker or clearing organization, and to settle open positions on a daily basis. Therefore, any default on the part of the SD is promptly identified by the FCM/foreign broker or clearing organization and steps are taken to mitigate the potential losses resulting from the default. These types of restrictions on the holding of customer funds by FCMs, foreign brokers, and clearing organizations and the clearing organizations' daily margining processes mitigate the risk associated with the covered SD's cleared futures, foreign futures, and cleared swaps transactions. Furthermore, while the cleared proprietary positions are being excluded from the minimum capital requirement based upon the risk margin amount, the positions are reflected in the covered SD's capital in the form of market risk and credit risk charges and the covered SD is required to hold capital sufficient to cover those charges.

The Commission is also modifying the proposed 8% risk margin amount for covered SDs electing the Net Liquid Assets Capital Approach by setting the multiplier at 2%. The Commission has reviewed the proposed capital requirements and has considered the comments received and believes that it is appropriate to modify the risk margin amount multiplier in the Net Liquid Assets Capital Approach, and to retain the 8% risk margin amount multiplier in the Bank-Based Capital Approach and the Tangible Net Worth Capital Approach. Therefore, under the final regulation, a covered SD that elects the Net Liquid Assets Capital Approach must maintain a minimum level of net capital that is equal to or greater than 2% of the initial margin of its uncleared swaps, computed on a counterparty-by-counterparty basis.

The Commission believes that modifying the risk margin amount multiplier under the Net Liquid Assets Capital Approach is appropriate due to (i) differences in the assets that comprise regulatory capital under the Net Liquid Assets Capital Approach relative the Bank-Based Capital Approach and the Tangible Net Worth Capital Approach, and (ii) differences in how the minimum capital requirement is applied under the Net Liquid Assets Capital Approach relative the Bank-Based Capital Approach and the Tangible Net Worth Capital Approach. As previously discussed, the Net Liquid Assets Capital Approach is a liquidity-based capital approach that requires a covered SD to hold at least one dollar of highly liquid assets for each dollar of the firm's liabilities (excluding qualifying subordinated debt). With respect to the assets that comprise net capital under the Net Liquid Assets Capital Approach, a SD is required to calculate its net worth in accordance with U.S. GAAP, and subtract all illiquid assets, such as fixed assets and intangible assets, and deduct all of the firm's liabilities (except certain qualifying subordinated debt) to determine its tentative net capital. The SD then deducts market risk charges on all of its proprietary positions, including uncleared swap and security-based swap positions, and credit risk charges on its exposures to counterparties on its derivative positions, to determine its net capital.

In contrast to the liquidity-based approach of the Net Liquid Assets

[185] *See* Commission regulation § 1.17(a)(1)(i) (17 CFR 1.17(a)(1)(i)) and SEC rule 15c3–1.

[186] *See, e.g.,* Commission regulations §§ 1.20, 1.22 and 39.15 (17 CFR 1.20, 1.22 and 39.15).

Capital Approach, the Bank-Based Capital Approach and the Tangible Net Worth Capital Approach are more properly viewed as solvency-based capital requirements that require a covered SD to maintain positive balance sheet equity. Under the Bank-Based Capital Approach and Tangible Net Worth Capital Approach, a covered SD is not required to deduct fixed assets or other illiquid assets from its balance sheet equity.[187] A covered SD is also not required to deduct market risk and credit risk charges from its balance sheet equity. Therefore, the capital that is available and that may be used to meet the minimum capital requirement is substantially more conservative under the Net Liquid Assets Capital Approach than it is under the Bank-Based Capital Approach and the Tangible Net Worth Capital Approach.

In addition to what assets qualify as capital, the risk margin amount requirement is applied in a more conservative manner to covered SDs under the Net Liquid Assets Capital Approach than it is under the Bank-Based Capital Approach and the Tangible Net Worth Capital Approach. Under the proposed Net Liquid Assets Capital Approach, a covered SD was required to maintain a level of net capital (as defined above) that equaled or exceeded 8% of the risk margin amount. Covered SDs electing the proposed Bank-Based Capital Approach or Tangible Net Worth Capital Approach were required to maintain balance sheet equity (without deductions for fixed assets and market risk and credit risk charges) that equaled or exceeded 8% of the risk margin amount. Therefore, covered SDs electing the Bank-Based Capital Approach or Tangible Net Worth Capital Approach may have substantially more assets that qualify as capital to meet the proposed 8% risk margin amount requirement.

The Commission recognizes that the differences in the capital approaches discussed above may provide a competitive advantage to covered SDs electing the Bank-Based Capital Approach and Tangible Net Worth Capital Approach due to the ability of such SDs to include fixed assets and not have to deduct market and credit risk charges. To address this potential competitive disadvantage, the Commission is modifying the regulation by setting the risk margin amount multiplier at 2% under the Net Liquid Assets Capital Approach. Given the differences in the operation of the respective capital approaches as discussed above, the Commission believes that setting the risk margin amount multiplier at 2% for covered SDs electing the Net Liquid Assets Capital approach imposes a minimum capital requirement that is more equivalent to the 8% risk margin amount requirement for Bank-Based Capital Approach and Tangible Net Worth Capital Approach SDs. Setting the risk margin amount at 2% also mitigates commenters' concern that the Net Liquid Assets Capital Approach results in ''double counting'' of positions in the capital computation.

The Commission proposed an 8% risk margin amount multiplier based upon its experience with FCM capital requirements, which requires each FCM to maintain a minimum capital requirement based upon 8% of the risk margin on the futures, foreign futures, and cleared swap positions carried in customer and noncustomer accounts. As noted by a commenter, the 8% risk margin amount was proposed in 2003 and adopted in 2004 based upon an analysis and comparison of the capital regime in effect at the time, which was based on a percentage of the customer funds held by an FCM, with a minimum capital requirement based upon risk margin associated with the customer positions carried by the FCM.[188] Staff also had the benefit of observing data of the actual performance of the two capital regimes for an extended period of time as each FCM was required to calculate its minimum capital requirement based on customer funds and its capital requirement based on a percentage of its risk margin amount for approximately three years as part of a pilot program.[189]

The Commission does not have sufficient data to perform a quantitative analysis of the optimal level to set the multiplier for the risk margin amount at this time. However, the Commission's decision to modify the final rule by removing cleared and uncleared security-based swaps, as well as proprietary futures, foreign futures, and cleared swaps positions from the risk margin amount calculation and to set the multiplier at 2% should mitigate many of the commenters' concerns that the proposed 8% risk margin amount calculation was over inclusive of the types of positions included in the calculation and was set at a percentage that was too high. In addition, as the commenters noted, the FCM capital requirement of 8% of the risk margin on futures, foreign futures and cleared swaps is based upon margin calculations using clearing organization models that require the clearing organization to use a 99% one-tailed confidence interval over a minimum liquidation period of one day for futures, agricultural swaps, energy swaps, and metal swaps of one day, and a minimum liquidation period of five days for all other swaps.[190] In contrast, initial margin for uncleared swaps is required to be calculated at a 99% one-tailed confidence interval over minimum liquidation period of 10 business days (or the maturity of the swap if shorter).[191] The greater minimum holding period for uncleared swaps generally requires a higher level of initial margin, which would increase the covered SD's minimum capital requirement relative to cleared transactions.

Also, the Commission's final approach is consistent with the Congressional mandate to adopt capital requirements that are to the maximum extent practicable, comparable with the SEC and prudential regulators' capital requirements. The SEC's final rules require a SBSD to maintain net capital (not tentative net capital) that is equal to or greater than 2% of the risk margin amount calculated on its customer cleared security-based swaps and uncleared security-based swaps. Therefore, the Commission's final regulation is comparable with the SEC's final rule for SBSDs.[192]

The Commission believes it will be necessary to monitor and evaluate whether the numerical percentage is effective in achieving the statutory requirement for capital. Therefore, unlike the SEC, the Commission is not committing to a predetermined upward ratcheting percentage, but will

[187] SDs electing the Tangible Net Worth Capital Approach are required to deduct intangible assets.

[188] *See Minimum Financial and Related Reporting Requirements for Futures Commission Merchants and Introducing Brokers,* 68 FR 40835 (July 9, 2003) (''2003 *Proposed Risk-based Capital Rulemaking*''). The final rule is available at 69 FR 49784 (Aug. 12, 2004). *See also,* IIB/ISDA/SIFMA 3/3/2020 Letter.

[189] *See 2003 Proposed Risk-based Capital Rulemaking,* 68 FR 40835 at 40839.

[190] *See* Commission regulation § 39.13(g) (17 CFR 39.13(g)).

[191] *See* Commission regulation § 23.154(b)(2) (17 CFR 23.154(b)(2)).

[192] Under the Commission's final rule, a covered SD will be required to maintain a minimum level of adjusted net capital equal to or greater than 2% of the risk margin associated with the SD's proprietary uncleared swap transactions. Under the SEC's final rule, a stand-alone SBSD will be required to maintain a minimum level of net capital equal to or greater than 2% of the sum of the SBSD's customer cleared security-based swaps and uncleared security-based swaps. Covered SDs that clear customer swaps would be required to register as an FCM and will be subject to the FCM–SD capital requirements discussed in section II.B. above, which includes a minimum capital requirement of 8% of the risk margin amount associated with the FCM–SD's cleared customer futures, foreign futures, and cleared swap positions.

continually monitor and evaluate, which provides the Commission more flexibility in making fact-based assessments about the efficacy of the final rule in the future.

The Commission will monitor the impact that the 2% risk margin amount has on the level of minimum capital required of covered SDs electing the Net Liquid Assets Capital Approach after the compliance date of the rules. The Commission intends to use the financial statements and other information that it will receive from covered SDs under the financial reporting requirements discussed in section II.D. below to continually monitor the minimum capital requirements under the final rule, ensuring the Commission's capital requirements are adequately calibrated to protect the safety and soundness of the covered SDs. The information that the Commission will receive will allow it to determine if it would be appropriate to propose amending the minimum capital requirements by, among other things, increasing or decreasing the risk margin amount multiplier.

The Commission also has considered the comments that the minimum capital requirement should be revised to require a covered SD to maintain tentative net capital in excess of the risk margin amount as opposed to the proposed net capital requirement. The Commission is not modifying the final rule to reflect these comments. While the Commission acknowledges that a covered SD electing the Net Liquid Assets Capital Approach is required to both include its uncleared swaps in the 2% risk margin amount calculation in order to establish its minimum capital requirement and to take capital charges for market risk and credit risk on the uncleared swaps in computing the amount of capital the covered SD holds, the Commission does not believe that it would be appropriate to revise the final rule at this time to only apply to tentative net capital. If the Commission were to revise the final regulation consistent with the comments, then a covered SD would be subject only to the minimum fixed-dollar net capital requirement of $20 million (and those approved to use capital models, a tentative net capital requirement of $100 million). Including the uncleared swaps in establishing a minimum capital requirement is intended to provide a floor of net capital that each SD following the Net Liquid Assets Capital Approach is required to maintain to cover all risks to the firm, including market, credit, operation, liquidity, and legal risk.

With respect to commenters' concerns that the proposed risk margin amount would exacerbate the impact of a covered SD's inability to portfolio margin uncleared swaps and uncleared security-based swaps with a counterparty in a single account, the Commission recognizes the capital and margin efficiencies that portfolio margining provides to covered SDs and counterparties. The Commission also recognizes that the inability of a covered SD that is dually-registered with the SEC as a SBSD to portfolio margin uncleared swaps and uncleared security-based swaps impacts the SD's ability to compete with bank SDs that may margin uncleared swaps and security-based swaps in a single account, subject to the rules of the applicable prudential regulator. Under the Dodd-Frank Act framework, the Commission has the authority to establish margin requirements for swaps and the SEC has the authority to establish margin requirements for security-based swaps. Therefore, the respective Commissions need to take coordinated action in order for a dually-registered covered SD and SBSD to margin uncleared swaps and security-based swaps with a counterparty in a single account. The Commission will consult with the SEC regarding portfolio margining and, as part of such consultation, address capital issues.

With respect to comments that the risk margin amount may make it difficult for covered SDs and other market participants to enter into swaps that facilitate the transition from interbank offered rates to other risk-free rates, the Commission invites market participants that may be impacted by the capital rule to seek guidance from Commission staff. As noted above, Commission staff has provided no-action relief, including margin relief, to facilitate a covered SD's transition of open swaps with an interbank offered rate to other rates.

Minimum Capital Requirement of a Registered Futures Association Under Net Liquid Assets Capital Approach

The third criterion of the proposed Net Liquid Assets Capital Approach required a covered SD to maintain net capital that was equal to or greater than the amount of net capital required by an RFA of which the covered SD was a member. As noted in the *2016 Capital Proposal,* the proposed minimum capital requirement based on membership requirements of an RFA is consistent with section 17(p)(2) of the CEA and current regulation 1.17 for FCMs and IBs.[193]

Section 17(p)(2) of the CEA provides, in relevant part, that an RFA must adopt rules establishing minimum capital and other financial requirements applicable to the RFA's members for which such requirements are imposed by the Commission.[194] Section 17(p)(2) further requires an RFA to implement a program to audit and enforce its members' compliance with such capital and other financial requirements. As noted above, the NFA currently is the only RFA, and each SD is required to be a member of NFA.[195]

The *2016 Capital Proposal* noted that NFA is required by section 17 of the CEA to adopt SD capital rules once the Commission imposes capital requirements on SDs, and that NFA's capital rules must be at least as stringent as the Commission's capital requirements on covered SDs.[196] The Commission's proposed Net Liquid Assets Capital Approach incorporated the NFA minimum capital requirement into the Commission's capital rule, which would make a violation of the NFA's rule also a violation of the Commission's rule in a manner that is consistent with the current FCM capital rules.[197]

The Commission received several comments regarding the proposed requirement that a covered SD must meet the capital rules adopted by the NFA. Several commenters stated that any future NFA capital rules for covered SDs should be subject to public comment.[198] One commenter also stated that creating, revising and implementing

[193] *See* Commission regulations §§ 1.17(a)(1)(i)(C) and 170.16 (17 CFR 1.17(a)(1)(i)(C) and 170.16).

[194] *See* section 17(p)(2) of the CEA (7 U.S.C. 21(p)(2)), which requires RFAs to adopt rules establishing minimum capital and other financial requirements applicable to its members for which such requirements are imposed by the Commission, provided that such requirements may not be less stringent than the requirements imposed by the CEA or by Commission regulations.

[195] Commission regulation § 170.16 (17 CFR 170.16) provides, in relevant part, that each person registered as an SD must become and remain a member of at least one futures association that is registered with the Commission under section 17 of the CEA and provides for the membership of SDs. NFA is currently the only RFA and accepts SD members.

[196] *See 2016 Capital Proposal,* 81 FR 91252 at 91259 and footnote 87 at 91269.

[197] Commission regulation § 1.17(a)(1)(i)(C) (17 CFR 1.17(a)(1)(i)(C)) currently incorporates NFA's minimum capital requirement for an FCM into the Commission's minimum capital requirement by providing that each person registered as an FCM must maintain adjusted net capital required by an RFA of which the FCM is a member.

[198] ED&F Man/INTL FCStone 3/3/2020 Letter; Letter from Scott Earnest, Shell Trading Risk Management LLC (March 2, 2020) (Shell 3/3/2020 Letter).

systems, controls, processes, reporting and related internal mechanisms requires ample notice of uninterrupted requirements that could be jeopardized by an inconsistent NFA capital requirement.[199] To address this issue, the commenter requested that the Commission require NFA to establish a public comment period to solicit feedback on any covered SD capital requirements prior to mandating compliance with such requirements.[200]

Another commenter stated that the Commission's efforts to obtain public input pursuant to the *2016 Capital Proposal* and the *2019 Capital Reopening* may be nullified if the NFA adopts capital rules that are different from the Commission's final rules.[201] The commenter requested that the Commission require NFA to adopt capital rules that closely mirror the Commission's final capital rules, or, at the least, require NFA to conduct a rigorous notice and comment process prior to finalizing its capital rules.[202]

The Commission appreciates the commenters concerns regarding the need for conformity between its final capital rules governing covered SDs and those that may be adopted by NFA as an RFA in the future. The Commission believes, however, that the concerns are largely mitigated by the existing statutory and Commission regulatory requirements as well as the internal governance structure of NFA, which was established to comply with these requirements. Section 17(j) of the CEA, for example, requires NFA to file with the Commission any change in or addition to its rules. Any such change or addition is effective within 10 days of submission unless NFA requests, or the Commission notifies NFA of its intent to subject the filing to, a review and approval process.[203] To the extent NFA plans to adopt significant new rules, it typically has worked very closely with Commission staff to ensure, among other things, consistency with existing Commission regulations. The current capital and financial requirements applicable to FCMs and IBs, are essentially the same under both Commission regulations and NFA rules.[204]

Further, the statutory and Commission regulatory requirements and NFA's governance structure ensure that SDs are represented and given a voice in the potential adoption of NFA rules, including capital and financial reporting rules, that may impact them. Specifically, section 17(b)(5) of the CEA and regulation 170.3 require generally that the rules of an RFA assure fair representation of its members in the adoption of any rule, in the selection of its officers, directors, and in other aspects of its administration.[205] In this regard, NFA's Articles of Incorporation require that its Board of Directors include 5 elected representatives of registered (or provisionally-registered) SDs, registered (or provisionally registered) major swap participants and registered RFEDs. Of these representatives, at least 2 must be SDs that are Large Financial Institutions [206] (as of June 30 of the prior calendar year) and at least 2 others must be representatives of SDs, MSPs or RFEDs that are not Large Financial Institutions.[207]

In light of NFA's governance structure, the Commission's review process with respect to new NFA rules and the typically close interaction between Commission and NFA staff with regard to NFA's adoption of new rules, the Commission believes that an additional mandatory public comment period for NFA capital rules would be unnecessary. Accordingly, the Commission is adopting the third criterion that a covered SD electing the Net Liquid Assets Capital Approach must maintain capital in an amount equal to or in excess of an amount of capital, if any, imposed by an RFA of which the covered SD is a member.

b. Computation of Net Capital To Meet Minimum Capital Requirement

The second component of the proposed Net Liquid Assets Capital Approach required a covered SD to compute the amount of ''tentative net capital'' and ''net capital'' that the SD maintains in order to satisfy its minimum capital requirement. Proposed regulation 23.101(a)(1)(ii) required each covered SD electing the Net Liquid Assets Capital Approach to compute its tentative net capital and net capital in accordance with the SEC's computation of tentative net capital and net capital for nonbank SBSDs under Rule 18a–1 as if the covered SD was a nonbank SBSD, subject to several adjustments.[208]

The Net Liquid Assets Capital Approach and the SEC capital approach for SBSDs are based on the existing FCM and BD capital rules and place an emphasis on liquidity of the entity. The FCM and BD capital rules are liquidity-based capital requirements that generally require a firm to maintain at all times at least $1 dollar of highly liquid assets to cover each dollar of its unsubordinated liabilities, which is generally money owed to customers, counterparties and creditors.

A covered SD electing the Net Liquid Assets Capital Approach will compute net capital by first determining its net worth under U.S. GAAP, which generally reflects the firm's total assets less its total liabilities. The covered SD would then adjust its net worth by deducting certain assets such as unsecured receivables and undermargined counterparty accounts. The covered SD would also be able to add back to its net worth certain qualifying subordinated liabilities. The result of these adjustments would be the covered SD's ''tentative net capital.''

The covered SD will then compute its ''net capital'' by deducting from ''tentative net capital'' prescribed capital charges from the mark-to-market value of its proprietary swap, security-based swap, equities, and commodity positions. The prescribed capital charges for the covered SD's proprietary positions are the existing standardized capital charges set forth in Commission regulation 1.17 for FCMs and SEC rule 15c3–1 for BDs. The Proposal also provided that a covered SD could seek approval from the Commission or an RFA to use internal models to compute market risk and credit risk capital charges in lieu of the standardized capital charges. The application and approval process for market risk and credit risk capital models is discussed in section II.C.7. below.

(i) Swap Dealers Not Approved To Use Internal Capital Models

The *2016 Capital Proposal* required a covered SD electing the Net Liquid Assets Capital Approach to apply, in computing its net capital, standardized market risk and credit risk capital

[199] ED&F Man/INTL FCStone 3/3/2020 Letter.

[200] *Id.*

[201] *See* Shell 3/3/2020 Letter.

[202] *Id.*

[203] *See* section 17(j) of the CEA (7 U.S.C. 21(j)).

[204] *Cf.* Commission regulation § 1.17 (17 CFR 1.17) with NFA Financial Requirements.

[205] 7 U.S.C. 21(b)(5) and Commission regulation § 170.3 (17 CFR 1.17). *See also,* section 17(b)(11) of the CEA (7 U.S.C. 21(b)(11)) which requires that an RFA provide for meaningful representation on the governing board of such association of a diversity of membership interests and provides that no less than 20 percent of the regular voting members of the board be comprised of qualified nonmembers of or persons not regulated by such association.

[206] The term ''Large Financial Institution'' is defined in Article XVIII(n) of NFA's Articles of Incorporation as ''a Swap Dealer included in a well defined, publicly available and independent list of financial institutions that the Board of Directors identifies by resolution from time to time.''

[207] Article XVII, Section 2A(d) of NFA Articles of Incorporation. Article VIII, Section 3(c)(iv) requires that NFA's Executive Committee composition include 13 Directors, 2 of whom represent SDs, MSPs or RFEDs.

[208] *See 2016 Capital Proposal,* 81 FR 91252 at 91260–61.

charges set forth in SEC Rule 18a–1, and the appendices thereto, for positions in swaps, security-based swaps, and other proprietary positions, if the covered SD had not obtained Commission or RFA approval to use internal models. The standardized market risk charges under SEC rule 18a–1 are rules-based capital charges that require a covered SD to compute market risk capital charges for swaps, security-based swaps, and other positions by multiplying the notional amount or fair market value of the positions by a specified percentage set forth in SEC rule 18a–1.[209] The resulting market risk charges would be deducted from the covered SD's tentative net capital to arrive at the firm's net capital.

Standardized credit risk charges under SEC Rule 18a–1 generally provide that unsecured receivables are subject to a 100 percent credit risk capital charge (*i.e.,* the covered SD would have to deduct 100 percent of any unsecured receivable balance, including receivables from swap and security-based swap counterparties for unpaid variation margin or mark-to-market gains, from tentative net capital in computing net capital).[210] Accordingly, under the proposed standardized credit risk charges, covered SDs were required to deduct any unsecured receivables arising from not collecting variation margin from any counterparty, including counterparties that are exempt or excepted from having to pay and collect variation margin with the covered SD. Therefore, covered SDs would have to take a capital charge for any exposures arising from unpaid variation margin to any counterparties, including commercial end users and counterparties excluded from or exempt from the requirement to exchange variation margin with the covered SD.

The Commission proposed several adjustments that a covered SD electing the Net Liquid Assets Capital Approach could make to the standardized credit risk capital charges set forth in SEC rule 18a–1. In this regard, the Commission proposed that a covered SD, in computing its regulatory capital, may recognize unsecured receivables from third-party custodians as a current asset in computing its regulatory capital, where the receivable represents the amount of initial margin that the covered SD posted with the third-party custodian for uncleared swaps or uncleared security-based swaps pursuant to the margin rules of the Commission or SEC, as applicable.[211] Absent this modification of the application of Rule 18a–1, a covered SD would have to take a 100% capital charge for the receivables from the third party custodians.[212] The Commission proposed this modification to rule 18a–1 to take into account that covered SDs are required to post initial margin for all swaps with SD counterparties and with all financial end users with material swaps exposure under the uncleared swap margin rules, while the SEC's final rules do not require a SBSD to post initial margin for security-based swaps with other SBSDs or with financial end users.[213]

The Commission received a comment on the proposed adjustment to permit covered SDs to recognize receivables from third-party custodians as a current asset in computing their net capital under SEC rule 18a–1.[214] The commenter stated that it supported the proposed adjustment, but noted that the rule was too restrictive by recognizing initial margin held by third-party custodian pursuant to the Commission's rules and the rules of the SEC. The commenter noted that covered SDs may enter into uncleared swap or security-based swap transactions with SDs that are subject to the margin rules of a prudential regulator, or a SD that operates in a foreign jurisdiction that has received a margin comparability determination from the Commission. The commenter stated that in order to avoid creating unwarranted disparities depending on the parties with which a covered SD trades, the Commission should expand the adjustment to allow an SD to recognize IM posted in accordance with the margin rules of a prudential regulator or foreign jurisdiction for which the Commission has made a comparability determination.[215]

The Commission has considered the comment and is modifying the final regulation to allow a covered SD electing the Net Liquid Assets Capital Approach to recognize initial margin for uncleared swaps and security-based swaps deposited with third-party custodians as a current asset in computing its net capital. The covered SD must deposit the initial margin with a third-party custodian in accordance with the applicable rules of the Commission, SEC, prudential regulators, or a foreign jurisdiction that has obtained a margin comparability determination from the Commission. The modification of the final regulation is consistent with the original intent of the proposed regulation, which was to permit covered SDs to recognize initial margin posted with third-party custodians pursuant to the new margin framework which requires a SD to both post and collect initial margin with a swap dealer counterparty or with a financial end user with material swaps exposure.[216] The modification more fully and accurately reflects the types of counterparties that a covered SD may transact with, and the regulations that may govern such uncleared swap and security-based swap transactions.

The Commission also proposed to permit a covered SD that elects the Net Liquid Assets Capital Approach to exclude a capital charge contained in proposed SEC rule 18a–1(c)(viii). Applying SEC proposed rule 18a–1(c)(viii) would require a covered SD to take a capital charge to the extent that standardized market risk charges computed on a portfolio of customer security-based swaps exceeded the clearinghouse margin associated with such cleared security-based swaps positions.[217] The SEC did not include this capital charge in its final rules, and the Commission is deleting the exception from this capital charge in final regulation 23.101(a)(1)(ii) as it is no longer necessary.

[209] *See, e.g.,* SEC rule 18a–1.

[210] *See* 2019 SEC Final Capital Rule, 84 FR 43872 at 44053.

[211] *See* paragraph (a)(1)(ii)(A)(*4*) of proposed Commission regulation § 23.101; *2016 Capital Proposal,* 81 FR 91252 at 91310.

[212] The *2019 SEC Final Capital Rule* provides interpretive guidance stating that a BD or a stand-alone SBSD does not have to take a capital charge for initial margin for swaps and security-based swaps that is posted with a third-party custodian if: (i) The initial margin requirement is funded pursuant to a fully-executed written loan agreement with an affiliate of the stand-alone BD or SBSD; (ii) the loan agreement provides that the lender waives re-payment of the loan until the initial margin is returned to the stand-alone BD or SBSD; and (iii) the liability of the stand-alone BD or SBSD to the lender can be fully satisfied by delivering the collateral serving as the initial margin to the lender. *See 2019 SEC Final Capital Rule,* 84 FR 43872 at 43887.

[213] Commission regulation § 23.152 (17 CFR 23.152).

[214] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[215] *Id.*

[216] The term ''material swaps exposure'' is defined by Commission regulation 23.150 (17 CFR 23.150) to mean that the entity and its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July and August of the previous calendar year that exceeds $8 billion.

[217] *See SEC 2012 Proposed Capital Rule,* 77 FR 70214 at 70335. The SEC also requested comment on proposed rule text that extended the capital charge to cleared swaps in addition to cleared SBS. *See Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers,* 83 FR 53007 (Oct. 19, 2018).

(ii) Swap Dealers Approved To Use Internal Capital Models

The *2016 Capital Proposal* permitted a covered SD electing the Net Liquid Assets Capital Approach to seek Commission or RFA approval to use internal models to compute market risk and credit risk capital charges on its swaps, security-based swaps and other proprietary positions in lieu of the standardized deductions contained in the SEC Rule 18a–1.[218] In order to be considered for approval, the SD's models must meet the qualitative and quantitative requirements set forth in proposed regulation 23.102 and Appendix A to regulation 23.102.

The Commission noted in the *2016 Capital Proposal* that the Federal Reserve Board had adopted quantitative and qualitative requirements for internal models used by bank holding companies to compute market risk and credit risk capital charges.[219] In developing the proposed market risk and credit risk requirements for covered SDs, including the proposed quantitative and qualitative internal model requirements, the Commission incorporated the market risk and credit risk model requirements adopted by the Federal Reserve Board.[220] The Commission's proposed model requirements are also comparable to the SEC's model requirements for SBSDs and for BDs.[221] The model requirements and the process for obtaining Commission or RFA review is set forth in section II.C.7. of this release.

The Commission's *2016 Capital Proposal* required a covered SD electing the Net Liquid Assets Capital Approach to compute its credit risk charges as if the covered SD were a SBSD subject to SEC rule 18a–1.[222] The *SEC 2012 Proposed Capital Rule* limited the use of credit risk models to transactions with commercial end users.[223] The Commission, however, believed that a covered SD should be able to use credit risk models to compute capital charges for uncleared swap and security-based swap transactions with all counterparties, and not just commercial end users. In this regard, the Commission proposed that covered SDs that elect the Net Liquid Assets Capital Approach or the Bank-Based Capital Approach, and FCM–SDs could use models to compute credit risk charges for swap and security-based swaps counterparties. Therefore, the Commission proposed to add paragraph (a)(1)(ii)(A)(*3*) to regulation 23.101 to allow a covered SD electing the Net Liquid Assets Capital Approach to use credit risk models to compute credit risk charges for uncollected variation margin and initial margin from swap and security-based swap counterparties.

In its final rule adopting capital requirement for SBSDs, the SEC modified its rule 18a–1 from the proposal to permit SBSDs approved to use credit risk models to use such models to compute credit risk capital charges from all classes of swap and security-based swap counterparties and not just commercial end users.[224] Therefore, the Commission has modified the final regulation 23.101 by deleting paragraph (a)(1)(ii)(A)(*3*) as the provision is no longer necessary as the SEC and CFTC rules are aligned in that a covered SD may use an approved model to compute counterparty credit risk charges for swap and security-based swap transactions with all counterparties.

3. Capital Requirement for Covered SDs Electing the Bank-Based Capital Approach

a. Computation of Minimum Capital Requirement

The *2016 Capital Proposal* provided covered SDs with an option of electing the Bank-Based Capital Approach, which is based on the Federal Reserve Board's capital requirements for bank holding companies.[225] The Federal Reserve Board's bank holding company capital requirements are consistent with the bank capital framework adopted by the BCBS.[226] The BCBS framework is an internationally-recognized framework for setting capital requirements for banks and bank holding companies, and was developed to provide prudential standards to help ensure the safety and soundness of bank and bank holding companies. The Bank-Based Capital Approach also offers a covered SD that is part of bank holding company structure with potential efficiencies as the covered SD may maintain financial accounting records in a manner that provides for the efficient consolidation of the SD into the financial reporting requirements of the bank-holding company.

The Commission's Bank-Based Capital Approach was set forth in proposed regulation 23.101(a)(1)(i), and required a covered SD to maintain a minimum level of regulatory capital that is equal to or in excess of the greatest of the following four criteria:

(1) $20 million of common equity tier 1 capital, as defined under the bank holding company regulations in 12 CFR 217.20, as if the SD itself were a bank holding company subject to 12 CFR part 217;[227]

(2) common equity tier 1 capital, as defined under the bank holding company regulations in 12 CFR part 217.20, equal to or greater than 8% of the SD's risk-weighted assets computed under the bank holding company regulations in 12 CFR part 217 as if the SD were a bank holding company subject to 12 CFR part 217;

(3) common equity tier 1 capital, as defined under 12 CFR 217.20, equal to or greater than 8 percent of the sum of:

(a) The amount of ''uncleared swap margin'' (as that term is defined in proposed regulation 23.100) for each uncleared swap position open on the books of the SD, computed on a counterparty by counterparty basis pursuant to regulation 23.154;

(b) the amount of initial margin that would be required for each uncleared security-based swap position open on the books of the SD, computed on a counterparty-by-counterparty basis pursuant to proposed SEC Rule 18a–3(c)(1)(i)(B), without regard to any initial margin exemptions or exclusions that the rules of the SEC may provide to such security-based swap positions; and

(c) the amount of initial margin required by a clearing organization for cleared proprietary futures, foreign

[218] The Commission proposed that a covered SD's market risk models must calculate the total market risk for its proprietary positions under SEC rule 18a–1(d) (17 CFR 240.18a–1(d)) as the sum of the VaR measure, stressed VaR measure, specific risk measure, comprehensive risk measure, and incremental risk measure of the portfolio of proprietary positions in accordance with proposed Commission regulation § 23.102 and proposed Appendix A of regulation § 23.102. *See* paragraph (a)(1)(ii)(A)(*2*) of proposed Commission regulation § 23.101; *2016 Capital Proposal,* 81 FR 91252 at 91310.

[219] *See 2016 Capital Proposal,* 81 FR 91252 at 91258; *See,* 12 CFR 217, subparts E and F.

[220] *See 2016 Capital Proposal,* 81 FR 91252 at 91258.

[221] *See 2016 Capital Proposal,* 81 FR 91252 at 91278.

[222] *See 2016 Capital Proposal,* 81 FR 91252 at 91310; Proposed regulation 23.101(a)(1)(ii).

[223] *See SEC 2012 Proposed Capital Rule,* 77 FR 70214 (Nov. 23, 2012) at *70245–46.*

[224] *See 2019 SEC Final Capital Rule,* 84 FR 43872 at 43902–93.

[225] *See* paragraph (a)(1)(i) of proposed Commission regulation § 23.101, *2016 Capital Proposal,* 81 FR 91252 at 91310.

[226] BCBS is the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. Institutions represented on the BCBS include the Federal Reserve Board, the European Central Bank, Deutsche Bundesbank, Bank of France, Bank of England, Bank of Japan, and Bank of Canada.

[227] Common equity tier 1 capital is defined in 12 CFR 217.20 of the Federal Reserve Board's rules. Common equity tier 1 capital generally represents the sum of a bank holding company's common stock instruments and any related surpluses, retained earnings, and accumulated other comprehensive income.

futures, swaps, and security-based swap positions open on the books of the SD; or

(4) the capital required by an RFA of which each SD is a member. Commenters generally supported the proposed Bank-Based Capital Approach as it represents an internationally recognized capital regime for establishing capital that is designed to promote the safety and soundness of banking institutions under standards issued by the BCBS. One commenter stated that the Bank-Based Capital Approach is a significant and necessary pillar in the Commission's proposed regulatory framework as it fosters greater comparability of covered SDs with bank SDs, provides a risk-sensitive capital methodology for covered SD business models that are not adequately captured in traditional net capital calculations, and provides covered SD subsidiaries of bank holding companies with potential risk management and operational synergies.[228] Another commenter supported the Bank-Based Capital Approach noting that the Commission's proposal of offering distinct capital approaches recognizes that covered SDs have a wide range of business models, many of which do not fit easily within other proposed capital frameworks.[229] This commenter further stated that covered SDs that are not dually-registered as SBSDs or FCMs generally do not maintain custody of customer assets nor are they subject to insolvency regimes premised on liquidation and the return of customer assets and, therefore, it makes sense for the Commission not to apply the Net Liquid Assets Capital Approach or FCM approach which are premised on the customer profile and insolvency regime applicable to SBSDs and FCMs, respectively.[230]

Fixed-Dollar Minimum Capital Requirement Under Bank-Based Capital Approach

The first criterion under the Commission's Proposal required covered SDs electing the Bank-Based Capital Approach to maintain a minimum of $20 million of common equity tier 1 capital. The Commission believed that given the role that a SD performs in the financial markets by engaging in swap dealing activities that it was appropriate to require each SD to maintain a minimum level of capital, stated as an absolute dollar amount, that does not fluctuate with the level of the firm's dealing activities to help ensure the safety and soundness of the SD.

The proposed $20 million of minimum capital also was consistent with the minimum regulatory capital requirements proposed by the Commission for SDs that elect the Net Liquid Assets Capital Approach or the Tangible Net Worth Capital Approach as discussed in sections II.C.2.a. and II.C.4., respectively, of this release. The proposed $20 million minimum capital requirement also was consistent with the net capital requirements adopted by the SEC for SBSDs, and was consistent with the current minimum net capital requirements for OTC derivatives dealers registered with the SEC.[231] The Commission did not receive comment on the proposed $20 million dollar minimum capital requirement, and is adopting the requirement as proposed.

Minimum Capital Based on Risk-Weighted Assets Under Bank-Based Capital Approach

The second criterion of the minimum capital requirement for covered SDs electing the Bank-Based Capital Approach required a covered SD to maintain common equity tier 1 capital equal to or greater than 8% of the covered SD's risk-weighted assets computed under the bank holding company regulations in 12 CFR part 217 as if the covered SD was a bank holding company. In effect, this provision of proposed regulation 23.101(a)(1)(i) imposed a capital approach on a covered SD that is generally consistent with the capital approach that the Federal Reserve Board imposes on bank holding companies.[232] For purposes of the *2016 Capital Proposal,* as is also the case for the Federal Reserve Board's minimum ratio requirement, the assets and off-balance sheet transactions or exposures of the bank holding company would be weighted relative to their respective risk.[233] Thus, under the *2016 Capital Proposal,* the greater the perceived risk of the assets and the off-balance sheet items, the greater the weighting for the risk and the greater the amount of capital necessary to cover 8% of the risk-weighted assets.[234] The Commission believed it was important to include this criterion in its minimum capital requirements so that a covered SD maintained a level of common equity tier 1 capital that was comparable to the level that the SD would maintain if it were subject to the capital rules of the Federal Reserve Board.

Proposed paragraph (a)(1)(i) of regulation 23.101 required a covered SD electing the Bank-Based Capital Approach to compute its risk-weighted assets in accordance with the Federal Reserve Board's capital requirements contained in 12 CFR part 217. The Proposal included two general approaches to computing risk-weighted assets under 12 CFR part 217. The first approach was for covered SDs that did not have Commission or RFA approval to calculate their risk-weighted assets using internal market risk or credit risk models. Proposed regulation 23.103 required these covered SDs to use a standardized, or rules-based, approach to computing their risk-weighted assets. Under the standardized approach, the covered SDs would use the credit risk charges from the Federal Reserve Board's standardized approach under subpart D of 12 CFR 217 and the standardized market risk charges for FCMs set forth in regulation 1.17.[235] As discussed in section II.B.3.a. above, regulation 1.17 contains the standardized market risk capital charges that have been imposed on FCMs for many years and is being amended by this rulemaking to reflect explicit

[228] *See* MS 3/3/2020 Letter.

[229] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[230] *Id.*

[231] The SEC capital requirements for SBSDs impose a minimum net capital requirement of $20 million for SBSDs that are not approved to use internal capital models and a $100 million dollar tentative net capital and $20 million net capital requirement for SBSDs that are approved to use internal capital models *See 2019 SEC Final Capital Rule,* 84 FR 43872 at 43884. SEC rule 15c3–1(a)(5) (17 CFR 240.15c3–1(a)(5)) currently requires an OTC derivatives dealer that has obtained approval to use capital models to maintain a minimum of $100 million of tentative net capital and $20 million of net capital. *See 2019 SEC Final Capital Rule,* 84 FR 43872 at 44042, 44052.

[232] As discussed further below, the Commission's Proposal differed from the rules of the Federal Reserve Board in that the Commission's Proposal would require a covered SD to adjust its risk-weighted assets calculation by including the market risk capital charges computed in accordance with Commission regulation § 1.17 (17 CFR 1.17) if the covered SD had not obtained approval from the Commission or from an RFA to use internal market risk models.

[233] *See* 12 CFR 217 subparts D, E, and F.

[234] Large, complex banks also must make further adjustments to these risk-weighted assets, calculated pursuant to approved models, for the additional capital they must hold to reflect the market risk of their trading assets *See* 12 CFR 217 subpart F. The market risk requirements generally apply to Federal Reserve Board-regulated institutions with aggregate trading assets and trading liabilities equal to 10 percent or more of total assets or one billion dollars or more.

[235] The Federal Reserve Board's standardized approach under subpart D of 12 CFR 217 applies only to credit risk charges; the Federal Reserve Board has not adopted standardized market risk charges. Bank and bank holding companies that are subject to market risk charges are required to use internal models and, accordingly, subpart D of 12 CFR 217 does not include a standardized approach for computing market risk charges. To address this issue, the Commission proposed that a covered SD that had not obtained Commission or RFA approval to use internal market risk models must apply the standardized market risk capital charges contained in Commission regulation § 1.17 (17 CFR 1.17) in computing its total risk-weighted assets.

standardized capital charges for swap and security-based swap positions that are aligned with the SEC's standardized market risk capital charges. Generally, market risk charges are computed under regulation 1.17 by multiplying the notional value or market value of the position or asset by a fixed percentage set forth in the regulation.[236] The market risk charges are then multiplied by a factor of 12.5 and added to the total risk-weighted assets of the SD.[237]

The second approach to computing risk-weighted assets permitted covered SDs that have Commission or RFA approval to use internal market risk and credit risk models to use such models to calculate their risk-weighted assets. The models would have to meet the qualitative and quantitative requirements set forth in proposed regulation 23.102 and Appendix A to regulation 23.102 in order to be approved. The qualitative and quantitative requirements were based on the Federal Reserve Board's qualitative and quantitative requirements for capital models in 12 CFR part 217.[238] The proposed qualitative and quantitative requirements for the models, and the proposed model submission process, are discussed in section II.C.7. of this release.

The Commission acknowledged in the *2016 Capital Proposal* that limiting a covered SD's ability to use only common equity tier 1 capital to meet its minimum capital requirement based upon 8% of its risk-weighted assets was a departure from the Federal Reserve Board's requirements, which allow a bank holding company to meet its minimum capital requirements with a combination of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital.[239] The Commission stated in the *2016 Capital Proposal* that it was proposing the stricter standard as common equity tier 1 capital is a more conservative form of capital than additional tier 1 or tier 2 capital, particularly as it relates to the permanence of the capital and its availability to absorb unexpected losses.[240] The Commission also proposed the stricter common equity tier 1 requirement as it did not propose to include in the SD's minimum capital requirement certain of the prudential regulators' capital add-ons, including the capital conservation buffer and the countercyclical capital buffer.[241]

The Commission received comments regarding the proposed limitation of the type of capital that a covered SD may use under the Bank-Based Capital Approach in satisfying its 8% of risk-weighted assets to common equity tier 1 capital ratio requirement. One commenter supported the proposed limitation noting that the more conservative common equity tier 1 capital is appropriate given the Commission's Proposal does not include all of the capital add-ons and supervisory safeguards that are set forth in the prudential regulators' capital framework.[242]

Other commenters stated that the proposed minimum capital requirement of common equity tier 1 capital equal to or greater than 8% of risk-weighted assets would impose a capital requirement on covered SDs that is materially higher and more restrictive than the prudential regulators' capital requirement for banks and bank holding companies.[243] These commenters noted that the prudential regulators' minimum capital requirements provide that an entity is ''adequately capitalized'' if its common equity tier 1 capital is equal to or greater than 4.5% of the SD's risk-weighted assets, and is ''well capitalized'' if its common equity tier 1 capital is at least 6.5% of its risk-weighted assets.[244] These commenters further stated that the Commission's proposed ''early warning capital requirement'' would effectively require SDs to maintain common equity tier 1 capital equal to at least 9.6% (120% × 8%) of risk-weighted assets as entities subject to the ''early warning capital requirements'' generally ensure that their regulatory capital exceeds such requirements.[245] Another commenter stated that the Proposal may make it difficult for covered SDs subject to the Commission's capital rule to compete with bank SDs subject to the capital rules of a prudential regulator, and more generally would deviate from the more tailored risk-based approach taken by the prudential regulators.[246]

In addition, a commenter requested that the Commission revise its Bank-Based Capital Approach to recognize subordinated debt as capital in meeting the 8% of risk-weighted assets capital ratio.[247] This commenter noted that prudential regulators' capital requirements permit a bank or a bank holding company to recognize certain subordinated debt as capital in meeting the 8% of risk-weighted assets capital ratio requirement.[248]

The Commission requested additional comment in the *2019 Capital Reopening* on whether the proposed minimum capital requirement based upon a covered SD's common equity tier 1 capital was appropriate.[249] The Commission also requested comment on whether a covered SD should be able to

[236] For example, U.S. Treasuries are subject to capital charges of between zero and six percent depending on the time to maturity of each treasury instrument, and readily marketable equity securities are subject to a 15 percent capital charge. *See* Commission regulation § 1.17(c)(5)(v) (17 CFR 1.17(c)(5)(v)), which references SEC rule 15c3–1(c)(2)(vi) (17 CFR 240.15c3–1(c)(2)(vi)). SEC rule 15c3–1(c)(2)(vi)(A)(1) (17 CFR 240.15c3–1(c)(2)(vi)(A)(1)) provides that a BD shall take a capital charge on U.S. Treasuries of between zero and six percent of the fair market value of the instrument depending upon the time to maturity. SEC rule 15c3–1(c)(2)(vi)(J) (17 CFR 240.15c3–1(c)(2)(vi)(J)) provides a capital charge for equities equal to 15 percent of the fair market value of the securities.

[237] The 12.5 multiplication factor is necessary to ensure that the SD maintains a level of common equity tier 1 capital to cover the full amount of the market risk charge. Since the SD is required to maintain common equity tier 1 capital equal to or in excess of 8% of the risk-weighted assets, the market risk charge is multiplied by 12.5, which effectively requires the SD to hold common equity tier 1 capital in an amount equal to the full amount of the market risk charge. This approach is consistent with the Federal Reserve Board's approach to bank holding companies.

[238] Federal Reserve Board model-based capital charges for credit risk and market risk are set forth in 12 CFR part 217 subparts E and F, respectively.

[239] Under the Federal Reserve Board's rules, a bank holding company's total capital must equal or exceed at least 8% of its risk-weighted assets. In addition, at least six percent of the bank holding company's capital must be in the form of tier 1 capital, and at least 4.5 percent of the tier 1 capital must qualify as common equity tier 1 capital. The remaining two percent of capital may be comprised of tier 2 capital. Tier 1 capital includes common equity tier 1 capital and further includes such instruments as preferred stock. Tier 2 capital includes certain types of instruments that include both debt and equity characteristics (*e.g.,* certain perpetual preferred stock instruments and subordinated term debt instruments). *See* 12 CFR 217.10.

[240] *See 2016 Capital Proposal,* 81 FR 91252 at 91259–60.

[241] *See* 12 CFR 217.11. The capital conservation buffer and the countercyclical capital buffer represent capital ''add-ons'' to the bank capital requirements and are intended to require entities subject to the rules to have certain levels of capital in order to make capital distributions and discretionary bonuses.

[242] *See* AFR 5/15/2017 Letter.

[243] *See* ISDA 5/15/2017 Letter; MS 5/15/2017 Letter; SIFMA 5/15/2017 Letter.

[244] *Id.*

[245] *Id.* The *2016 Capital Proposal* required each covered SD subject to the Bank-Based Capital Approach, the Net Liquid Assets Capital Approach, or the Tangible Net Worth Capital Approach to provide written notification to the Commission within 24 hours of the covered SD's regulatory capital falling below 120 percent of the SD's minimum requirement. This proposed notice provision, which is consistent with current FCM requirements in Commission regulation § 1.12 (17 CFR 1.12), is generally referred to as the ''early warning capital requirement.'' The proposed ''early warning capital requirement'' for SDs was included in paragraph (c)(2) of proposed Commission regulation § 23.105. *See 2016 Capital Proposal,* 81 FR 91252 at 91318.

[246] *See* JBA 3/14/2017 Letter.

[247] *See* SIFMA 5/15/2017 Letter.

[248] *Id.*

[249] *See 2016 Capital Proposal,* 81 FR 91252 at 91260.

use additional tier 1 and tier 2 capital, including subordinated debt, in addition to common equity tier 1 capital in meeting the 8% of its risk-weighted assets requirement.[250]

Common Equity Tier 1 Capital

The Commission received comments in response to the *2019 Capital Reopening* generally supporting the minimum capital requirement based on a percentage of the covered SD's risk-weighted assets, including the requirement for covered SDs electing the Bank-Based Capital Approach to maintain common equity tier 1 capital equal to a specific percentage of the risk-weighted assets. Commenters, however, stated that the proposed requirement that a covered SD maintain only common equity tier 1 capital in excess of 8% of its risk-weighted assets was not consistent with prudential regulators' requirements and was higher than the comparable requirements imposed by the Federal Reserve Board for bank holding companies.[251] These commenters noted that the prudential regulators requirements permit banks to use a combination of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital in meeting their regulatory capital requirements.[252]

Several commenters further noted, consistent with comments received from the *2016 Capital Proposal,* that the Commission was effectively imposing a requirement for a covered SD electing the Bank-Based Capital Approach to maintain common equity tier 1 capital in excess of 9.6 percent of the SD's risk-weighted assets due to the proposed ''early warning capital requirements'' that requires a covered SD to notify the Commission if its regulatory capital falls below 120 percent of its minimum requirement.[253] Commenters further stated that the resulting 9.6% common equity tier 1 capital requirement is not consistent with any bank-based capital methodology.[254]

Commenters suggested that the Commission align the proposed 8% common equity tier 1 capital requirement with the Federal Depository Insurance Corporation's prompt corrective action (''PCA'') framework, which is calibrated based on the U.S. Basel III risk-weighted average framework.[255] Under the PCA framework, a bank is deemed ''adequately capitalized'' if it maintains common equity tier 1 capital of at least 4.5 percent of the bank's risk-weighted assets, and is deemed ''well capitalized'' if it maintains common equity tier 1 capital of at least 6.5 percent of the bank's risk-weighted assets.[256] Commenters recommended revising the final regulations to provide that a covered SD that elects the Bank-Based Capital Approach must maintain common equity tier 1 capital at a level that is not less than 4.5 percent of the SD's risk-weighted assets, and must maintain common equity tier 1 capital in excess of 6.5 percent of the SD's risk-weighted assets in computing the ''early warning capital requirement'' under proposed regulation 23.105(c)(2).[257] Another commenter suggested that the Commission adopt a risk-weighted asset ratio that is tiered based on the size and complexity of the covered SD's business (*e.g.,* a 4.5% common equity tier 1 requirement with the tier 2 capital being eligible for the remaining 3.5%).[258]

The Commission has considered the proposed requirement for a covered SD electing the Bank-Based Capital Approach to maintain common equity tier 1 capital equal to or in excess of 8% of the SD's risk-weighted assets, and has considered the comments that have been received. The Commission is adopting the requirement as a component of the final capital rule for covered SDs electing the Bank-Based Capital Approach, subject to the following modifications. The Commission is retaining the minimum requirement for a covered SD to maintain capital at a level equal to or in excess of 8% of the SD's risk-weighted assets. The Commission is modifying the final regulation, however, to require that at least 6.5% of the minimum 8% capital requirement must be common equity tier 1 capital, with the remaining 1.5% to be comprised of common equity tier 1 capital, additional tier 1 capital, or tier 2 capital, as defined by the Federal Reserve Board in 12 CFR 217.20. The Commission is further modifying the final rule to provide that any capital that is in the form of subordinated debt must meet the conditions adopted by the SEC for qualifying subordinated debt for SBSDs set forth in rule 18a–1d (17 CFR 240.18a–1d). In addition, a covered SD may use additional tier 1 and tier 2 capital (including qualifying subordinated debt) to meet the early warning capital requirement above the 6.5% of common equity tier 1 capital.

The Commission is adopting these modifications as it believes that it establishes an appropriate balance between ensuring that a covered SD maintains an appropriate level of permanent capital in the form of common equity tier 1 capital and permitting an SD to use other forms of capital formation, including qualifying subordinated debt. As noted below, the subordinated debt qualifications require the lender to subordinate their claims against the covered SD to the claims of all other creditors, which is comparable to the position of holders of common equity capital. The subordinated debt regulations further place restrictions on the ability of the SD to repay the subordinated debt if it would adversely impact the capital of the SD.[259] In addition, final regulation 23.104 imposes limitations on the withdrawal of equity from a covered SD by actions of its shareholders, including paying dividends and similar distributions, if such distributions would result in the SD holding less than 120% of its minimum capital requirement.[260] These additional regulatory requirements effectively ensure that the capital, including capital provided in the form of subordinated debt, is retained in the covered SD ensuring its safety and soundness.

The final rule is also consistent with the Commission's capital rules for FCMs, the SEC's rules for BDs and SBSDs, and the prudential regulators' rules for banks and bank holding companies, all of which recognize certain qualifying subordinated debt as capital.[261] The final regulations also impose identical terms and conditions on qualifying subordinated debt under the Bank-Based Capital Approach and the Net Liquid Assets Capital Approach as covered SDs electing either approach

[250] *Id.*

[251] *See, e.g.,* MS 3/3/2020 Letter; IIB/ISDA/SIFMA 3/3/2020 Letter.

[252] *Id.*

[253] *Id.*

[254] *See* MS 3/3/2020 Letter.

[255] *Id.*

[256] *See* 12 CFR 208.43(b) for the Federal Reserve Board's capital measures and capital levels that are used for determining the supervisory actions for insured depository institutions that are not adequately capitalized.

[257] *See* IIB/ISDA/SIFMA 3/3/2020 Letter. MS 3/3/2020 Letter at 8.

[258] *See* Shell 3/3/2020 Letter.

[259] *See, e.g.,* SEC rule 18a–1d(b)(7) (17 CFR 240.18a–1(b)(7)) which suspends a SBSD's obligation to make a scheduled payment on a subordinated loan agreement if, after giving effect to the payment obligation (and to any other payment obligations under other subordinated debt agreements that are scheduled to be paid on or before the payment date of the subordinated loan agreement in question), the SBSD's net capital would fall below 120 percent of the SBSD's minimum net capital or tentative net capital requirement, as applicable.

[260] *See* final Commission regulation § 23.104.

[261] *See, e.g.,* Commission regulation § 1.17(h) (17 CFR 1.17), SEC rules 15c3–1d and 18a–1d (17 CFR 240.15c3–1d and 17 CFR 240.18a–1d), and Federal Reserve Board rule 217.20 (12 CFR 217.20) for rules governing subordinated debt as capital for FCMs, BDS and SBDS, and banks and bank holding companies, respectively.

are subject to the subordinated debt provision of SEC rule 18a–1d.[262]

The SEC's qualification conditions in Rule 18a–1d require that the loan agreement must: (i) Be in writing and have a minimum term of at least one year; (ii) be a valid and binding obligation enforceable in accordance with its terms against the SD and the lender; and (iii) effectively subordinate any right of the lender to receive any payment with respect to the loan agreement to the prior payment in full of all claims of all present and future creditors of the covered SD arising out of any matter occurring prior to the date on which the related payment obligation matures, except for claims which are the subject of subordinated loan agreements that rank on the same priority as, or junior to, the claim of the lender under the subordinated loan agreement. Rule 18a–1d also contains conditions intended to ensure that the SBSD does not make payments on subordinated loans if such payments would reduce the SBSD's net capital below 120% of its minimum capital requirement. These terms and conditions effectively result in the subordinated debt having the characteristics of common equity as the issuances of the subordinated loan rank just above common equity holders in the event of the insolvency of the covered SD. Therefore, the Commission believes that it is appropriate to recognize subordinated debt that meets the conditions of SEC rule 18a–1d to qualify as tier 2 capital under the Commission's final regulation.

Calculation of Risk-Weighted Assets

As noted above, the Proposal required a covered SD electing the Bank-Based Capital Approach to compute its risk-weighted assets in accordance with the Federal Reserve Board's capital requirements contained in 12 CFR part 217. Covered SDs using the standardized approach were required to use the credit risk charges from the Federal Reserve Board's standardized approach under subpart D 12 CFR part 217. Covered SDs using internal capital models were required to use models that met the qualitative and quantitative requirements set forth in proposed regulation 23.102 and Appendix A to regulation 23.102. The qualitative and quantitative requirements set forth in regulation 23.102 and Appendix A were based on the Federal Reserve Board's qualitative and quantitative requirements for capital models in 12 CFR part 217. Federal Reserve Board model-based capital charges for credit risk and market risk are set forth in 12 CFR part 217 subparts E and F, respectively.

Commenters noted that the Federal Reserve's capital approach is currently undergoing significant transformation as it implements the revised Basel III framework adopted in 2017.[263] One commenter stated that the Federal Reserve Board's implementation of certain fundamental aspects of the Basel III framework, including approaches for credit, market, and operational risks remain pending, and further noted that the BCBS is also making further revisions to the credit valuation adjustment risk framework to further align it with other capital requirements.[264] Another commenter stated that there are significant ongoing efforts to revise specific credit risk and market risk methodologies, which will likely require at least two, and potentially several, years to reach finalization.[265] The commenters stated that it is essential that the Commission adopt a Bank-Based Capital Approach that provides covered SDs with certainty of application despite these and other future changes to the bank capital framework.[266] The commenters stated that given the ongoing revisions to the banking regulators' capital requirements, the Commission should revise its rules to incorporate the Federal Reserve Board's rules by reference instead of setting forth explicit capital model provisions and quantitative and qualitative capital requirements in Appendix A of regulation 23.102.

The commenters also specifically stated that given the current unsettled nature of the prudential regulators' requirements, covered SDs electing the Bank-Based Capital Approach that are approved to use internal market risk and credit risk models should be permitted to choose whether or not to apply the Federal Reserve Board's provisions for advanced approaches for Federal Reserve Board-regulated institutions.[267] The Commenter further stated that covered SDs should also be permitted to compute their credit risk-weighted assets using the current exposure method (''CEM''), the internal models method (''IMM''), or SA–CCR with certain modifications.[268]

The Commission has considered the Proposal and the comments requesting flexibility in adopting the Bank-Based Capital Approach. The Commission understands that some critical elements of Basel III are still being revised and adoption by the Federal Reserve Board is an ongoing process that may span several years, which makes incorporating specific market risk and credit risk components of the Federal Reserve Board's rules into Appendix A of regulation 23.102 difficult. In this process the Federal Reserve Board also may allow for alternative calculation methods, some transitionally and some permanently, which further makes specific incorporation of bank capital requirements into Appendix A challenging.

The Commission does not want to introduce conflicting deadlines, contradictory guidance, or cause firms to incur duplicative model implementation costs during this implementation process. Thus, the Commission is modifying the final rules to incorporate the Federal Reserve Board's market risk and credits requirements by referencing the applicable sections of the Federal Reserve Board's regulations in 12 CFR part 217 instead of incorporating specific market risk and credit risk requirements contained in 12 CFR part 217 into Appendix A of regulation 23.102. This modification of the rule text will provide legal certainty to the covered SDs that future changes to the relevant market risk and credit risk requirements in 12 CFR part 217 will be appropriately incorporated into the Commission's capital requirements without further Commission action, such as a rulemaking. The Commission will retain Appendix A of regulation 23.102 as it will be applicable to covered SDs electing the Net Liquid Assets Capital Approach or the Tangible Net Worth Capital Approach to compute market risk and credit risk capital charges.

The Commission is also modifying the final rule to provide that where the Federal Reserve Board's rules allow for alternative calculation methods, the Commission's final rule also allows for the same alternatives. For example, commenters noted that subpart D of 12 CFR part 217 currently provides that bank holding companies may compute standardized credit risk charges for OTC

[262] A covered SD that elects the Net Liquid Assets Capital Approach is permitted under SEC rule 18a–1 (17 CFR 240.18a–1) to recognize subordinated debt that meets the qualification standards in SEC rule 18a–1d (17 CFR 240.18a–1d) in meeting its minimum capital requirements.

[263] IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter.

[264] IIB/ISDA/SIFMA 3/3/2020 Letter.

[265] MS 3/3/2020 Letter.

[266] *See* IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter.

[267] *Id.*

[268] *Id.* The CEM, IMM, and SA–CCR approaches for computing credit risk are set forth in the Federal Reserve Board's capital rules for bank holding companies, 12 CFR part 217.

derivative transactions using either the CEM or SA–CCR calculation methods. The Commission's final rule permits covered SDs to elect to use either method, recognizing that both CEM and SA–CCR are part of the BCBS international capital framework and have been adopted by the prudential regulators.

Furthermore, the choice of calculation method elected by a covered SD does not have to be the same as the calculation method the covered SD's banking parent or affiliate elects to use or is required to use under the Federal Reserve Board's rules. For example, a covered SD may elect to use the CEM method notwithstanding that its banking affiliate uses the SA–CCR method. However, a covered SD must address these differences in its model application, particularly if it relies upon or uses model documentation provided by a banking affiliate to prudential regulators as part of a model approval or oversight process by the prudential regulators. The covered SD also must inform the Commission or NFA if another regulator has denied its or its affiliate's use of an alternative calculation.

In choosing an alternative calculation the non-bank SD must adopt the entirety of the alternative. The Commission understands that some alternatives may include charges or deductions for risks not otherwise part of market and credit risk models described in this rule (*e.g.,* operational risk), however, the Commission is not prepared to accept partial application of alternative calculation methods or to compensate this inclusion by reducing other charges calculated per this rule outside of the market and credit risk models.

The Commission is implementing the above revisions to the final rules by modifying regulation 23.100 to include a definition of the term ''BHC equivalent risk-weighted assets'' that defines the method that a covered SD that elects the Bank-Based Capital Approach uses to compute market risk and credit risk using either models or standardized charges in computing its regulatory capital. Under the BHC equivalent risk-weighted assets definition, a covered SD that is not approved to use models would compute market risk in accordance with the standardized charges in Commission regulation 1.17 and SEC rule 18a–1, and would compute credit risk charges in accordance with the standardized charges using the bank holding company regulations in subpart D of 12 CFR part 217. Covered SDs approved to use models would compute market risk in accordance with the bank holding company requirements set forth in subpart F of 12 CFR part 217, and would compute credit risk charges in accordance with the bank holding company requirements in subpart E of 12 CFR part 217. The Commission also is modifying regulation 23.103 to remove the calculation of market and credit risk under the Bank-Based Capital Approach as it is now contained in revised regulation 23.100, and modifying definitions in regulation 23.100 to define the terms ''advanced approaches Board-regulated institution'' and ''OTC derivative contract'' to effect the above revisions to the rule text.

Commenters also requested that the Commission modify the final rules by providing an adjustment to the Federal Reserve Board's SA–CCR credit risk calculation when the SD applies SA–CCR in computing its capital.[269] One commenter stated that the Federal Reserve Board's SA–CCR rules set a ''supervisory factor'' for energy derivatives of between 18%, for oil and natural gas transactions, and 40%, for electricity transactions.[270] The commenter represented that when adopting the calibrations, the Federal Reserve Board calibrated the supervisory factors to spot prices rather than forward prices. The commenter stated that SDs active in the oil, natural gas, and electricity markets are heavily concentrated in forward markets, which have very different volatilities and credit risk profiles than those of spot markets.

The Commission is not modifying the final regulations to reset the supervisory factors adopted by the Federal Reserve Board for derivative transactions. This is an issue that the Commission will assess during the implementation of the rule.

Minimum Capital Requirement Based on Risk Margin Amount Under Bank-Based Capital Approach

The third criterion comprising the minimum capital requirement under the proposed Bank-Based Capital Approach required a covered SD to maintain common equity tier 1 capital equal to or in excess of 8% of the sum of: (i) The covered SD's uncleared swap margin requirements for uncleared swaps transactions; (ii) the initial margin that would be required for each uncleared security-based swap transaction pursuant to SEC's proposed Rule 18a–3(c)(1)(i)(B), without regard for any amounts of security-based swaps that may be exempted or excluded under the SEC's proposal; (iii) the risk margin required on the covered SD's cleared futures, foreign futures, and swaps positions; and (iv) the amount of initial margin required by a clearing organization that clears the covered SD's proprietary security-based swaps.[271]

This requirement was intended to ensure that a covered SD electing the Bank-Based Capital Approach maintains a minimum level of capital that is comprehensive with respect to all of the SD's operations and activities. The Commission believed that the proposed 8% risk margin amount was an appropriate approach as the minimum capital requirement was correlated with the ''risk'' of the covered SD's futures, foreign futures, swaps, and security-based swaps positions as measured by the margin required on the positions. Specifically, a covered SD's minimum capital requirement would increase or decrease in proportion to the number, size, complexity and all risks inherent in the SD's customer, client, and proprietary derivatives business.[272]

Commenters generally raised the same concerns regarding the 8% risk margin amount as discussed in detail in section II.C.2.a. above for the covered SDs electing the Net Liquid Assets Capital Approach. Specifically, commenters stated the 8% risk margin amount is too high a percentage and includes too many types of derivatives products. Commenters also stated that the risk margin amount is not a good measure of the risk of the positions to the covered SD.

One commenter also stated that the Commission should not adopt the 8% risk margin amount for covered SDs electing the Bank-Based Capital Approach. One commenter stated that prudential regulators do not have a minimum capital requirement based on a bank SD's risk margin amount.[273]

One commenter stated that if the Commission adopted the risk margin amount, the Commission should modify the final regulation to permit covered SDs electing the Bank-Based Capital Approach to include additional tier 1 capital and tier 2 capital in addition to common equity tier 1 capital in meeting the risk margin amount.[274]

The Commission has considered the proposed risk margin amount requirement for covered SDs electing the Bank-Based Capital Approach and has considered the comments received, and is adopting the requirement with

[269] *See* IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter.

[270] *See* MS 3/3/2020 Letter.

[271] *See 2016 Capital Proposal,* 81 FR 91252 at 91258–59.

[272] *See* 2016 Capital Proposal, 81 FR 91252 at 91258.

[273] IIB/ISDA/SIFMA 3/3/2020 Letter.

[274] *Id.*

several modifications. The final regulation will require a covered SD electing the Bank-Based Capital Approach to maintain a combination of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital in an amount equal to or greater than 8% of the covered SD's uncleared swap margin. The term ''uncleared swap margin'' is defined in regulation 23.100, and means the amount of initial margin computed in accordance with the Commission's uncleared margin rules (regulation 23.154; 17 CFR 23.154) that a SD would be required to collect from each counterparty for each outstanding swap position of the SD, including all swap positions that are excluded or exempt from the uncleared margin rules under regulation 23.150 (17 CFR 23.150), legacy swap positions, exempt foreign exchange swaps or foreign exchange forwards.

As discussed in section II.C.2.a. above, the Commission believes that a minimum capital requirement based on initial margin is an appropriate component of a covered SD's minimum capital requirement. The intent of the risk margin amount requirement was to ensure that a covered SD has a sufficient level of capital to meet its obligations as a SD, and to cover potential operational risk, legal risk, and other risks, and not just the risks of its trading portfolio. The Commission believes that the risk margin amount is a minimum capital requirement that provides a floor based on a measure of the risk of the swap positions, the volume of positions, the number of counterparties and the complexity of operations of the covered SD. The risk margin amount is based on the initial margin that is computed on the proprietary positions held by the covered SD. Initial margin reflects the degree of risk associated with the positions, with lower risk positions having lower initial margin requirements and higher risk positions having higher initial margin requirements. Therefore, the Commission believes that because the risk margin amount calculation is directly related to the volume, size, complexity and risk of the covered SD's uncleared swap positions, it serves as a good proxy for inherent risk in the SD's positions, operations, and other risks, and is used to calibrate the amount of the minimum capital required of a covered SD.

The Commission, however, is not modifying the regulation by lowering the risk margin amount multiplier from 8% to 2% or to a different percentage. As discussed in section II.C.2.a. above, the minimum capital requirement based upon the risk margin amount is applied in a different manner in the Bank-Based Capital Approach as compared with the Net Liquid Assets Capital Approach. Under the Bank-Based Capital Approach, a covered SD is required to maintain balance sheet equity in excess of 8% of the risk margin on uncleared swap positions. This approach is a less conservative approach than the Net Liquid Assets Capital Approach, which requires a covered SD to maintain current, liquid assets, less market risk and credit risk capital charges on proprietary positions including swaps and security-based swaps, in excess of 2% of the risk margin amount on uncleared swaps. Due to the different approaches, the Commission believes that it is appropriate to set the risk margin amount multiplier at 8% under the Bank-Based Capital Approach to help ensure that the minimum capital requirement ensures the safety and soundness of the covered SD.

The Commission also believes that many of the commenters' concerns are mitigated by the modifications that the Commission is making to the final regulation. Consistent with its approach for FCM–SDs and Net Liquid Assets Capital Approach, the Commission is modifying the final regulation to exclude cleared and uncleared security-based swap positions, and proprietary futures, foreign futures, and cleared swap positions from the risk margin amount calculation.

In addition, as noted above, the Commission will monitor the risk margin amount after the compliance date of the regulations to assess whether adjustments are necessary to the regulations to ensure the safety and soundness of the covered SD. The Commission will use the information that it obtains from financial reports submitted by covered SDs and from the Commission's and NFA's ongoing oversight of the SDs to continually monitor and evaluate the adequacy of the minimum capital requirements.

Minimum Capital Requirement of a Registered Futures Association Under Bank-Based Capital Approach

The fourth criterion of the proposed minimum capital requirements required a covered SD to maintain the minimum level of capital required by an RFA of which the covered SD is a member. As noted above, the proposed minimum capital requirement based on membership requirements of an RFA is consistent with current FCM capital requirements under regulation 1.17, and reflects Commission regulations that require each covered SD to be a member of an RFA.[275] As further noted above, the Proposal is also consistent with section 17(p)(2) of the CEA, which provides, in relevant part, that an RFA must adopt rules establishing minimum capital and other financial requirements applicable to the RFA's members for which such requirements are imposed by the Commission.[276] The Proposal recognizes that the NFA, as the only RFA, would be required by section 17 of the CEA to adopt capital rules for covered SDs once the Commission imposes capital requirements on covered SDs, and would incorporate the NFA minimum capital requirements into the Commission's regulation.

The Commission received general comments regarding the proposed requirement that a covered SD must meet the capital rules adopted by the NFA. Several commenters stated that any future NFA capital rules for covered SDs should be subject to public comment.[277] Another commenter stated that the Commission's efforts to obtain public input pursuant to the *2016 Capital Proposal* and the *2019 Capital Reopening* may be nullified if the NFA adopts capital rules that are different from the Commission's final rules, and requested that the Commission require NFA to adopt capital rules that closely mirror the Commission's final capital rules, or, at the least, require NFA to conduct a rigorous notice and comment process prior to finalizing its capital rules.[278]

As discussed in section II.C.2.a. above, the Commission believes that commenters' concerns are largely mitigated by the existing statutory and Commission regulatory requirements as well as the internal governance structure of NFA, which was established to comply with these requirements. Section 17(j) of the CEA requires NFA to file with the Commission any change in or addition to its rules. Any such change or addition is effective within 10 days of submission unless NFA requests, or the Commission notifies NFA of its intent to subject the filing to, a review and approval process.[279] Further, NFA's governance structure ensures that SDs are represented in the

[275] *See* Commission regulations §§ 1.17(a)(1)(i)(C) and 170.16 (17 CFR 1.17(a)(1)(i)(C) and 170.16).

[276] *See* section 17(p)(2) of the CEA, which requires RFAs to adopt rules establishing minimum capital and other financial requirements applicable to its members for which such requirements are imposed by the Commission, provided that such requirements may not be less stringent than the requirements imposed by the CEA or by Commission regulations.

[277] ED&F Man/INTL FCStone 3/3/2020 Letter; Shell 3/2/2020 Letter.

[278] *See* Shell 3/2/2020 Letter.

[279] *See* section 17(j) of the CEA (7 U.S.C. 21(j)).

potential adoption of NFA rules, including capital and financial reporting rules, that may impact them. As noted in section II.C.2.a. above, section 17(b)(5) of the CEA and regulation 170.3 require generally that the rules of an RFA assure fair representation of its members in the adoption of any rule, in the selection of its officers, directors, and in other aspects of its administration.[280] Therefore, the Commission is adopting this component of the minimum capital requirements of the Bank-Based Capital Approach as proposed.

Final Minimum Capital Requirement for Covered SDs Electing the Bank-Based Capital Approach

As noted above, the Commission proposed that a covered SD electing the Bank-Based Capital Approach must maintain common equity tier 1 capital equal to or greater than the greatest of (i) $20 million, (ii) 8% of the covered SD's risk margin amount, (iii) 8% of the covered SD's risk-weighted assets, or (iv) the amount of capital required by an RFA. Also as noted above, the Commission is modifying the final regulation to permit a covered SD to hold common equity tier 1, additional tier 1, and tier 2 capital to meet the 8% of the risk margin amount and to meet the 8% of risk weighted assets. Therefore, the Commission is modifying the final minimum capital requirement to require a covered SD to satisfy each of the four minimum capital requirements. This modification is intended to align the final rule with the original proposal, which required a covered SD to hold a sufficient amount of common equity tier 1 capital to meet each of the four minimum capital requirements. Under the final rule, the covered swap dealer will continue to have to meet each of the four criteria, but may use capital other than common equity tier 1 capital to meet such requirements consistent with the rule.

4. Capital Requirement for Covered SDs Electing the Tangible Net Worth Capital Approach

The Commission proposed to permit covered SDs that are ''predominantly engaged in non-financial activities,'' as defined below, to elect a capital requirement based on the SD's tangible net worth (the ''Tangible Net Worth Capital Approach'').[281] The term ''tangible net worth'' was proposed to be defined as the net worth of a covered SD, as determined in accordance with U.S. GAAP, excluding goodwill and other intangible assets.[282] The *2016 Capital Proposal* further required a covered SD, in computing its tangible net worth, to include all liabilities or obligations of a subsidiary or affiliate that the covered SD guaranteed, endorsed, or assumed either directly or indirectly to ensure that the tangible net worth of the covered SD reflects the full extent of the covered SD's potential financial obligations.[283] The proposed definition further provided that in determining net worth, all long and short positions in swaps, security-based swaps, and related positions must be marked to their respective market values to ensure that the tangible net worth reflected the current market value of the covered SD's swap and security-based swap positions, including any accrued losses on such positions.[284]

The Commission further proposed that a covered SD eligible for the Tangible Net Worth Capital Approach must maintain tangible net worth in an amount equal to or in excess of the greatest of:

(1) $20 million plus the amount of the covered SD's market risk exposure requirement and credit risk exposure requirement associated with the covered SD's swap and related hedge positions that are part of the covered SD's swap dealing activities;

(2) 8% of the sum of:

(a) The amount of uncleared swap margin (as that term was defined in regulation 23.100) for each uncleared swap position open on the books of the covered SD, computed on a counterparty by counterparty basis pursuant to regulation 23.154 without regard to any initial margin exemptions or thresholds that the Commission's margin rules may provide;

(b) the amount of initial margin that would be required for each uncleared security-based swap position open on the books of the covered SD, computed on a counterparty by counterparty basis pursuant to 17 CFR 240.18a–3(c)(1)(i)(B) without regard to any initial margin exemptions or exclusions that the rules of the SEC may provide to such security-based swap positions; and

(c) the amount of initial margin required by clearing organizations for cleared proprietary futures, foreign futures, swaps and security-based swaps positions open on the books of the covered SD; or

(3) The amount of net capital required by the registered futures association of which the covered SD is a member.

The *2016 Capital Proposal* further provided that a covered SD could use internal models to compute market risk and credit risk capital charges provided that the models were approved by the Commission or an RFA.[285] A covered SD that did not obtain Commission or RFA approval to use internal models was required to compute standardized market risk and credit risk charges for its proprietary swaps, security-based swaps, or other financial positions in accordance with the FCM standardized market risk and credit risk capital charges set forth under regulation 1.17, as proposed to be amended.[286]

The Commission also proposed that to be eligible to use the Tangible Net Worth Capital Approach, a covered SD's financial activities must be de minimis in relation to its overall financial and non-financial activities. Specifically, the *2016 Capital Proposal* provided that the covered SD must be ''predominantly engaged in non-financial activities.'' The term ''predominantly engaged in non-financial activities'' was proposed to be defined by referencing the definition of the term ''financial activities'' under the Federal Reserve Board's regulations establishing criteria for determining if a nonbank financial company is ''predominantly engaged in financial activities'' and therefore, subject to Federal Reserve Board oversight.[287]

Title I of the Dodd-Frank Act established the Financial Stability Oversight Council (''FSOC''), which, among other authorities and duties, may subject a nonbank financial company to supervision by the Federal Reserve Board and consolidated prudential standards if the FSOC determines that material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the company's activities, could pose a threat to the financial stability of the U.S. Title I of the Dodd-Frank Act defines a ''nonbank financial company'' to include both a U.S. nonbank financial

[280] 7 U.S.C. 21(b)(5) and Commission regulation § 170.3 (17 CFR 1.17). *See also,* section 17(b)(11) of the CEA (7 U.S.C. 21(b)(11)) which requires that an RFA provide for meaningful representation on the governing board of such association of a diversity of membership interests and provides that no less than 20 percent of the regular voting members of[the board be comprised of qualified nonmembers of or persons not regulated by such association.

[281] *See* proposed Commission regulation § 23.101(a)(2)(ii), *2016 Capital Proposal,* 81 FR 91252 at 91311.

[282] *See* proposed Commission regulation § 23.100, *2016 Capital Proposal,* 81 FR 91252 at 91309–10.

[283] *See* proposed definition of ''tangible net worth'' in Commission regulation § 23.100, *2016 Capital Proposal,* 81 FR 91252 at 91310.

[284] *Id.*

[285] *See* proposed Commission regulation § 23.102(a), *2016 Capital Proposal,* 81 FR 91252 at 91311.

[286] *See* section II.B.3.a above for a discussion of the standardized market risk and credit risk capital charges for FCMs and FCM–SDs.

[287] *See* 12 CFR 242.3.

company and foreign nonbank financial company that, among other things, are ''predominantly engaged in financial activities.'' For purposes of Title 1 of the Dodd-Frank Act, a company is considered to be ''predominantly engaged'' in financial activities if either (i) the annual gross revenue derived by the company and all of its subsidiaries from financial activities, as well as from the ownership or control of an insured depository institution, represented 85 percent or more of the consolidated annual gross revenues of the company; or (ii) the consolidated assets of the company and all of its subsidiaries related to financial activities, as well as related to the ownership or control of an insured depository institution, represent 85 percent or more of the consolidated assets of the company.

The Commission proposed to adopt this Federal Reserve Board standard to distinguish covered SDs that are predominantly engaged in financial activities from covered SDs that are predominantly engaged in non-financial activities. The Commission, however, modified the test for purposes of the eligibility of the Tangible Net Worth Capital Approach to provide that a covered SD would be considered ''predominantly engaged in non-financial activities'' if: (i) The consolidated annual gross financial revenues of the covered SD in either of its two most recently completed fiscal years represented less than 15 percent of the consolidated gross revenue in that fiscal year (''15% Revenue Test''); and (ii) the consolidated total financial assets of the covered SD at the end of its two most recently completed fiscal years represented less than 15 percent of the consolidated total assets as of the end of the fiscal year (''15% Asset Test'').

The *2016 Capital Proposal* also proposed to define the financial activities covered by the 15% Revenue Test and 15% Asset Test by reference to the listed financial activities set forth in Appendix A of 12 CFR part 242, which covers an extensive range of financial activities and services.[288] The financial activities set forth in Appendix A of 12 CFR part 242 include, among other things: (i) Lending, exchanging, transferring, investing for others, or safeguarding money or securities; (ii) insuring, guaranteeing, or indemnifying against loss or harm, damage or death in any state; (iii) providing financial, investment, or economic advisory services; (iv) issuing or selling interests in a pool; (v) underwriting, dealing in, or making a market in securities; and (vi) engaging as principal in the investment and trading of certain financial instruments. The Commission, however, proposed to explicitly provide that accounts receivable from non-financial activities, which may meet the definition of financial activities under 12 CFR part 242, may be excluded by the covered SD from the computation of its financial activities.[289] The Commission stated that the purpose of providing this exclusion was to prevent the covered SD's non-financial activities from becoming part of the computation of the covered SD's financial activities merely on the basis that the non-financial activities result in the covered SD recognizing receivables.

The Commission proposed the Tangible Net Worth Capital Approach in recognition that certain entities that engage predominantly in non-financial activities may currently or in the future meet the statutory and regulatory definition of the term ''swap dealer'' and, therefore, will be required to register as such with the Commission.[290] The Commission stated that while these entities may meet the definition of a ''swap dealer'' they may also be primarily commercial entities engaged predominantly in non-financial activities.[291] The Commission further recognized that covered SDs that are primarily engaged in commercial activities differ from financial entities in various ways, including the composition of their respective balance sheets (*e.g.,* the types of assets they hold), the types of transactions they enter into, and the types of market participants and swap counterparties that they deal with. Because of these differences, the Commission stated that application of the Bank-Based Capital Approach or the Net Liquid Assets Capital Approach could result in inappropriate capital requirements that would not be proportionate to the risk taken by such covered SDs, and proposed to permit these covered SDs to have an option of electing the Tangible Net Worth Capital Approach.[292] The Commission, however, modified the standards established by the Federal Reserve Board as it believed that covered SDs that engage in anything more than a de minimis level of financial activities must be subject to either the Net Liquid Assets Capital Approach or the Bank-Based Capital Approach in order for the Commission's regulations to achieve the Congressional mandate that the SD capital requirements ensure the safety and soundness of the SD.

The Commission received comments generally supporting the proposed Tangible Net Worth Capital Approach, but also stating that the qualifying criteria were overly narrow and entity specific.[293] Commenters generally noted that a parent entity that is ''predominantly engaged in non-financial activities'' as defined by the regulation would not be permitted in any practical way to establish a covered SD subsidiary that would qualify to use the Tangible Net Worth Capital Approach as the swaps activity of the SD subsidiary would be considered financial activities.[294] Another commenter stated that commercial firms often establish subsidiaries to perform centralized risk management operations for the full commercial enterprise, including entering into swap transactions, and that such subsidiaries should have the ability to elect a Tangible Net Worth Capital Approach.[295] Commenters further noted that the proposed Tangible Net Worth Capital Approach would discriminate against corporate entities that are predominantly engaged in non-financial activities but elect to maintain their swap dealing activities in separate legal entities.[296] Several commenters suggested that the Commission should address these concerns by modifying the Proposal to permit a covered SD to elect the Tangible Net Worth Capital Approach if the SD or its parent meets the qualifying criteria of ''predominantly engaged in non-financial activities.''[297]

In reopening the comment period in 2019, the Commission requested further

[288] *See* definition of ''predominantly engaged in non-financial activities'' in proposed Commission regulation § 23.100, *2016 Capital Proposal,* 81 FR 91252 at 91309.

[289] *Id.*

[290] The term ''swap dealer'' is defined by section 1a(49) of the CEA and Commission regulation § 1.3 (17 CFR 1.3). Regulation 1.3 provides that an entity may apply to limit its designation as an SD to specified categories of swaps or specified activities in connection with swaps.

[291] *See 2016 Capital Proposal,* 81 FR 91252 at 91255.

[292] Furthermore, as an SD, the firm is subject to the Commission's final swaps margin requirements.

[293] *See, e.g.,* Letter from Phillip Lookadoo, and Jeremy Weinstein, International Energy Credit Association (May 15, 2017) (IECA 5/15/2017 Letter); Letter from Scott Earnest, Shell Trading Risk Management LLC (May 15, 2017) (Shell 5/15/2017 Letter); Letter from David McIndoe, Commercial Energy Working Group (May 15, 2017) (CEWG 5/15/2017 Letter); and Letter from Michael P. LeSage, Cargill Risk Management, a unit of Cargill, Inc. (May 15, 2017) (Cargill 5/15/2017 Letter).

[294] *See* IECA 5/15/2017 Letter; Shell 5/15/2017 Letter; CEWG 5/15/2017 Letter.

[295] *See* Letter from National Corn Growers Association and National Gas Supply Association, (May 15, 2017) (NCGA/NGSA 5/15/2017 Letter).

[296] *See, e.g.,* Shell 5/15/2017 Letter.

[297] *See* IECA 5/15/2017 Letter; CEWG 5/15/2017 Letter; NCGA/NGSA 5/15/2017 Letter.

comment on the Tangible Net Worth Capital Approach based upon issues raised in the *2016 Capital Proposal.*[298] The Commission requested comment on whether a covered SD that does not meet the ''predominantly engaged in non-financial activities'' standard should be eligible to use the Tangible Net Worth Capital Approach if its parent entity, or the ultimate parent of its consolidated ownership group, satisfies the qualifying standards.[299] The Commission further requested comment on whether a covered SD that relies on a parent entity to satisfy the ''predominantly engaged in non-financial activities'' criteria should be required to obtain parent guarantees, or some other form of financial support, for its swaps obligations.[300]

The Commission also requested comment in the *2019 Capital Reopening* on whether a covered SD that was primarily engaged in commodity swaps should be permitted to use the Tangible Net Worth Capital Approach notwithstanding that its parent entity does not meet the ''predominantly engaged in non-financial activities'' requirements (*i.e.,* the parent is primarily engaged in financial activities).[301] Finally, the Commission requested comment regarding modifications that commenters believed the Commission should consider to the 15% Asset Test and/or the 15% Revenue Test, and requested that commenters explain why such modifications were necessary to achieve the purpose and objective of the Tangible Net Worth Capital Approach.[302]

The Commission received comments in response to the *2019 Capital Reopening,* and the commenters continued to generally support a Tangible Net Worth Capital Approach.[303] Several commenters, however, continued to express the concern that the eligibility criteria, as expressed in the 15% Asset Test and the 15% Revenue Test, are not broad enough and should be expanded to provide more covered SDs with the ability to elect the Tangible Net Worth Capital Approach.[304] One commenter stated that the Commission should revise the qualifications to permit more covered SDs to elect the Tangible Net Worth Capital Approach, which the commenter viewed as a more suitable approach than the Bank-Based Capital Approach and the Net Liquid Assets Capital Approach.[305]

Other commenters stated that the Commission should revise the eligibility criteria for the Tangible Net Worth Capital Approach to provide that a covered SD may use such capital approach if it is part of a holding company or corporate structure that is itself ''predominantly engaged in non-financial activities'' and satisfies the 15% Asset Test and the 15% Revenue Test.[306] Several of these commenters noted that parent entities that are non-financial entities often ''ring-fence'' financial activities (including swap dealing activities and treasury functions) in affiliates that are stand-alone legal entities, and that the Commission's Proposal effectively prevents such stand-alone entities from being eligible for the Tangible Net Worth Capital Approach as they are not ''predominantly engaged in non-financial activities.'' [307] A commenter stated that centralizing financial functions into a single subsidiary provides efficiencies for some holding companies that are primarily involved in non-financial businesses, such as energy production or agriculture, and that the Commission's rules should be corporate-structure neutral.[308] An additional commenter stated that the ultimate parent level is the proper level at which to determine whether a corporate enterprise, and its subsidiaries, is predominantly engaged in non-financial activity.[309] Another commenter stated that a covered SD that otherwise qualifies for and elects the Tangible Net Worth Capital Approach should not be required to obtain a parent guarantee for obligations arising from its swaps activities.[310]

The Commission also received comments that the eligibility criteria for the Tangible Net Worth Capital Approach should be modified to permit a covered SD to use such approach if the SD's swap dealing activity is focused on agricultural and exempt swap transactions (a ''commodity-focused covered SD''), even if the covered SD is part of a financial holding company or a corporate parent that provides general financial services.[311] Two entities submitted a joint comment stating that the Commission's capital rules should recognize unique issues of small, commodity-focused covered SDs by expanding the eligibility criteria for the Tangible Net Worth Capital Approach to include smaller covered SDs with portfolios predominantly centered around counterparties that qualify for the hedging end user exception under section 2(h)(7) of the CEA.[312] The joint comment stated that smaller commodity-focused covered SDs do not present the type of interconnectedness and systemic risk to the broader financial markets in comparison to other covered SDs, in part due to (i) relatively lower trading volumes (*i.e.,* market impact); and (ii) the non-financial and hedging nature of their customer base.[313] The joint commenters further stated that a significant percentage of the customer base and trading activities of smaller commodity-focused covered SDs may qualify for the hedging end user exception under section 2(h)(7) of the CEA, entering into swap transactions for the purpose of hedging physical commodity risk. The commenters claim that as a result of the end user exception from clearing and margin, smaller commodity-focused covered SDs may not collateralize these relationships fully or the extent they would otherwise be required when dealing with financial entities or financial end users, and that they would be required to internalize capital charges for all uncollateralized exposures, placing burdensome costs on these SDs, their market presence, and ultimately commercial end user customers.[314] The commenters suggest that the Commission should modify the final rule by adopting an additional qualifying test for smaller commodity-

[298] *See 2019 Capital Reopening,* 84 FR 69664 at 69674–75.

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *See, e.g.,* IIB/SIFMA/ISDA 3/3/2020 Letter; MS 3/3/2020 Letter; CEWG 3/3/2020 Letter; Letter from Jennifer Fordham, National Corn Growers Association/Natural Gas Supply Association (March 3, 2020) (NCGA/NGSA 3/3/2020 Letter); ED&F Man/INTL FCStone 3/3/2020 Letter; and Shell 3/3/2020 Letter.

[304] *See, e.g.,* Shell 3/3/2020 Letter; CEWG 3/3/2020 Letter; MS 3/3/2020 Letter; IIB/SIFMA/ISDA 3/3/2020 Letter; NCGA/NGSA 3/3/2020 Letter.

[305] *See* NCGA/NGSA 3/3/2020 Letter. The NCGA/NGSA suggested that the Commission base the eligibility of the Tangible Net Worth Capital Approach based on the definition of the term ''financial entity'' contained in section 2(h)(7)(C)(i)(VIII) of the CEA (7 U.S.C. 2(h)(7)(C)(i)(VIII)).

[306] *See* Shell 3/3/2020 Letter; CEWG 3/3/2020 Letter; NCGA/NGSA 3/3/2020 Letter.

[307] *See* Shell 5/15/2017 Letter; NCGA/NGSA 3/3/2020 Letter.

[308] *See* NCGA/NGSA 3/3/2020 Letter.

[309] *See* CEWG 3/3/2020 Letter.

[310] *See* Shell 3/3/2020 Letter.

[311] *See* ED&F Man/INTL FCStone 3/3/2020 Letter; MS 3/3/2020 Letter; CEWG 3/3/2020 Letter.

[312] *See* ED&F Man/INTL FCStone 3/3/2020 Letter.

[313] *Id.* To demonstrate the nature of their customer base as commercial end users, and the relative size of their trading activities, the two commenters represent that as of March 3, 2020, the two firms have not come into scope for complying with the Commission's margin requirement for uncleared swap transactions.

[314] *Id.*

focused covered SDs with portfolios predominantly centered on counterparties that are commercial end users.[315]

One commenter stated that it agreed with comments filed in response to the *2016 Capital Proposal,* which supported an expansion of the eligibility for the Tangible Net Worth Capital Approach to covered SDs that provide access to physical hedging markets.[316] Commenters also suggested that the Commission should modify the ''predominantly engaged in non-financial activities'' criteria by, for instance, providing that covered SDs whose swaps notional amounts are at least 85 percent concentrated in commodity reference assets (*e.g.,* agricultural and exempt commodities) are eligible for the Tangible Net Worth Capital Approach.[317]

Commenters also suggest modifications to the 15% Assets Test and 15% Revenue Test. One commenter stated the respective tests should consider the assets and revenue derived from trading and investing in physical commodities to be non-financial in nature.[318] This commenter further suggested that all hedges of commercial risk should be considered non-financial in nature as the activity is more indicative of an entity being a commercial end user rather than an entity engaged in activity that is financial.[319] Another commenter stated that the Commission should exclude financial hedges of physical commodity, interest rate, or other corporate risks from being considered ''financial activities'' for purposes of the 15% Assets Test and the 15% Revenue Test.[320] This commenter asserted that the use of financial derivatives to manage commercial risk is common for non-financial entities and is not indicative of an entity being engaged in financial activity.[321] The commenter further stated that the Commission should consider assets and revenue derived from trading and investing in physical commodities to be non-financial in nature as including such activity as ''financial in nature'' under the Federal Reserve Board's definition of that term, was not because such activity is financial, but because certain banks need the ability to transact in physical commodity markets to support their financial derivatives activity.[322]

The Commission has considered the comments received on the proposed Tangible Net Worth Capital Approach and is adopting the regulations as proposed, subject to the following modifications. The Commission is modifying the definition of the term ''predominantly engaged in non-financial activities'' in regulation 23.100 to effectively extend the eligibility of the Tangible Net Worth Capital Approach to covered SDs that are subsidiaries of parent entities that are commercial enterprises. Specifically, the definition in regulation 23.100 is modified to provide that a swap dealer is predominantly engaged in non-financial activities if: (1) The swap dealer's consolidated annual gross financial revenues, or if the swap dealer is a wholly owned subsidiary, then the swap dealer's consolidated parent's annual gross financial revenues, in either of its two most recently completed fiscal years represents less than 15 percent of the swap dealer's consolidated gross revenue in that fiscal year, and (2) the consolidated total financial assets of the swap dealer, or if the swap dealer is wholly owned subsidiary, the consolidated total financial assets of the swap dealer's ultimate parent, at the end of its two most recently completed fiscal years represents less than 15 percent of the swap dealer's consolidated total assets as of the end of the fiscal year. The modifications to the definition of the term ''predominantly engaged in non-financial activities'' will permit a covered SD that either directly satisfies the 15% Asset Test and the 15% Revenue Test, or is a subsidiary of an ultimate parent entity that satisfies the 15% Asset Test and the 15% Revenue Test, to elect the Tangible Net Worth Capital Approach.

The Commission is adopting this modification as it recognizes that certain corporate entities that are predominantly engaged in nonfinancial activities establish separate legal entities to operate as financial affiliates to act on behalf of itself and the other affiliates of the corporate enterprise. The Commission believes that by allowing the ultimate consolidated parent entity to conduct the test it provides a better indication as to whether the overall entity is commercial in nature or financial in nature, and whether the covered SD should be viewed as a commercial SD or financial SD. The Commission does not believe that covered SDs that are separately established subsidiaries of commercial entities should be precluded from electing the Tangible Net Worth Capital Approach as it was not the intent of the Proposal to prohibit a commercial enterprise from establishing financial subsidiaries that otherwise meet the definition of a swap dealer due to their support of the activities of their parent entity, affiliates, and their respective commercial customers from electing a Tangible Net Worth Capital Approach.

The Commission is not modifying the final rule to require a covered SD that is eligible to elect the Tangible Net Worth Capital Approach as a result of its parent satisfying the ''predominantly engaged in non-financial activities'' standard to obtain any specific financial support or guarantees from its parent. The test to determine whether a SD can elect the Tangible Net Worth Capital Approach at the ultimate parent level is only to determine whether the consolidated entity is commercial in nature; however, the final Tangible Net Worth Capital Approach requires the covered SD to maintain its own regulatory capital in the form of tangible net worth equal to or greater than $20 million plus the amount of market risk charges and credit risk charges associated with the covered SD's swaps and related hedge positions that are part of the its swap dealing activities. In addition, the covered SD is required to reflect its positions in swaps, security-based swaps, and related positions at fair market value, which ensures that all market-to-market losses are deducted from the SD's tangible net worth. The tangible net worth is intended to ensure that a covered SD has an appropriate level of financial resources available to directly meet its obligations as they arise, which will ensure the safety and soundness of the covered SD. Furthermore, covered SDs electing the Tangible Net Worth Capital Approach are subject to the risk management requirements of Commission regulation 23.600, which requires the SD, among other things, to assess its liquidity resources and outlays on a daily basis, including margin obligations, to ensure that it has both the financial resources and liquidity to meet its financial obligations to swap counterparties.

The Commission also is not modifying the final regulation to allow commodity-focused covered SDs that are direct or indirect subsidiaries of global financial holding companies to

[315] *Id.*

[316] *See* ED&F Man/INTL FCStone 3/3/2020 Letter (citing Letter from Christine Stevenson, BP Energy Company (May 15, 2017), Letter from William Dunaway, INTL FCStone Inc. (May 15, 2017), and Shell 5/15/2017 Letter).

[317] *See* MS 3/3/2020 Letter; IIB/ISDA/SIFMA 3/3/2020 Letter; CEWG 3/3/2020 Letter.

[318] *See* Shell 3/3/2020 Letter. *See also,* CEWG 3/3/2020 Letter representing that the inclusion by the Federal Reserve Board of trading and investing in physical commodities in the definition of activities that are ''financial in nature'' was because certain banks need the ability to transact in physical commodity markets to support their derivatives activity.

[319] *Id.*

[320] *See* CEWG 3/3/2020 Letter.

[321] *Id.*

[322] *Id.*

elect the Tangible Net Worth Capital Approach. As noted above, the Commission proposed the Tangible Net Worth Capital Approach in recognition that not all covered SDs would be financial firms and able to satisfy the Net Liquid Assets Capital Approach or the Bank-Based Capital Approach due to the measurement of illiquid assets necessary to commercial activities. The Commission limited the availability of the Tangible Net Worth Capital Approach to covered SDs that are not predominantly engaged in financial activities. Further, as discussed above, the Commission believes that it is appropriate to extend the Tangible Net Worth Capital Approach to accommodate covered SDs that are direct or indirect subsidiaries of holding companies or corporate parent entities that are not predominantly engaged in financial activities, in order to allow such holding companies or corporate parent entities to establish separate SD subsidiaries to provide financial services for the corporate group, including engaging in swaps on behalf of the corporate group. In such situations, the covered SD is established to act on behalf of the commercial parent entity by, for example, entering into swaps with commercial end users that are seeking to manage their commercial risks with swaps, and to offset the risks incurred by its commercial affiliates by entering into swaps with counterparties, including other SDs or financial end users.

Covered SDs that are subsidiaries of financial holding companies or corporate entities, however, present different issues. While the covered SD may engage in commodity-focused swaps and may also engage in trading of physical commodities, it is doing so as a subsidiary of a financial parent entity. The Commission has generally perceived greater risk from global financial entities than it does from commercial enterprises, and, for this reason does not believe that it would be appropriate to extend the more limited capital treatment of the Tangible Net Worth Capital Approach to such covered SDs. Therefore, the Commission is adopting the Tangible Net Worth Capital Approach as proposed, without requiring parent guarantee and subject to the limited modification to eligibility discussed above, in order to be neutral as to the overall corporate structure employed by commercial entities.

5. Capital Requirements for Covered MSPs

The Commission proposed to establish a minimum capital requirement for covered MSPs as directed by section 4s(e) of the CEA.[323] An MSP is defined as a person that is not a swap dealer and that: (i) Maintains a substantial position in swaps, excluding positions held to hedge or mitigate commercial risk; (ii) has outstanding swaps that create ''substantial counterparty exposures that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets;'' or (iii) is a financial entity that is highly leveraged, is not subject to capital requirements of a prudential regulator, and has a substantial position in swaps, including positions used to hedge and mitigate commercial risk.[324]

Proposed regulation 23.101(a)(2)(ii) required a covered MSP to maintain the greater of (i) positive tangible net worth, or (ii) the amount of capital required by the RFA of which the covered MSP was a member. The term ''tangible net worth'' was proposed to be defined as the net worth of a covered MSP as determined in accordance with US GAAP, excluding goodwill and other intangible assets. The Proposal further required a covered MSP in computing its tangible net worth to include all liabilities or obligations of a subsidiary or affiliate that the covered MSP guarantees, endorses, or assumes, either directly or indirectly, to ensure that the tangible net worth reflects the full extent of the covered MSP's potential financial obligations. The proposed definition further provided that in determining net worth, all long and short positions in swaps, security-based swaps and related positions must be marked to their market value to ensure that the tangible net worth reflects the current market value of the covered MSP's swaps and security-based swaps, including any accrued losses on such positions.

A positive tangible net worth standard was proposed for MSPs, rather than an alternative approach, including the Net Liquid Assets Capital Approach, Bank-Based Capital Approach, or Tangible Net Worth Capital Approach, as the Commission anticipated that entities that register as MSPs may be engaging in a range of business activities that are different from, and broader than, the activities of covered SDs. In addition, covered MSPs are expected to use swaps for different purposes (*e.g.,* hedging or investing) than covered SDs, which generally engage in swaps as a dealing activity. Covered MSP's also may engage in commercial activities that require the holding of a substantial amount of fixed assets or engage in financial activities that are beyond swap dealing activities, which results in the holding of assets that are not consistent with the general Net Liquid Assets Capital Approach or the Bank-Based Capital Approach, such as fixed assets or intangible assets.

The *2016 Capital Proposal* also considered the impact of the final margin rules for uncleared swap transactions in developing the proposed positive tangible net worth requirement for covered MSPs. Covered MSPs subject to the Commission's margin regulations are required to post and collect initial margin and variation margin with SDs, other MSPs, and financial end users (subject to certain thresholds and minimum transfer amounts).[325] The exchanging of variation margin and the exchange of initial margin by covered MSPs and certain of their counterparties would substantially reduce the uncollateralized exposures that the covered MSPs and the counterparties have to each other, which mitigates the possibility that covered MSPs could destabilize the financial markets or present systemic risk. Lastly, the Commission's proposed covered MSP capital standards are comparable with the SEC's capital standards for MSBSPs subject to the SEC's capital requirements, and are intended to require a covered MSP to maintain a sufficient level of assets to meet its obligations to counterparties and creditors and to help ensure the safety and soundness of the covered MSP.[326]

The Commission requested additional comment on the proposed capital requirements for covered MSPs in the *2016 Capital Proposal.* Specifically, the Commission requested comment on whether the positive tangible net worth capital requirement was an appropriate standard for MSPs; whether the Net Liquid Assets Capital Approach or the Bank-Based Capital Approach would be a more appropriate method for establishing capital requirements for covered MSPs; and whether other capital approaches should be considered for covered MSPs.[327] The Commission further requested comment on whether the positive tangible net worth capital requirement should include a minimum fixed-dollar amount requirement, for example, equal to $20 million or some other amount, and

[323] *See 2016 Capital Proposal,* 81 FR 91252 at 91264–65. There currently are no MSPs provisionally registered with the Commission.

[324] *See* Commission regulation § 1.3 (17 CFR 1.3). There currently are no MSPs provisionally registered with the Commission.

[325] *See* 17 CFR part 23, subpart E (Capital and Margin Requirements for Swap Dealers and Major Swap Participants).

[326] *See* 17 CFR 240.18a–2.

[327] *See 2016 Capital Proposal,* 81 FR 91252 at 91264–25.

whether the positive tangible net worth capital requirements should include a requirement for a covered MSP to maintain positive tangible net worth in an amount in excess of the market risk and credit risk charges on the covered MSP's swap and security-based swap positions.[328] The Commission did not receive comments addressing these issues.

The Commission has considered the proposed capital requirements for covered MSPs, and is adopting the capital requirements as proposed. The Commission believes that it is appropriate to impose a capital requirement on a covered MSP that requires such entity to maintain the greater of (i) positive tangible net worth, or (ii) the amount of capital required by an RFA of which the covered MSP is a member. The Commission also recognizes that the positive tangible net worth capital requirement is a less rigorous requirement than the Net Liquid Assets Capital Approach or the Bank-Based Capital Approach. The Commission believes, however, that the positive tangible net worth capital requirement is appropriate to help ensure the safety and soundness of the covered MSP.

Under the final rule as adopted, a covered MSP is required to maintain the greater of (i) positive tangible net worth, or (ii) the minimum amount of capital required by an RFA of which the covered MSP is a member.[329] The final rule further requires a covered MSP to mark its swaps, security-based swaps and related positions to their market values in computing its tangible net worth, and to include in its liabilities obligations of a subsidiary or affiliate that the covered MSP guarantees, endorses, or assumes either directly or indirectly, to ensure that the tangible net worth of the covered MSP reflects the extent of such potential financial obligations.[330]

As noted above, there are no MSPs currently provisionally-registered with the Commission, and only two firms have ever provisionally-registered as MSPs. Therefore, the Commission has limited experience with MSPs and such experience does not provide reliable information or data on how such firms may be structured or operate in future. This lack of information and data makes establishing a more tailored capital requirement beyond the positive tangible net worth requirement challenging. Accordingly, the Commission will monitor any future developments with MSPs and assess the appropriateness of the positive tangible net worth capital requirement to such firms to ensuring the safety and soundness of the MSPs. The Commission will consider any rule amendments that may be necessary based upon the information and data that it will receive from any registered MSP. In addition, the final capital rule provides that an MSP must also maintain a level of capital as established by the RFA of which it is a member. This provision is consistent with section 17 of the CEA, which provides that an RFA must establish minimum capital requirements for members that are at least as stringent as applicable capital requirements adopted by the Commission. This provision authorizes NFA, as the only RFA, to adopt capital requirements for its member MSPs that are higher than the Commission's MSP capital requirement. This provides an additional level of assurance that the Commission or NFA can adjust, if necessary, capital requirements relative to the business activities of any MSPs that the Commission in the future believes present systemic risk.

6. Requirements for Market Risk and Credit Risk Models

The Commission's Proposal recognized that internal market risk and credit risk capital models, including value-at-risk (''VaR'') models, can provide a more effective means of measuring economic risk from complex trading strategies involving swaps, security-based swaps, and other proprietary positions than the standardized market risk and credit risk charges set forth in regulation 1.17. In order to use internal capital models to compute its capital, the covered SD or FCM–SD must obtain the approval of the Commission or an RFA of which it was a member.

In developing the specific proposed market risk and credit risk models requirements, including the proposed quantitative and qualitative requirements of the models discussed below, the Commission incorporated the market risk and credit risk model requirements adopted by the Federal Reserve Board for bank holding companies, including the value at risk (''VaR''), stressed VaR, specific risk, incremental risk, and comprehensive risk qualitative and quantitative standards and requirements. The Commission's proposed qualitative and quantitative requirements for capital models also are comparable to the SEC's existing capital model requirements for ANC Firms and the capital model requirements adopted for SBSDs.

a. VaR Models

Proposed regulation 23.102 required that a VaR model's quantitative criteria include the use of a VaR-based measure that incorporates a 99 percent, one-tailed confidence interval.[331] The VaR-based measure must be based on a price shock equivalent to a ten business-day movement in rates or prices. Price changes estimated using shorter time periods must be adjusted to the ten-business-day standard. The minimum effective historical observation period for deriving the rate or price changes is one year, and data sets must be updated at least quarterly or more frequently if market conditions warrant. The Commission noted that for many types of positions it would be appropriate for a covered SD or FCM–SD to update its data positions more frequently than quarterly. In all cases, a covered SD or FCM–SD must have the capability to update its data sets more frequently than quarterly in anticipation of market conditions that require such updating.

The covered SD or FCM–SD also would not need to employ a single internal capital model to calculate its VaR-based measure. A covered SD or FCM–SD may use any generally accepted approach, such as variance-covariance models, historical simulations, or Monte Carlo simulations, based on the nature and size of the positions the model covers. The internal capital model must use risk factors sufficient to measure the market and credit risk inherent in all positions. The risk factors must address the risks including interest rate risk, credit spread risk, equity price risk, foreign exchange risk, and commodity price risk. For material positions in the major currencies and markets, modeling techniques must incorporate enough segments of the yield curve—in no case less than six—to capture differences in volatility and less than perfect correlation of rates along the yield curve.

The internal capital model may incorporate empirical correlations within and across risk categories, provided that the covered SD or FCM–SD validates and demonstrates the reasonableness of its process for measuring correlations. If the internal capital model does not incorporate empirical correlations across risk categories, the covered SD or FCM–SD must add the separate measures from its internal capital models for the

[328] *Id.*

[329] *See* paragraph (a)(2) of Commission regulation § 23.101, as adopted.

[330] *See* definition of the term ''tangible net worth'' in Commission regulation § 23.100, as adopted.

[331] *2016 Capital Proposal,* 81 FR 91252, 91269–72.

appropriate risk categories as listed above to determine its aggregate VaR-based measure of capital.

The VaR-based measure must include the risks arising from the nonlinear price characteristics of options positions or positions with embedded optionality and the sensitivity of the fair value of the positions to changes in the volatility of the underlying rates, prices or other material factors. A covered SD or FCM–SD with a large or complex options portfolio must measure the volatility of options positions or positions with embedded optionality by different maturities and/or strike prices, where material.

The internal capital model also must be subject to backtesting requirements that must be calculated no less than quarterly. A covered SD or FCM–SD must compare its daily VaR-based measure for each of the preceding 250 business days against its actual daily trading profit or loss, which includes realized and unrealized gains and losses on portfolio positions as well as fee income and commissions associated with its activities. If the quarterly back-testing shows that the covered SD's or FCM–SD's daily net trading loss exceeded its corresponding daily VaR-based measure, a back-testing exception has occurred. If a covered SD or FC–SD experiences more than four back-testing exceptions over the preceding 250 business days, it is generally required to apply a multiplication factor in excess of three when it calculates its VaR-based capital requirements.

The qualitative requirements proposed would specify, among other things, that: (i) Each VaR model must be integrated into the covered SD's or FCM–SD's daily internal risk management system; (ii) each VaR model must be reviewed periodically by the firm's internal audit staff and annually by a third party service provider; and (iii) the VaR measure computed by the model must be multiplied by a factor of at least three but potentially a greater amount if there are exceptions to the measure resulting from quarterly backtesting results.

A covered SD or FCM–SD would also be subject to on-going supervision by staff of the Commission and RFA with respect to its internal risk management, including its use of VaR models.

b. Stressed VaR Models

The Commission proposed that covered SDs or FCM–SDs approved to use VaR models to compute market risk deductions also must include a stressed VaR component in the calculation. The stressed VaR measure supplements the VaR measure, as the VaR measure's inherent limitations produced an inadequate amount of capital to withstand the losses sustained by many financial institutions in the financial crisis of 2007–2008.[332] The stressed VaR measure also should contribute to a more appropriate measure of the risks of a covered SD's or an FCM–SD's positions as stressed VaR is intended to account for more volatile and extreme price changes.

The *2016 Capital Proposal* required a covered SD or FCM–SD to use the same model that it uses to compute its VaR measure for its stressed VaR measure. The model inputs however would be calibrated to reflect historical data from a continuous 12-month period that reflects a period of significant financial stress appropriate to the covered SD's or FCM–SD's portfolio. The stressed VaR measure must be calculated at least weekly and be no less than the VaR measure. The Commission further noted that it expected that the stressed VaR measure would be substantially greater than the VaR measure.

The Commission also required that the stress tests take into account concentration risk, illiquidity under stressed market conditions, and other risks arising from the covered SD's or FCM–SD's activities that may not be captured adequately in the covered SD's or FCM–SD's internal VaR models. For example, it may be appropriate for the covered SD or FCM–SD to include in its stress testing large price movements, one-way markets, nonlinear or deep out-of-the-money products, jumps-to-default, and significant changes in correlation. Relevant types of concentration risk include concentration by name, industry, sector, country, and market.

The Proposal also provided that a covered SD or FCM–SD must maintain policies and procedures that describe how it determines the period of significant financial stress used to compute its stressed VaR measure and be able to provide empirical support for the period used. These policies and procedures must address: (i) How the covered SD or FCM–SD links the period of significant financial stress used to calculate the stressed VaR-based measure to the composition and directional bias of the covered SD's or FCM–SD's portfolio; and (ii) the covered SD's or FCM–SD's process for selecting, reviewing, and updating the period of significant financial stress used to calculate the stressed VaR measure and for monitoring the appropriateness of the 12-month period in light of the covered SD's or FCM–SD's current portfolio. Before making material changes to these policies and procedures, a covered SD or FCM–SD must obtain approval from the Commission or RFA. The Commission or the RFA also may require a covered SD or FCM–SD to use a different period of stress to compute its stressed VaR measure.

c. Specific Risk Models

The Commission proposed to allow covered SDs or FCM–SDs to model their specific risk. Under the Proposal, the specific risk model must be able to demonstrate the historical price variation in the portfolio, be responsive to changes in market conditions, be robust to an adverse environment, and capture all material aspects of specific risk for its positions. The Proposal required that a covered SD's or FCM–SD's models capture event risk (such as the risk of loss on equity or hybrid equity positions as a result of a financial event, such as the announcement or occurrence of a company merger, acquisition, spin-off, or dissolution) and idiosyncratic risk, and capture and demonstrate sensitivity to material differences between positions that are similar but not identical, and to changes in portfolio composition and concentrations. If a covered SD or FCM–SD calculates an incremental risk measure for a portfolio of debt or equity positions under paragraph (I) of proposed 23.102 Appendix A, the covered SD or FCM–SD is not required to capture default and credit migration risks in its internal models used to measure the specific risk of these portfolios.

The Commission noted in the Proposal that it understood that not all debt, equity, or securitization positions (for example, certain interest rate swaps) have specific risk. Therefore, the Commission proposed that there would be no specific risk capital requirement for positions without specific risk. A covered SD or FCM–SD, however, must have clear policies and procedures for determining whether a position has specific risk.

The Commission also stated in the Proposal that it believed that a covered SD or FCM–SD should develop and implement VaR-based models for both market risk and specific risk. A covered SD's or FCM–SD's use of different approaches to model specific risk and general market risk (for example, the use of different models) would be reviewed to ensure that the overall capital requirement for market risk is

[332] *See Revisions to the Basel II market risk framework,* published by the Basel Committee on Banking Supervision for an explanation of the implementation of the stressed VaR requirement.

commensurate with the risks of the covered SD's or FCM–SD's positions.

d. Incremental Risk Models

The Commission proposed an incremental risk requirement for covered SDs or FCM–SDs that measures the specific risk of a portfolio of debt positions using internal models. Incremental risk consists of the default risk and credit migration risk of a position. Default risk means the risk of loss on a position that could result from the failure of an obligor to make timely payments of principal or interest on its debt obligation, and the risk of loss that could result from bankruptcy, insolvency, or similar proceeding. Credit migration risk means the price risk that arises from significant changes in the underlying credit quality of the position. A covered SD or FCM–SD also may include portfolios of equity positions in the incremental risk model with the prior permission from the Commission or RFA, provided that the covered SD or FCM–SD consistently includes such equity positions in how it internally measures and manages the incremental risk for such positions at the portfolio level. Default is assumed to occur with respect to an equity position that is included in its incremental risk model upon the default of any debt of the issuer of the equity position.

e. Comprehensive Risk Models

The *2016 Capital Proposal* required a covered SD or FCM–SD to compute all material price risks of one or more portfolios of correlation trading positions using an internal model. The Commission required the model to measure all price risk consistent with a one-year time horizon at a one-tail, 99.9 percent confidence level, under the assumption either of a constant level of risk or of constant positions. The Commission stated that it expected that the covered SD or FCM–SD remains consistent in its choice of constant level or risk or positions, once it makes a selection. Also, the covered SD's or FCM–SD's choice of a liquidity horizon must be consistent between its calculation of its comprehensive and incremental risk.

The Commission also required a covered SD's or FCM–SD's comprehensive risk model to capture all material price risk, including, but not limited to: (i) The risk associated with the contractual structure of cash flows of each position, its issuer, and its underlying exposures (for example, the risk arising from multiple defaults, including the ordering of defaults in tranched products); (ii) credit spread risk, including nonlinear price risks; (iii) volatility of implied correlations, including nonlinear price risks such as the cross-effect between spreads and correlations; (iv) basis risks; (v) recovery rate volatility as it relates to the propensity for recovery rates to affect tranche prices; and (vi) to the extent that the comprehensive risk measure incorporates benefits from dynamic hedging, the static nature of the hedge over the liquidity horizon. The Commission noted that additional risks that are not explicitly discussed but are a material source of price risk must be included in the comprehensive risk measure.

The Commission also required a covered SD or FCM–SD to have sufficient market data to ensure that it fully captures the material price risks of the correlation trading positions in its comprehensive risk measure. Moreover, a covered SD or FCM–SD must be able to demonstrate that its model is an appropriate representation of comprehensive risk in light of the historical price variation of its correlation trading positions. A covered SD or FCM–SD also would be required to inform the Commission and RFA if the covered SD or FCM–SD plans to extend the use of a model that has been approved to an additional business line or product type.

The Proposal required that the comprehensive risk measure must be calculated at least weekly. In addition, a covered SD or FCM–SD must at least weekly apply to its portfolio of correlation trading positions a set of specific stressed scenarios that capture changes in default rates, recovery rates, and credit spreads, and various correlations. A covered SD or FCM–SD must retain and make available to the Commission and the RFA the results of the stress testing, including comparisons with capital generated by the covered SD's or FCM–SD's comprehensive risk model. A covered SD or FCM–SD must promptly report to the Commission or the RFA any instances where the stress tests indicate any material deficiencies in the comprehensive risk model.

f. Credit Risk Models

The *2016 Capital Proposal* required covered SDs or FCM–SDs seeking to obtain Commission or RFA approval to use internal models to compute credit risk to submit credit risk models that satisfy the quantitative and qualitative requirements set forth in Appendix A to proposed regulation 23.102. With respect to uncleared derivatives contracts, a covered SD or FCM–SD would need to determine an exposure charge for each counterparty to its uncleared derivatives positions. The exposure charge for a counterparty that is insolvent, in a bankruptcy proceeding, or in default of an obligation on its senior debt, is the net replacement value of the uncleared derivatives contracts with the counterparty (*i.e.,* the net amount of uncollateralized current exposure to the counterparty). The counterparty exposure charge for all other counterparties is the credit equivalent amount of the covered SD's or FCM–SD's exposure to the counterparty multiplied by an applicable credit risk-weight factor multiplied by 8%. The credit equivalent amount is the sum of the covered SD's or FCM–SD's (i) maximum potential exposure (''MPE'') multiplied by a backtesting determined factor; and (ii) current exposure to the counterparty. The MPE amount is a charge to address potential future exposure and is calculated using the VaR model as applied to the counterparty's positions after giving effect to a netting agreement, taking into account collateral received, and taking into account the current replacement value of the counterparty's positions.

The Commission in its margin requirements (*see* Commission regulations 23.150 through 23.161) set forth the requirements for eligible collateral for uncleared swaps. In order to account for collateral in its VaR model for the credit risk charges, the Commission stated that it expected a covered SD or FCM–SD to account only for the collateral that complies with Commission regulation 23.156 and is held in accordance with regulation 23.157 for uncleared swaps that are subject to the Commission's margin rules. A covered SD or FCM–SD would be able to take into consideration in its VaR calculation collateral that does not comply with regulation 23.156 and is not held in accordance with regulation 23.157, for uncleared swaps that are not subject to the Commission's margin rules.

The Commission proposed to allow covered SDs or FCM–SDs to use internal methodologies to determine the appropriate credit risk-weights to apply to counterparties, if it has received the Commission's or the RFA's approval. A higher percentage credit risk-weight factor would result in a larger counterparty exposure charge amount. The Commission stated that it expected that the counterparty credit risk-weight should be based on an assessment of the creditworthiness of the counterparty.

The Commission stated that its proposed approach to calculating credit risk charges is appropriate given that its requirements are based on a method of

computing capital charges for credit risk exposures in the international capital standards for banking institutions. Since credit risk is the risk that a counterparty could not meet its obligations on an OTC derivatives contract in accordance with agreed terms (such as failing to pay), the considerations that inform a covered SD's or FCM–SD's assessment of a counterparty's credit risk should be broadly similar across the various relationships that may arise between the dealer and the counterparty. Therefore, the Commission believes that its approach is a reasonable model, as the SEC also uses a similar approach for its ANC BDs and SBSDs using models.

The Commission also proposed that covered SDs or FCM–SDs that are subject to the Bank-Based Capital Approach requirement could also request Commission or RFA approval to use the Federal Reserve Board's internal ratings-based and advanced measurement model approaches to compute risk-weighted assets for the credit exposures listed in subpart E of 12 CFR 217. The covered SD or FCM–SD would have to include such exposures in its application to the Commission and RFA, and explain how its proposed models are consistent with the Federal Reserve Board's model criteria in subpart E of 12 CFR 217.

The Commission received several comments concerning the use of internal capital models. One commenter expressed a strong concern regarding the *2016 Capital Proposal's* potential heavy reliance on the use of internal models.[333] The commenter stated that a reliance on internal models can permit regulated entities to manipulate risk controls to increase their own profits at the cost of increasing risks to the public. The commenter pointed out that analysis of the financial crisis experience evidenced manipulation of models to reduce capital charges. While the commenter acknowledged post-crisis refinements to internal model requirements, both in technique and governance, it argued that resource limitations at regulators, as well as continuing pressure from industry, may limit regulators' ability to prevent weakening standards and model misuse. The commenter thus advocated for strong limitations and floors to counterbalance the use of internal models.[334]

The Commission appreciates the commenter's concerns regarding models generally, and the need for the Commission to maintain strong limitations and floors. In this regard, the Commission is providing that only capital models that satisfy specified quantitative and qualitative requirements set forth in the regulations will be approved for use by covered SDs. Such requirements are consistent with the standards established by the BCBS and SEC for banking institutions and BDs, respectively. In addition, the Commission plans to work with NFA to establish a comprehensive ongoing examination program over the capital models used by covered SDs, which will be designed to identify and address issues with model performance through such means as back-testing results. These steps should assist with mitigating concerns regarding model performance.

Other commenters generally supported the Commission's Proposal to permit internal capital models in lieu of standardized market and credit risk capital charges.[335] Another commenter stated that it strongly supports permitting SDs the flexibility to use internal models, when appropriate.[336]

Two commenters stated that the detailed quantitative and qualitative requirements for market risk and credit risk models set forth in Appendix A of proposed regulation 23.102 do not reflect the requirements of all of the models that a bank or bank holding company may use for market risk and credit calculations under the capital rules of the Federal Reserve Board.[337] One of the commenters stated that the prudential regulators have undertaken an extensive effort to revise U.S. Basel III risk-weighted asset standards, which has includes significant ongoing efforts to revise specific credit risk and market risk methodologies that will require several years to finalize.[338] One of the commenters stated that the differences between the Federal Reserve Board rules and the requirements of Appendix A would require a covered SD electing the Bank-Based Capital Approach to submit a model application that contains more information than the information required by the Federal Reserve Board.[339] The commenters also state that the calculations of market risk and credit risk under some of the Federal Reserve Board rules differ from the calculation requirements under proposed Appendix A of regulation 23.102. The commenters recommended that the Commission modify proposed regulation 23.102 and appendix A to allow a Bank-Based Capital Approach to use models approved to calculate market risk and credit risk exposures if the model satisfies the relevant Federal Reserve Board requirements for market risk and credit risk models, as appropriate. The commenters also recommended that the Commission permit a covered SD that has obtained approval to use credit risk models to calculate its credit risk exposure using the Federal Reserve Board's advance approaches capital framework, contained in subpart E of 12 CFR part 217, and further permit a covered SD that has obtained approval to use market risk models to calculate its market risk using the Federal Reserve Board's rules contained in subpart F of 12 CFR part 217. The commenters stated that the above modifications would allow covered SDs electing the Bank-Based Capital Approach to calculate market risk and credit risk consistently with how bank SDs and many foreign SDs calculate their exposures for capital purposes.

The Commission recognizes that the Federal Reserve Board's capital rules are continuing to evolve and will evolve further in the future as global banking regulators continue to harmonize capital requirements under the Basel capital framework. The Commission proposed the Bank-Based Capital Approach in recognition that it reflected a global banking capital regime that was designed for safety and soundness. The proposed approach also provided covered SDs that are non-bank subsidiaries of bank holding companies the ability to use capital models approved by prudential regulators for their bank affiliates.

The Commission understands that model requirements set forth in proposed Appendix A of regulation 23.102 do not reflect fully the market risk and credit risk options available at this time to banking organizations under the rules of the Federal Reserve Board. The Commission also understands that each of the market risk and credit risk options under the Federal Reserve Board's rules are, and will continue to be, based on Basel capital requirements, and thus appropriate for calculating market risk or credit risk for covered SDs. Therefore, the Commission is modifying regulation 23.102 to both clarify and expand the market risk and credit risk models that may be used by a covered SD such that the requirement aligns with requirements of the Federal Reserve Board. Specifically, the Commission is modifying paragraph (c) of regulation 23.102 to provide that a covered SD's application for market risk models must include the information

[333] *See* AFR 5/15/17 Letter.

[334] *Id.*

[335] *See, e.g.,* ISDA 5/15/17 Letter; SIFMA 5/15/17 Letter; MS 5/15/17 Letter.

[336] *See* IFM 5/15/17 Letter.

[337] *See IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter.*

[338] *Id.*

[339] IIB/ISDA/SIFMA 3/3/2020 Letter.

specified in Federal Reserve Board's rules contained in subpart F of 12 CFR part 217, and the information required under subpart E of 12 CFR part 217 for credit risk models. The Commission believes that the modifications are appropriate in that they provide model requirements that are identical to the Federal Reserve Board's requirements and, by incorporating the Federal Reserve Board's rules by reference, address concerns raised regarding the ongoing revisions to the rules as Basel enhancements continue to be adopted.

7. Model Approval Process for Covered SDs and FCM–SDs

The Commission's Proposal required each covered SD and FCM–SD to submit an application for approval to use internal capital models to compute market risk or credit risk capital charges to the Commission and to the RFA of which the SD or FCM–SD was a member.[340] The Proposal provided that a covered SD's or FCM–SD's application must be in writing and must be filed with the Commission and with an RFA in accordance with applicable filing requirements. Proposed Appendix A to regulation 23.102 required the application to include: (i) A list of categories of positions that the covered SD or FCM–SD holds in its proprietary accounts and a brief description of the methods the covered SD or FCM–SD would use to calculate market risk and credit risk charges; (ii) a description of the mathematical models to be used to price positions and to compute market risk and credit risk; (iii) a description of how the covered SD or FCM–SD would calculate current exposure and potential future exposure for its credit risk charges, and (iv) a description of how the covered SD or FCM–SD would determine internal credit risk-weights of counterparties, if applicable. The Commission or RFA also may require a covered SD or FCM–SD to supplement its application with additional information necessary for a proper evaluation.[341]

The Proposal also provided that the Commission or RFA could deny the application or approve the application, subject to any conditions or limitations that the Commission or RFA may require, if such denial or approval is found to be in the public interest. In making a public interest determination, the Commission will consider whether the applicant's models meet the quantitative and qualitative requirements, and assess the governance structure regarding the development, operation, and ongoing monitoring of the models. The Commission will further assess the qualification of personnel with the responsibility for operating the models and the personnel with responsibility for supervising the daily operations and reporting to senior management. The Commission's assessment is intended to determine that the use of capital models does not impair the overall safety and soundness of the covered SD or FCM–SD. The Commission also will consider the potential benefits that models provide by more appropriately reflecting market and credit risk as compared to standardized capital charges, which encourages FCM–SDs and covered SDs to provide markets to market participants and provides for a more efficient use of FCM–SD and covered SD capital.

A covered SD or FCM–SD also would be required to cease using the models if: (i) The models are altered or revised materially, or if the SD's or FCM–SD's internal risk management is materially changed, and such changes have not been submitted to the Commission and RFA for approval; (ii) the Commission or RFA determines that the models are no longer sufficient or adequate to compute market or credit risk charges; (iii) the SD or FCM–SD fails to comply with the regulations governing the use of models; or (iv) the Commission by written order finds that permitting the SD or FCM–SD to continue to use the internal models is no longer appropriate.

The Commission requested comment in the *2016 Capital Proposal* on all aspects of the proposed model review process, including the viability of the proposed model review process given the number of provisionally-registered covered SDs, the number of capital models that may be required to be approved for each provisionally-registered covered SD, and the complexity of the models that may be submitted for approval.[342] The Commission also requested comment on whether the regulation should include a process for the automatic approval or temporary approval of capital models that had been reviewed and approved by a prudential regulator or an appropriate foreign regulator.[343]

Commenters generally stated that it was necessary for the Commission to develop an efficient approach for the review and approval of internal models and noted that covered SDs or FCM–SDs that did not have model approval at the compliance date would be at a significant competitive disadvantage relative to covered SDs and FCM–SDs that had the approval to use models at the compliance date. In this connection, one commenter stated that in no event should a covered SD be required to use the proposed standardized capital charges while awaiting model approval at the compliance date.[344] Another commenter requested that the Commission clarify that no covered SD would be required to use the proposed standardized capital charges while awaiting model approval.[345]

Other commenters suggested various approaches that the Commission should adopt to ensure that covered SDs and FCM–SDs have the ability to use capital models at the compliance date. One commenter stated that capital models should be deemed ''provisionally approved'' while under review by the Commission or NFA at the compliance date.[346] Several commenters stated that the Commission should automatically approve market risk models and credit risk models of covered SDs or FCM–SDs that have already been approved by a prudential regulator, the SEC, or certain foreign regulators.[347] One commenter stated that Commission's final rule should provide for the recognition of internal capital models used throughout corporate families if such models have been approved by a prudential regulator, the SEC, or a foreign regulator in a jurisdiction that has adopted the Basel capital requirements, provided that the relevant regulatory authority has ongoing periodic assessment power with regard to the model and provides the CFTC and the NFA with appropriate information.[348]

The Commission invited interested persons to provide additional comment on the model approval process in the *2019 Capital Reopening.* Commenters generally reiterated their views that the Commission needed to adopt an efficient and effective model review process that recognizes the complexity of the undertaking, and ensures that all covered SDs and FCM–SDs that want to use models have authorization to use such models at the compliance date in

[340] *See 2016 Capital Proposal,* 81 FR 91252 at 91269–70. FCMs and FCM–SDs that also are registered BDs would have to obtain SEC approval as an ANC Firm in order to use market risk and credit risk models in lieu of taking standardized capital charges. *See* Commission regulation § 1.17(c)(6)(i), as adopted.

[341] *See 2016 Capital Proposal,* 81 FR 91252 at 91269–70.

[342] *See 2016 Capital Proposal,* 81 FR 91252 at 91272–73.

[343] *Id.*

[344] *See* ISDA 5/15/17 Letter.

[345] *See* IFM 5/15/17 Letter.

[346] *See* ISDA 5/15/17 Letter.

[347] *See, e.g.,* FIA 5/15/17 Letter; SIFMA 5/15/17 Letter. *See also,* ABN/ING/Mizuho/Nomura 1/29/2018 Letter.

[348] *See* ISDA 5/15/17 Letter.

order to avoid competitive disadvantages for firms not permitted to use models.[349] One commenter stated that the failure to create and implement a flexible capital model approval process and timeline creates a competitive disadvantage for smaller covered SDs (including smaller commodity-focused covered SDs) relative to bank and bank holding company-affiliate SDs.[350] The commenter noted that many larger SDs currently operate with approved models, and noted that smaller SDs do not have off-the-shelf or pre-approved internal models that can be used or leveraged for capital compliance purposes, and anticipate significant expense and resource will be necessary for the development of counterparty credit risk and market risk model procedures, processes, and systems.[351] One commenter stated that firms submitting models for the first time must be provided with sufficient time to complete the approval process.[352]

Another commenter stated that commodity-focused covered SDs should be subject to models that focus on risks associated with the physical commodity market, and the capital model should not need to account for non-applicable risks.[353] The commenter requested that the Commission confirm that a commodity-focused covered SD's capital model needs only to account for the positions and risks relevant to the applicable business and does not need to address every risk and requirement set forth in proposed Appendix A to regulation 23.102.[354]

Commenters also expressed the view that the Commission should provide automatic model approval or provisional model approval to SDs and FCM–SDs that use models that have been reviewed and approved by the SEC, a prudential regulator, or a qualified foreign regulator. One commenter also stated that the Commission should provide provisional approval for models submitted by covered SDs in good faith, subject to further review and approval if necessary.[355]

NFA expressed its willingness to undertake the review of covered SDs and covered FCM–SDs capital models for compliance with the regulatory requirements.[356] NFA noted that it currently has a team with significant model experience that has been focusing on the review, approval, and ongoing monitoring of covered SD's initial margin models for uncleared swaps. NFA stated that it would leverage the experience it has gained in reviewing and approving initial margin models, and would allocate similar resources to the review of covered SDs' internal capital models for compliance with the Commission's requirements.

NFA also commented, however, that the capital model review process will be significantly more complex than the process conducted for initial margin models. The additional complexity is attributable in part to the lack of an industry-wide, standardized internal capital model and the fact that each covered SD may have several models under the proposed capital rules to address various aspects of market risk (*e.g.,* VaR models and stressed VaR models). The review process is further challenged in that the Commission did not propose a multi-year compliance schedule that would allow capital models to be phased-in over a sufficiently long period of time comparable to the now six-year phase-in schedule for initial margin requirements for uncleared swaps.[357]

NFA estimated that as many as 51 covered SDs (from 21 corporate families) could be subject to the Commission's capital rules and may seek model review and approval prior to the compliance date. NFA also commented that it would need to build systems and processes to receive the requisite model information from covered SDs and FCM–SDs, and that its review would need to occur over a period of time given the complexity of the market and credit risk models. To address these concerns, NFA suggested several modifications that the Commission could make to the process of reviewing and approving capital models. Specifically, NFA suggested that a covered SD electing a Bank-Based Capital Approach that uses the internal market and credit risk capital models previously reviewed by a prudential regulator for an affiliated SD (*e.g.,* a bank holding company) be permitted to use such models without a formal review or approval of the covered SD's capital models prior to the compliance date. NFA also stated that the Commission should consider implementing a similar process for covered SDs that use internal market risk and credit risk models that have been reviewed or approved for the covered SD's use or for use by an affiliate of the covered SD by a foreign regulator in a jurisdiction that has implemented the Basel III capital standards. NFA stated that for covered SDs or covered FCM–SDs that are permitted to use capital models without a pre-compliance date review and approval as outlined above, it would review the SDs' or FCM–SDs' overall capital compliance, including their use of models after the compliance date through NFA's examination process and ongoing compliance monitoring program.

NFA commented that if the above framework is implemented, it will work with the Commission to develop a pre-compliance date model review and approval process, including appropriate information gathering and certification requirements for covered SDs with models that have not been reviewed by a prudential or qualified foreign regulator, as well as an appropriate post-compliance date model review and monitoring process. NFA stated that it is committed post compliance date to monitor the overall governance and use of market and credit risk models by all covered SDs that are subject to a model pre-approval process or post-compliance model review including, at a minimum, assessing model performance test results and monitoring for compliance with the Commission's SD capital rules.

NFA further estimated that if the above framework is adopted that as many as 12 covered SDs that are provisionally-registered may require immediate capital model review. These 12 covered SDs have not obtained direct regulatory approval to use capital models and are not part of corporate families that have obtained any other regulatory approval to use capital models. NFA also estimated that it will take approximately 15 months to review and approve capital models for these 12 covered SDs.

NFA also recommended a modification to the final rule language. NFA stated that to make the post-compliance date framework effective, since NFA will not formally approve a

[349] *See, e.g.,* NCGA/NGSA 3/3/2020 Letter; CEWG 3/3/2020 Letter; FIA–PTG 3/3/2020 Letter.

[350] *See* ED&F Man/INTL FCStone 3/3/2020 Letter.

[351] *Id.*

[352] *See* FIA–PTG 3/3/2020 letter.

[353] *See* CEWG 3/3/2020 Letter.

[354] *Id.*

[355] *See* NCGA/NGSA 3/3/2020 Letter. The NCGA/NGSA also stated that the Commission's capital rules should allow for the use of unencumbered cash to be considered part of a covered SD's capital base even when the cash is swept into a corporate omnibus account and held overnight at a financial institution. The Commission acknowledges that under the proposed Tangible Net Worth Capital Approach, unencumbered cash deposits, including cash transferred to an affiliate, would be considered a tangible asset and part of the capital base. *See also,* CEWG 3/3/2020 Letter.

[356] *See* Letter from Carol Wooding, National Futures Association (March 2, 2020) (NFA 3/2/2020 Letter).

[357] *Id.* The Commission's margin rules for uncleared swap transactions are subject to a phase-in period that extended from September 1, 2016 to September 1, 2021. *See* Commission regulation § 23.161 (17 CFR 23.161).

covered SD's use of market and credit risk models previously reviewed by a prudential regulator a qualified foreign regulator, it believed that it is important that the Commission and/or NFA reserve the authority to require that a covered SD cease at any time using internal models if the covered SD is not in compliance with the Commission's capital requirements. To address this issue, NFA recommended that the Commission modify regulation 23.102(e) to clarify the Commission's and NFA's authority to rescind a covered SD's use of models that were not formally ''approved'' prior to the requirements compliance date.[358]

The Commission has considered the Proposal and the comments received, and is adopting the model approval process as proposed with several modifications discussed below. The Commission recognizes the substantial resources that are necessary in order to effectively and efficiently review and approve capital models submitted by covered SDs, and further recognizes that Commission staff would not be able to perform such reviews in a reasonable period of time. Therefore, final regulations 1.17(c)(6)(v) and 23.102 provides two alternative approaches for FCM–SDs and covered SDs, respectively. An FCM–SD or a covered SD may submit an application to the Commission for approval to use internal models to compute market risk and credit risk capital charges in lieu of standardized charges. In the alternative, an FCM–SD or a covered SD may submit an application to NFA (as an RFA) to use internal models provided that the Commission has made a determination that NFA's process to approve internal models is consistent with the Commission's approval process and NFA's approval would be accepted as an alternative means of compliance with the Commission's model requirements and approval as contained in Regulation 23.102.[359]

In this release, the Commission is setting forth a process for determining whether the NFA's standard and process for reviewing and approving an FCM–SD's and a covered SD's capital models is comparable to those of the Commission's. As part of the Commission's assessment, the Commission will perform a review of the NFA's FCM–SD and covered SD capital requirements for consistency with the Commission's requirements. The Commission also will assess the sufficiency of the NFA's planned model review process and procedures to ensure that such processes and procedures are adequate for providing NFA with an appropriate basis for determining whether an FCM–SD's or a covered SD's capital models satisfy the NFA's model requirements. Based on these assessments, the Commission will issue a determination that the NFA's approval of an FCM–SD's or a covered SD's capital models may serve as an alternative means of complying with the Commission's model approval requirement. The Commission is delegating authority to issue the determination to the Director of the Division of Swap Dealer and Intermediary Oversight under the revisions to regulation 140.91.

Due to limited Commission resources, the Commission anticipates that FCM–SDs and covered SDs will seek model approval from the NFA in order to help ensure a timely review. As noted in its comment letter, NFA has devoted substantial efforts to obtain the personnel and other resources necessary to perform the review, approval, and ongoing assessment of FCM–SDs' and covered SDs' models to calculate initial margin for uncleared swaps, and plans to leverage these resources and experience in its review and assessment of capital models.

In addition, as noted in section II.B.2. above, NFA is required by section 17(p) of the CEA to adopt capital requirements for SDs that are at least as stringent as the Commission's capital requirements for covered SDs. In this regard, the Commission has approved NFA Compliance Rule 2–49, which incorporates the Commission's part 23 rules into NFA's rules. Therefore, the capital and financial reporting requirements set forth in this final rulemaking will become NFA requirements 60 days after the publication of this **Federal Register** release (the effective date). The NFA SD capital requirements will include the options for market risk and credit risk models and will require SDs to obtain NFA approval to use such models under the NFA SD capital rules.[360]

The Commission further acknowledges that the model review process will require a period of time that will prevent the Commission or NFA from reviewing and approving models for all covered SDs that seek model approval prior to the compliance date of the regulations. The Commission also recognizes that a process that results in some covered SDs receiving approval to use capital models while the capital models of other covered SDs are under review at the compliance date solely due to the inability of the Commission or NFA to complete the necessary review would place the non-model covered SDs at a substantial competitive disadvantage.

To address this issue, the Commission is modifying regulation 23.102 by providing a new paragraph (f) to provide that a covered SD may use capital models after filing an application for model approval with the Commission, and pending approval by the Commission or the NFA, provided that the covered SD submits a certification to the Commission and to NFA certifying that the models have been approved for use by the covered SD, or an affiliate of the covered SD, by the SEC, a prudential regulator, a foreign regulatory authority in a jurisdiction that the Commission has found to be eligible for substituted compliance under Commission regulation 23.106, or a foreign regulatory authority whose capital adequacy requirements are consistent with the BCBS bank capital requirements. The certification must be signed by the covered SD's Chief Executive Officer, Chief Financial Officer, or other appropriate official with knowledge of the covered SD's capital requirements and the capital models, and must include a representation that the models are in substantial compliance with Commission's model requirements.

The final rule further requires a covered SD to revise its certification to address any material changes or revisions to the models, or to reflect any regulatory restrictions placed on the models by the regulatory authority that approved the models. The covered SD is also required to cease using the models if the regulatory authority that previously approved the models for use by the SD, or by the SD's affiliate, withdraws its approval prior to the Commission or NFA approving the models.

To clarify, the covered SD is not required to submit a model application to NFA with its certification. NFA will

[358] NFA noted that proposed Appendix A to Commission regulation § 23.102, which provides that the Commission or an RFA may revoke a covered SD's internal market and credit risk models. NFA stated that this provision of Appendix A should be modified to clarify that the Commission or an RFA may revoke a covered SD's ability to use internal market and credit risk models that have been approved by a prudential regulator or qualified foreign regulator. *See* NFA 3/2/2020 Letter.

[359] At this time, NFA is the only RFA.

[360] The Commission also revised paragraph (c) of Appendix A of final regulation 23.102 to provide that a covered SD that files a model application with the Commission may request confidential treatment under the Freedom of Information Act. Paragraph (c) of Appendix A does not apply to applications filed with the NFA, which is not subject to the Freedom of Information Act.

obtain any necessary documentation and model information as part of its ongoing examination and monitoring of the covered SD, including the information necessary to approve the models of the covered SD.

The covered SD will be subject to the Commission's and NFA's supervision and ongoing monitoring pending the Commission's or NFA's final determination to approve or not approve the application. This supervision and monitoring will include the review of the models performance and compliance with Commission requirements through examination and review of periodic reports, including back-testing results.

The Commission is not, however, adopting a process to permit FCM–SDs to use capital models pending the Commission's or NFA's approval. FCM–SDs must have approval in order to use capital models. The Commission is making this distinction as FCM–SDs carry customer and noncustomer funds, and act as intermediaries in the futures markets by performing daily settlement cycles on behalf of customers and noncustomers, and guaranteeing their customers' and noncustomers' financial performance to clearing organizations and other FCMs. As noted above, capital models have the potential to substantially reduce the market risk and credit risk capital charges that an FCM must take relative to the standardized charges. The Commission believes that given the important role that FCMs perform in the futures markets, and in order to provide greater protection to customers and their funds, that FCM–SDs must have model approval prior to using such models to compute their adjusted net capital. Furthermore, the Commission notes that currently the only FCM–SDs provisionally-registered with the Commission are four ANC Firms that have existing approvals to use capital models and may continue to use such models after the compliance date of these rules.

The *2016 Capital Proposal* also included proposed amendments to the Commission's delegation of authority to the Director of the Division of Swap Dealer and Intermediary Oversight contained in regulation 140.91. The proposed amendments delegated to the Director the authority of the Commission to approve capital models submitted to the Commission under regulation 23.102 and Appendix A. The authority to revoke a previously approved model was not delegated to the Director. The Commission did not receive comments on the proposed amendments to the delegation of authority under regulation 140.91 and, for the reasons discussed in the *2016 Capital Proposal,* is adopting the amendments substantially as proposed.

8. Liquidity Requirements for Covered SDs and FCM–SDs

The *2016 Capital Proposal* required FCM–SDs and covered SDs electing the Bank-Based Capital Approach or the Net Liquid Assets Capital Approach to satisfy specific liquidity requirements.[361] The *2016 Capital Proposal* did not proposed liquidity requirements for covered SDs electing the Tangible Net Work Capital Approach, covered MSPs, bank SDs, or bank MSPs.

Proposed regulation 23.104(a)(1) required covered SD electing the Bank-Based Capital Approach to meet the liquidity requirements established by the Federal Reserve Board for banking entities. Specifically, proposed regulation 23.104(a)(1) required covered SDs to comply with the liquidity coverage ratio requirements set forth in 12 CFR part 249, and apply such requirements as if the covered SD were a bank holding company subject to 12 CFR part 249.[362] The proposed liquidity coverage ratio required the SD to maintain each day an amount of high quality liquid assets (''HQLAs''), as defined in 12 CFR 249.20, that is no less than 100 percent of the SDs total net cash outflows over a prospective 30 calendar-day period (the ''HQLA Proposal'').[363]

The Commission proposed several adjustments to the liquidity coverage ratio to better reflect the business of an SD. For example, the Commission proposed to permit a covered SD to consider cash deposits that are readily available to meet the general obligations of the SD as a level 1 liquid asset in computing its liquidity coverage ratio.[364] The Commission also proposed modifying the liquidity coverage ratio so that covered SDs organized and domiciled outside of the U.S. could recognize certain foreign deposited assets in computing its liquidity coverage ratio. Finally, the Commission's Proposal required a covered SD to maintain a contingency funding plan component, as well as, certain internal senior management notifications and approvals.[365]

Proposed regulation 23.104(b) required covered SDs electing the Net Liquid Assets Capital Approach and FCM–SDs to adopt a liquidity stress test requirement that addressed the types of liquidity outflows experienced by SEC-registered BDs that are ANC Firms in times of stress (the ''LST Proposal''). Under the Commission's proposed LST Proposal, a covered SD or FCM–SD would be required to perform a liquidity stress test at least monthly that took into account certain assumed conditions lasting for 30 consecutive days. The results of the liquidity stress test would be reviewed by senior management periodically. The covered SD or FCM–SD also would be required to have a contingency funding plan to address potential liquidity issues.

In proposing these requirements, the Commission intended to address the potential risk that a covered SD or FCM–SD may not be able to meet both expected and unexpected current and future cash flow and collateral needs as a result of adverse events impacting the covered SD's or FCM–SD's daily operations or financial condition. Further, the proposed liquidity requirements were consistent with those that had been proposed at the time for SBSDs by the SEC and the existing liquidity requirements adopted by the Federal Reserve Board for bank holding companies.[366]

The Commission received comments on the proposed HQLA Proposal and the LST Proposal. One commenter suggested that covered SDs should be able to elect either the HQLA Proposal or the LST Proposal, without regard to the SD's chosen capital approach.[367] Another commenter stated that the requirements of the HQLA Proposal and the LST Proposal should be revised to be more similar to each other given that both approaches have the comparable regulatory objective of helping to ensure that a covered SD or FCM–SD has sufficient access to liquidity to meet its obligations during periods of expected and unexpected market activity.[368] The commenter specifically noted that the LST Proposal's definition of liquidity reserves is materially narrower than the HQLA Proposal's definition of HQLA, and that the Commission should expand the definition under the LST Proposal to match the definition under the HQLA

[361] *See 2016 Capital Proposal,* 81 FR 91252 at 91273–75.

[362] *Id.*

[363] *See* 12 CFR 249.10. Federal Reserve Board rules require a regulated institution to maintain a liquidity coverage ratio of HQLA to net cash outflows that is equal to or greater than 1.0 on each business day.

[364] *See* proposed Commission regulation § 23.104(a)(1); *2016 Capital Proposal,* 81 FR 91252 at 91317.

[365] *See* proposed Commission regulation § 23.104; *2016 Capital Proposal,* 81 FR 91252 at 91317–18.

[366] *See* SEC proposed rule 18a–1(f), 77 FR 70213 (Nov. 23, 2012), and 12 CFR part 249.

[367] *See, e.g.,* MS 5/15/17 Letter.

[368] *See* SIFMA 5/15/17 Letter.

Proposal so as to recognize the full range of assets that are actually available to a firm to support its liquidity needs.[369]

Commenters also raised the concept of a third alternative, which would be the application of a more qualitative than quantitative requirement applicable to covered SDs that are subsidiaries of bank holding companies and already subject to comprehensive overall liquidity risk management program requirements at a parent level.

The Commission requested additional comments regarding the proposed liquidity requirements in the *2019 Capital Reopening.* The Commission requested specific comment on whether it was necessary for the proposed SD capital rules to include additional liquidity requirements given that the Commission had previously adopted a risk management program set forth in regulation 23.600 for both bank SDs and covered SDs that includes liquidity requirements.

The Commission received comments in response to the *2019 Capital Reopening.* Several commenters suggested that the Commission defer adopting separate and distinct quantitative liquidity requirements as part of the SD capital rule given that the SD risk management program adopted by the Commission in regulation 23.600 requires a covered SD to assess liquidity risk.[370] One commenter stated that the Commission should not adopt the proposed specific liquidity requirement as SDs have a diversity of business models, making standard quantitative liquidity requirements difficult to apply across SDs. The commenter further stated that the Commission should instead rely on the qualitative liquidity requirements in regulation 23.600, and evaluate the sufficiency of the liquidity program based on the specific business and associated risks of the covered SD.[371] The commenter noted that regulation 23.600 is tailored specifically to address liquidity needs associated with posting margin and performing on swap transactions. In this regard, the commenter stated that a covered SD is required under regulation 23.600 to measure liquidity needs on a daily basis, assess procedures to liquidate non-cash collateral in a timely manner without significant effect on price, and apply appropriate collateral haircuts that accurately reflect market risk and credit risk, as well as requiring a covered SD to establish and enforce a system of risk management policies and procedures to monitor and manage market and credit risk associated with its dealing activities. The commenter further stated that the requirements of regulation 23.600 achieve the objective of ensuring SD liquidity in a flexible manner, without imposing a separate and standardized quantitative approach for firms that have different operations.

One commenter noted that many covered SDs engage in multiple business lines, not just swap dealing, which may be subject to separate regulatory frameworks which address liquidity risk. For example, a dual-registered BD/SD would be subject to either the Net Liquid Assets Capital Approach or the FCM approach if the SD is also a registered FCM, which is a liquidity-based capital requirement that requires the entity to take net capital deductions for nonmarketable or otherwise illiquid assets.[372] In addition, this commenter noted that a quantitative standard applicable at a covered SD level may trap liquid assets within the covered SD and make such assets unavailable at the SD's holding company level.[373] The commenter stated that this may make the holding company and other affiliates of the covered SD less resilient by removing the flexibility to liquidate assets held at the covered SD and deploy the cash where and when it is needed most.[374]

Commenters also noted that many of the covered SDs are directly or indirectly already subject to various forms of quantitative liquidity requirements due to their status as subsidiaries of large U.S. bank holding companies. One commenter stated that liquidity coverage ratios and Federal Reserve regulation YY-mandated internal liquidity stress testing programs apply and operate on a consolidated basis across large U.S. bank holding companies, ensuring that liquidity risks arising in covered SDs are addressed in consolidated liquidity requirements. This commenter further noted that U.S. bank holding companies subject to Recovery and Resolution Planning requirements are required to consider funding and liquidity requirements of SDs that are ''material operating entities'', which may result in a requirement to preposition liquidity and funding in a covered SD.

The Commission has considered the comments received and assessed the additional proposed liquidity requirements and has determined to defer the adoption of final rules at this time. As noted by the Commission in the *2019 Capital Reopening* and by many of the commenters, regulation 23.600 currently imposes liquidity requirements on covered SDs. Regulation 23.600 requires each SD to establish, document, maintain, and enforce a system of written risk management policy and procedures designed to monitor and manage the risk associated with the covered SD's swaps activities. A covered SD' risk management policies and procedures must take into account market, credit, foreign currency, legal, operational, settlement, and any other applicable risks in addition to liquidity risk. With respect to liquidity risk, the risk management policies and procedures must, at a minimum, monitor and/or manage the daily measurement of liquidity needs and include an assessment of the procedures to liquidate non-cash collateral in a timely manner and without significant effect on the price realized for the non-cash collateral.

Moreover, staff's review of covered SDs' risk exposure reports has revealed that there is a wide disparity in how covered SDs establish their liquidity risk management policies and procedures, and assess their liquidity needs. This disparity is in part due to the variety of provisionally-registered SDs under the Commission's jurisdiction. Some covered SDs are subsidiaries of much larger parent organizations, many of which are banking entities, that are subject to sophisticated liquidity risk management policies and procedures at both the parent and subsidiary levels. Other covered SDs are not part of a large bank holding company or financial organization and have different, less sophisticated liquidity policies and procedures that are more suited to the type of swaps activities that they engage in with counterparties. Given the diversity of the provisionally-registered SDs, the Commission believes that it is not advisable to impose a single, mandated method of measuring liquidity needs at a covered SD, and the Commission has determined to defer the adoption of detailed quantitative liquidity requirements at this time. Commission staff will monitor covered SDs' liquidity as part of its ongoing monitoring of the financial reporting submitted by covered SDs and will reassess the appropriateness of recommending to the Commission additional liquidity risk management requirements that are a supplement to, enhancement of, or replacement of, the

[369] *Id.*

[370] *See* IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter; Shell 3/3/2020 Letter.

[371] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[372] *See* IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter; Shell 3/3/2020 Letter.

[373] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[374] *Id.*

current liquidity risk management requirements in regulation 23.600. Such additional liquidity requirements would be based upon the Commission staff's assessment and experience with actual liquidity practices and procedures used by covered SDs and would be tailored to address any potential deficiencies or lapses in liquidity risk management.

9. Equity Withdrawal Restrictions for Covered SDs and Covered MSPs

The *2016 Capital Proposal* proposed to prohibit certain withdrawals of equity capital from covered SDs.[375] The restrictions were based upon existing equity withdrawal restrictions for FCMs set forth in regulation 1.17(e). The Proposal generally provided that the capital of a covered SD, or any subsidiary or affiliate of the covered SD that has any of its liabilities or obligations guaranteed by the covered SD, may not be withdrawn by action of the covered SD or by its equity holders if the withdrawal, and any other similar transactions scheduled to occur within the succeeding six months, would result in the covered SD holding less than 120 percent of the minimum regulatory capital that the covered SD is required to hold pursuant to proposed regulation 23.101. The Proposal also included an exception permitting the covered SD to pay required tax payments and reasonable compensation to equity holders of the SD.

In addition to the equity withdrawal restrictions, proposed regulation 23.104(d) authorized the Commission to issue an order to restrict for up to 20 business days the withdrawal of capital from a covered SD, or to prohibit the covered SD from making an unsecured loan or advance to any stockholder, partner, member, employee or affiliate of the covered SD. The Proposal further authorized the Commission to issue an order restricting or prohibiting the withdrawal of capital if, based upon the information available, the Commission concludes that the withdrawal, loan or advance may be detrimental to the financial integrity of the covered SD, or may unduly jeopardize the covered SD's ability to meet its financial obligations to counterparties or to pay other liabilities which may cause a significant impact on the markets or expose the counterparties and creditors of the covered SD to loss.[376]

As noted in the Proposal, the proposed equity withdrawal restrictions discussed above are consistent with existing equity withdrawal restrictions imposed on FCMs and BDs, and with equity withdrawal restrictions adopted by the SEC for SBSDs.[377] In addition, the grant of authority to the Commission to issue an order temporarily restricting certain unsecured loans or advances is consistent with the existing Commission authority under regulation 1.17(g)(1) for FCMs and with the SEC's authority over BDs and SBSDs.[378] Further, the Commission proposed to make the existing language of 1.17(g)(1) as applicable to FCMs more consistent with same language contained in final SEC equity withdrawal restrictions for BDs and SBSDs, and received no comments thereon.

The Commission did not receive comments on the proposed equity withdrawal requirements. The Commission has considered the Proposal and for the reasons set out in the 2016 Proposal is adopting them with a minor modification. The equity withdrawal restrictions were proposed in paragraphs (c) and (d) of regulation 23.104. The Commission is redesignating paragraphs (c) and (d) of regulation 23.104 as paragraphs (a) and (b) in the final rule to reflect the removal of the proposed liquidity requirements in proposed regulation 23.104(a) and (b) as discussed above. The Commission is further adopting the amendment to 1.17(g)(1) as proposed to make the language of the FCM equity withdrawal order restriction consistent with the same language as effective for BDs and SBSDs, and now regulation 23.104 for SDs.

10. Leverage Ratio Requirements for Covered SDs

The Commission requested comment in the *2019 Capital Reopening* as to whether it would be appropriate for the Commission, at a future date after notice and comment, to revise the covered SD capital requirements by adopting a leverage ratio for SDs in lieu of the proposed percentage of the risk margin amount, if adopted as final. The Commission also requested comment on the cost, if any, in terms of additional required capital that a leverage ratio requirement would impose on a covered SD relative to the Net Liquid Assets Capital Approach, Bank-Based Capital Approach, and Tangible Net Worth Capital Approach, and how the adoption of a leverage ratio requirement would affect the efficiency, competitiveness, integrity, safety and soundness, and price discovery of the swap markets.[379]

Commenters generally opposed the adoption of a leverage ratio. One commenter stated that while leverage ratios have been argued to serve as effective backstops to guard against miscalculations of market risk or credit risk, leverage ratios are very blunt instruments that create perverse incentives.[380] This commenter noted that a leverage ratio would discourage a covered SD from maintaining a reserve of safer, lower-yielding, securities and cash positions, despite the liquidity and safety and soundness benefits of such instruments.[381] The Commission is not adopting a leverage ratio as part of its capital requirements at this time.

*D. Swap Dealer and Major Swap Participant Financial Recordkeeping, Reporting and Notification Requirements.*

Section 4s(f) of the CEA requires SDs and MSPs to make any reports regarding transactions and positions, as well as any reports regarding financial condition, that the Commission adopts by rule or regulation.[382] Consistent with section 4s(f), the Commission proposed new regulation 23.105, which require SDs and MSPs to satisfy current books and records requirements, ''early warning'' and other notification filing requirements, and periodic and annual financial report filing requirements with the Commission and with any RFA of which the SDs and MSPs are members.

The notice and financial reporting requirements proposed by the Commission differentiate covered SDs and covered MSPs from bank SDs and bank MSPs.[383] For covered SDs and covered MSPs, the Commission proposed a financial reporting, notification and recordkeeping approach that was modelled after the existing reporting regimes followed by FCMs and BDs, and that was proposed by the SEC for SBSDs. Where applicable, the Commission proposed flexibility for foreign-domiciled SDs and MSPs recognizing that a significant number of these SDs and MSPs would likely be subject to existing financial

[375] *See 2016 Capital Proposal,* 81 FR 91252 at 91275.

[376] *Id.* The Proposal further provided that the covered SD may request a hearing on the order, which must be held within two business days of the date of the written request by the covered SD.

[377] Equity withdrawal restrictions for FCMs are set forth in Commission regulation § 1.17(e) (17 CFR 1.17(e)), and for BDs are set forth in SEC rule 15c3–1(e)(2) (17 CFR 240.15c3–1(e)(2)). SEC equity withdrawal restrictions for SBSDs are contained in SEC rule 18a–1(h)(2) (17 CFR 240.18a–1(h)(2)).

[378] *See* SEC rule 15c3–1(e)(3) (17 CFR 240.15c3–1(e)(3)) for BDs and rule 18a–1(h)(3) (17 CFR 240.18a–1(h)(3)) for SBSDs.

[379] *See 2019 Capital Reopening,* 84 FR 69664 at 69669.

[380] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[381] *Id.*

[382] 7 U.S.C. 6s(f).

[383] *See* proposed Commission regulation § 23.105(a)(2); *2016 Capital Proposal,* 81 FR 91252 at 91318.

reporting requirements. For bank SDs and bank MSPs, the Commission proposed more limited requirements as the financial condition of these entities will be predominantly supervised by the applicable prudential regulator and subject to its capital and financial reporting requirements.

The recordkeeping, reporting and notification requirements in the *2016 Capital Proposal* were intended to facilitate effective oversight over the Commission's capital requirements and improve internal risk management, via requiring robust internal procedures for creating and retaining records central to the conduct of business as an SD or MSP.[384] The *2016 Capital Proposal* proposed to require covered SDs and covered MSPs to, among other things: (i) Maintain current ledgers and other similar records summarizing transactions affecting their assets, liabilities, income, and expenses; (ii) file notices of certain events with the Commission, including notices of failing to comply with the applicable minimum capital requirements; (iii) file monthly unaudited and annual audited financial statements with the Commission; and (iv) provide the Commission with additional information as requested.[385] The Proposal also required bank SDs and bank MSPs to file certain information with the Commission. Such information included: (i) Quarterly statements of financial condition, regulatory capital computations, and aggregate swaps position information; (ii) notice filings, including notice of a failure to maintain the minimum applicable capital requirement; and (iii) additional information as requested by the Commission.[386]

The Commission received several detailed comments regarding the 2016 proposed financial reporting, notification and recordkeeping requirements. Several commenters noted the importance of harmonizing the Commission's financial reporting and notification requirements with the requirements of other regulators, namely the SEC and the prudential regulators.[387] Commenters generally supported the Commission's approach of permitting non-U.S. SDs and MSPs to use International Financial Reporting Standards (''IFRS'') in lieu of U.S. GAAP in the preparation of required financial statements, but some asked that the Commission remove the foreign domicile requirement to use IFRS.[388] Several commenters to the Proposal also expressed concern that the 60-day timeline for annual certified financial statement reporting was not practical for many large non-financial companies as they are typically permitted to provide audited financial statements within 90 days of the end of their fiscal year.[389] Other commenters expressed concern for the weekly position reporting requirements.[390] Several covered SDs that are subsidiaries of non-financial public companies requested that the posting period for public disclosures be extended or eliminated altogether, noting that additional time would be necessary to allow for internal and external auditors to review the information.[391]

In the *2019 Capital Reopening,* the Commission asked several additional questions in response to these comments. The Commission specifically asked whether the IFRS requirement should be expanded to include a broader set of eligible covered SDs and whether the annual audit reporting timelines for certain covered SDs should be lengthened to 90 days.[392] The Commission also asked whether it should harmonize certain requirements, including the public disclosure timelines of bank SDs, with the finalized reporting, notification and recordkeeping requirements of SBSDs adopted by the SEC.[393]

The Commission received several comments in response to the questions.[394] Certain commenters stated that the Commission should permit non-U.S. covered SDs and U.S. covered SDs that are subsidiaries of non-U.S. parent companies to use IFRS, one stating that there would be no material difference in its financial statements if they were produced under IFRS versus GAAP.[395] Several commenters did not believe that the Commission should adopt the weekly margin position reporting requirements, citing that information required under the reporting is duplicative of information received or proposed to be received under the Commission proposed part 45 data requirements.[396] Several commenters also stated that the Commission should harmonize public disclosure requirements with those adopted by the SEC for stand-alone SBSDs.[397] One commenter stressed that the Commission should not adopt any financial reporting requirements for bank SDs, and that covered SDs following the Bank-Based Capital Approach should be subjected to the same reporting timeline (45 days after quarter end) as a bank.[398]

After considering those comments and in light of the final financial reporting, notification and recordkeeping requirements for MSBSP and SBSDs adopted by the SEC,[399] the Commission is adopting the recordkeeping, notice and financial reporting requirements as proposed with the following modifications.

1. Routine Financial Reporting and Recordkeeping Requirements

Proposed regulation 23.105(b) required a covered SD or a covered MSP to prepare current ledgers or other similar records showing or summarizing each transaction affecting its asset, liability, income, expense, and capital accounts.[400] The accounts must be classified in accordance with U.S. GAAP provided, however, that if the covered SD or covered MSP is organized under the laws of a foreign jurisdiction and is not otherwise required to prepare its records or financial statements in accordance with U.S. GAAP, the SD or MSP may prepare the required records in accordance with IFRS issued by the International Accounting Standards Board.[401] The Commission also proposed to require covered SDs and covered MSPs to file periodic financial

[384] *See 2016 Capital Proposal,* 81 FR 91252 at 91295.

[385] *See* Proposed Commission regulation § 23.105; *2016 Capital Proposal,* 81 FR at 91252 at 91318–22.

[386] *Id.*

[387] *See* SIFMA 5/15/17 Letter.

[388] *See, e.g.,* Shell 5/15/17 Letter; BPE 5/15/17 Letter.

[389] *See, e.g.,* Shell 5/15/17 Letter; Cargill 5/15/17 Letter.

[390] *See* MS 5/15/17 Letter at 9; SIFMA 5/15/17 Letter at 29.

[391] *See* Shell 5/15/17 Letter; NCGA/NGSA 5/15/2017 Letter; and CEWG 5/15/2017 Letter.

[392] *See 2019 Capital Reopening,* 84 FR 69664 at 69678 (Dec. 19, 2019).

[393] *Id. See also, Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers,* 84 FR 68550 (Dec. 16, 2019).

[394] Shell Trading 3/3/2020 Letter; NCGA/NGSA 3/3/2020 Letter; IIB/ISDA/SIFMA 3/3/2020 Letter.

[395] *See* Shell 3/3/2020 Letter at 3: CEWG 3/3/2020 Letter at 5–6; NCGA/NGSA 3/3/2020 at 6–7; IIB/ISDA/SIFMA 3/3/2020 Letter at 52.

[396] *See* NCGA/NGSA 3/3/2020 Letter; IIB/ISDA/SIFMA 3/3/2020 Letter at 53.

[397] *See* CEWG 3/3/2020 Letter at 6; IIB/ISDA/SIFMA 3/3/2020 Letter.

[398] *See* IIB/ISDA/SIFMA 3/3/2020 Letter at 50–51.

[399] *Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers,* 84 FR 68550 (Dec. 16, 2019).

[400] These proposed requirements are based upon existing FCM and BD financial recordkeeping and reporting requirements. Commission regulation § 1.18 (17 CFR 1.18) requires each FCM to prepare and keep current ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each transaction affecting its asset, liability, income, expense and capital accounts. SEC rule 17a–3 (17 CFR 240.17a–3) requires a BD to make and maintain comparable ledgers and other similar records reflecting its assets, liabilities, income and expenses.

[401] FCMs are required to classify accounts only in accordance with U.S. GAAP.

reports with the Commission and with the SDs' or MSPs' RFA.[402] In proposed regulation 23.105(d)(2) and (e)(3), the monthly unaudited and annual audited financial statements must also be prepared in accordance with U.S. GAAP, provided, however, that the Commission proposed to permit covered SDs or covered MSPs that are organized and domiciled outside of the U.S., and otherwise are not required to prepare financial statements in accordance with U.S. GAAP, to prepare the financial statements in accordance with IFRS or another local accounting standard, after requesting approval by the Commission, which is discussed below, in lieu of U.S. GAAP.[403]

Commenters generally supported the Commission's approach of permitting non-U.S. covered SDs and covered MSPs to use IFRS in lieu of U.S. GAAP in the preparation of required financial statements. However, several commenters requested that the proposed regulation be modified to permit U.S.-based covered SDs that are subsidiaries of non-U.S. parent entities to prepare required financial statements in accordance with IFRS.[404] These commenters stated that U.S. covered SDs that are subsidiaries of foreign-based holding companies may prepare their financial statements in accordance with IFRS as the subsidiary is consolidated with the parent in producing the parent's consolidated financial statements, and further stated that requiring U.S. GAAP financial statements in such situations would impose unnecessary costs on covered SDs without providing substantial enhancements to the regulatory objectives.[405] Three commenters to the *2019 Capital Reopening* stated that the Commission should permit non-U.S. covered SDs and U.S. covered SDs that are subsidiaries of non-U.S. parent companies to use IFRS, one stating that there would be no material difference in its financial statements if they were prepared in accordance with IFRS versus U.S. GAAP.[406]

The Commission is adopting regulation 23.105(b), (d)(2) and (e)(3) as proposed with the exception of a modification to the eligibility requirement for the use of IFRS to address concerns raised by commenters. The Commission is generally comfortable with both U.S. GAAP and IFRS accounting standards for covered SDs and covered MSPs, especially as both standards continue to move towards greater convergence. However, the Commission's preference continues to be U.S. GAAP, and therefore, the Commission is requiring that covered SDs or covered MSPs that are not included in the exception described below, must prepare their financial statements in accordance with U.S. GAAP. In response to commenters, the Commission has removed the requirement that an eligible covered SD or covered MSP must be domiciled outside the U.S in order to be permitted to use IFRS. However, all covered SDs and covered MSPs that are also registered as FCMs or BDs must continue to prepare their financial statements in accordance with U.S. GAAP and are not eligible to use IFRS. The Commission notes that foreign domiciled covered SD or covered MSP may also apply under final regulation 23.106 for a Capital Comparability Determination and has retained language in regulation 23.105(o) to make clear that such a determination could consider different, yet comparable financial reporting requirements including the use of a local accounting standard other than U.S. GAAP or IFRS.

The Commission proposed in regulation 23.105(d)(1) to require a covered SD or covered MSP to file a monthly unaudited financial report within 17 business days of the close of business each month, and proposed in regulation 23.105(e)(1) to require a covered SD or covered MSP to file an annual audited financial report within 60 days of the close of the SD's or MSP's fiscal year-end date. Proposed regulation 23.105(e)(2) required the annual financial statements to be audited by a public accountant that is in good standing in the accountant's home country jurisdiction.[407]

The *2019 Capital Reopening* asked several questions regarding whether it would be appropriate to expand the 60-day annual audit reporting requirement.[408] In response, the Commission received several comments advocating for extending the financial reporting timelines in general, not just the 60-day audit requirement. One commenter requested that the Commission permit covered SDs that elect to use the Bank-Based Capital Approach to submit quarterly reports, as opposed to monthly, and that such reports should be filed within 45 days of the end of the quarter, as is currently required of banks and bank holding companies by regulations of prudential regulators.[409] Another commenter supported the proposition that monthly financial reporting be eliminated for non-bank covered SDs.[410] Other commenters supported an extension of the annual audited financial statement requirement from 60 to 90 days after the end of the covered SD's fiscal year.[411]

As noted in the Proposal, the timing of the proposed financial reporting requirements is consistent with the existing requirements for FCMs, which is harmonized with that required of BDs and SBSDs by the SEC.[412] Timely financial reporting is the Commission's primary method for routine monitoring for compliance with the Commission's capital rule across multiple registrants. The Commission does not expect this timing to be operationally challenging for non-commercial covered SDs, as many of these registrants already prepare financial reports within the organization on a routine basis. In addition, several of these firms are expected to be dually registered with the SEC as either a SBSD or BD, and will be subject to a monthly financial reporting requirement and 60-day reporting timeline for annual audited financial statements.[413]

On the other hand, covered SDs eligible to use the Tangible Net Worth Capital Approach and who are not dually-registered with the SEC could engage in a wide variety of business

[402] As noted in the proposal, these periodic financial reporting requirements are consistent with existing requirements for FCMs and BDs. *See* Commission regulation § 1.10 (17 CFR 1.10), which requires FCMs to submit unaudited monthly and audited annual financial reports to the Commission and to the FCMs' respective designated self-regulatory organization. SEC rule 17a–5 (17 CFR 240.17a–5) directs BDs to file unaudited monthly reports and annual audited reports with the SEC.

[403] *See* proposed Commission regulations §§ 23.105(d)(2) and (e)(3), *2016 Capital Proposal,* 81 FR at 91252 at 91319. Commission regulation § 1.10 (17 CFR 1.10) provides that FCMs must present its unaudited monthly reports and audited annual reports in accordance with U.S GAAP.

[404] *See, e.g.,* Shell 5/15/17 Letter; BPE 5/15/17 Letter.

[405] *Id.*

[406] *See* Shell 3/3/2020 Letter at 3: CEWG 3/3/2020 Letter at 5–6; NCGA/NGSA 3/3/2020 at 6–7; IIB/ISDA/SIFMA 3/3/2020 Letter at 52.

[407] The monthly unaudited and the annual audited financial reports must be prepared in the English language and denominated in U.S. dollars. The proposal also required that the monthly unaudited and annual audited financial reports include: (1) A statement of financial condition; (2) a statement of income or loss; (3) a statement of cash flows; (4) a statement of changes in ownership equity; (5) a statement of the applicable capital computation; and (6) any further materials that are necessary to make the required statements not misleading. Proposed Regulation 23.105(e)(4)(iii) would further require that the annual audited financial statements also include any necessary footnote disclosures. *See 2016 Capital Proposal,* 81 FR 91252 at 91320.

[408] *2019 Capital Reopening* at 69679.

[409] *See* IIB/ISDA/SIFMA 3/3/2020 Letter at 52.

[410] *See* NCGA/NGSA 3/3/2020 at 6.

[411] *See* NCGA/NGSA 3/3/2020 at 6.

[412] *See* Commission regulation § 1.10(b) (17 CFR 1.10(b)), and 17 CFR 240.17a–5, and 240.18a–7.

[413] *See* 17 CFR 240.18a–7(a)(1) and (c)(5).

operations and may be closely held corporations, partnerships or subsidiaries thereof. These covered SDs may not be subject to routine reporting requirements and could require longer periods to perform year-end audit requirements based on the composition of their balance sheet and financial statements. Therefore, the Commission is modifying the timeline for commercial firms by moving the monthly unaudited requirement to a quarterly requirement, and expanding the annual audit timeline for these firms to 90 days. This expanded approach will only be available to covered SDs that elect the Tangible Net Worth Capital Approach under regulation 23.101(a)(2).

The Commission notes that regardless of a covered SD's reporting timeline or elected approach, compliance with the Commission's capital rule is an ''at all times'' requirement. As such, covered SDs should routinely monitor their capital position and notify the Commission and its RFA of material changes in accordance notification requirements discussed herein. In this regard, regulation 23.105(h) provides that the Commission or RFA may, by written notice, require any covered SD or covered MSP to file financial or operational information to the Commission or RFA.[414] Accordingly, covered SDs and covered MSPs eligible to file financial information on a quarterly basis in accordance with regulation 23.105(d), may be required by the Commission or RFA to furnish such information on a monthly or more frequent basis as provided by such notices under regulation 23.105(h). As such, covered SDs and covered MSPs should therefore maintain their books and records in a manner capable of furnishing such information upon request by the Commission or RFA under a written notice issued under regulation 23.105(h) and to be able to demonstrate compliance with notification requirements under regulation 23.105(c). Therefore, the Commission is adopting the financial reporting process and timelines for covered SDs as proposed in regulation 23.105(d)(1), 23.105(e)(1), and 23.105(h) with the modifications discussed above for covered SDs and covered MSPs eligible to use the Tangible Net Worth Capital Approach and regarding furnishing additional reports as requested by the Commission or RFA.

The Commission also proposed in regulation 23.105(d)(3), (4) and (e)(5) to permit a covered SD or covered MSP that is registered with the Commission as an FCM or registered with the SEC as a BD to satisfy the Commission's SD or MSP financial statement reporting requirements by submitting a CFTC Form 1–FR–FCM or its applicable SEC Financial and Operational Combined Uniform Single (''FOCUS'') Report in lieu of the specific financial statements required under proposed regulation 23.105.[415] Similarly, the Commission proposed to permit covered SDs and covered MSPs dually registered with the SEC as either SBSDs or MSBSPs to comply with the Commission's financial reporting and notification requirements under regulation 23.105 by filing simultaneously with the Commission all applicable notices or reports required under the SEC's rules.[416] This proposed framework is consistent with the Commission's long history of permitting SEC registrants to meet their financial statement filing obligations with the Commission by submitting a FOCUS Report in lieu of CFTC Form 1–FR–FCM and reduces the burden on dually registered firms by not requiring two separate financial reporting requirements.

The SEC finalized reporting requirements which require SBSDs and MSBSPs to file a FOCUS form X–17A–5 Part II, no longer requiring a separate FORM SBS as proposed.[417] The Commission is not changing its approach permitting dual registrants the ability to file SEC forms in lieu of the financial reporting and notification requirements of the CFTC. Accordingly, regulation 23.105(d) and (e) have been modified to permit these dual registered covered SDs to file FOCUS reports as discussed in lieu of the Commission's financial reporting requirements.

The Commission has made further technical modifications to the general financial reporting requirements to align them with existing rules for FCMs and dually-registered SBSDs and BDs. The Commission is making these modifications to prevent different treatment between dually-registered SDs and stand-alone SDs. The Commission is modifying regulation 23.105(d) to remove the statement of cash flows, as this schedule is not necessary to assess the financial condition and safety and soundness of the covered SD, nor required of existing FCMs under regulation 1.10 or for BDs under 17 CFR 240.17a–5. For the same reasons, regulation 23.105(d) is also modified to include a statement of changes in liabilities subordinated to the claims of general creditors and references to the annual audited or certified financial report throughout regulation 23.105 have been renamed annual financial report. The Commission has also included references to SEC rule § 240.17a–5 to paragraphs (d)(3) and (e)(5) of regulation 23.105, as SBSDs and MSBSPs which are dually-registered BDs file financial reports in accordance with that rule.

The Commission did not receive comments on the other aspects not discussed herein in regards to regulation 23.105(d) and (e) and is adopting such provisions substantially as proposed.

2. Swap Dealer and Major Swap Participant Notice Requirements

The *2016 Capital Proposal* required SDs and MSPs to file certain regulatory notices with the Commission and with the RFA of which the SDs or MSPs are members if certain defined events occurred.[418] Certain of the notice provisions applied solely to covered SDs and covered MSPs, while other notice provisions applied solely to bank SDs and bank MSPs. The Commission also proposed notice provisions that applied to all registered SDs and MSPs. The proposed notice provisions were based on the existing notice provisions

[414] As discussed in the *2016 Capital Proposal,* the Commission's intention is to require all covered SDs and covered MSPs to file financial reports and notices required under regulation 23.105 with both the Commission and the RFA. As noted, this is consistent with the existing approach under Commission regulations §§ 1.10 and 1.12 (17 CFR 1.10 and 1.12) applicable to FCMs and IBs. Regulation 23.105(h) and elsewhere in regulations 23.105(c), (d), and (e), have been modified to clarify such reporting requirements.

[415] FCMs are required to file monthly unaudited and annual audited Forms 1–FR–FCM with the Commission and with their designated self-regulatory organization. The Forms 1–FR–FCM include, among other information, a statement of financial condition, a statement of income or loss, a statement of changes in ownership equity, a statement of liabilities subordinated to the claims of general creditors, a statement of the computation of regulatory minimum capital, and any further information as may be necessary to make the required statements not misleading. *See* Commission regulation § 1.10(d) (17 CFR 1.10(d)). SEC FOCUS Reports are required to contain, among other statements and information, a statement of financial condition, a statement of income or loss, a statement of changes in ownership equity, a statement of liabilities subordinated to the claims of general creditors, and a statement of the computation of regulatory minimum capital. *See* SEC rule 17a–5 (17 CFR 240.17a–5).

[416] *See* Commission regulation § 23.105(c)(5) (17 CFR 23.105(c)(5)) referencing proposed 17 CFR 240–18a–8 for notification requirements for SBSDs and MSBSPs. *See* § 23.105(d)(3) and § 23.105(e)(5) (17 CFR 23.105(d)(3) and 23.105(e)(5)) referencing proposed 17 CFR 240.18a–7, for monthly and annual financial reporting requirements for SBSDs and MSBSPs.

[417] *See* Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers, 84 FR 68550 (December 16, 2019). *See* SEC rule 18a–7 (17 CFR 240.18a–7), 84 FR 68550 at 68662–67; SEC rule 18a–10 (17 CFR 240.18a–10), 84 FR 68550 at 68668–69.

[418] *See 2016 Capital Proposal,* 81 FR 91252 at 91277–78.

applicable to FCMs, and are intended to require registrants to provide the Commission and RFA with notice of certain events that may indicate that the registrants are experiencing an actual or a potential adverse event, affecting their financial or operational condition.[419] Upon filing of a notice, the Commission or an RFA would initiate an inquiry, including engaging directly with the SD or MSP as necessary, to assess if the notice is an indication of potential issues with the registrant regarding its ability to meet its obligations to customers, counterparties, clearing organizations, creditors, and the marketplace in general.

The Commission proposed in regulation 23.105(c) to require a covered SD or a covered MSP to provide the Commission and RFA with immediate written notice when the firm is: (i) Undercapitalized; (ii) fails to maintain capital at a level that is in excess of 120 percent of its minimum capital requirement; or (iii) fails to maintain current books and records. Proposed regulation 23.105(c) also required a covered SD or covered MSP, as applicable, to provide notice to the Commission and to an RFA within 24 hours of: (i) Failing to comply with the liquidity requirements under proposed regulation 23.104, (ii) experiencing a 30 percent reduction in capital as compared to the last reported capital in a financial report filed with the Commission, or (ii) failing to post or collect initial margin for uncleared swap and security-based swap transactions or exchange variation margin for uncleared swap or security-based swap transactions as required by the Commission's uncleared swaps margin rules or the SEC's uncleared security-based margin rules, respectively, if the total amount that has not been exchange is equal to or greater than: (1) 25 percent of the SD's or MSP's required capital under final regulation 23.101 calculated for a single counterparty or group of counterparties that are under common ownership or control; or (2) 50 percent of the SD's or MSP's required capital under final regulation 23.101 calculated for all of the SD's counterparties.[420]

Proposed regulation 23.105(c) also required a covered SD or covered MSP to provide the Commission and an RFA with a minimum two days advance notice of an intention to withdraw capital by an equity holder that would exceed 30 percent of the SD's or MSP's excess regulatory capital.[421] Finally, the proposal required a covered SD or covered MSP that is dually-registered with the SEC as an SBSD or MSBSP to file with the Commission and with its RFA a copy of any notice that the SBSD or MSBSP is required to file with the SEC under SEC Rule 18a–8 (17 CFR 240.18a–8). SEC Rule 18a–8 requires SBSDs and MSBSPs to provide written notice to the SEC for comparable reporting events as proposed by the Commission in regulation 23.105(c), including if a SBSD or MSBSP is undercapitalized or fails to maintain current books and records.[422] The Commission proposed to require covered SDs and covered MSPs that are dually-registered with the SEC to file copies with the Commission of notices filed with the SEC under Rule 18a–8 to allow the Commission to be aware of any events that may indicate that the SD or MSP is unable to meet its operational or financial obligations on an ongoing basis.

The Commission did not receive comments on the proposed notice provisions in regulation 23.105(c). The Commission has considered the proposal, and is adopting the SD and MSP notice requirements as proposed, with a modification to eliminate the notice provision relating to liquidity requirements that the Commission did not adopt.

3. Swap Dealers and Major Swap Participants Subject to the Capital Rules of a Prudential Regulator

The Commission proposed limited financial reporting for bank SDs and bank MSPs that are subject to the capital requirements of a prudential regulator, as these SDs and MSPs are already subject to existing financial reporting requirements by such prudential regulator. As such, the Commission did not propose to require a bank SD or bank MSP to file monthly unaudited or annual audited financial statements with the Commission or with the RFA of which the SD or MSP is a member. The Commission also did not propose to require such bank SDs or bank MSPs to file notifications contained in Regulation 23.105(c) with the Commission or with an RFA. The Commission did, however, propose to require bank SDs and bank MSPs to file quarterly unaudited financial reports. The Commission also proposed certain regulatory notices that bank SDs and bank MSPs must file with the Commission and with an RFA.

Under the Proposal, bank SDs and bank MSPs were required to file financial reports and specific position and margin information with the Commission and with the RFA of which the SDs and MSPs are members within 17 business days of the end of each calendar quarter. The financial reports and specific position information that would be required under this requirement was set forth in a separate Appendix B to proposed Regulation 23.105(p). The information required on Appendix B was intended to be identical to that required by the SEC for SBSDs subject to the capital rules of a prudential regulator.[423] These quarterly unaudited reports filed with the Commission were largely based on existing ''call reports'' that the bank SDs and bank MSPs are required to file with their respective prudential regulator.[424]

In addition, proposed regulation 23.105(p) required bank SDs and bank MSPs to file certain notices with the Commission and their RFA following the occurrence of certain events. Proposed regulation 23.105 (p)(3)(i) required a bank SD or bank MSP to file a notice with the Commission and with an RFA if the SD or MSP filed a notice of change of its reported capital category with the Federal Reserve Board, the OCC, or the FDIC. Proposed regulation 23.105(p)(3) also required a bank SD that is a foreign bank to notify the Commission if the SD files a notice of a change in its capital category or a notice of falling below its minimum capital requirement with a prudential regulator or with its home country supervisor.[425] Proposed regulation 23.105(p)(3) also required a bank SD or bank MSP to file notices in the event the SD or MSP fails to post or collect initial margin for uncleared swap transactions

[419] *See* Commission regulation § 1.12 (17 CFR 1.12), which requires FCMs to file notices with the Commission and with the FCMs' designated self-regulatory organizations of certain events, including a firm being undercapitalized or failing to maintain current books and records.

[420] *See* Commission regulations §§ 23.152 and 23.153 (17 CFR 23.152 and 23.153).

[421] The term 'regulatory capital'' is defined in proposed Commission regulation § 23.100 and means the relevant capital approach applicable to the SD under proposed Commission regulation § 23.101. *See 2016 Capital Proposal,* 81 FR 91252 at 91309–11.

[422] *See* 17 CFR 240.18a–8.

[423] *See* 2016 *Capital Proposal,* 81 FR 91252 at 91279.

[424] *See* proposed Commission regulation § 23.105(p) and Appendix B; 2016 *Capital Proposal,* 81 FR 91252 at 91321–22 and 91329–32. *See also,* Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices (''call reports''); 12 U.S.C. 324; 12 U.S.C. 1817; 12 U.S.C. 161; and 12 U.S.C. 1464. The proposed financial reporting requirement was consistent with the SEC proposed filing requirement for SBSDs that are subject to the capital rule of a prudential regulator. *See* proposed SEC rule 17 CFR 240.18a–8. Specifically, the Commission proposed that the SDs and MSPs submit to the Commission Appendix B of proposed Commission regulation § 23.105, which is largely based on the SEC's proposed Form SBS part 2 and part 5.

[425] These notices are identical to those finalized for SBSDs by the SEC in 17 CFR 240.18a–8(c).

or post or collect uncleared swap variation margin as required under the respective prudential regulators' rules subject to certain thresholds.[426] Finally, proposed regulation 23.105(p) also included an identical oath and affirmation provisions and electronic filing requirements for bank SDs and bank MSPs as the Commission proposed under paragraphs (f) and (n) of regulation 23.105 for covered SDs and covered MSPs.

The *2019 Capital Reopening* noted that the SEC finalized its recordkeeping, reporting and notification requirements for SBSDs and MSBSPs, which include requiring SBSDs and MSBSPs subject to the capital rules of a prudential regulator to report quarterly unaudited financial information and provide notices of change in its capital category or falling below its minimum capital requirement with the a prudential regulator.[427] The *2019 Capital Reopening* asked whether it was appropriate to make specific changes to proposed regulation 23.105(p) Appendix B in this regard, and to make such schedule align with that finalized by the SEC under Form X–17a–5 FOCUS Part IIC.[428]

Several commenters noted that the 17 business day timeline for the quarterly unaudited financial reporting requirement for bank SDs and bank MSPs was inconsistent with existing banking requirements which permit between a 30-day or 45 calendar day timeline depending on size. In addition, the SEC amended their requirements for SBSDs subject to the capital rules of a prudential regulator to 30 calendar days, making slight adjustments to the schedules in order to make them more consistent with existing call reports.

As noted previously, the Commission wishes to harmonize the reporting requirements for bank SDs and bank MSPs to the maximum extent practicable. The Commission is modifying final regulation 23.105(p) to require a 30 calendar day reporting timeline comparable to that required by SBSD subject to the capital rules of a prudential regulator. The Commission is also adopting the notification requirements relating to the notices of change in capital category or failing below its minimum capital requirement with a prudential regulator. The Commission, however, is not adopting the additional requirements relating to posting and collecting of initial and variation margin under certain thresholds as these notices are not required for SBSDs subject to the rules of a prudential regulator. The Commission further notes in this regard that bank SDs and bank MSPs are also not subject to the Commission's rules for uncleared margin. The Commission is making technical amendments to the Appendix B to align the schedule with that required of SBSD subject to the capital requirements of a prudential regulator under FORM x–17a–5 FOCUS Part IIC, which have been aligned primarily with FFIEC Form 031.

4. Public Disclosures

The Commission proposed to require covered SDs and covered MSPs to provide public disclosure on their website of required financial reporting, including a statement of financial condition and of the amount of minimum regulatory capital required and the amount of regulatory capital of the SD or MSP no less than quarterly, with the same information provided from an audited financial statement no less than annually.[429] The Commission also proposed to require bank SDs and bank MSPs to make publically available no less than quarterly similar financial information.[430] In both instances, the proposed public disclosures were required to be posted to the SD's or MSP's website within ten business days after the SD or MSP is required to file the financial information with the Commission.

The Commission noted in the *2016 Capital Proposal* that its approach was consistent with the financial reporting information the Commission had previously determined should not qualify as exempt from the Freedom of Information Act for FCMs.[431] For bank SDs and bank MSPs, the Commission noted the Proposal was consistent with publically available information provided by bank entities in call reports.[432]

Several covered SDs that are subsidiaries of public companies requested that the posting period on firm's website be extended from ten days to 20 days for the quarterly information, noting that additional timeframe would be necessary to allow for internal and external auditors to review the information.[433] One commenter stated that public disclosure of financial reports will be onerous for commercial covered SDs, while others requested elimination of public disclosures by bank SDs.[434]

In the *2019 Capital Reopening,* the Commission asked questions regarding the practicality of moving the posting deadline from ten business days to 30 calendar days to be consistent with the final requirements adopted by the SEC for SBSDs. Further, the Commission asked whether it was appropriate to remove the public disclosure requirement for bank SDs and bank MSPs under the rationale that this information is already provided to the public on a timely basis as a result of separate disclosure requirements imposed by the prudential regulators.[435] In response, commenters confirmed that a longer period for public disclosure would be preferred and that imposing an additional Commission requirement for bank SDs is duplicative and would override existing balances that were struck.[436] One commenter suggested harmonizing the public disclosure requirement for stand-alone SDs with the biannual requirement required by the SEC for stand-alone SBSD.[437] Another commenter recommended that an exemption be provided for commercial firms which meet a certain threshold of minimum capital.[438]

The Commission believes that is best to harmonize public disclosure requirements to the maximum extent practicable with that required of SBSDs by the SEC. Thus, the Commission is not adopting public disclosure requirements for bank SDs and bank MSPs as these SDs and MSPs will already be providing public disclosures of key financial information as part of the ''call report'' process. Covered SDs and covered MSPs will be required to bi-annually make available on its website basic financial information 30 calendar days following when such information is filed with the Commission. This approach will harmonize the Commission's public disclosure requirements with those required of the stand-alone SBSDs under 17 CFR 240.18a–7(b). Therefore, the Commission is not adopting proposed regulation 23.105(p)(7)

[426] These notices are identical to those required for SDs and MSPs subject to the capital rules of the Commission and proposed under 23.105(c). *See* 2016 *Capital Proposal,* 81 FR 91252 at 91318.

[427] *See* 17 CFR 240.18a–7(a)(2) and 240.18a–8(c).

[428] *2019 Capital Reopening,* 84 FR 69664 at 69680.

[429] *See* Proposed Commission regulation § 23.105(i)(3); *2016 Capital Proposal,* 81 FR 91252 at 91320.

[430] *See* Proposed Commission regulation § 23.105(p)(7); *2016 Capital Proposal,* 81 FR 91252 at 91322.

[431] *See 2016 Capital Proposal,* 81 FR 91252 at 91277.

[432] *Id.*

[433] *See* Shell 5/15/17 Letter; NCGA/NGSA 5/15/2017 Letter; CEWG 5/15/2017 Letter.

[434] *See* Shell 5/15/17 Letter; SIFMA 5/15/17 Letter; MS 5/15/17 Letter.

[435] *See 2019 Capital Reopening,* 84 FR 69664 at 69680, questions 13–a and 13–b.

[436] *See* NCGA/NGSA 3/3/2020 Letter at 6; IIB/ISDA/SIFMA 3/3/2020 Letter at 52.

[437] *See* Shell 3/3/2020 Letter at 4.

[438] *See* Cargill 3/3/2020 Letter at 3.

regarding public disclosures requirements for bank SDs and bank MSPs. The Commission is adopting regulation 23.105(i) as proposed with modification to the timelines as discussed above.

5. Electronic Filing Requirements for Financial Reports and Regulatory Notices

Proposed regulation 23.105(n) required all notifications and financial statement filings submitted to the Commission pursuant to regulation 23.105 to be filed in an electronic manner using a user authentication process approved by the Commission. Proposed regulation 23.105(f) and (p) required each filing made pursuant to Regulation 23.105 include an oath or affirmation signed by an appropriate SD or MSP personnel that the information provided in the filing was true and correct. The Commission notes that many SDs and MSPs are already familiar with the Commission approved WinJammer filing system maintained jointly by NFA and Chicago Mercantile Exchange. WinJammer currently allows Commission registrants that are authorized to use the electronic system to file financial reports and notices with the Commission and NFA simultaneously. The Commission views this system, as well as other future Commission approved systems, as the most effective way to ensure that the filings required under proposed regulation 23.105 would be submitted promptly and directly to the Commission.

One commenter to the 2016 Proposal asked that the Commission provide clarity with the requirements of the oath or affirmation.[439] Another commenter, while generally supportive of the proposed requirements, encouraged the Commission to either adopt standard forms or mandate that the financial filings be accomplished in a form and manner prescribed by an RFA.[440] This commenter further suggested that the Commission consider the SEC's final adopted forms as a starting point for the Commission's forms and encouraged the Commission to parallel any financial reporting requirements for prudentially regulated SDs and those relying on substituted compliance with the SEC's filing requirements for these firms.[441]

As with other requirements regarding financial reporting for SDs and MSPs, the Commission wishes to harmonize these rules to the maximum extent practicable with that adopted by the SEC. The Commission expects that those registrants that are dually-registered with the SEC as either BDs or SBSDs, including those that are also subject to the capital rules of a prudential regulator, would fully comply with the Commission's reporting requirements by filing forms adopted by the SEC. Accordingly, to ensure that bank SD or bank MSP duly registered with the SEC will not be subject to two separate filing requirements, the Commission is amending 23.105(p) by including a provision that a bank SD or bank MSP may file a Form X–17A–5 FOCUS Part IIC in lieu of the forms required under 23.105(p).

The Commission wishes to add clarity that while it is adopting specific schedules in Appendix A and B with regard to swap position information, it is not adopting a standard form for the other routine monthly or annual filing requirements as discussed above.[442] Nonetheless, the Commission may approve additional procedures developed by an RFA, which could include standard forms or procedures necessary to carry out the Commission's filing requirements. The Commission notes that an RFA is required to adopt minimum capital, segregation, and other financial requirements applicable to its members, in accordance with section 17(p)(2) of the CEA. In this regard, each self-regulatory organization, which includes an RFA, must have minimum financial and related reporting requirements that are the same as or more stringent than the Commission's requirements.[443] The Commission is not modifying the proposed language related to the oath or affirmation that financial reports be true and correct. This language is identical to that required in regulation 1.10(d)(4) and that is required by the SEC in 240.17a–5(e)(2) and 240.18a–7(d)(1). In order to ensure that the oath and affirmation is harmonized with SEC for duly registered SBSDs, the Commission is modifying the application of the oath or affirmation to only apply to financial reports, and not to notice or other filings as proposed. For the same reasons, the Commission is modifying the language that for corporations, the oath and affirmation must be signed by the duly authorized officer. The Commission is adopting all other aspects of regulation 23.105(f) and (p) as proposed.

6. Swap Dealer and Major Swap Participant Reporting of Position Information

Proposed regulation 23.105(l) required each covered SD or covered MSP to file monthly swap and security-based swap position information with the Commission and with the RFA of which the SD or MSP is a member. This information was proposed to be reported using Appendix A to regulation 23.105, and was based upon the information proposed to be filed with the SEC by SBSDs.[444] Accordingly, covered SDs or covered MSPs that are dually-registered as SBSDs would be subject to file the same position information with both regulators. In this regard, all covered SDs or covered MSPs were permitted under proposed 23.105(d)(3) to file SEC forms in lieu of the Commission's financial reporting requirements.

The position information that was proposed in regulation 23.105(l) would include a covered SD's or covered MSP's: (i) Current net exposure by the top 15 counterparties, and all other counterparties combined; (ii) total exposure by the top 15 counterparties, and all others combined; and, (iii) the internal credit rating, gross replacement value, net replacement value, current net exposure, total exposure, and margin collected for the top 36 counterparties. The covered SD or covered MSP would also have to provide current exposure and net exposure by country for the top 10 countries. The Commission also proposed in 23.105(m) to require covered SDs and MSPs to file with the Commission information about their custodians that hold margin for uncleared swaps pursuant to regulations 23.152 and 23.153 and the aggregate amounts of margin held at such custodians, as well as, the aggregate amount required to be posted and collected pursuant to such rules. The Commission indicated this information will be necessary component of its financial surveillance program to monitor the financial condition and positions of SDs and MSPs.

In the *2019 Capital Reopening,* the Commission noted that a commenter had raised issue with the fact that the proposed appendices did not contain accompanying form instructions, despite having defined terms in both

[439] SIFMA 5/15/17 Letter at 28.

[440] NFA 3/2/2020 Letter at 6, 7.

[441] *Id.*

[442] Please note that due to changes in **Federal Register** publication requirements, the appendices that had been referred to as Appendix A to section 23.105 and Appendix B to section 23.105 in previous documents are being published in this final rule as Appendix B to Subpart E of Part 23 and Appendix C to Subpart E of Part 23, respectively.

[443] *See* also Commission regulation § 1.52 (17 CFR 1.52).

[444] *See* SEC proposed Form SBS part 4.

column headings and rows.[445] In this regard, the Commission asked whether it would be appropriate to incorporate by reference the form instructions published alongside of finalized SEC form X–17a–5 FOCUS Part II and IIC on the proposed appendices to regulation 23.105. Further, the Commission asked whether it was appropriate to modify the proposed Appendices to align certain column headings and rows to that finalized by the SEC in their aforementioned forms.

The Commission received one comment in support of adding the explanatory note incorporating by reference the form instructions published by the SEC.[446] Therefore, the Commission is making technical modifications to the Appendix A to align the schedules with that required of SBSDs under Form X–17a–5 FOCUS Report Part II and incorporate by reference their form instructions. In this regard, the headings of Schedules 2, 3, and 4 of Appendix A have been modified to indicate that these will be required to be completed by Covered SDs authorized to use models. Much of the information on these schedules is required under regulation 23.105(k), and is consistent with that required by the SEC under their form schedules. In addition, Schedule 1 of Appendix A contains general position information and utilizes identical column and row headings as the comparable SEC schedule and applies generally to all covered SDs. All other aspects of regulation 23.105(l) and the incorporated Appendix A are being adopted as proposed. The Commission did not receive comment on the monthly custodian reporting in regulation 23.105(m) and is adopting as proposed.

7. Reporting Requirements for Swap Dealers and Major Swap Participants Approved To Use Internal Capital Models

The Commission proposed reporting requirements for covered SDs that have received approval from the Commission or from an RFA under proposed regulation 23.102(d) to use internal models to compute market risk capital charges or credit risk capital charges. The Commission's proposed requirements for the collection of model information are largely based on existing requirements for ANC Firms under regulation 1.17 and the rules of the SEC, and on SEC rules for SBSDs and BDs.

Regulation 23.105(k) required a covered SD to file, on a monthly basis, a listing of each product category for which the covered SD does not use an internal model to compute market risk deductions, and the amount of the market risk deduction; a graph reflecting, for each business line, the daily intra-month VaR; the aggregate VaR for the SD; for each product for which the SD uses scenario analysis, the product category and the deduction for market risk; and, credit risk information on swap, mixed swap, and security-based swap exposures, including: (A) Overall current exposure, (B) current exposure listed by counterparty; (C) the 10 largest commitments listed by counterparty, (D) the SD's maximum potential exposure listed by counterparty for the 15 largest exposures; (E) the SD's aggregate maximum potential exposure, (F) a summary report reflecting the SD's current and maximum potential exposures by credit rating category, and (G) a summary report reflecting the SD's current exposure for each of the top 10 countries to which the SD is exposed.

Regulation 23.105(k) also required each covered SD approved to use internal capital models to submit a report identifying the number of business days for which the actual daily net trading loss exceeded the corresponding daily VaR and the results of back-testing of all internal models used to compute allowable capital, including VaR, and credit risk models, indicating the number of back-testing exceptions. All of the information required to be submitted to the Commission or RFA under proposed regulation 23.105(k) would be required to be filed within 17 days of the close of each month, with the exception of the report identifying the number of business days for which the actual daily net trading loss exceeded the corresponding daily VaR, which would be required on a quarterly basis.

The Commission did not receive comment on the proposed reporting requirements for covered SDs and MSPs who have been approved to use models under regulation 23.102(d). The Commission also notes that such reporting requirements are identical to that finalized by the SEC for SBSDs and MSBSDs who have been approved to use models to calculate their market and credit risk charges under the SEC's rules. As such, the Commission is adopting regulation 23.105(k) with slight technical amendments to align such requirements with that finalized by the SEC.

8. Weekly Position and Margin Reporting

The Commission proposed weekly reporting of position and margin information for the purposes of conducting risk surveillance of SDs and MSPs. This requirement would apply to SDs and MSPs subject to the capital and margin rules of either the Commission or a prudential regulator. Similar reporting is currently provided on a daily basis by DCOs for cleared swaps.[447]

Proposed regulation 23.105(q)(1) would require SDs and MSPs to report position information, in a format specified by the Commission, (i) by counterparty, and (ii) for each counterparty, by the following asset classes—commodity, credit, equity, and foreign exchange or interest rate. Under the uncleared margin rules, these are asset classes within which margin offsets may be taken.[448]

Proposed regulation 23.105(q)(2) would require SDs and MSPs to report margin information, in a format specified by the Commission, showing: (i) The total initial margin posted by the SD or MSP with each counterparty; (ii) the total initial margin collected by the SD or MSP from each counterparty; and (iii) the net variation margin paid or collected over the previous week with each counterparty.

Several commenters noted that the weekly position requirement was duplicative of information provided as part of the Commission's Part 45 program.[449] Other commenters noted ambiguities in the Commission's proposed requirements and indicated that any weekly reporting requirement would likely be very costly to implement.[450]

As noted in the Proposal, the Commission currently uses positon and margin information filed by DCOs to identify and to take steps to mitigate the risks posed to the financial system by participants in cleared markets including DCOs, clearing members, and large traders.[451] In addition, the Commission has collected specific transactional swap data as part of its Part 45 program and uses such data in various surveillance and oversight

[445] *See 2019 Capital Reopening,* 84 FR 69664 at 69680 footnote 121, citing to SIFMA 5/17/17 Letter.

[446] IIB/ISDA/SIFMA 3/3/2020 Letter at 50, fn. 108.

[447] Commission regulation § 39.19(c)(1) (17 CFR 39.19(c)(1)).

[448] 17 CFR 23.154(b)(2)(v).

[449] *See* ISDA 5/15/2017 Letter; Cargill 5/15/2017 Letter.

[450] *See* INTL FCStone 5/15/2017 Letter; CEWG 5/15/2017 Letter; BPE 5/15/2017 Letter; SIFMA 5/15/2017 Letter.

[451] *See 2016 Capital Proposal,* 81 FR 91252 at 91279–80.

functions.[452] The Commission has recently proposed revisions to the Part 45 data collection, including several additional fields, such as initial and variation margin.[453] Therefore, the Commission at this time believes that imposing an additional weekly position reporting requirement for SDs and MSPs would be duplicative of these efforts. The Commission will revisit the need for a separate weekly position and margin reporting requirement once the routine financial reporting requirements of SDs and MSPs are effective. Accordingly, the Commission is not adopting the weekly position and margin reporting requirements in proposed regulation 23.105(q) at this time.

*E. Comparability Determinations for Eligible Covered SDs and Covered MSPs*

The Commission proposed a substituted compliance framework that would permit covered SDs and covered MSPs that were organized and domiciled in a foreign jurisdiction to rely on compliance with their applicable home country regulator's capital and financial reporting requirements in lieu of meeting all or parts of the Commission's capital adequacy and financial reporting requirements.[454] The availability of substituted compliance was conditioned upon the Commission issuing a determination that the relevant foreign jurisdiction's capital adequacy and financial reporting requirements are comparable with the Commission's corresponding capital adequacy and financial reporting requirements (*i.e.,* a ''Capital Comparability Determination''). Furthermore, FCM–SDs and dually-registered FCM/MSPs (''FCM–MSPs'') were not eligible for substituted compliance as FCMs are required to comply with the capital and financial reporting requirements in part 1 of the Commission's regulations.[455]

The proposed Capital Comparability Determination framework established a standard of review for determining whether some or all of the relevant foreign jurisdiction's capital adequacy and financial reporting requirements are comparable with the Commission's corresponding capital adequacy and financial reporting requirements. This framework, as detailed below, is generally consistent with the approach adopted by the Commission in assessing substituted compliance of the margin rules for covered SDs engaging in cross-border uncleared swap transactions.

Proposed regulation 23.106 provided that any eligible covered SD or covered MSP, and any foreign regulatory authority that has direct supervisory authority with respect to capital and financial reporting over one or more eligible covered SDs or covered MSPs, is permitted to request a Capital Comparability Determination. The Commission further proposed that eligible covered SDs and covered MSPs may coordinate with their home country regulators in order to simplify and streamline the process for obtaining a Capital Comparability Determination.[456]

Persons requesting a Capital Comparability Determination are required to submit to the Commission: (i) Copies of the relevant foreign jurisdiction's capital and financial reporting requirements (including English translations of any foreign language documents); (ii) descriptions of the objectives of the relevant capital and financial reporting requirements and how such requirements are comparable to, or different from, the Commission's capital and financial reporting requirements (*e.g.,* the Net Liquid Assets Capital Approach and Bank-Based Capital Approach), international standards such as Basel bank capital requirements, if applicable; and, (iii) descriptions of how such requirements address the elements of the Commission's capital and financial reporting rules. A person requesting a Capital Comparability Determination is further required to identify the regulatory provisions that correspond to the Commission's capital and financial reporting requirements (and, if necessary, identify whether the foreign jurisdiction's capital requirements do not address a particular element). A person requesting the determination is also required to provide a description of the ability of the relevant foreign regulatory authority or authorities to supervise and enforce compliance with the applicable capital and financial reporting requirements, and to provide any other information and documentation the Commission deems appropriate.

The proposal identified certain key factors that the Commission would consider in making a Capital Comparability Determination. Specifically, the Commission would consider: (i) The scope and objectives of the relevant foreign jurisdiction's capital requirements; (ii) how and whether the relevant foreign jurisdiction's capital adequacy requirements compare to international Basel capital standards for banking institutions or to other standards such as those used for securities brokers or dealers; (iii) whether the relevant foreign jurisdiction's capital requirements achieve comparable outcomes to the Commission's corresponding capital requirements; (iv) the ability of the relevant regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements; and (v) any other facts or circumstances the Commission deems relevant. The Commission further stated that a foreign capital regime may be deemed comparable in some, but not all, elements of the Commission's capital and financial reporting requirements.

Proposed regulation 23.106 further provided that any covered SD or covered MSP that, in accordance with a Capital Comparability Determination, complies with a foreign jurisdiction's capital and financial reporting requirements, would be deemed in compliance with the Commission's corresponding capital adequacy and financial reporting requirements. Accordingly, the failure of such an SD or MSP to comply with the relevant foreign capital and financial reporting requirements may constitute a violation of the Commission's capital adequacy and financial reporting requirements. In addition, all covered SDs and covered MSPs relying on substituted compliance would remain subject to the Commission's examination and enforcement authority regardless of the Commission issuing a Capital Comparability Determination.

The Commission also retained the authority to impose any terms and conditions it deems appropriate in issuing a Capital Comparability Determination and to further condition, modify, suspend, terminate or otherwise restrict any Capital Comparability Determination it had issued in its discretion. Such revisions or termination of the Capital Comparability Determination could result from, for example, changes in foreign laws or regulatory oversight. In this regard, the Capital Comparability Determinations issued by the Commission would require that the Commission be notified of any material changes to information submitted in support of a Capital

[452] *See* 85 FR 21578 at 21579, 21584.

[453] *See* 85 FR 21578 at 21649–51.

[454] *See 2016 Capital Proposal,* 81 FR 91252 at 91280–81.

[455] Two FCMs currently are organized and domiciled outside of the U.S., and neither is provisionally-registered as an SD or MSP. Accordingly, the Commission does not view the inability of an FCM–SD or an FCM–MSP to avail itself of substituted compliance to present any issues to registrants.

[456] The Commission also confirms that a trade association or similar organization may submit a Capital Comparability Determination on behalf of one or more eligible covered SDs or covered MSPs.

Comparability Determination, including, but not limited to, changes in the relevant foreign jurisdiction's supervisory or regulatory regime.

Commenters generally supported the Commission's proposed substituted compliance framework.[457] One commenter stated that less than full acceptance of foreign regulation by the Commission would result in substantially increased costs to non-U.S. covered SDs and to U.S. covered SDs with non-U.S. parent entities.[458]

Several commenters stated that the Commission should streamline or simplify the proposed substituted compliance process for certain non-U.S. covered SDs. In this regard, one commenter requested that the Commission grant automatic qualification for substituted compliance with the Commission's capital rules for any non-U.S. covered SD that is subject to Basel-compliant home country capital requirements administered by a regulatory authority that is either in a G20 jurisdiction or is a member of the BCBS or IOSCO.[459] Another commenter requested that the Commission exempt non-US covered SDs from the substituted compliance approval process in cases where the covered SDs are subject to capital standards in their home countries that the Federal Reserve Board has determined in the context of foreign banking organizations to be consistent with the Basel III standards.[460] One commenter stated that the Commission should clarify that a non-U.S. SD that qualifies for substituted compliance with the Commission's capital requirements can also meet any relevant Commission notification requirements in proposed regulation 23.105(c) by meeting comparable home country notice requirements.[461]

One commenter also requested that the Commission's assessment of the capital framework of a foreign jurisdiction be performed in a holistic manner, as opposed to narrowly focusing on a line-by-line comparison of regulatory requirements.[462] In addition, one commenter stated that the Commission issue Capital Comparability Determinations well in advance of the compliance date, which will help alleviate potential issues with eligible covered SDs having to seek capital model approval.[463]

NFA also requested that the Commission revise proposed regulation 23.106(a)(4), which provides that a covered SD that intends to comply with the capital adequacy and financial reporting requirements of a foreign jurisdiction that has received a Capital Comparability Determination to file a notice to that effect with NFA, and further requires NFA to confirm that the covered SD may comply with some or all of the requirements of the foreign jurisdiction in lieu of the Commission's requirements.[464] NFA suggested that the requirement be revised to require that a non-U.S. covered SD make only a notice filing similar to the substituted compliance process for margin and entity-level requirements.[465]

The Commission has reviewed the proposed substituted compliance framework and considered the comments received and is adopting the framework with several modifications as discussed below. There currently are 24 non-U.S. covered SDs provisionally registered with the Commission. These 24 non-U.S. covered SDs are located in a total of 7 foreign jurisdictions, with 12 SDs located in the United Kingdom. The Commission also understands that many, if not all, of the 24 non-U.S. covered SDs are subject to regulatory requirements in their respective home country jurisdictions, including capital and financial reporting requirements.

The Commission's approach to substituted compliance is a principles-based, holistic approach that focuses on whether the foreign regulations are designed with the objective of ensuring overall safety and soundness of the non-U.S. covered SD in a manner that is comparable with the Commission's overall capital and financial reporting requirements and is not based on a line-by-line assessment or comparison of a foreign jurisdiction's regulatory requirements with the Commission's requirements. The Commission also will seek to address applications for Capital Comparability Determinations in as expeditious manner, which should provide adequate notice to market participants of its determination prior to the compliance date of these rules.

The Commission is retaining the requirement in proposed regulation 23.106(a)(2) that requires a person to submit a written request to Commission for a Capital Comparability Determination. The Commission is not revising the framework to permit certain non-U.S. covered SDs to satisfy their CFTC regulatory requirements through a process of automatic qualification of substituted compliance with the capital or financial reporting requirements of a foreign jurisdiction, including foreign jurisdictions that are compliant with Basel capital standards. The Commission believes that appropriate capital and financial reporting are fundamental to the Commission's statutory mandate of promoting the safety and soundness of covered SDs, and helping to ensure that such firms meet their financial obligations to swap counterparties. Accordingly, the Commission believes that a non-U.S. covered SD seeking to comply with the Commission's capital and financial reporting requirements must submit information that demonstrates how the foreign regulatory requirements achieve comparable outcomes to the Commission' requirements. The Commission believes that the proposal provides sufficient flexibility for persons seeking Capital Comparability Determinations in that it permits regulatory authorities as well as non-U.S. covered SDs to submit the required materials for the Commission's consideration.

Proposed regulation 23.106(a)(1) provided that a covered SD, covered MSP, or a foreign regulatory authority that has direct supervisory authority over one or more covered SDs or covered MSPs that are eligible for substituted compliance may request a Capital Comparability Determination. The Commission is modifying regulation 23.106(a)(1) by providing that a trade association or other similar group also may request a Capital Comparability Determination on behalf of its member covered SDs and covered MSPs. The purpose of this modification is to provide greater flexibility and efficiencies in the substituted compliance framework by allowing trade associations to request Capital Comparability Determinations for multiple covered SDs or covered MSPs that may be in a particular jurisdiction. This modification potentially allows the Commission to focus its limited resources on a smaller number of requests and will allow covered SDs and covered MSPs to reduce costs by not having to submit individual Capital Comparability Determination requests.

The Commission also is modifying proposed regulation 23.106(a)(3), which provided that the Commission would consider all relevant factors in assessing whether a foreign jurisdiction's capital

[457] *See, e.g.,* ISDA 5/15/2017 Letter; SIFMA 5/15/2017 Letter; MS 5/15/2017 Letter; JBA 3/14/2017 Letter; Letter from Sarah Miller, Institute of International Bankers (May 15, 2017) (IIB 5/15/2017 Letter); IIB/ISDA/SIFMA 3/3/2020 Letter; MS 3/3/2020 Letter; Letter from Atsushi Hirayama, International Bankers Association of Japan (February 27, 2020) (IBAJ 2/27/2020 Letter); and NFA 3/2/2020 Letter.

[458] *See* SIFMA 5/15/2017 Letter.

[459] *See* IIB 5/15/2017 Letter.

[460] *See* JBA 3/14/2017 Letter.

[461] *See* IIB/ISDA/SIFMA 3/3/2020 Letter.

[462] *See* IBAJ 2/27/2020 Letter.

[463] *See* NFA 3/2/2020 Letter.

[464] *Id.*

[465] *Id.*

and financial reporting requirements are comparable to the Commission's, including whether or how the foreign jurisdiction's capital adequacy requirements compare to the capital standards issued by the BCBS for banking institutions or to other standards used for securities brokers or dealers. The Commission is removing this specific reference to BCBS capital standards and to broker-dealer standards in the final rule. As noted above, the Commission's approach to substituted compliance is a principles-based, holistic approach that focuses on whether the foreign regulations are designed with the objective of ensuring overall safety and soundness of the non-U.S. covered SD or MSP in a manner that is comparable with the Commission's overall capital and financial reporting requirements. While a foreign jurisdiction's incorporation of BCBS standards or broker-dealer standards are approaches that the Commission would consider for substituted compliance, it was not the Commission's intent to limit the regulatory approaches, or to appear to limit the regulatory approaches, that it would deem acceptable for substituted compliance. To clarify the rule, and to avoid any potential confusion, the Commission is removing the references to BCBS and broker-dealer standards from the rule. This modification, however, does not represent any change in the Commission's stated approach to substituted compliance.

Proposed regulation 23.106(a)(4) required a non-U.S. covered SD or a non-U.S. covered MSP to file with an RFA a notice of the SD's or MSP's intent to comply with the requirements of a foreign jurisdiction that had received a Capital Comparability Determination. Regulation 23.106(a)(4) further provided that the RFA would determine the information that was necessary to be included in the notice and would provide a confirmation to the non-U.S. covered SD or non-U.S. MSP of its ability to meet the Commission's requirements through substituted compliance. The Commission is modifying the notice and confirmation provisions in final regulation 23.106(a)(4) to require a non-U.S. covered SD or non-U.S. covered MSP to file a notice of its intent to avail itself of a Capital Comparability Determination with the Commission. As the capital and financial reporting requirements are entity-level requirements, it is necessary for the Commission to assess whether each non-U.S. covered SD or non-U.S. covered MSP that files a notice of its intent to meet the Commission's capital and reporting requirements through substituted compliance satisfies any conditions set forth in the applicable Capital Comparability Determination issued to applicable foreign jurisdiction. Upon receipt of a notice, Commission staff will engage with the non-U.S. covered SD or non-U.S. covered MSP to determine the extent to which the foreign regulation that it is subject to is consistent with the Commission's Capital Comparability Determination. As part of the determination, the Commission will review the foreign jurisdiction's regulations, process, and/or procedures, as applicable, for assessing the ongoing financial condition of a covered SD or a covered MSP in determining whether it is appropriate to extend substituted compliance to the notice provisions contained in regulation 23.105(c).

Regulation 23.106(a)(4) also provided that the failure of a non-U.S. covered SD or non-non-U.S. covered MSP operating under substituted compliance to comply with the capital adequacy or financial reporting requirements of the relevant foreign jurisdiction may constitute a violation of the Commission's capital adequacy and financial reporting requirements. The Commission is modifying this provision in final regulation 23.106(a)(4)(ii) to explicitly provide that the Commission may initiate an action for a violation of the Commission's rules when a covered SD or covered MSP subject to a capital comparability determination has failed to comply with a foreign jurisdiction's corresponding capital adequacy and financial reporting requirements. This modification is intended to provide clarity to the final rule by providing that the Commission may initiate an action against a non-U.S. covered SD or non-U.S. covered MSP for failure to comply with the relevant Commission capital and financial reporting requirements when it violates the corresponding foreign jurisdiction's requirements.

### *F. Additional Amendments to Existing Regulations*

#### 1. Financial Reporting Requirements for FCMs or IBs That Are Also Registered SBSDs

The Commission is amending regulation 1.10 to authorize dually-registered FCM/SBSDs and IB/SBSDs to file SEC Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part II C (''FOCUS Report''), as applicable, in in lieu of CFTC Form 1–FR–FCM or Form 1–FR–IB.

Regulation 1.10 requires each FCM to file an unaudited monthly financial report with the Commission and with the FCM's designated self-regulatory organization (''DSRO'') within 17 business days of the close of each month.[466] An FCM's monthly financial reports must be submitted on CFTC Form 1–FR–FCM. FCMs also are required to file an audited annual financial report with the Commission and with the firm's DSRO within 60 days of the end of the FCM's fiscal year end. An FCM's annual financial report may be submitted on Form 1–FR–FCM or, subject to certain conditions, presented in a manner consistent with U.S. GAAP.[467]

Regulation 1.10 requires each IB to file with NFA an unaudited financial report on a semi-annual basis, and an audited annual financial report.[468] The IB unaudited reports must be submitted on Form 1–FR–IB within 17 business days of the date of the report. IB annual reports may be filed on Form 1–FR–IB or, subject to certain conditions, presented in a manner consistent with U.S. GAAP. IB annual financial reports must be filed within 90 days of the IB's fiscal year end.[469]

Regulation 1.10(h) currently streamlines the financial reporting requirements imposed on FCMs and IBs that are dually-registered as BDs. Such dual-registrants are permitted to file with the Commission and with the firms' DSRO the SEC's FOCUS Reports, in lieu of a Form 1–FR–FCM or Form 1–FR–IB. The *2016 Capital Proposal* proposed amending regulation 1.10(h) to permit an FCM or IB that is dually-registered as a SBSD or MSBSP to file an SEC FOCUS Report in lieu of a CFTC Form 1–FR–FCM or CFTC Form 1–FR–IB.[470] The proposed amendment is consistent, as noted above, with the current provisions that authorize dually-registered FCMs/BDs and IBs/BDs to file FOCUS Reports in lieu of the CFTC financial forms. Furthermore, the Commission's experience with

[466] The term ''self-regulatory organization'' (''SRO'') is defined in Commission regulation § 1.3 (17 CFR 1.3) as a contract market, a swap execution facility (all as further defined under§ 1.3), or an RFA under section 17 of the CEA. The term ''designated self-regulatory organization'' is also defined in Commission regulation § 1.3 and generally means the SRO that has primary financial surveillance responsibilities over a registrant.

[467] *See* Commission regulation § 1.10(d)(3) (17 CFR 1.10(d)(3)).

[468] *See* Commission regulation § 1.10(b)(2)(i) (17 CFR 1.10(b)(2)(i)). An IB is required to file its unaudited financial report as of the middle and the end of its fiscal year end.

[469] Commission regulation § 1.10(b)(2)(ii)(A) (17 CFR 1.10(b)(2)(ii)(A)).

[470] *See 2016 Capital Proposal,* 81 FR 91252 at 91281–82.

regulation 1.10(h) has been that the FOCUS Reports include information that is substantially comparable to the Forms 1–FR and provide the information necessary for the Commission to conduct financial surveillance of the registrants.

Regulations 1.10(f) and 1.16(f) also currently provide that a dually-registered FCM/BD or IB/BD may automatically obtain an extension of time to file its unaudited and audited financial reports required under regulation 1.10 by submitting a copy of the written approval for the extension issued by the BD's securities designated examining authority (''DEA'').[471] The *2016 Capital Proposal* proposed amending regulations 1.10(f) and 1.16 to provide that an FCM or IB that is also registered with the SEC as an SBSD or an MSBSP may obtain an automatic extension of time to file its unaudited or audited FOCUS Report with the Commission and with the firm's DSRO, as applicable, by submitting a copy of the SEC's or the DEA's approval of the extension request. The proposed amendment maintains the intent of the current regulations by retaining a consistent approach to the granting to dual registrants extensions of time to file financial reports. The Commission also proposed a technical amendment to regulation 1.16 to correct a cross reference to SEC rule 17a–5 (17 CFR 240.17a–5) for extensions of time to file audited financial statements.

The Commission did not receive any comments related to the proposed amendments to the provisions of regulations 1.10 and 1.16 noted above. After further consideration and for the reasons stated in the *2016 Capital Proposal,* the Commission is adopting these amendments substantially as proposed.

2. *Amendments to the FCM and IB Notice Provisions in Regulation 1.12*

Regulation 1.12 requires an FCM or IB to file a notice with the Commission and with the registrant's DSRO when certain prescribed events occur that trigger a notice filing requirement.[472] Such events include the registrant: (i) Failing to maintain compliance with the Commission's capital requirements or the capital rules of a SRO; (ii) failing to hold sufficient funds in segregated or secured amount accounts to meet its regulatory requirements; (iii) failing to maintain current books and records; and (iv) experiencing a significant reduction in capital from the previous month-end.

The Commission proposed amending regulation 1.12(a) to require an FCM or IB that is a dual registrant with the SEC to file a notice if the FCM or IB fails to meet any applicable SEC's minimum capital requirements. The Commission stated that such notice is appropriate as it provides Commission staff with the opportunity to assess the potential impact of the dually-registered FCM's or IB's failure to meet SEC minimum capital requirements on the respective firm's CFTC regulated activities, and to initiate discussions with the SEC regarding the capital deficiency.[473]

Commission regulation 1.12(b) requires an FCM or IB to file notice with the Commission and with the firm's DSRO if a firm's adjusted net capital falls below the applicable ''early warning level'' set forth in the regulation.[474] The Commission proposed amending regulation 1.12(b) to require an FCM or IB that is also registered with the SEC as a SBSD or a MSBSP to file a notice if the SBSD's or MSBSP's capital falls below the ''early warning level'' established in the rules of the SEC. The proposal was intended to provide additional information to the Commission in its efforts to monitor the financial condition of its registrants.

The Commission did not receive any comments related to the above proposed amendments to regulation 1.12. For the reasons stated in the *2016 Capital Proposal,* the Commission is adopting the amendments as proposed.

3. *FCM and IB Unsecured Receivables From Swap Transactions*

Regulation 1.17 provides that an FCM or IB, in computing its net capital, must exclude unsecured receivables except for certain specified unsecured receivables, including interest receivable, floor broker receivable, commissions receivable from other brokers or dealers, mutual fund concessions receivable and management receivable from registered investment companies and commodity pools. The regulation further provides that an FCM or IB must exclude these otherwise permitted unsecured receivables from current assets in computing its net capital if the receivable is outstanding longer than 30 days from the payable date.[475] The operation of the regulation effectively allowed an FCM or IB to reflect commissions due from FCMs that carried customer accounts introduced by the FCM or IB as a current asset in computing its net capital, as the FCMs generally paid these commissions within 30 days from the payable date.

The Commission proposed to amend regulation 1.17(c)(2)(ii)(B) to codify several staff no-action letters that provided that staff would not recommend an enforcement action against an IB that reflect certain commissions receivable balances from swap transactions that are outstanding no more than 60 days from the month-end accrual date as current assets in computing its net capital, provided that the commissions are promptly billed.[476] The staff no-action letters were issued to accommodate the long-standing commission billing practices in the swaps market that differed from the futures markets. Commissions for swaps transactions are often billed and paid in a process that exceeds 30 days. The final rule adopted by the Commission would allow both FCMs and IBs to recognize unsecured commissions receivable resulting from swap transactions in computing their net capital, provided that the unsecured receivables are not outstanding more than 60 days from the month end accrual date and the commissions are billed promptly after the close of the month.

The Commission also proposed amending regulation 1.17(c)(2)(ii)(B) by adding a new provision that allows FCMs and IBs to recognize dividends receivable that are not outstanding more than 30 days. This proposed amendment was to further align the Commission's capital rules with the SEC's capital, which specifically addressed the capital treatment of dividends.

The Commission received no comments on the proposed amendments to regulation 1.17(c)(2)(ii)(B). After considering the issue, and for the reasons stated in the *2016 Capital Proposal,* the Commission has determined to adopt the amendments to regulation 1.17(c)(2)(ii)(B) as proposed.

4. Amendments to FCM and IB Notice and Disclosure Requirements for Bulk Transfers

Regulation 1.65 provides that an FCM or IB must obtain a customer's specific consent prior to transferring the customer's account to another FCM or

[471] Commission regulations §§ 1.10(f) and 1.16(f) (17 CFR 1.10(f) and 1.16(f)).

[472] Commission regulation § 1.12 (17 CFR 1.12).

[473] *See 2016 Capital Proposal,* 81 FR 91252 at 91282.

[474] If an FCM's or IB's adjusted net capital falls below a certain threshold, such as 120 percent of its minimum adjusted net capital requirement, the firm is deemed to be maintaining adjusted net capital at a level below its ''early warning level.''

[475] Commission regulation § 1.17(c)(2)(ii) (17 CFR 1.17(c)(2)(ii)).

[476] *See 2016 Capital Proposal,* 81 FR 91252 at 91282.

IB, except if the account is transferred at the customer's request.[477] Regulation 1.65 further provides that an FCM or IB may transfer a customer's account without the customer's specific consent if the FCM's or IB's account agreement with the customer contains a valid consent by the customer to a prospective transfer of the account; the customer is provided with written notice of, and a reasonable opportunity to object to, the transfer; and, the customer has not objected to the transfer or given other instructions as to the disposition of the account. The written notice provided to the customers is required to contain certain prescribed information including, the reason for the transfer, a statement that the customer is not required to accept the proposed transfer and may direct that the account be liquidated or transferred to an FCM or IB of the customer's choosing, and a clear statement of how the customer is to provide notice that it does not consent to the proposed transfer.[478]

An FCM or IB is also required to file with the Commission notice of a transfer of customer accounts at least five business days prior to the transfer if the transfer involves more than 25 percent of the FCM's or IB's total accounts (or 50 percent if the FCM or IB has less than 100 accounts).[479] The notice must be submitted to the Commission by mail, addressed to the Deputy Director, Compliance and Registration Section, Division of Swap Dealer and Intermediary Oversight.[480] Finally, the notice must be filed with the Commission as soon as practicable and no later than the day of the transfer if the FCM or IB cannot file the notice at least five business days prior to the transfer.[481] The FCM or IB is required to file a brief statement explaining the circumstances necessitating the delay in filing.

The Commission proposed to amend regulation 1.65 noting that it had found that five days' notice, when given, often is not a sufficient amount of time to allow the Commission to effectively monitor the bulk transfer of customer accounts.[482] Specifically, the Commission proposed to amend regulation 1.65(b) to require that the notice of a bulk transfer of customer accounts must be filed with the Commission at least ten business days in advance of a transfer. The Commission noted that the bulk transfers of customer accounts are generally planned well in advance such that the FCM or IB should be able to provide the Commission ten days advance notice of such a transfer. The Commission also proposed to amend regulation 1.65(d) to require the notice to be filed by the FCM or IB electronically, which is consistent with the filing requirements of other notices and financial forms filed by FCMs or IBs with the Commission. The Commission noted that the electronic system to file such notices already exists and has been used by FCMs and IBs for many years. Accordingly, the Commission believed that the proposed electronic filing of notices of bulk transfers would not result in any additional costs either to the Commission or to FCMs and IBs.

The Commission also proposed to amend regulation 1.65(d) to provide that the notices shall be considered filed with the Commission when submitted to the Director of the Division of Swap Dealer and Intermediary Oversight. The Commission proposed to require the notices of bulk transfer to be addressed to the Director of the Division of Swap Dealer and Intermediary Oversight to reflect organizational changes since the rule was last revised, and to ensure that such notices are reviewed promptly upon receipt.

The Commission further proposed to amend regulation 1.65(e) to delegate to the Director of the Division of Swap Dealer and Intermediary Oversight the authority to accept a lesser time period for the notification provided for in regulation 1.65(b). However, the notice must be filed as soon as practicable and in no event later than the day of the transfer. This provision is deemed necessary as certain transfers may be performed under exigent circumstances where 10 days advance notice is not possible, such as situations where the FCM or IB becomes insolvent and is required to terminate its business.

The Commission did not receive any comments regarding the proposed amendments to the bulk transfer provisions of regulation 1.65. The Commission has considered the proposed amendments and, for the reasons stated in the *2016 Capital Proposal,* has determined to adopt the amendments as proposed.

5. Conforming Amendments to Delegated Authority Provisions in Regulation 140.91

Commission regulations 1.10, 1.12, and 1.17 reserve certain functions to the Commission, the greater part of which the Commission has delegated to the Director of the Division of Swap Dealer and Intermediary Oversight through the provisions of regulation 140.91.[483] The Commission proposed to amend regulation 140.91 to provide similar delegations with respect to functions reserved to the Commission in part 23.

Regulation 23.101(c), as adopted, requires a covered SD or covered MSP to be in compliance with the minimum regulatory capital requirements at all times and to be able to demonstrate such compliance to the Commission at any time. Regulation 23.103(d), as adopted, requires a covered SD or covered MSP, upon request, to provide the Commission with additional information regarding its internal models used to compute its market risk exposure requirement and OTC derivatives credit risk requirement. Regulation 23.105(a)(2), as adopted, requires a covered SD or covered MSP to provide the Commission with immediate notification if the SD or MSP fails to maintain compliance with the minimum regulatory capital requirements, and further authorizes the Commission to request financial condition reporting and other financial information from the covered SD or covered MSP. Regulation 23.105(d), as adopted, authorizes the Commission to direct a bank SD or bank MSP that is subject to capital rules established by a prudential regulator, or has been designated a systemically important financial institution by the Financial Stability Oversight Council and is subject to capital requirements imposed by the Board of Governors of the Federal Reserve System, to file with the Commission copies of its capital computations for any periods of time specified by the Commission.

The Commission proposed to amend regulation 140.91 to delegate to the Director of the Division of Swap Dealer and Intermediary Oversight, or the Director's designee, the authority reserved to the Commission under regulations 23.101(c), 23.103(d), and 23.105(a)(2) and (d).[484] The Commission did not receive any comments regarding the proposed amendments to regulation 140.91 to delegate the functions noted above to DSIO staff and has determined

[477] Commission regulation § 1.65(a)(1) (17 CFR 1.65(a)(1)).

[478] Commission regulation § 1.65(a)(2) (17 CFR 1.65(a)(2)).

[479] Commission regulation § 1.65(b) (17 CFR 1.65(b)).

[480] Commission regulation § 1.65(d) (17 CFR 1.65(d)).

[481] Commission regulation § 1.65(e) (17 CFR 1.65(e)).

[482] *See 2016 Capital Proposal,* 81 FR 91252 at 91282.

[483] Commission regulation § 140.91 (17 CFR 140.91).

[484] *See 2016 Capital Proposal,* 81 FR 91252 at 91282–83.

to adopt the amendments substantially as proposed. The delegation of such functions to staff of the Division of Swap Dealer and Intermediary Oversight is necessary for the effective oversight of SDs and MSPs compliance with minimum financial and related reporting requirements. The delegation of authority is also comparable to the authorities currently delegated to staff under regulation 140.91 regarding the supervision of FCMs compliance with minimum financial requirements.

*G. Effective Date and Compliance Date*

The proposed amendments and new regulations adopted by the Commission shall be effective 60 days after publication in the **Federal Register**. Several commenters requested that timeline for implementation be extended to allow for approval of capital models.[485] Specific concerns included comments that the implementation timeline should not create competitive disparities between SDs utilizing models approved by other regulators and SDs seeking model approval for the first time from the Commission and NFA.[486] Another commenter stated SDs that did not have model approval at the compliance date would be at a significant competitive disadvantage relative to covered SDs and FCM–SDs that had the approval to use models at the compliance date because such SDs would be required to use the proposed standardized capital charges while awaiting model approval at the compliance date.[487] Several commenters further stated that the Commission should automatically approve market risk models and credit risk models of covered SDs or FCM–SDs that have already been approved by a prudential regulator, the SEC, or certain foreign regulators.[488] In view of these concerns, the Commission is extending the compliance date for the amended regulations and the new regulations until October 6, 2021. Additionally, the Commission has provided for the ability of SDs to use capital models pending Commission/NFA approval, provided the SD files the certification required under Commission regulation 23.102(f) and the model has been approved by the SEC, prudential regulators, or qualified foreign regulators. Further, the Commission has provided for a substituted compliance program. By setting the compliance date as October 6, 2021, the Commission has addressed commenters' concerns by allowing SDs a sufficient period of time to develop policies, procedures, and systems, to implement new financial reporting regimes and to develop capital models, as applicable, to meet the new regulatory requirements while also maintaining consistency with the SEC's compliance date for rules imposing capital, margin, segregation, and financial reporting obligations for SBSDs, and amending existing rules for BDs. The coordination of the compliance date will assist dually-registered entities with meeting their CFTC and SEC regulatory requirements.

## III. Related Matters

*A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (''RF Act'') requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities.[489] This rulemaking would affect the obligations of SDs, MSPs, FCMs, and IBs. The Commission has previously determined that SDs, MSPs, and FCMs are not small entities for purposes of the RF Act.[490] Therefore, the requirements of the RF Act do not apply to those entities. The Commission has found it appropriate to consider whether IBs should be deemed small entities for purposes of the RF Act on a case-by-case basis, in the context of the particular Commission regulation at issue.[491] As certain IBs may be small entities for purposes of the RF Act, the Commission considered whether this rulemaking would have a significant economic impact on such registrants.

Only a few of the regulations included in this rulemaking, the amendment of Commission regulations 1.10, 1.12, 1.16 and 1.17, will impact the obligations of IBs. These amendments will permit the filing and harmonization of financial reporting and notification rules as adopted by the SEC for dual registered SBSD and MSBSPs and accommodate common billing practices in the swap industry surrounding the collection of commission receivables. The Commission believes that these amendments will have a minimal effect on IBs, and are not expected to impose any new burdens or costs on them. The Commission does not, therefore, expect small entities to incur any additional costs as a result of this proposed rulemaking.

Accordingly, for the reasons stated above, the Commission believes that this rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the regulations being published today by this **Federal Register** release will not have a significant economic impact on a substantial number of small entities.

*B. Paperwork Reduction Act*

1. Background

The Paperwork Reduction Act of 1995 (''PRA'')[492] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The rule amendments adopted herein results in an amendment to existing collection of information ''Regulations and Forms Pertaining to Financial Integrity of the Market Place; Margin Requirements for SDs/MSPs''[493] as discussed below. The responses to this collection of information are mandatory. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (''OMB'').

The Commission did not receive any comments regarding its PRA burden analysis in the preamble to the Proposal. The Commission is revising collection number 3038–0024 to reflect the adoption of amendments to Parts 1 and 23 of its regulations, as discussed below, with changes to reflect adjustments that were made to the final rules in response to comments on the Proposal. The Commission does not believe the rule amendments as adopted impose any other new collections of information that require approval of OMB under the PRA.

[485] *See* Citadel 5/15/2017 Letter; SIFMA 5/15/2017 Letter; FIA 5/15/2017 Letter; FIA–PTG 5/24/2017 Letter.

[486] *See* Citadel 5/15/2017 Letter.

[487] *See* ISDA 5/15/17 Letter.

[488] *See, e.g.,* FIA 5/15/17 Letter; SIFMA 5/15/17 Letter. *See also,* ABN/ING/Mizuho/Nomura 1/29/2018 Letter.

[489] 5 U.S.C. 601 *et seq.*

[490] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982) (FCMs) and Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620 (Jan. 19, 2012) (SDs and MSPs).

[491] *See* Introducing Brokers and Associated Persons of Introducing Brokers, Commodity Trading Advisors and Commodity Pool Operators; Registration and Other Regulatory Requirements, 48 FR 35248, 35276 (Aug. 3, 1983).

[492] 44 U.S.C. 3501 *et seq.*

[493] *See* OMB Control No. 3038–0024, *http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3038-0024.*

2. New Information Collection Requirements and Related Burden Estimates [494]

Currently, there are approximately 108 SDs and no MSPs provisionally registered with the Commission that may be impacted by this rulemaking and, in particular, the collection of information contained herein and discussed below.

i. FOCUS Report

The amendments to Commission regulation 1.10(h) allow an FCM or IB that is also an SEC-registered securities BD to file, subject to certain conditions, its FOCUS Form X–17a–5–Part II in lieu of its Form 1–FR. Because these amendments provide an alternative to filing Form 1–FR, the Commission believes that the amendments would not cause FCMs or IBs to incur any additional burden. Rather, to the extent that the rule provides an alternative to filing a Form 1–FR and is elected by FCMs or IBs, it is reasonable for the Commission to infer that the alternative is less burdensome to such FCMs and IBs.

The amendments to Commission regulation 1.10(f) allow an FCM or IB that is dually-registered with the SEC as either a SBSD or MSBSP to request an extension of time to file its uncertified FOCUS Report. The Commission is unable to estimate with precision how many requests it would receive from registrants under § 1.10(f) in relation to FOCUS Report annually. The Commission anticipates that it will receive one such request in the aggregate annually, and that preparing such a request will consume five burden hours, resulting in an annual increase in burden of five hours in the aggregate.

ii. Notice of Failure To Maintain Minimum Financial Requirements

Commission regulations 1.12(a) and (b) currently require FCMs and IBs, to file notices if they know or should have known that certain specified minimum financial thresholds have been exceeded. The amendments to Commission regulation 1.12(a) and (b) add as an additional threshold for such notices certain financial requirements of the SEC if the applicant or registrant is registered with the SEC as an SBSD or MSBSD. The Commission is unable to estimate with precision how many additional notices it would receive from such entities as a result of the additional minimum threshold. In an attempt to provide conservative estimates, the Commission anticipates receiving 10 such notices in the aggregate annually, and that preparing such a notice will consume five burden hours, resulting in an annual increase in burden of 50 hours in the aggregate.

iii. Requests for Extensions of Time To File Financial Statements

The amendments to Commission regulation 1.16(f) allow an FCM or IB that is registered with the SEC as an SBSD or MSBSP to request an extension of time to file its audited annual financial statements.[495] The Commission is unable to estimate with precision how many of such requests it would receive from such entities. The Commission anticipates receiving one such request in the aggregate annually, and that preparing the request will consume five burden hours, resulting in an annual increase in burden of five hours in the aggregate.

iv. Capital Requirement Elections

Amended Commission regulation 23.101(a)(7) requires that certain SDs that wish to change their capital election submit a written request to the Commission and provide any additional information and documentation requested by the Commission. The Commission is unable to estimate with precision how many of such requests it would receive from such entities. The Commission anticipates that it would receive one such request in the aggregate annually, and that preparing such a request would consume five burden hours, resulting in an annual increase in burden of five hours in the aggregate.

v. Application for Use of Models

Commission regulation 23.102(a) allow an SD to apply to the Commission or a RFA of which it is a member for approval to use internal models when calculating its market risk exposure and credit risk exposure under Commission regulations 23.101(a)(1)(i)(B), 23.101(a)(1)(ii)(A), or 23.101(a)(2)(ii)(A), by sending to the Commission and such RFA an application, including the information set forth in Appendix A to Commission regulation 23.102 and meeting certain other requirements. Amended Commission regulation 1.17(c)(6)(v) relatedly allows an FCM that is also an SD to apply in writing to the Commission or an RFA of which it is a member for approval to compute deductions for market risk and credit risk using internal models in lieu of the standardized deductions otherwise required under Commission regulation 1.17.[496]

Appendices A and B to Commission regulation 23.102 contain further related information collection requirements, including that the SD: (i) Provide notice to the Commission and RFA and/or update its application and related materials for certain inaccuracies and amendments; (ii) notify the Commission or RFA before it ceases to use such internal models to compute deductions; (iii) if a VaR model is used, have an annual review of such model conducted by a qualified third party service, (iv) conduct stress-testing, retain and make available to the Commission and the RFA records of the results and all assumptions and parameters thereof, and notify the Commission and RFA promptly of instances where such tests indicate any material deficiencies in the comprehensive risk model; (v) demonstrate to the Commission or the RFA that certain additional conditions have been satisfied and retain and make available to the Commission or the RFA records related thereto; and (vi) comply with additional conditions that may be imposed on the SD by the Commission or the RFA.

As discussed above, there are currently 108 SDs and 0 MSPs provisionally registered with the Commission. Of these, the Commission estimates that approximately 56 SDs and no MSPs would be subject to the Commission's capital rules as they are not subject to the capital rules of a prudential regulator. The Commission further estimates conservatively that 32 of these SDs would seek to obtain Commission approval to use models for computing their market and credit risk capital charges.

The Commission staff estimates that an SD approved to use internal models would spend approximately 5,600 hours per year to review and update the models and approximately 640 hours per year to back-test the models for the aggregate of 6,240 annual burden hours for each SD. Consequently, Commission staff estimates that reviewing and backtesting the models for the 32 SDs will result in an aggregate annual hour burden of approximately 199,680 hours.

[494] This discussion does not include information collection requirements that are included under other Commission regulations and related OMB control numbers.

[495] The registrant would also be required to promptly file with the DSRO and the Commission copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time.

[496] Note that the changes to Commission regulation § 1.17(c)(6)(i) (17 CFR 1.17(c)(6)(i)), which permit any dual registered FCM Broker-Dealer who has received approval by the SEC under § 240.15c3–1(a)(7) (17 CFR 240.15c3–1(a)(7)) to use models to calculate its market and credit risk charges, do not add an additional collection of information and therefore are not considered in this analysis.

vi. Equity Withdrawal Requirements.

Commission regulation 23.104 adds equity withdrawal restrictions on certain SDs. Commission regulation 23.104(a) allows an SD to apply in writing for relief from restrictions on certain equity withdrawals. Commission staff estimates that 28 of the 107 currently provisionally registered SDs would be subject to this regulation. Commission staff estimates that each of these 28 SDs would file approximately two notices annually with the Commission and that it would take approximately 30 minutes to file each of these notices. This results in an aggregate annual hour burden estimate of approximately 28 hours.

vii. Financial Recordkeeping, Reporting and Notification Requirements for SDs and MSPs

Commission regulation 23.105 requires that each SD and MSP maintain certain specified records, report certain financial information and notify or request permission from the Commission under certain specified circumstances, in each case, as provided in the proposed regulation. For example, the regulation requires generally that SDs and MSPs maintain current books and records, provide notice to the Commission of regulatory capital deficiencies and related documentation, provide notice of certain other events specified in the rule, and file financial reports and related materials with the Commission (including the information in Appendix A and B to the regulation, as applicable). Regulation 23.105 also requires the SD or MSP to furnish information about its custodians that hold margin for uncleared swap transactions and the amounts of margin so held, and for SDs approved to use models (as discussed above), provide additional information regarding such models, as further described in regulation 23.105(k).

The Commission estimates that there are 28 SD firms which will be required to fulfill their financial reporting, recordkeeping and notification obligations under regulation 23.105(a)–23.105(n) because they are not subject to a prudential regulator, not already registered as an FCM, and not dually registered as a SBSD. The Commission expects these 28 firms will apply to use models. Commission staff estimates that the preparation of monthly and annual financial reports for these SDs, including the recordkeeping, related notification and preparation of the specific information required in Appendix A to 23.105, would impose an on-going burden of 250 hour per firm annually. The Commission further estimates it will cost each SD $300,000 to retain an independent public accountant to audit its financial statements each year. Thus, the total burden hours estimated for compliance with 23.105(a)–23.105(n) for these 28 SD firms would be 7,000 hours annually.

Regulation 23.105(p) and its accompanying Appendix B impose a quarterly financial reporting and notification obligations on SDs which are subject to a prudential regulator. The Commission expects that approximately 52 of the 108 currently provisionally registered SDs are subject to a prudential regulator. The Commission estimates that these reporting and notification requirements will impose a burden of 33 hours on-going annually. This results in a total aggregate burden of 1,716 hours annually.

viii. Capital Comparability Determinations

Commission regulation 23.106 allows certain SDs, MSPs, and foreign regulatory authorities to request a Capital Comparability Determination with respect to capital adequacy and financial reporting requirements for SDs or MSPs, as discussed above. As part of this request, persons are required to submit to the Commission certain specified supporting information and further information, as requested by the Commission. Further, if such a determination was made by the Commission, an SD or MSP would be required to file a notice with the RFA of which it is a member of its intent to comply with the capital adequacy and financial reporting requirements of the foreign jurisdiction. Moreover, in issuing a Capital Comparability Determination, the Commission would be able to impose any terms and conditions it deems appropriate, including additional capital and financial reporting requirements.

The Commission expects that 43 firms out of the 108 currently provisionally registered SDs would seek Capital Comparability Determinations. These 24 firms are located in five different jurisdictions, all of which appear to have adopted some level of Basel compliant capital rule or another capital rule that would apply to SDs. As such, Commission staff estimates that it will take approximately ten hours per firm annually to prepare and submit requests for Capital Comparability Determinations and otherwise comply with the requirements of proposed regulation 23.106, resulting in aggregate annual burden of 240 hours.

## IV. Cost Benefit Considerations

### *A. Background*

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its discretionary actions before promulgating a regulation under the CEA or issuing certain orders.[497] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. In this cost benefit section, the Commission discusses the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.[498] In addition, in Attachment A to this section, the Commission, using available data, estimates the cost of the final rule to each type of SD or MSP.

This rulemaking implements the new statutory framework of Section 4s(e) of the CEA, added by Section 731 of the Dodd-Frank Act, which requires the Commission to adopt capital requirements for SDs and MSPs that do not have a prudential regulator (*i.e.,* ''covered swap entities'' or ''CSEs'') and amends Commission regulation 1.17 to impose specific market risk and credit risk capital charges for uncleared swap and security-based swap positions held by an FCM.[499] Section 4s(e) of the CEA requires the Commission to adopt minimum capital requirements for CSEs that are designed to help ensure the CSE's safety and soundness and be appropriate for the risk associated with the uncleared swaps held by a CSE. In addition, section 4s(e)(2)(C) of the CEA, requires the Commission to set capital requirements for CSEs that account for the risks associated with the CSE's entire swaps portfolio and all other activities conducted by the CSE. Lastly, section 4s(e)(3)(D) of the CEA provides that the Commission, the prudential regulators, and the SEC, must ''to the maximum extent practicable'' establish and maintain comparable capital rules. The rulemaking also includes certain financial reporting requirements related to an SDs and MSPs financial condition and capital requirements.

In the following cost-benefit considerations, the Commission has

[497] 7 U.S.C. 19(a).

[498] The Commission notes that the costs and benefits in this rulemaking, and highlighted below, have informed the policy choices described throughout this release.

[499] *See* section 4s(e)(2)(B).

evaluated the costs and benefits of this rulemaking. In this section the Commission will: (i) Discuss the general benefits and costs of regulatory capital; (ii) summarize the rulemaking; (iii) describe the baseline for which the cost and benefits of this rulemaking were considered; (iv) provide an overview of the different capital approaches set out in this rulemaking and the rationale for each approach; (v) describe the costs and benefits to each type of SD and MSP under their corresponding capital approaches; (vi) discuss the reporting requirements; and (vii) an analyze the rulemaking as it relates to each of the 15(a) factors.

Where reasonably feasible, the Commission has endeavored to estimate quantifiable costs and benefits. Where quantification is not feasible, the Commission identifies and describes costs and benefits qualitatively. The Commission acknowledges that it is limited in estimating the actual cost of its final capital rule. First, the initial and recurring costs for any particular registrant will depend on, among other things, its size, organizational structure, swap dealing activity, other business activities, modelling capacities, practices, and cost structure. In the 2016's proposal's cost-benefit considerations, the Commission estimated the cost of its capital proposal using SDR data on interest rate swaps for the purposes of extrapolating certain possible ranges regarding the possible cost of capital at Commission registered SDs. Interest rate swaps served as a proxy for all covered swap positions held by all covered SDs and then estimated the initial margin based on that portfolio. Interest rate swaps were selected because they represented a majority of the swaps notional reported to swap data repositories. The Commission did not receive any data or comments specifically addressing this analysis. Upon further review, the Commission has concluded that because this approach considered only one type of swap, the Commission does not believe that this estimate was helpful in understanding the range of possible cost outcomes that could have flowed from the proposal.

In order for the Commission to be able to develop a credible estimate, it would need access to proprietary information for each swap dealer. Among some of the information that the Commission currently lacks and would be relevant are: (i) Position level data, sufficient to estimate risk margins; (ii) for the Bank-Based Capital Approach, data about the registrant's Risk-Weighted Assets (RWAs); and (iii) for the Net Liquid Assets Capital Approach and the tangible net worth approach, data about market risk and credit risk charges. For these reasons, the Commission has not quantified the costs of the rule in terms of the level of capital charges the rule may require. Instead, the Commission has attempted to quantify costs in terms of how implementation of the rule may affect registrants' capital requirements in comparison to their existing capital levels and other circumstances. As detailed in Attachment A, the Commission has compiled available capital data and considered whether additional capital would be required to meet the Commission's capital requirements.

In considering the effects of the final rule and the resulting costs and benefits, the Commission acknowledges that the swaps markets have many types of market participants including SDs and their clients (who could be professional investors, public and non-public operating firms) and function internationally with: (i) Transactions that involve U.S. firms occurring across different international jurisdictions; (ii) some entities organized outside of the United States that are prospective Commission registrants; and (iii) some entities that typically operate both within and outside the United States. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the amendments on all relevant swaps activities, whether based on their actual occurrence in the United States or on their connection with, or effect on U.S. commerce pursuant to, section 2(i) of the CEA.[500]

*B. Regulatory Capital*

Regulatory capital is designed to ensure that a firm will have enough capital, in times of financial stress, to cover the risk inherent of the activities in the firm. Regulatory capital's framework can be designed differently, but its primary purpose remains the same—to meet this objective. Although a firm may mitigate its risks through other methods, including risk management techniques (*e.g.,* netting, credit limits, margin), capital is viewed as the last line of defense of an entity, ensuring its viability in times of financial stress. In adopting this rulemaking, the Commission was cognizant of the purpose of capital and the potential trade-off between the costs of requiring additional capital and the Commission's statutory mandate of helping to ensure the safety and soundness of SDs and MSPs thereby promoting the stability of the U.S. financial system.

*C. General Summary of Rulemaking*

The Commission designed this rulemaking on well-established existing capital regimes. The framework, which draws upon the principles and structures of bank-based capital, broker-dealer capital, and FCM capital, provides CSEs, operating under a current capital regime, with the ability to continue to comply with that regime, with minor adjustments to account for the inherent risk of swap dealing and to mitigate regulatory arbitrage. The Commission, in developing its capital framework, provides CSEs with the flexibility to continue operating under a similar capital framework, which should mitigate disruptions to the markets and mitigate the possibility of duplicative or even conflicting rules, while helping to ensure the safety and soundness of the CSE and the stability of the U.S. financial system.

The final rule detail minimum capital requirements for different ''types'' or ''categories'' of CSEs and further define the capital computations, including various market risk and credit risk charges, whether using models or a standardized rules-based or table-based approach, to determine whether a CSE satisfies the minimum capital requirements. The Commission's final rules permit SDs that are neither registered as FCMs nor subject to the capital rules of a prudential regulator to elect a capital requirement that is based on existing bank holding company (''BHC'') capital rules adopted by the Federal Reserve Board or a capital requirement that is based on the existing FCM/BD net capital rules. The Commission's final rule also permits certain SDs that meet defined conditions designed to ensure that they are ''predominantly engaged in non-financial activities'' to compute their minimum regulatory capital based upon the firms' tangible net worth. Further, the Commission is allowing SDs to obtain approval from the Commission, or from an RFA of which the SDs are members, to use internal models to compute certain market risk and credit

[500] Pursuant to section 2(i) of the CEA, activities outside of the United States are not subject to the swap provisions of the CEA, including any rules prescribed or regulations promulgated thereunder, unless those activities either have a direct and significant connection with activities in, or effect on, commerce of the United States; or contravene any rule or regulation established to prevent evasion of a CEA provision enacted under the Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376. 7 U.S.C. 2(i).

risk capital charges when calculating their capital.[501]

The Commission is also imposing certain restrictions on the withdrawal of capital from SDs if certain defined triggers are breached.

The final rules also establish a program of ''substituted compliance'' that will allow a CSE that is organized and domiciled in a non-U.S. jurisdiction (''non-U.S. CSE'') (or an appropriate regulatory authority in the non-U.S. CSE's home country jurisdiction) to petition the Commission for a determination that the home country jurisdiction's capital and financial reporting requirements are comparable to the CFTC's capital and financial reporting requirements for such CSE, such that the CSE may satisfy its home country jurisdiction's capital and financial reporting requirements (subject to any conditions imposed by the Commission) in lieu of the Commission's capital and financial reporting requirements (*i.e.,* ''Comparability Determination'').

Consistent with section 4s(f), the Commission is requiring SDs and MSPs to satisfy current books and records requirements, ''early warning'' and other notification filing requirements, and periodic and annual financial report filing requirements with the Commission and with any RFA of which the SDs and MSPs are members.

*D. Baseline*

In determining the costs and benefits of this rulemaking, the Commission's benchmark from which this rulemaking was evaluated was the market's status quo, *i.e.,* the swap market as it exists today. As this final rule will implement capital and financial reporting on CSEs and recordkeeping requirements on SDs and MSPs, the Commission will discuss the incremental costs and benefits to each type or category of SD and MSP, as to their current capital and financial reporting and recordkeeping requirements. As each CSE or its parent holding company may be complying with current capital requirements, based on capital requirements that are a result of the entity or its parent entity registering with a financial agency, as a result of it being a financial intermediary (*e.g.,* as an BD, FCM or BHC), the Commission has set different baselines for each type or category of entity. In the case that a CSE does not have current capital requirements, the Commission considered the full cost and benefit of its amendments on the entity. The following is a list of types or categories of registered entities and their corresponding capital regimes that the CSE currently complies with, if there is any, and their corresponding financial reporting and capital requirements. [502] Therefore, the Commission is using the status quo or baseline to evaluate the costs and benefits of these final rules for the following types or categories of CSEs:

SDs That Are Bank Subsidiaries

- *Capital.* Currently U.S. CSEs that are bank subsidiaries and are not a BD or an FCM are not subject to capital requirements; however, as part of a BHC or a subsidiary of a bank, the CSE's parent entity must comply with the prudential regulators' capital requirements. In addition, certain non-U.S. CSEs that are subsidiaries within a bank holding company and are not BDs or FCMs are currently complying with a foreign jurisdiction's capital, liquidity and financial reporting requirements and these CSEs are covered below, in the Substituted Compliance section.
- *Reporting.* These SDs do have reporting requirements, but not for the information that is requested in this rulemaking; however, a BHC must report the requested information to the Federal Reserve Board, which includes certain swap and security-based swap positions held at its SD subsidiary.

SDs That Are BDs (Including, OTC Derivatives Dealers) (With and Without Models)

- *Capital.* If a CSE is also registered as a BD with the SEC, the CSE is already meeting the SEC's BD capital requirements.
- The SEC currently imposes the Net Liquid Assets Capital Approach on BDs. However, the SEC has modified certain parts of this approach to address certain types of BDs (*i.e.,* ANC Firms and OTC derivatives dealers). As discussed below, an ANC Firm is currently approved by the SEC to use capital models to calculate certain market and credit risk charges. In addition, OTC derivatives dealers may be approved by the SEC to use capital models provided that they maintain a minimum of $100 million in tentative net capital and at least $20 million in net capital. Certain non-U.S. SDs are already complying with capital, liquidity and reporting requirements in other jurisdictions. Therefore, the Commission will cover these SDs in the Substituted Compliance section.
- *Reporting.* As a BD, these SDs must comply with the SEC's BD reporting requirements (the Commission's amended reporting requirements are based on the SEC reporting requirements).

SDs That are FCMs and not BDs (With and Without Models)

- *Capital.* For CSEs that are also registered with the Commission as FCMs, the Commission's Net Liquid Assets Capital Approach that is similar to the capital requirements of a registered BD.
- *Reporting.* As an FCM, these SDs must comply with the Commission's FCM reporting requirements (the Commission's amended reporting requirements are based on these).

SDs That Are BDs and/or FCMs (ANC Firms With Models and One Other SD)

- *Capital.* For CSEs that are also registered as BDs/FCMs (using approved models), a significant percentage of these SDs are currently using the ANC capital approach, as discussed below. There is currently one other SD that is not an ANC Firm, but meets the requirements set out above for SD/BDs and FCM–SDs.
- *Reporting.* As an ANC firm, these SDs must comply with the SEC's and the CFTC's ANC firm reporting requirements.

Stand-Alone SDs and Commercial SDs (With and Without Models)

- *Capital.* Currently a CSE that is a stand-alone SD has no capital requirements; however, certain non-US Stand-alone SDs are complying with a foreign jurisdiction's capital, liquidity and reporting requirements and, therefore, will be included in the Substituted Compliance benchmark below.
- *Reporting.* As CSEs, these entities have reporting requirements, but not for the information required requested in this rulemaking.

[501] Section 17 of the CEA sets forth the registration requirements for RFAs. RFAs are defined as self-regulatory organizations under Commission regulation § 1.3 (17 CFR 1.3). The Commission recognizes that SDs that seek model approval from the Commission or from an RFA will be required to submit documentation addressing several capital models including value at risk, stressed value at risk, specific risk, comprehensive risk and incremental risk. To the extent that models are reviewed and approved by an RFA, additional costs may be incurred by the RFA which may be passed on to the SDs.

[502] The baseline of this CBC doesn't include those SDs that are also registered with the SEC as Security-based Swap Dealers (SD–SBSDs), as the SEC's rule will become effective at the same time as the Commission's Final rule. Therefore, unless SD–SBSDs are registered as another category of registered entities that impose capital requirements, this CBC will treat these entities as currently having no current capital requirements. However, the Commission recognizes that to the extent that the SEC's capital requirements for these dual registered SD–SBSDs require greater minimum capital than the Commission's Final Rule, the costs discussed below with be mitigated.

MSPs

• *Capital.* Although there are no MSPs at this time, it is possible that an MSP in the future may have existing capital requirements. For example, if a bank is determined to be an MSP or an insurance company, these entities may have existing capital requirements.

• *Reporting.* As MSPs, these entities have reporting requirements, but not for the information required in this rulemaking.

Substituted Compliance [503]

• *Capital.* As discussed above, there are certain non-U.S. CSEs that comply with a foreign jurisdiction's capital and financial reporting requirements. Commission staff understands that generally these foreign capital requirements are either a bank-based capital regime or a dealer-based regime, which, as the Commission has been informed by these foreign regulators, are similar to the Net Liquid Assets Capital Approach.

• *Reporting.* The Commission understands that some of these non-U.S. CSEs are currently complying with a foreign jurisdiction's financial reporting requirements; however, these financial reporting requirements may not be the same as the Commission is requiring in this rulemaking.

Prudentially Regulated SDs [504]

• *Reporting.* These SDs comply with their applicable prudential regulator's reporting requirements.

*E. Overview of Approaches*

In developing the capital approaches required herein, the Commission selected from well-established frameworks. As a result of the financial crisis and over the years after the crisis, each of the approaches has undergone significant analysis and changes.

The Commission is providing certain CSEs with an option to choose between a Bank-Based Capital Approach (similar to the prudential regulators' capital approach) and a net Liquid Assets Capital Approach (similar to the SEC's and CFTC's capital approach). As detailed below, the Bank-Based Capital Approach is designed to require an SD to have enough equity, including common equity tier 1 capital (as defined above), to absorb losses in a time of stress, while the net liquid assets method is designed to require an SD to hold at all times more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities.

The following table summarizes the Commission's capital rules followed by a summary of each approach:

| Approaches | SD entities | Equity type | The greatest of the following: |
|---|---|---|---|
| *Net Liquid Assets Capital, Regulation 1.17, FCM Approach.* | *SD–FCM* | Net Liquid Assets (Assets – Liabilities – Market Risk – Credit Risk). | $20 million or $100 million if approved to use capital models.<br>8% of the total customer and non-customer cleared margin, plus an additional 2% of the total amount of a swap dealer's initial margin on uncleared swaps.<br>RFA. |
| *ANC, Regulation 1.17 and SEC Rule 15c3–1.* | *SD–FCM–ANC Approved Firm* | Net Liquid Assets (Assets – Liabilities – Market Risk – Credit Risk). | $5 billion tentative net capital (not discounted).<br>$6 billion early warning net capital (not discounted).<br>$1 billion Net Discounted Assets.<br>8% of the total customer and non-customer cleared margin, plus an additional 2% of the total amount of a swap dealer's initial margin on uncleared swaps.<br>RFA. |
| *Net Liquid Assets Capital, SEC Rule 15c3–1 or 18a–1.* | *SD–BDs, SD–BDs (OTC Derivatives Dealers), SD–Non-Bank Subsidiaries of BHC, SD.* | Net Liquid Assets (Assets – Liabilities – Market Risk – Credit Risk). | $20 million.<br>2% of the total amount of a swap dealer's initial margin on uncleared swaps.<br>RFA. |
| *Bank-Based Capital* | *SD–Non-Bank Subsidiaries of BHC, SD.* | Common Tier 1 Equity, Tier 1 or Tier 2, subject to limits [505]. | $20 million.<br>8% of RWA.<br>8% of the total amount of a swap dealer's initial margin on uncleared swaps.<br>RFA. |
| *Tangible Net Worth Capital Approach.* | *SDs–Non-financial Entities (15% test).* | Basic Equity (Assets – Liabilities – Goodwill). | $20 million plus market and credit risk charges.<br>8% of the total amount of a swap dealer's initial margin on uncleared swaps.<br>RFA. |
| *MSPs* | *MSP* | Equity | ≥$0.<br>RFA. |

[503] The Commission estimates that there are 24 SDs that may be eligible for substituted compliance under this rulemaking.

[504] The Commission notes that under section 4s(e) of the CEA, these SDs must comply with the prudential regulators' capital requirements, but must also comply with the Commission's reporting and recordkeeping requirements.

[505] Under the final rule, 6.5% of RWA must be met using CET1, the remaining amount is permitted to be met with capital in the form of Tier 1 or Tier 2, provided that subordinated debt meets the conditions in Commission regulation 18a–1d (17 CFR 240.18a–1d). In addition, $20 million must be comprised of CET1, and 8% of total amount of swap dealer's initial margin on uncleared swaps must be comprised of CET1, Tier 1 or Tier 2 capital as defined under banking rules.

1. Bank-Based Capital Approach

Under the Bank-Based Capital Approach a CSE would need to maintain regulatory capital that meets the following:

- $20 million of common equity tier 1;
- Six point five percent (6.5%) of common equity tier 1 capital equal to the sum of the following: (i) The amount of its risk-weighted assets (''RWA''), which is the market risk capital charge under a VaR computation or a standardized formula table (Reg. 1.17); (ii) the amount of current counterparty credit risk (''CCR''), which is the sum of the default risk capital charge and a credit value adjustment (''CVA'') risk capital charge, which is under either a standardized formula table or a VaR method, provided that an additional one point five percent (1.5%) of capital may be met with common equity tier 1 capital, additional tier 1 capital, or tier 2 capital (including subordinated debt subject to the conditions in SEC rule 18a–1d;
- Eight percent (8%) of the total amount of a swap dealer's uncleared swap initial margin comprised of common equity tier 1, additional tier 1, or tier 2 capital; and
- The amount required by its RFA.

As noted above, the Commission is requiring a $20 million fixed-dollar floor, as this is the minimum amount of required capital under all approaches. The Commission is requiring this minimum level as it believes that this is the minimum amount of capital that should be required for a CSE, without regard to the volume of swaps the CSE engages in, to conduct its dealing activity. As noted above, this amount is based on the Commission's experience with other registered entities that are currently subject to capital requirements. The Commission is also adopting, an eight percent (8%) of uncleared swap initial margin requirement, as through its experience in supervising FCMs, it recognizes that this capital computation is a determinative condition in computing their required capital and requires an SD to maintain a higher level of capital as the operational and other risks associated with its dealing activity base increases, as measured by the initial margin requirements on the swaps positions. As discussed above, under the Bank-Based Capital Approach, the Commission is maintaining the 8% level of initial margin requirement. The Commission believes that the 8% level is properly calibrated for the Bank-Based Capital Approach method in determining capital. Unlike the Net Liquid Assets Capital Approach, which leaves higher quality assets in determining the required level of capital, the Bank-Based Capital Approach uses its entire balance sheet in determining the amount of required capital. As a result of including all of its assets (*e.g.,* property, plant and equipment (''PP&E'')) in determining the capital requirement under the Bank-Based Capital Approach, the Commission believes that the 8% requirement is properly set, ensuring that the Commission meets its statutory requirements for harmonization. In addition, the Commission has determined to include only a SD's initial margin amount on its uncleared swaps in calculating its capital requirement under this prong of the Bank-Based Capital Approach. As discussed above in section II.C.3., the Commission did not include other instruments that require initial margin because it believes that these other instruments either do not contain the same level of risk to the SD as uncleared swaps (*e.g.,* cleared swaps) or are not within the products or markets for which the Commission typically regulates. The Commission recognizes that by not including these margined instruments in the minimum calculation, it may be decreasing the amount of required capital; however, these instruments are not removed from the required amount of capital component, which includes these positions net of applied market and credit risk charges. The Commission believes this approach better harmonizes the minimum calculation across the different elective approaches under the Commission's framework and in comparison to other regulators (namely, the SEC and the Federal Reserve Board and OCC).

In addition, the Commission has included a standardized table for market risk that is currently not part of the BCBS or prudential regulator capital framework. The Commission included the standardized table in calculating an SD's market risk charges to address SDs that do not use approved models in computing market risk charges. The Commission included the regulation 1.17 standardized market risk charges, as it believes these charges result in adequate capital computations for the level of market risk inherent in these financial instruments. In addition, the Commission is currently using these standardized charges in computing an FCM's market risk charges on the same financial instruments for an FCM's required capital.

2. Net Liquid Assets Capital Approach

Under this approach, an SD is required to maintain minimum net capital equal to or exceeding the greatest of:

- $20 million; or
- Two percent (2%) of the total amount of a swap dealer's uncleared swap initial margin.

Net capital is generally defined as an SD's current and liquid assets minus its liabilities (excluding certain qualifying subordinated debt), with the remainder discounted according to either a CFTC or RFA approved VaR-based model or a standardized rules-based approach set out in regulation 1.17.

As noted and discussed above, under this approach, the Commission requires a $20 million fixed-dollar floor. In addition, the Commission is adopting, under this approach, a net liquid assets test that is designed to allow an SD to engage in activities that are part of its swaps business (*e.g.,* holding risk inherent in swaps into its dealing inventory), but in a manner that places the SD in the position of holding at all times more than one dollar of highly liquid assets for each dollar of unsubordinated liabilities (*e.g.,* money owed to customers, counterparties, and creditors). The Commission believes that the Net Liquid Assets Capital Approach, although structurally different than the Bank-Based Capital Approach, ensures the safety and soundness of the SD, while providing the same protections to the financial system.

As discussed above, under the Net Liquid Assets Capital Approach, the Commission is changing the proposed 8% level of initial margin requirement to 2%. The Commission believes that, under this approach, the 2% level is properly calibrated in determining an SD's capital requirement. As discussed above in section II.C.1., as a concept an 8% risk margin amount capital minimum component was originally proposed by the Commission in 2003, and subsequently adopted in 2004, to apply to FCMs. At the time, the Commission justified this minimum amount component based on an analysis and comparison of the amount to then existing FCM capital regime, which used a percentage of the customer funds held by an FCM as the minimum.[506]

[506] *See Minimum Financial and Related Reporting Requirements for Futures Commission Merchants and Introducing Brokers, 68 FR 40835 (July 9, 2003) and 69 FR 49784 (Aug. 12, 2004). See also, CFTC Division of Trading and Markets, Review of Standard Portfolio Analysis of Risk Margining System Implemented by the Chicago Mercantile Exchange, Board of Trade Clearing Corporation,*

Continued

The Commission originally proposed to use this same concept and percentage for use in determining SD minimum capital as means to harmonize the SD approach with Commission's experience and familiarity with its use in the existing FCM approach. Yet, the Commission recognizes that the Commission's margin requirements for uncleared swap positions generally impose a higher initial margin requirement relative to cleared futures positions, which justify using a different multiplied in the Net Liquid Assets Capital Approach.

Minimum initial margin requirements for cleared futures transactions are generally set by clearing organizations and typically have a different margin period of risk. In this regard, the FCM minimum capital requirement of 8% of the risk margin amount on futures is based upon margin calculations using clearing organization models that require a 99% one-tailed confidence interval over a minimum liquidation period of one day for futures.[507] In contrast, initial margin for uncleared swaps is required to be calculated at a 99% one-tailed confidence interval over minimum liquidation period of 10 business days (or the maturity of the swap if shorter).[508] The greater margin period of risk for uncleared swaps generally requires a higher level of initial margin, which when used in determining minimum capital results in a higher level of required capital relative to if cleared futures margin was alternative used. The modification of the final rule to set the risk margin amount multiplier at 2% for uncleared swap positions is therefore appropriate given the generally higher initial margin requirements imposed on such positions under the Commission's regulations relative to cleared positions.

As noted above, a 2% multiplier using uncleared swap margin is also justified under the Net Liquid Assets Capital Approach as compared to a 8% multiplier in Bank-Based Capital Approach and Tangible Net Worth Approach because of differences in the composition of capital under the approaches. Bank-Based Capital Approach and Tangible Net Worth Capital Approach do not account for illiquid assets when determining the amount of capital, thereby including a much greater composition of assets as compared to that under the Net Liquid Assets Capital Approach. Applying a higher more comparable multiplier percentage under Net Liquid Assets Capital Approach would result in much more stringent capital requirement and could make competition among SDs utilizing this approach exponentially more difficult, especially for SDs which may be required to use this approach as a result of dual-registration with the SEC as either a BD or SBSD.

3. Alternative Net Capital (''ANC'')

Under the ANC approach, an SD/BD or FCM would need to maintain its net capital in accordance with the following requirements:

- $1 billion net capital;[509]
- $5 billion tentative net capital;[510] and
- $6 billion early warning net capital.[511]

An SD that is registered with the SEC as a BD and is approved by the SEC to use internal models to compute certain market risk and credit risk capital charges (an ''ANC Firm'') will be able to continue to use the ANC approach in calculating its SD capital; however, with enhancements to the minimum capital requirements as adopted by the SEC.

An ANC Firm must maintain, at all times, tentative net capital, which is the net capital of an ANC Firm before deductions for market and credit risk, of $5 billion. In addition, an ANC Firm must maintain, at all times, early warning tentative net capital, which is the net capital of an ANC Firm before deductions for market and credit risk, of $6 billion. Lastly, an ANC Firm must maintain, at all times, $1 billion of net capital, which is net discounted assets (discounted by VaR models for market and credit risk).

In adopting this approach, the Commission recognizes that ANC Firms are dual registrants with the Commission and SEC that offer a wide-range of financial services and act as different types of intermediaries (*e.g.,* BD, FCM, SD). As a result of the additional complexity and risk inherent in these entities, and the Commission's experience with these ANC Firms, the Commission is increasing their minimum capital requirements consistent with the SEC.

The Commission expects that SDs that are ANC Firms will elect to use this capital approach for their swaps transactions. The Commission believes that since this approach has been in effect for more than 10 years and it properly accounts for the inherent risk and complexity of these firms, including their swap dealing activities, that it is appropriate to permit ANC Firms to continue using this approach, but with some enhancements based on the Commission's experience. As discussed above, the Commission is increasing the minimum capital requirements for ANC Firms in a manner consistent with the SEC's increases for ANC Firms. The Commission believes that the increases are appropriate to reflect the potential increase in swaps activities that ANC Firms may engage in, particularly if affiliates move their swaps activities into the ANC Firms to more efficiently use the capital held by the ANC Firms.

4. Tangible Net Worth

The Commission is adopting a Tangible Net Worth Capital Approach for both SDs and MSPs. With respect to SDs, the Commission is requiring an SD to maintain minimum net capital equal to or in excess of the greater of:

- $20 million plus market and credit risk charges;
- Eight percent (8%) of the total amount of a swap dealer's uncleared swap initial margin; or
- The amount required by its RFA.

The term tangible net worth is defined to mean an SD's net worth as determined in accordance with generally accepted accounting principles in the United States, excluding goodwill and other intangible assets.

As noted above, the Commission is adopting this approach as it recognizes that certain SD's that are primarily engaged in non-financial activities may engage in a diverse range of business activities different from, and broader than, the dealing activities conducted by a financial entity. An SD, availing itself of this approach, must meet the Commission's 15% revenue test and 15% asset test as discussed in section II.C.4. to demonstrate that entity or its parent/consolidated entity is primarily engaged in non-financial activities.

As discussed below, the Commission believes that the Tangible Net Worth Capital Approach meets statutory mandate, as it is designed to help ensure the safety and soundness of the SD, while calibrated to the inherent risk of the uncleared swaps held by the SD and the overall activity of the SD. As the Tangible Net Worth Capital Approach would only be available to SDs that are primarily engaged in non-financial activities, the Commission believes that this approach has proper controls to ensure that it is only able to be utilized by SDs which could not likely meet the other tests due to their unique position

*and the Chicago Board of Trade (Apr. 2001) (''T&M 2001 Report'')*. *See,* IIB/ISDA/SIFMA 3/3/2020 Letter.

[507] *See* Commission regulation § 39.13(g) (17 CFR 39.13(g)).

[508] *See* Commission regulation § 23.154 (b)(2) (17 CFR 23.154(b)(2)).

[509] *See* SEC rule 15c3–1(a)(7) (17 CFR 240.15c3–1(a)(7)).

[510] *See Id.*

[511] *See Id.*

in commercial markets as well as the swap dealing markets.

With respect to MSPs, the Commission is requiring an MSP to maintain net tangible net worth in the amount equal to or in excess of the greater of the MSP's positive net worth or the amount of capital required by an RFA of which the MSP is a member. There are currently no MSPs and the only previously registered MSP were required to register as a result of their legacy swaps and not any current swap activity. The Commission believes that the capital requirements for MSPs are appropriate given that no entities are currently registered and the Commission is uncertain of the types of entities that may register in the future. As noted above, the Commission has taken this uncertainty into consideration by proposing to allow an RFA to establish an MSP's minimum capital requirements. Such RFA's are required under section 17 of the CEA to establish capital requirements for all members that are subject to a Commission minimum capital requirement. Accordingly, RFAs may adjust their rules going forward depending on the nature of any entities that may seek to register as MSPs, and adopt minimum capital requirements as appropriate. Such RFA rules must be submitted to the Commission for review prior to the rules becoming effective.

As discussed above, the Commission is maintaining the 8% level of initial margin requirement under the Tangible Net Worth Capital Approach. Similar to the discussion above in the Bank-Based Capital Approach, the Commission believes that the 8% level is properly calibrated. Unlike the Net Liquid Assets Capital Approach, which leaves higher quality assets in determining the required level of capital, the Tangible Net Worth Capital Approach uses a SD's entire balance sheet in determining the amount of required capital. As a result of including all assets, including illiquid assets (*e.g.,* PP&E) in determining the capital requirements, the Commission believes that the 8% requirement is properly set, ensuring that the Commission meets its statutory requirements. For the same reasons discussed above with the other approaches, the Commission also decided to include only a SD's initial margin amount on its uncleared swaps in calculating its capital requirement under this prong.

5. Substituted Compliance

As described above, the Commission is providing certain non-U.S. CSEs with the ability to petition the Commission for approval to comply with comparable foreign capital and financial reporting requirements in lieu of some or all of the Commission's requirements. The Commission recognizes that this may provide these CSEs with cost advantages by avoiding the costs of potentially duplicative or conflicting regulation.

In limiting the scope of substituted compliance, the Commission does not believe it should make available substituted compliance to all CSEs. The Commission is adopting substituted compliance only to non-U.S. CSEs, as it believes that it is necessary that its capital requirements apply to U.S. CSEs, as they are integral to the U.S. swaps market and critical in ensuring the stability of the U.S. financial system.

Additionally, the Commission recognizes that substituted compliance, to the extent that it puts conditions on its comparability determination, may result in additional costs to these CSEs; however, the Commission believes that providing a substituted compliance regime that allows for conditions instead of an all-or-nothing approach will benefit these CSEs and provide for a more competitive swaps market. Moreover, to the extent that a non-U.S. CSE must comply with a foreign regime and the Commission does not find that regime comparable, the Commission recognizes that these non-U.S. CSE may be burdened with additional costs and subject to conflicting and/or duplicative costs.

*F. Entities*

The following section discusses the related incremental costs and benefits of the rulemaking's capital approaches and reporting requirements on each type or category of SDs and MSPs. The Commission understands that certain SDs and MSPs organized and domiciled outside of the U.S. would be included in these types or categories of entities. These non-U.S. SDs and MSPs are discussed in the Substituted Compliance section below.

1. Bank Subsidiaries

Currently, all U.S. CSEs that are subsidiaries in a BHC and are not a BD or FCM currently are not subject to capital requirements;[512] however, their parent BHC complies with the Federal Reserve's capital requirements. Under the Federal Reserve Board's capital requirements, which are based on Basel III requirements, a BHC must maintain adequate capital for the entire consolidated entity.[513] That is, all the assets and liabilities of the BHC's consolidated subsidiaries are consolidated into the holding company. The Federal Reserve Board's capital requirements are then imposed on the BHC, requiring the BHC to maintain capital levels according to those requirements.

As these CSEs are not currently required to be separately capitalized, the Commission understands that this may add incremental cost to the consolidated entity and/or the CSE as they may have to retain earnings or further capitalize the CSE to the required capital levels. However, the Commission recognizes that a consolidated entity may capitalize one of its subsidiaries in many different ways, including retaining earnings from the CSE or from within the consolidated group. Even with this requirement imposing capital on the subsidiaries, as noted above, the BHC must maintain capital levels in accordance with the Federal Reserve Board's capital requirements, which are calculated on a consolidated basis; therefore, incremental costs may be mitigated, as it may be possible for the consolidated entity to keep the same level of capital within the BHC, but reallocated among its subsidiaries.[514] In addition, the Commission recognizes that earnings may now have to be retained in the CSE and may no longer be available to be reallocated to fund other more profitable activities within the consolidated group or to be returned to shareholders; however, the Commission believes that by providing these CSEs with the option of differing capital approaches, these CSEs will select the capital approach this is optimal for its operations, financial structure and which will reduce duplicative or conflicting rules and the administrative costs of calculating and maintaining additional sets of books and records.

[512] The Commission acknowledges that some subsidiaries in a BHC may be an insurance company and, therefore, may have capital requirements set by its insurance regulator. Such entities are outside the scope of the Commission's rulemaking as these entities are currently not registered with the CFTC as an SD or MSP. The Commission further acknowledges that there are some non-U.S. subsidiaries that are part of a bank and those subsidiaries and/or their parent may be subject to the capital regime of a foreign regulator. The Commission believes that in such a case, the capital regime that is likely to be applicable would be either the Basel III-based approach or a version of the net liquid assets approach.

[513] *See Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule;* Final Rule, 78 FR 62018 (Oct. 11, 2013).

[514] The Commission notes that the bank or an insurance company in a BHC must maintain certain capital and as such, may not be able available to capitalize the CSE.

The Commission believes that although the capital approaches adopted herein may be structurally different, they each require a CSE to maintain adequate capital levels commensurate to its regulated swap dealing activities, which should help ensure the safety and soundness of the CSE and the stability of the U.S. financial system.

In requiring capital for a bank subsidiary that is an SD, as discussed above, the SD may incur additional costs. As a result of the additional costs, some SDs may be put at a competitive disadvantage, when compared to those dealers with lesser capital requirements or with no capital requirements. As a result of this additional cost, some swap dealing activity may become too costly—becoming a low margin activity—and, therefore, some SDs may limit their dealing activity or exit the swaps market. Additional costs may also be passed on to customers in the form of higher prices; however, if these SDs are to remain competitive in the swaps market, they must compete by matching or beating prices of their competitors or provide other additional services to their customers. In addition, as most of the largest swap dealers are part of a BHC, these SDs are already incurring capital charges at the consolidated level, and, therefore, the incremental cost and the effect on competition and pricing of swaps may be mitigated. Because these SDs have the option to select the most optimal capital approach for them, they can control some of the burdens placed on them by the rules and thereby, mitigate the rulemaking's effect on pricing.

2. SD/BD (Without Models)

An SD that is also a BD that does not use SEC/CFTC-approved models to calculate its market and credit risk charges has the option to use either the Bank-Based Capital Approach or the Net Liquid Assets Capital Approach, but with standardized capital charges for market risk and credit risk. The Commission recognizes that although it is giving an option to these SDs to comply with either approach, these SDs must still meet the SEC's BD capital requirement.

The standardized capital charges impose significant capital requirements for uncleared swaps primarily in the form of rules-based market risk charges and credit risk charges. The Commission does not anticipate that many SD/BDs engaging in significant swaps activity will do so using the standardized capital charges for market and credit risk.

3. SD/BD/OTC Derivatives Dealers (Without Models)

An SD that is registered with the SEC as an OTC derivatives dealer will have the option to comply with either the Bank-Based Capital Approach or the Net Liquid Assets Capital Approach. As OTC derivatives dealers, these SDs already comply with the SEC's net liquid assets capital requirements. OTC derivative dealers also may be approved by the SEC to use internal models to calculate market and credit risk charges in lieu of standardized, rules and table-based capital charges for swaps, security-based swaps and other financial instruments.

The Commission believes that since SDs that are registered OTC derivatives dealers are already complying with the SEC's Net Liquid Assets Capital Approach, they will select this approach in meeting with the Commission SD's proposed capital requirements. The Commission believes that allowing these entities to continue using current capital requirements will reduce the possibility of duplicative or conflicting rules and administrative costs of calculating and maintaining additional sets of books and records. The Commission believes that this will result in only a small incremental cost to OTC derivative dealers.

The Commission recognizes that OTC derivatives dealers already have received approval from the SEC to use models in computing their current capital requirements and, therefore, will not incur any additional costs in developing and implementing this model-based approach in computing capital charges.

4. FCM–SD (Without Models)

An SD that is also registered with the Commission as an FCM that does not use models to calculate market and credit risk charges, must compute its capital in accordance with the standardized market and credit risk charges set forth in regulation 1.17. The Commission is amending certain provisions of regulation 1.17 to reduce the burden on an FCM engaging in swaps. The amendments align the FCM capital requirements with that of the Net Liquid Assets Capital Approach for SDs in regulation 23.101. In amending the requirements, the Commission believes that it is reducing the burden placed on SDs/FCMs, as the amount of capital on uncleared swaps would have been significantly higher under the current requirements and would have placed FCM–SDs at a competitive disadvantage. Specifically, regulation 1.17 currently does not allow an FCM to recognize collateral held at a third-party custodian as capital. Therefore, under regulation 1.17 an FCM–SD would have to take a 100 percent capital charge for margin posted with third-party custodians even though the Commission's uncleared margin rules require initial margin to be held at a third-party custodian. This is true even though the custodian has no ability to rehypothecate the initial margin and the SD has the ability to retrieve the initial margin back from the custodian with no encumbrance. Therefore, the Commission believes that its amendments to regulation 1.17 to allow an FCM–SD to recognize margin posted with third-party custodians in accordance with the Commission's margin rules allows an FCM–SD to meet its minimum level of required capital while also requiring an FCM–SD to maintain adequate capital levels, when considering the amount of initial margin that the SD has at its disposal in the event of a counterparty default.

As a result of the amendments, FCM–SDs should benefit from lower capital charges and should allow these FCM–SDs to continue to comply with one capital rule, which should mitigate some of the administrative costs and reduce the possibility of duplicative or conflicting rules. The Commission is not providing these SDs with an option to use the Bank-Based Capital Approach, as the Commission believes that this option is unnecessary and costly, and the current FCM capital approach reflects that the firm is not only a SD, but acts as an intermediary for customers on futures markets. The Commission has made amendments to account for FCM–SDs' swap activities and in allowing these FCMs to change their current capital method, the Commission believes that this would add an additional layer of complexity and costs to the FCMs, as the FCMs would have to change, modify or migrate all of their current systems to a new capital regime. In addition, the Commission believes that requiring the same capital regime, with beneficial amendments, is more appropriate in transitioning the Commission's capital requirements to these entities, as it should result in fewer burdens and a simple transition in implementing the Commission's amended capital requirements. Further, the Commission believes that this would simplify the Commission's ability to supervise these entities, as the Commission will be able to seamlessly transition from its current capital regime to these new requirements; however, the Commission recognizes that by not providing these

SDs with the option to use the Bank-Based Capital Approach it may be foreclosing the ability of these SDs to use a capital approach that may be more cost effective.

The Commission recognizes that by amending regulation 1.17 capital charges it is reducing the burden currently placed on FCM–SDs' swaps activities, which may result in greater liquidity in the swaps market, as this activity will be less costly and may incentivize these entities to engage in more swap dealing activity.

As a result of the amendments to regulation 1.17, these FCM–SDs may be able to realize some of the cost saving of the amendments when competing with other dealers for counterparties. This cost savings may also result in more efficient pricing for their counterparties. However, the Commission notes, as stated above, that as a result of the Commission's margin requirements for uncleared swaps these benefits may be limited.

5. ANC Firms (SD/BDs and/or FCMs That Use Models)

An SD that is an ANC Firm (*i.e.,* also a BD and/or FCM, with approval by the SEC/CFTC to use models in computing market risk and credit risk charges), will incur minimal additional capital charges, as a result of the amendments. The Commission is retaining this approach for these firms, but with an increase in the capital thresholds, as noted above. The Commission is making these amendments based on market experience in supervising ANC Firms, and in recognition that the amendments are consistent with the SEC's capital increases for ANC Firms. The Commission notes that the current ANC Firms are already maintaining more than the amended thresholds; however, by increasing these capital requirements the Commission recognizes that this may have an additional cost, as ANC Firms will now be required to maintain these capital levels, as under the current capital thresholds, these were held at their discretion.

The Commission recognizes that ANC firms already have received approval from the to use models in computing their current capital requirements and, therefore, they will not incur any additional costs in developing and implementing this model-based approach in computing capital charges.

6. Stand-Alone SD (With and Without Models)

A stand-alone SD is provided with an option to comply with either the Bank-Based Capital Approach or the Net Liquid Assets Capital Approach. In providing this option, the Commission, as discussed above, believes that both options provide adequate capital requirements and account for the financial activities of an SD. Therefore, the Commission believes that these SDs will benefit, as these SDs will have the ability to select the most optimal approach, based on their organizational and operational structure and the composition of their assets. In addition, this option will also reduce the possibility of duplicative or conflicting rules and administrative costs of calculating and maintaining additional sets of books and records.

A stand-alone SD that does not use models must compute their market risk and credit risk charges in accordance with rules-based requirements and standardized tables. The Commission recognizes that under the Bank-Based Capital Approach, market risk charges are calculated with a prudential regulator's approved model; however, to allow stand-alone SDs to use the Bank-Based Capital Approach without a model, the Commission is incorporating regulation 1.17 market risk charges into the framework. In providing this alternative, the Commission is providing an option to those stand-alone SDs that do not have Commission-approved models. In doing so, the Commission is providing these SDs with a benefit, as they are still able to choose the most efficient capital approach. The Commission incorporated regulation 1.17 market risk charges, as amended, as it believes that this is a well-established method that properly accounts for market risk charges.

However, the Commission recognizes that many of these entities are not currently subject to minimum capital requirements, and as such, will incur additional costs on all of their financial activities, including their swap activities, which may result in possible increases in costs and pricing. In addition, a stand-alone SD selecting to use models in computing its market and credit risk charges may incur additional costs in developing and implementing these models.

The Commission recognizes that by requiring capital for SDs this may put these SDs at a competitive disadvantage, when compared to those dealers with a lesser capital requirement or with no additional capital requirements as a result of these rules. As a result of this additional cost, some swap activities may become too costly and, therefore, some SDs may limit their activity or exit the swaps market. This additional cost may in turn be passed on to customers in the form of higher prices; however, if these SDs are to remain competitive in the swaps market, they must compete by matching or beating prices of their competitors or provide other additional services to their customers. If an SD decides to limit its activity or withdraw from the swaps market, this may result in a reduced level of liquidity in the swaps market.

In requiring minimum capital requirements, the Commission believes that it is complying with its statutory mandate, as these standards are calibrated to the level of risk in an SD and are designed to help ensure safety and soundness of the SD and the stability of the U.S. financial system. In addition, the Commission's proposal is modeled after two well-established capital regimes, which should help ensure safety and soundness of the SD and competition among all registered SDs.

7. Non-Financial SD (With and Without Models)

An SD or an SD that has a parent that is predominantly engaged in non-financial activities, as defined in regulation 23.100 (85% non-financial threshold), may use the Tangible Net Worth Capital Approach. This approach is designed after GAAP's tangible net worth computation and excludes intangibles and goodwill.[515] The Commission is also requiring that the non-financial SD include in its capital requirement its market risk and credit risk charges.

The Commission believes that this approach, which is tailored to non-financial entities that are SDs or have a SD in its corporate family, provides these entities with the flexibility to meet an appropriate capital requirement, without requiring the firms to engage in costly restructuring of their operations and business. The Commission recognizes that these SDs deal in swaps, but the Commission also recognizes that these entities or their parent entity are primarily engaged in commercial activities and these SDs primarily transact with commercial clients. BCBS and the Commission did not fully consider this type of business model when developing the Bank-Based Capital Approach and the Net Liquid Assets Capital Approach. In allowing these entities to maintain their current structure, the Commission believes that its approach will allow for less disruption to these SDs and in the markets, as these SDs may serve smaller clients that would not otherwise be able to participate in the swaps market

[515] Under GAAP, tangible net equity is determined by subtracting a firm's liabilities from its tangible assets.

without these SDs. However, the Commission, in helping to ensure the safety and soundness of these SDs, is requiring that these entities maintain a level of tangible net worth equal to or greater than the greatest of (i) $20 million plus the SD's market and credit risk charges, (ii) eight percent of its uncleared swaps initial margin amount or (iii) the amount of capital required by an RFA, as this would account for the SD's exposure (market and credit risk) to the swaps markets, without penalty to the SD's or the SD's parent's commercial activities.

In developing this approach, the Commission also recognizes that the commercial activities of a commercial SD could affect the overall financial health of the SD. That is, in the event of a substantial loss emanating from its commercial activities, this loss may have a substantial negative affect on the SD, which may find itself in financial distress. As the Commission is not accounting for the risk in the commercial activities, it is possible that the amount and type of capital that a commercial SD is required to maintain may not be adequate to prevent the failure of the SD, which then will affect all of its swap counterparties. However, in tailoring this method to these commercial SDs, the Commission is taking a position that is consistent with the Commission's prior positions on commercial entities, as it believes these commercial entities and their corresponding activities present less default and systemic risk than a financial entity.[516]

The Commission recognizes that these entities are not currently subject to minimum capital requirements, and as such, will incur additional costs due to the imposition of a capital requirement on all of their swap dealing activities, which may result in possible increases in pricing; however, as the Commission has developed its capital requirements to better account for activities in these commercial SDs, it believes that the additional cost should be mitigated by this approach.

In addition, as the Commission expects that many of these SDs will use models in computing its market and credit risk charges, this may also result in additional costs in developing and implementing these models; however, this cost should be mitigated by the savings that may be realized by using such models.

8. MSP

An MSP must maintain capital (*i.e.,* tangible net worth) of the greater of positive tangible net worth or the amount of capital required by a RFA of which the MSP is a member. This approach is designed after GAAP's tangible net worth computation and excludes intangible assets and goodwill. Currently there are no MSPs. The Commission cannot determine if other entities will register in the future as MSPs, however, the Commission is required to adopt a capital requirement to address potential future registrants.

In adopting the Tangible Net Worth Capital Approach for MSPs, the Commission is allowing these entities to continue their operations if they become registered as MSPs with little to no changes to the entities' structures. In providing for this, the Commission believes that these entities if they become registered as MSPs will incur minimal additional costs to comply with the proposed requirements.

The Commission believes that the adopted capital requirements will help ensure the safety and soundness of MSPs, as these entities will typically be posting and collecting margin on all of their new uncleared swaps and, therefore, as these MSPs are registered only as a result of being an end user of swaps and not a swap dealer, the margin requirements satisfy most of the safety risk for these entities, which is on a $1 for $1 basis, than through more burdensome capital requirements. Therefore, the Commission is only requiring MSPs to maintain solvency, while noting that the entity may be subject to other capital requirements and hence required to comply with those capital requirements.

As the Commission's capital requirements will result in minimal additional costs to these MSPs, there should be little to no effect on competition, as they are end users (*i.e.,* price takers) and little to no incremental effect on pricing.

9. Substituted Compliance

A non-U.S. CSE that is already complying with a comparable foreign jurisdiction's capital or financial reporting regime is provided with the ability to meet the Commission's capital requirements by meeting the foreign jurisdiction's capital requirements. In providing these CSEs with the ability to continue to comply with their current capital and financial reporting regimes the Commission believes that it is limiting the potential for conflicting and duplicate capital requirements. In addition, as each foreign jurisdiction must be determined to be of comparable effect, which mitigate the possible negative impacts on the U.S. financial system.

The Commission further recognizes that non-U.S. CSEs that use conditional substituted compliance may incur additional costs; however, the Commission believes that conditional substituted compliance provides an offsetting benefit to these CSEs as it allows for a conditional substituted compliance determination instead of an all-or-nothing approach, which may result in the Commission not recognizing a foreign jurisdictions capital requirements, resulting in more substantial additional cost, including possible conflicting and/or duplicative requirements.

*G. Liquidity Requirements*

The Commission proposed to require FCM–SDs and covered SDs electing the Bank-Based Capital Approach or the Net Liquid Assets Capital Approach to satisfy specific liquidity requirements.[517] The proposal required covered SD electing the Bank-Based Capital Approach to meet the liquidity coverage ratio requirements set forth in 12 CFR part 249.[518] In addition, the proposal required covered SDs electing the Net Liquid Assets Capital Approach and FCM–SDs to adopt a liquidity stress test requirement that was similar to those undertaken by SEC ANC Firms.[519]

The Commission proposed these requirements to address the potential risk that a covered SD or FCM–SD may not be able to meet both expected and unexpected current and future cash flows, including collateral needs. As noted above, the Commission is not adopting these requirements. Therefore, by not including these requirements, the Commission recognizes that it may be increasing risk to the financial system. The Commission realizes that it is possible for a firm to have enough capital, but not enough liquidity to continue its operations as an ongoing business. These requirements were intended to ensure that SDs would have enough liquid assets to meet liabilities, which would help it during a liquidity crisis—ensuring the short-term continuing operations of the SD. However, the Commission believes this increased risk to the financial system is mitigated by the Commission's regulation 23.600, which imposes liquidity requirements on covered SDs. Regulation 23.600 requires each SD to establish, document, maintain, and enforce a system of written risk management policy and procedures designed to monitor and manage the

[516] *See e.g.,* 17 CFR 39.6.

[517] *See 2016 Capital Proposal,* 81 FR 91252 at 91273–75.

[518] *Id.*

[519] *Id.*

risk associated with the covered SD's swaps activities, including liquidity risk. In addition, for those SDs that are part of a bank holding company, the bank holding company must comply with high quality liquid asset requirements, which should mitigate this increased risk at these SD. Finally, this risk is greatly reduced for firms electing the Net Liquid Assets Capital Approach, which already incorporates a liquidity component into its primary determination of the capital amount.

In not adopting these requirements, the Commission believes that SDs will be provided with greater flexibility in meeting its current liquidity needs. This should allow SDs to allocate their funds in a more efficient manner, which may result in a greater return on capital, as they will no longer need to set aside funds in low-returning assets.

*H. Equity Withdrawal Restrictions*

In the Final Rule, the Commission is prohibiting certain withdrawals of equity capital from covered SDs.[520] The equity withdrawal restriction generally provides that the capital of a covered SD, or any subsidiary or affiliate of the covered SD that has any of its liabilities or obligations guaranteed by the covered SD, may not be withdrawn by action of the covered SD or by its equity holders if the withdrawal would result in the covered SD holding less than 120 percent of the minimum regulatory capital that the covered SD is required to hold pursuant to proposed regulation 23.101. As discussed above in section II. C. 9., the Commission adopted these requirements to ensure the safety and soundness of the covered SD and the integrity of the financial system, because the Commission believes that the withdrawal, loan or advance may be detrimental to the financial integrity of the covered SD. In addition, these transactions may unduly jeopardize the covered SD's ability to meet its financial obligations to counterparties or to pay other liabilities which may cause a significant impact on the markets or expose the counterparties and creditors of the covered SD to loss. However, the Commission notes that in adopting these requirements, the Commission may be limiting the consolidated entity's, including the covered SDs and their affiliates, financial flexibility. That is, these requirements may limit the ability of the consolidate entity to allocate capital, at a critical time, to an entity that may need funding or an entity with a greater rate of return. The Commission recognizes this, but, as stated above, believes that if it permitted this activity, it may cause significant impact on the financial system.

*I. Reporting and Recordkeeping Requirements*

The recordkeeping, reporting and notification requirements set out in this rulemaking are intended to facilitate effective oversight and improve internal risk management, via requiring robust internal procedures for creating and retaining records central to the conduct of business as an SD or MSP. Requiring registered SDs and MSPs to comply with recordkeeping and reporting rules should help ensure more effective regulatory oversight. The amendments will help the Commission determine whether an SD or MSP is operating in compliance with the Commission's capital requirements and allow the Commission to assess the risks and exposures that these entities are managing.

As detailed above in Section II.D., the Commission is requiring all SDs to file certain financial information pertaining to their capital requirements. Those SDs that are prudentially regulated are provided with the option to submit their financial information that is reported to their prudential regulator to the Commission. In addition, those SDs that are also FCMs may file their financial information pertaining to their capital requirements with the Commission, including notices, in the same manner as they currently report. For those SDs that are also registered with the SEC as a BD or a SBSD, these SDs may file the same financial information to the Commission, as they file with the SEC. In filing the required financial information with the Commission, these entities must file through the Winjammer electronic filing system. Alternatively, these same SDs have the option to report their financial information like stand-alone SDs, commercial SDs and MSPs report their financial information to the Commission. The Commission is providing this option, as the information reported to the Commission under this proposal and that is filed with the Commission or other financial regulatory agencies are similar, as the information provides the Commission with the ability to assess and monitor an SD's financial condition and whether the SD is currently meeting the Commission's capital requirements. In permitting these SDs to use their current required information, the Commission believes that this should mitigate some additional costs to prepare and report this information to the Commission. In addition, these SDs should already have developed policies, procedures and systems to aggregate, monitor, and track their swap dealing activities and risks. As such, this should also mitigate some of the costs incurred under the rulemaking.

Those SDs and MSPs that are not subject to current capital requirements will have to develop and establish policies, procedures and systems to monitor, track, calculate and report the required information. In developing these policies, procedures and systems, these SDs will incur costs; however, as these entities are registered with the Commission as SDs, the Commission believes that they should already have developed policies, procedures and systems to aggregate, monitor, and track their swap activities and risks, as is required under the Commission's swap dealer framework. This should mitigate some of the burdens of the reporting and recordkeeping requirements. In addition, as the information that the Commission is requiring is based on GAAP or another accounting method, this information is already being prepared for other purposes and therefore, should again mitigate the costs in meeting these requirements.

The Commission also believes that as a result of the reporting and recordkeeping requirements, SDs should be able to more effectively track their trading and risk exposure in swaps and other financial activities. To the extent that these SDs can better monitor and track their risks, this should help them better manage risk.

As noted in the section F.9., the Commission is providing substituted compliance to certain non-U.S. CSEs. As discussed above and for the same reasons, the Commission believes that, in regards its reporting requirements, providing substitute compliance to these non-U.S. CSEs it should reduce the possibility of additional costs and duplicative or conflicting requirements.

*J. Section 15(a) Factors*

The following is a discussion of the cost and benefit considerations as it relates to the five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

1. Protection of Market Participants and the Public

The rules are intended to strengthen the swaps market by requiring all CSEs to maintain a minimum level of capital. These minimum capital requirements should enhance the loss absorbing

[520] *See* 23.104(a) and (b).

capacity of CSEs and reduce the probability of financial contagion in the event of a counterparty default or a financial crisis. In addition, capital functions as a risk management tool by limiting the amount of leverage that a CSE can incur. Financial reporting requirements for CSEs should help the Commission and investors monitor and assess the financial condition of these CSEs. As this rulemaking is designed to protect financial entities from default, this should have a direct benefit to the public, as the failure of these CSEs could result in a financial contagion, which could negatively impact the general public. On the other hand, the capital rules may require additional capital to be raised and will increase the cost of swaps for all market participants, as described above.

2. Efficiency, Competitiveness, and Financial Integrity of Swaps Markets

The Commission seeks to promote efficiency and financial integrity of the swaps market, and where possible, mitigate undue competitive disparities. Most notably, the Commission aligned the regulations with that of the prudential regulators', SEC's and the Commission's current capital frameworks to the greatest extent possible. Doing so should promote greater operational efficiencies for those SDs that are part of a BHC or are also registered with the SEC as a BD or the Commission as an FCM, as they may be able to avoid creating duplicative compliance and operational infrastructures and instead, rely on the infrastructure supporting the other registered entities. In addition, this approach should also enhance efficiency and limit conflicting rules, as these entities can continue to operate under their current regimes. Moreover, the amendments permit CSEs to calculate credit and market risk charges under a standardized or model-based approach, which allows them to choose the methodology that is the most suitable for their asset composition.

The Commission notes that the capital rule, like other requirements under the Dodd-Frank Act, could have a substantial impact on competition in the swaps market. As the Commission's capital rule will result in additional costs to certain CSEs that do not have current capital requirements, these CSEs may either limit their swap activities or withdraw from the swaps market. In this event, it is possible that this may result in less competition and increases in prices of swaps. Depending on the relative cost of the Commission's capital requirements compared with corresponding requirements under prudential regulators' regime, SEC's regime or in other jurisdictions, certain CSEs may have a competitive advantage or disadvantage; however, the Commission, in developing the capital rule, harmonized it with those of the prudential regulators and the SEC to the maximum extent practicable.

As noted above, the Commission, recognizing that SDs are critical to the financial integrity of the financial markets, designed their capital requirements to help ensure the safety and soundness of these SDs. In doing so, this should protect an SD in the event of a default by its counterparty or a financial crisis, which the Commission determines should reduce the probability of financial contagion.

3. Price Discovery

As noted above, the capital rule may have a negative effect on competition, as a result of increasing costs, which may result in some SDs limiting or withdrawing from the swaps markets. In that event, this negative effect on competition could result in a less liquid swaps market, which will have a negative effect on price discovery. However, as discussed above, most of the larger SDs or their parent entities are already subject to capital requirements that impose capital charges for their swap activities and, therefore, the rule's negative impact on competition, liquidity and price discovery should be limited, and in any event is outweighed by the increased benefit of the longer term safety and soundness of the entities that provide price discovery.

4. Sound Risk Management Practices

A well-designed risk management system helps to identify, evaluate, address, and monitor the risks associated with a firm's business. As discussed above, capital plays an important risk management function and limits the amount of leverage an entity can incur. In addition, capital serves as the last line of defense in the event of a counterparty default or severe losses at a firm. The Commission's capital rule is developed from two well-established capital regimes. Therefore, the Commission's capital rule should promote increase risk management practices within a CSE. Moreover, the Commission believes that as a result of the reporting and recordkeeping requirements, SDs may more effectively track their trading and risk exposure in swaps and other financial activities. To the extent that these SDs can better monitor and track their risks, this should help them better manage risk within the entity.

5. Other Public Interest Considerations

The Commission has not identified any additional public interest considerations related to the costs and benefits of the proposed rule.

*K. Attachment A to Cost Benefit Considerations*

i. Minimum Capital Requirement

Due to data availability, the Commission's analysis is focused on cost arising from minimum capital requirements. As discussed above, this rulemaking would prescribe capital requirements for SDs and MSPs that are not subject to a prudential regulator, and amendments to existing capital rules for FCMs would prescribe capital requirement for FCMs that are also registered as SDs and increase capital requirement for FCMs to account for risk arising from their swaps and security-based swaps. The Commission discusses cost at the entity level. The analysis below makes many assumptions that assume away complex details and the marginal cost resulting from the final rule would be much larger and proportionally larger for smaller entities. Please note that the true magnitude of cost is unknown.

As of June 3, 2020, there are approximately 108 SDs and no MSPs provisionally registered with the Commission. The Commission estimates that out of the 108 provisionally registered SDs, 15 U.S. Prudential Regulated Registrants SDs are exempt from the Commission's capital requirement; 38 SDs which are Non-U.S. Registrants Overseen by the FRB are also exempt from the Commission's capital requirement. For the rest of the 56 provisionally registered SDs, 4 SDs are also registered with the Commission as FCMs, while the other 52 SDs are not FCMs.

The cost benefit considerations noted in the *2016 Capital Proposal* included an analysis of interest rate swap position data for the purposes of extrapolating certain possible ranges regarding the possible cost of capital at Commission registered SDs. The Commission noted at the time that this was because interest rate swaps represent a majority of the swaps notional reported to swap data repositories. The Commission received no comments specifically addressing this analysis and upon further review has concluded that utilizing Part 45 data for this exercise could be problematic; drawing conclusions of estimated capital costs from the one particular type of swap data does not adequately reflect the variety of SDs and their respective dealing books under the

Commission's jurisdiction. The Commission has updated other tables that were included to reflect current registrations. The quantitative data noted herein reflect data either reported on existing Commission filings from these registrants or is readily available to the public as part of the bank or financial holding company public disclosure process.

Discussing Capital Requirement Cost at Entity Level

The Commission collects monthly financial and capital information from FCMs. There are currently four SDs that are also registered as FCMs. For the purpose of discussing cost of complying with these minimum capital requirements, the Commission further separates these SDs that are also FCMs into two categories: SDs that are also SEC registered ANC firms, and FCMs that are not ANC firms registered with the SEC.

1. SDs That Are FCMs and ANC Firms With the SEC

TABLE 1—CAPITAL FOR SDS THAT ARE ALSO FCMS AND ANC FIRMS AS OF APRIL 30, 2020

| Name of swap dealers | Registered as | Adjusted net capital | Net capital requirement | Excess net capital |
|---|---|---|---|---|
| CITIGROUP GLOBAL MARKETS INC | FCM BD SD | $9,448,443,343 | $ 4,041,143,110 | $5,407,300,233 |
| GOLDMAN SACHS & CO | FCM BD SD | 19,731,764,252 | 4,116,348,831 | 15,615,415,421 |
| JP MORGAN SECURITIES LLC | FCM BD SD | 23,422,668,118 | 5,808,368,054 | 17,614,300,064 |
| MORGAN STANLEY & CO LLC | FCM BD SD | 12,993,998,405 | 4,109,846,691 | 8,884,151,714 |

Source: FCM financial data as of April 30, 2020.

The Commission estimates that four SDs are already registered as ANC BDs with the SEC. Under the *2019 SEC Final Capital Rule,* ANC firms registered with the SEC are required to maintain a minimum of five billion dollars of tentative net capital and a minimum of one billion dollars of net capital. In addition, all ANC firms use models for risk charge computations. These minimum capital requirements for ANC firms by the SEC are much higher than the minimum capital requirements adopted by the Commission, thus are more likely the binding constraints for these firms. Based on financial information reported by these SDs in their monthly reports filed with the Commission, these four SDs maintain a significant amount of net capital in excess of SEC's requirement and the Commission's capital requirement. Therefore, the Commission expects that the likelihood of these entities needing to raise additional capital due to this rule might be low; however, there may be other significant costs for these entities to comply with this capital requirement. The true magnitude of these costs is hard to predict due to the complexities of these rules.

2. SDs That Are FCMs but Currently Are Not ANC Firms Registered With SEC

There are currently no provisionally registered swap dealers which are registered as FCMs but not ANC firms registered with the SEC. As noted in the 2016 Proposal, there were four previously provisionally registered SDs in this category, but withdrew their registration. The Commission understands that a majority of these SDs engaged in forex dealing business exited swaps dealing as result of the adoption of other regulatory requirements, namely the uncleared margin rules. Accordingly, the Commission does not expect there to be any other type of FCM registered as a SD and thus is not further considering the costs of capital for these entities.

For SDs that are not FCMs, the Commission prescribes the following minimum capital requirements depending on whether SDs are financial entities or commercial entities. Standardized approach to calculate credit and market risk may not be tailored to specific business models of SDs. Developing risk models for capital purposes and going through model approval process might be much more costly for SDs that currently do not have a formal model approval process in place. For the purpose of discussing the cost of complying with minimum capital requirement, the Commission separated stand-alone SDs into following categories.

3. Nonbank U.S. Subsidiaries of Bank Holding Companies (BHCs) or Financial Holding Companies Subject to Basel III Capital Regime

These SDs currently do not have any capital requirement, and the capital requirement resulting from this final rule may increase cost to these SDs as it may have to raise capital to the required level. However, U.S. parents of the SDs in this category are currently subject to the Federal Reserve's capital requirements on a consolidated basis, including U.S. Basel III capital requirement and also are participants of the Comprehensive Capital Analysis and Review (CCAR) and Dodd-Frank Act Stress Test (DFAST). CCAR evaluates the capital planning process and capital adequacy of the largest U.S.-based BHCs, including the firms' planned capital actions. The Dodd-Frank Act stress tests are a forward-looking component to help assess whether firms have sufficient capital to absorb losses and have the ability to lend to households and businesses even in times of financial and economic stress. Similarly, other SDs in this category are subsidiaries of foreign BHCs or a foreign financial holding company (FHC), which already comply with Basel III risk-based capital requirements and having common equity tier 1 capital ratio at consolidated level exceeding eight percent. The parent BHCs of these nonbank SDs, set out in the table below, are well capitalized due to these requirements, as indicated by their common equity tier 1 capital ratio at the consolidated level, which is much higher than eight percent.

Therefore, assuming that these SDs would use the Bank-Based Capital Approach, the final rule requires common equity tier 1 capital, additional tier 1 capital, or tier 2 capital to be equal or greater than the minimum requirement, that is, max [$20mm, 8%* RWA,[521] 8% * Risk Margin, RFA requirement] to be considered well-capitalized. Assuming risk margin based requirement is not the binding constraint, and CET1 qualified instruments are the same across jurisdictions, the additional CET1 capital required from the Commission's capital requirement may not be significant, as it may be possible for the consolidated entity to keep the same

[521] Under the final rule, 6.5% of RWA must be met using CET1, the remaining amount is permitted to be met with capital in the form of Tier 1 or Tier 2, provided that subordinated debt meets the conditions in Commission regulation 1.17(h) (17 CFR 1.17(h)).

level of capital within the BHC, but just reallocate among its subsidiaries.[522] In addition, the Commission recognizes that earnings will now have to retain in the SD and will no longer be available to be reallocated to fund other more profitable activities within the consolidated group or to be returned to shareholders. The Commission understands that capital is not additive, *i.e.,* the sum of capital at individual subsidiary level may be more than the amount of capital required at the parent level for all its subsidiaries, due to the loss of netting benefits.

TABLE 2—SD'S PARENT BHC'S COMMON EQUITY TIER 1 CAPITAL RATIO AS OF FIRST QUARTER 2020

| Name of swap dealers | Common equity tier 1 capital ratio of parent BHC | SEC registered BD |
|---|---|---|
| CITIGROUP ENERGY INC | Citigroup Inc. 11.1%[523] | N |
| CREDIT SUISSE CAPITAL LLC | Credit Suisse 12.1%[524] | Y |
| GOLDMAN SACHS FINANCIAL MARKETS LP | Goldman Sachs 12.3%[525] | Y |
| GOLDMAN SACHS MITSUI MARINE DERIVATIVE PRODUCTS LP. | Goldman Sachs 12.3% | N |
| ING CAPITAL MARKETS LLC | ING Group 13.97%[526] | N |
| J ARON & COMPANY | Goldman Sachs 12.3% | N |
| MERRILL LYNCH CAPITAL SERVICES INC | Bank of America 10.8%[527] | N |
| MERRILL LYNCH COMMODITIES INC | Bank of America 10.8% | N |
| MIZUHO CAPITAL MARKETS LLC | Mizuho Financial Group 11.65%[528] | N |
| MACQUARIE ENERGY LLC | Macquarie Bank 12.2%[529] | N |
| MORGAN STANLEY CAPITAL GROUP INC | Morgan Stanley 15.3%[530] | N |
| MORGAN STANLEY CAPITAL SERVICES LLC | Morgan Stanley 15.3% | N |
| MORGAN STANLEY CAPITAL PRODUCTS LLC | Morgan Stanley 15.3% | N |
| NOMURA DERIVATIVE PRODUCTS INC | Nomura Holdings 18.06%[531] | N |
| NOMURA GLOBAL FINANCIAL PRODUCTS INC | Nomura Holdings 18.06% | Y |
| SMBC CAPITAL MARKETS INC | SMFG 15.55%[532] | N |

As discussed above, the Commission expects these SDs would use models to calculate market risk and credit risk charges. Their parents BHCs most likely are already using their risk models to calculate capital for the positions of these wholly owned subsidiaries (including uncleared swaps) to measure the credit and market risk exposures of these positions.

4. U.S. SDs That Are Not Part of BHCs

The Commission estimates that there are approximately 8 U.S. SDs not part of BHCs or financial holding companies that comply with Basel III capital requirements. These SDs currently do not have any capital requirement. However, these SDs are part of groups that are already subject to the CFTC's or the SEC's net capital requirements. These SDs' consolidated group has excess net capital ranging from $32 million to $1.3 billion.[533] As it is possible for the consolidated entity to keep the same level of capital within the group, by reallocating it among subsidiaries, the additional cost of complying with the Commission's capital requirement may not be too burdensome. However, for those SDs or their consolidated groups that currently have smaller amount of excess net capital, they might need to raise additional capital and thus might incur significant cost to comply with the Commission's capital requirement. However, given the complexities of the final rule, the compliance cost to some SDs might be significant, particularly for certain business models.

TABLE 3—CURRENT CAPITAL REQUIREMENT (EXCESS NET CAPITAL) AT THE SD OR ITS PARENT LEVEL

| Name of swap dealers | Excess net capital at entity or its parent level | SEC Registered BD |
|---|---|---|
| BTIG LLC | [534] 85,162,256 | Y |
| GAIN GTX LLC | [535] 32,628,137 | N |

[522] For purposes of this analysis, the Commission is only using CET1 as a comparison since this represents the majority of eligible capital under the approach. The Commission expects firms to use permitted subordinated debt to comprise the remaining amount of capital.

[523] *https://www.citigroup.com/citi/investor/data/p200423a.pdf?ieNocache=743.*

[524] *https://www.credit-suisse.com/about-us-news/en/articles/media-releases/1q20-financial-report-202005.html.*

[525] *https://www.goldmansachs.com/investor-relations/financials/current/other-information/1q-pillar3-2020.pdf.*

[526] *https://www.ing.com/web/file?uuid=e0fcbfe7-f4a7-4746-af3b-b112c5e9b302&owner=b03bc017-e0db-4b5d-abbf-003b12934429&contentid=49857&elementid=2138555.*

[527] *https://mms.businesswire.com/media/20200415005331/en/785157/1/Q1_2020_Bank_of_America_Financial_Results_Press_Release.pdf?download=1.*

[528] *https://www.mizuho-fg.com/investors/financial/basel/capital/data2003/pdf/fg_fy01.pdf.*

[529] *https://www.macquarie.com/assets/macq/investor/regulatory-disclosures/2020/MBL-Basel-III-Pillar-3-capital-disclosures-032020.pdf.*

[530] *https://www.morganstanley.com/about-us-ir/shareholder/1q2020.pdf.*

[531] *https://www.nomuraholdings.com/company/group/holdings/pdf/basel_201912.pdf.*

[532] *https://www.smfg.co.jp/english/investor/library/basel_3/2020/2020_fg_e_cc1.pdf.*

[533] Selected FCM Financial Data as of April 30, 2020.

[534] At December 31, 2019, BTIG LLC's net capital was $85,412,256 which was $85,162,256 in excess of its minimum requirement.

[535] GAIN GTX LLC is a wholly owned subsidiary of GAIN Capital Holdings, Inc., a global provider of online trading services. GAIN Capital Group LLC (a CFTC registered FCM and RFD) is also subsidiary of GAIN Capital Holdings, Inc. and has excess net capital of 14,821,951.

[536] Excess net capital of INTL FCSTONE FINANCIAL INC (FCM and BD) as of Apr. 30, 2020.

[537] Excess net capital of Jefferies LLC, parent of Jefferies Derivative Products LLC, Jefferies Financial Products LLC, and Jefferies Financial Services LLC.

[538] Excess net capital at Cantor Fitzgerald & CO. (FCM and Broker-Dealer), which is owned by Cantor Fitzgerald Securities (94% ownership).

[539] Excess net capital of E D & F MAN CAPITAL MARKETS INC (FCM and BD) as of Apr. 30, 2020.

[540] At December 31, 2018, excess net capital was $1 .09 billion for Citadel Securities LLC, a registered BD.

TABLE 3—CURRENT CAPITAL REQUIREMENT (EXCESS NET CAPITAL) AT THE SD OR ITS PARENT LEVEL—Continued

| Name of swap dealers | Excess net capital at entity or its parent level | SEC Registered BD |
|---|---|---|
| INTL FCSTONE MARKETS LLC | [536] 72,247,715 | Y |
| JEFFERIES FINANCIAL PRODUCTS LLC | [537] 1,334,356,732 | N |
| JEFFERIES FINANCIAL SERVICES INC | 1,334,356,732 | N |
| CANTOR FITZGERALD SECURITIES | [538] 365,105,535 | N |
| ED&F MAN DERIVATIVE PRODUCTS INC | [539] 95,389,978 | N |
| CITADEL SECURITIES SWAP DEALER LLC | [540] 1,090,000,000 | N |

5. Non-Financial/Commercial SDs

The capital rule would require Non-Financial/Commercial SDs to maintain tangible net worth in an amount equal to or in excess of the minimum capital level that is, max ($20 million plus market risk charges and credit risk charges, 8% of risk margin, RFA requirement). Currently, there is no capital requirement for commercial SDs. The Commission estimates that currently three to four SD would be in this category, and believes that their tangible net worth greatly exceeds the Commission's requirement. Although these SDs may not need to raise additional capital, the cost of complying with the final rule might still be significant, particularly if these SDs choose to develop models for capital purposes.

6. Non-U.S. SDs Not Subject to a Prudential Regulator

The Commission is allowing a ''substituted compliance'' program for capital requirements for SDs that are: (1) Not organized under the laws of the U.S., and (2) not domiciled in the U.S. The Commission estimates that there are about 24 non-U.S. provisionally registered SDs not subject to U.S. prudential regulators that would be eligible to apply for substituted compliance. The Commission would permit these non-U.S. SDs (or regulatory authorities in the non-U.S. SD's home country jurisdictions) to petition the Commission to satisfy the Commission's capital requirements through a program of substituted compliance with the SD's home country capital requirements. These SDs are domiciled in U.K., Germany, France, Japan, Mexico, Singapore, and Australia; which are members of Basel Committee on Banking Supervision and have adopted Basel III risk-based capital.[541] Thus, the Commission expects that these SDs or their parents may not need to raise significant additional capital to comply with the Commission's capital requirements. However, these SDs may incur significant cost to obtain approval for substituted compliance.

ii. Margin vs. Capital

The Commission's capital rule also requires an SD to include the initial margin for all swaps that would otherwise fall below the $50 million initial margin threshold amount or the $500,000 minimum transfer amount, as defined in regulation 23.151, for purposes of computing the uncleared swap initial margin amount. As such, the uncleared swap initial margin amount would be the amount that an SD would have to collect from a counterparty, assuming that the exclusions and exemptions for collecting initial margin for uncleared swaps set forth in regulations 23.150–161 would not apply, and also assuming that the thresholds under which initial margin would not need to be exchanged would not apply. Accordingly, swaps that are not subject to the Commission's margin requirements such as those executed prior to the compliance date for margin requirements (''legacy swaps''), inter-affiliate swaps, and swaps with counterparties that would qualify for the exception or exemption under section 2(h)(7)(A) would have to be taken into account in determining the capital requirement.

The Commission believes that it would be appropriate to require an SD to maintain capital for uncollateralized swap exposures to counterparties to cover the ''residual'' risk of a counterparty's uncleared swaps positions. The Commission's approach regarding including uncollateralized swap exposures in the SD's capital requirements is consistent with the approach adopted by the prudential regulators in setting capital requirements for SDs subject to their jurisdiction and is consistent with the approach proposed by the SEC for SBSDs.

The Commission provides certain exemptions from initial margin requirements for uncleared trades between affiliates. However, inter-affiliate swaps would require capital to be held against them. The Commission understands that SDs may have different organizational structures due to various reasons. These reasons include, among others, centralized risk management for consolidation of balance-sheet, asset-liability and liquidity risk management; taxation benefits; funds transfer pricing; merger and acquisition; trading centers; and subsidiaries in different jurisdictions. An arms-length swap may be offset by swap transaction with an affiliated SD because of any of the reasons listed above and possibly others. Centralization of risk within different entities of a firm in the same jurisdiction provides risk reduction benefits somewhat similar to the CCP and is encouraged.

Both parties to a swap transaction may be required to hold capital even if they both are part of the same parent institution. In that sense, there may be double (or more) counting of capital at the parent level for a given outward facing swap based on the legal structure of the entity. This may lead to an uneven playing field between SDs if for a given swap, different swap dealers are required to hold different amount of capital based on the number of inter-affiliate trades that they execute for the same client facing trade.

iii. Model vs. Table

The capital rule allows an SD to apply to the Commission or an RFA of which it is a member for approval to use internal models when calculating its market risk exposure and credit risk exposure. The capital rule also allows an FCM that is also an SD to apply in writing to the Commission or an RFA of which it is a member for approval to compute deductions for market risk and credit risk using internal models in lieu of the standardized deductions otherwise required.

As discussed above, there are approximately 108 SDs and no MSPs provisionally registered with the Commission. Of these, the Commission estimates that approximately 55 SDs and no MSPs would be subject to the Commission's capital rules as they are

[541] *http://www.bis.org/bcbs/publ/d338.pdf.*

not subject to those of a prudential regulator. The Commission further estimates conservatively that most of these SDs would seek to obtain Commission approval to use models for computing their market and credit risk capital charges. These entities would incur cost to develop, maintain, document, audit models, and seek model approval. The possibility of using models to calculate credit risk and market risk charges may allow SDs to more efficiently deploy capital in other parts of its operations, because models could reduce capital charges and thereby could make additional capital available. This reduced capital requirement due to model use could improve returns of SDs and make them more competitive. However, if models developed for capital purposes deviate significantly from models used for pricing and risk management, and regulatory capital deviates significantly from economic capital, this could reduce the discussed benefits of capital rule.

Although the Commission expects that SDs would use models for calculating market risk and credit risk charges, it is possible that some entities, particularly potential new entrants, may not have the risk management capabilities of which the models are an integral part, and, therefore, have to rely on the standardized haircut approach. The benefit of the standardized haircut approach for measuring market risk is its inherent simplicity. Therefore, this approach may improve customer protections and reduce systemic risk. In addition, a standardized haircut approach may reduce costs for the SD related to the risk of failing to observe or correct a problem with the use of models that could adversely impact the firm's financial conditions, because the use of models would require the allocation by the SD of additional firm resources and personnel. Conversely, if the standardized haircuts are too conservative and netting benefits are very limited, they could make conducting swap business too costly, preventing or impairing the ability of the firms to engage in swaps, increasing transaction costs, reducing liquidity, and reducing the availability of swaps for risk mitigation by end users.

iv. Other Considerations

The capital rule requirements should reduce the risk of a failure of any major market participant in the swap market, which in turn reduces the possibility of a general market failure, and thus promotes confidence for market participants to transact in swaps for investment and hedging purposes. The capital requirements are designed to promote confidence in SDs among customers, counterparties, and the entities that provide financing to SDs, thereby, lessen the potential that these market participants may seek to rapidly withdraw assets and financing from SDs during a time of market stress. This heightened confidence is expected to increase swap transactions and promote competition among dealers. A more competitive swap market may promote a more efficient capital allocation.

However, to the extent that costs associated with the rules are high, they may negatively affect competition within the swap markets. This may, for example, lead smaller dealers or entities for whom dealing is not a core business to exit the market because compliance with the minimum capital and reporting requirements is too costly. These same costs may result in increased barriers of entry, as they may prevent new dealers from entering the market. The combination of these two events may lead to a concentration of SD in the market, which could lead to market inefficiencies.

The capital rule could have a substantial impact on domestic and international commerce and the relative competitive position of SDs operating under different requirements of various jurisdictions. Specifically, SDs subject to a particular regulatory regime may be advantaged or disadvantaged if corresponding requirements in other regimes are substantially more or less stringent. This could affect the ability of U.S. SDs to compete in the domestic and global markets and, the ability of non-U.S. SDs to compete in U.S. markets. Substantial differences between the U.S. and foreign jurisdictions in the costs of complying with these requirements for swaps between U.S. and foreign jurisdictions could reduce cross-border capital flows and hinder the ability of global firms to efficiently allocate capital among legal entities to meet the demands of their customers/counterparties.

The willingness of end users to trade with an SD dealer will depend on their evaluation of the counterparty credit risks of trading with that particular SD compared to alternative SDs, and their ability to negotiate favorable price and other terms. The capital and risk management requirements would in general reduce the likelihood of SDs' defaulting or failing, and therefore may increase the willingness of end users to trade with more SDs that have strong capital reserves. End users of covered swaps are mostly made up of sophisticated participants such as hedge fund, asset management, other financial firms, and large commercial corporations. Many of these entities trade substantial volume of swaps and are relatively well-positioned to negotiate price and other terms with competing dealers. To the extent that the capital rule results in increased competition, participants should be able to take advantage of this increased competition and negotiate improved terms. On the other hand, SDs may pass on additional capital, operational and compliance costs resulting from the final rule to end users in the form of higher fees or wider spreads. Thus end users may experience increased cost of using swaps for hedging and investing purposes.

In addition, benefits may arise when SDs consolidate with other affiliated SDs, FCMs, and/or BDs. This may yield efficiencies for clients conducting business in swaps, including netting benefits, reduced number of account relationships, and reduced number of governing agreements. These potential benefits, however, may be offset by reduced competition from a smaller number of competing SDs. Further, the capital rule will permit conducting swap business in an entity jointly registered as an FCM, or SBSD, or broker-dealer, which may offer the potential for these firms to offer portfolio margining for a variety of positions. From a holding company's perspective, aggregating swap business in a single entity, could help simplify and streamline risk management, allow more efficient use of capital, as well as operational efficiencies, and avoid the need for multiple netting and other agreements.

The rules may create the potential for regulatory arbitrage to the extent that they differ from corresponding rules other regulators adopt. Also, to the extent that the requirements are overly stringent, they may prevent or discourage new entrants into swap markets and thereby may either increase spreads and trading costs or even reduce the availability of swaps. In these cases, end users would face higher cost or be forced to use less effective financial instruments to meet their business needs.

**List of Subjects**

*17 CFR Part 1*

Brokers, Commodity futures, Reporting and recordkeeping requirements.

*17 CFR Part 23*

Capital and margin requirements, Major swap participants, Swap dealers, Swaps.

*17 CFR Part 140*

Authority delegations (Government agencies).

For the reasons stated in the Preamble, the Commodity Futures Trading Commission amends 17 CFR parts 1, 23, and 140 as follows:

## PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

**Authority:** 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a–1, 7a–2, 7b, 7b–3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23, and 24 (2012).

■ 2. Amend § 1.10 by:

■ a. Revising the paragraph (f)(1) introductory text; and

■ b. Revising paragraph (h)

The revisions read as follows:

### § 1.10 Financial reports of futures commission merchants and introducing brokers.

* * * * *

(f) * * * (1) In the event a registrant finds that it cannot file its Form 1–FR, or, in accordance with paragraph (h) of this section, its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part IIC (FOCUS report), for any period within the time specified in paragraphs (b)(1)(i) or (b)(2)(i) of this section without substantial undue hardship, it may request approval for an extension of time, as follows:

* * * * *

(h) *Filing option available to a futures commission merchant or an introducing broker that is also a securities broker or dealer.* Any applicant or registrant which is registered with the Securities and Exchange Commission as a securities broker or dealer, a security-based swap dealer, or a major security-based market participant may comply with the requirements of this section by filing (in accordance with paragraphs (a), (b), (c), and (j) of this section) a copy, as applicable, of its Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, Part IIC, or Part II CSE (FOCUS Report), in lieu of Form 1–FR; *Provided, however,* That all information which is required to be furnished on and submitted with Form 1–FR is provided with such FOCUS Report; and *Provided, further,* That a certified FOCUS Report filed by an introducing broker or applicant for registration as an introducing broker in lieu of a certified Form 1–FR–IB must be filed according to National Futures Association rules, either in paper form or electronically, in accordance with procedures established by the National Futures Association, and if filed electronically, a paper copy of such filing with the original manually signed certification must be maintained by such introducing broker or applicant in accordance with § 1.31.

* * * * *

■ 3. Amend § 1.12 by:

■ a. Revising paragraph (a) introductory text;

■ b. Revising paragraphs (a)(1), (b)(3) and (b)(4); and

■ c. Adding paragraph (b)(5).

The revisions and additions read as follows:

### § 1.12 Maintenance of minimum financial requirements by futures commission merchants and introducing brokers.

(a) Each person registered as a futures commission merchant or who files an application for registration as a futures commission merchant, and each person registered as an introducing broker or who files an application for registration as an introducing broker (except for an introducing broker or applicant for registration as an introducing broker operating pursuant to, or who has filed concurrently with its application for registration, a guarantee agreement and who is not also a securities broker or dealer), who knows or should have known that its adjusted net capital at any time is less than the minimum required by § 1.17 or by the capital rule of any self-regulatory organization to which such person is subject, or the minimum net capital requirements of the Securities and Exchange Commission if the applicant or registrant is registered with the Securities and Exchange Commission, must:

(1) Give notice, as set forth in paragraph (n) of this section that the applicant's or registrant's capital is below the applicable minimum requirement. Such notice must be given immediately after the applicant or registrant knows or should have known that its adjusted net capital or net capital, as applicable, is less than minimum required amount; and

* * * * *

(b) * * *

(3) 150 percent of the amount of adjusted net capital required by a registered futures association of which it is a member, unless such amount has been determined by a margin-based capital computation set forth in the rules of the registered futures association, and such amount meets or exceeds the amount of adjusted net capital required under the margin-based capital computation set forth in § 1.17(a)(1)(i)(B), in which case the required percentage is 110 percent;

(4) For securities brokers or dealers, the amount of net capital specified in Rule 17a–11(b) of the Securities and Exchange Commission (17 CFR 240.17a–11(b)); or

(5) For security-based swap dealers or major security-based swap participants, the amount of net capital specified in Rule 18a–8(b) of the Securities and Exchange Commission (17 CFR 240.18a–8(b)), must file notice to that effect, as soon as possible and no later than twenty-four (24) hours of such event.

* * * * *

■ 4. Amend § 1.16 by revising paragraphs (f)(1)(i)(B) and (f)(1)(ii)(B) to read as follows:

### § 1.16 Qualifications and reports of accountants.

* * * * *

(f)(1) * * *

(i) * * *

(B) A futures commission merchant that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with its designated self-regulatory organization a copy of any application that the registrant has filed with its designated examining authority, pursuant to § 240.17a–5(m) of this title, for an extension of time to file annual reports. The registrant must also promptly file with the designated self-regulatory organization and the Commission copies of any notice it receives from its designated examining authority to approve or deny the requested extension of time. Upon receipt by the designated self-regulatory organization and the Commission of copies of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1)(i).

* * * * *

(ii) * * *

(B) An introducing broker that is registered with the Securities and Exchange Commission as a securities broker or dealer may file with the National Futures Association copies of any application that the registrant has filed with its designated examining authority, pursuant to § 240.17a–5(m) of this title, for an extension of time to file annual reports. The registrant must also file promptly with the National Futures Association copies of any notice it receives from its designated examining

authority to approve or deny the requested extension of time. Upon the receipt by the National Futures Association of a copy of any such notice of approval, the requested extension of time referenced in the notice shall be deemed approved under this paragraph (f)(1)(ii).

* * * * *

■ 5. Amend § 1.17 by:
■ a. Revising paragraphs (a)(1)(i)(A) and (B);
■ b. Adding paragraph (a)(1)(ii);
■ c. Revising paragraphs (b)(9) and (10) and adding paragraph (b)(11) ;
■ d. Revising paragraph (c)(1)(i);
■ e. Revising paragraph (c)(2)(i);
■ f. Revising paragraphs (c)(2)(ii)(B) and (D) and adding paragraph (c)(2)(ii)(G);
■ g. Adding paragraphs (c)(5)(iii), (iv), (xv), and (xvi);
■ h. Revising paragraphs (c)(5)(viii), (x), (ix) and (xiv);
■ i. Revising paragraph (c)(6)(i) and (iv)(A), and adding paragraph (c)(6)(v); and
■ j. Revising paragraph (g)(1).

The revisions and additions read as follows:

**§ 1.17 Minimum financial requirements for futures commission merchants and introducing brokers.**

(a)(1)(i) * * *

(A) $1,000,000, *Provided, however,* that if the futures commission merchant also is a swap dealer, the minimum amount shall be $20,000,000;

(B) The futures commission merchant's risk-based capital requirement, computed as the sum of:

(*1*) Eight percent of the total risk margin requirement (as defined in § 1.17(b)(8) of this section) for positions carried by the futures commission merchant in customer accounts and noncustomer accounts; and

(*2*) For a futures commission merchant that is also a registered swap dealer, two percent of the total uncleared swap margin, as that term is defined in paragraph (b)(11) of this section.

* * * * *

(ii) A futures commission merchant that is registered as a swap dealer and has received approval to use internal models to compute market risk and credit risk charges for uncleared swaps must maintain net capital equal to or in excess of $100 million and adjusted net capital equal to or in excess of $20 million.

* * * * *

(b) * * *

(9) *Cleared over the counter derivative positions* means a swap cleared by a derivatives clearing organization or a clearing organization exempted by the Commission from registering as a derivatives clearing organization, and further includes positions cleared by any organization permitted to clear such positions under the laws of the relevant jurisdiction.

(10) *Cleared over the counter customer* means any person for whom the futures commission merchant carries on its books one or more accounts for the cleared over the counter derivative positions of such person, and such account or accounts are not proprietary accounts as defined in § 1.3 of this part.

(11) *Uncleared swap margin:* This term means the amount of initial margin, computed in accordance with § 23.154 of this chapter, that a dually-registered futures commission merchant and swap dealer would be required to collect from each counterparty for each outstanding swap position of the dually-registered futures commission merchant and swap dealer. A dually-registered futures commission merchant and swap dealer must include all swap positions in the calculation of the uncleared swap margin amount, including swaps that are exempt or excluded from the scope of the Commission's margin regulations for uncleared swaps pursuant to § 23.150 of this chapter, exempt foreign exchange swaps or foreign exchange forwards, or netting set of swaps or foreign exchange swaps, for each counterparty, as if the counterparty was an unaffiliated swap dealer. Furthermore, in computing the uncleared swap margin amount, a dually-registered futures commission merchant and swap dealer may not exclude the *initial margin threshold amount* or the *minimum transfer amount* as such terms are defined in § 23.151 of this chapter.

(c) * * *

(1) * * *

(i) Unrealized profits shall be added and unrealized losses shall be deducted in the accounts of the applicant or registrant, including unrealized profits and losses on fixed price commitments, uncleared swaps, uncleared security-based swaps, and forward contracts;

* * * * *

(2) * * *

(i) Exclude any unsecured commodity futures, options, cleared swaps, or other Commission regulated account containing a ledger balance and open trades, the combination of which liquidates to a deficit or containing a debit ledger balance only: *Provided, however,* deficits or debit ledger balances in unsecured customers', noncustomers', and proprietary accounts, which are the subject of calls for margin or other required deposits may be included in current assets until the close of business on the business day following the date on which such deficit or debit ledger balance originated providing that the account had timely satisfied, through the deposit of new funds, the previous day's debit or deficits, if any, in its entirety.

(ii) * * *

(B)(*1*) Interest receivable, floor brokerage receivable, commissions receivable from other brokers or dealers (other than syndicate profits), mutual fund concessions receivable and management fees receivable from registered investment companies and commodity pools that are not outstanding more than thirty (30) days from the date they are due;

(*2*) Dividends receivable that are not outstanding more than thirty (30) days from the payable date; and

(*3*) Commissions or fees receivable, including from other brokers or dealers, resulting from swap transactions that are not outstanding more than sixty (60) days from the month end accrual date provided they are billed promptly after the close of the month of their inception;

* * * * *

(D) Receivables from registered futures commission merchants or brokers, resulting from commodity futures, options, cleared swaps, foreign futures or foreign options transactions, except those specifically excluded under paragraph (c)(2)(i) of this section;

* * * * *

(G) Receivables from third-party custodians that maintain the futures commission merchant's initial margin deposits associated with uncleared swap and security-based swap transactions pursuant to the margin rules of the Commission, the Securities and Exchange Commission, a prudential regulator, as defined in section 1a(39) of the Act, or a foreign jurisdiction that has received a Comparability Determination under § 23.160 of this chapter.

* * * * *

(5) * * *

(iii) Swaps:

(A) *Uncleared swaps that are credit-default swaps referencing broad-based securities indices.*(*1*) *Short positions (selling protection).* In the case of an uncleared short credit default swap that references a broad-based securities index, deducting the percentage of the notional amount based upon the current basis point spread of the credit default swap and the maturity of the credit default swap in accordance with the following table:

TABLE TO § 1.17(C)(5)(III)(A)(*1*)—MARKET RISK CHARGES FOR UNCLEARED CREDIT DEFAULT SWAPS

| Length of time to maturity of CDS contract | Basis point spread (%) | | | | | |
|---|---|---|---|---|---|---|
| | 100 or less | 101–300 | 301–400 | 401–500 | 501–699 | 700 or more |
| Less than 12 months | 0.67 | 1.33 | 3.33 | 5.00 | 6.67 | 10.00 |
| 12 months but less than 24 months | 1.00 | 2.33 | 5.00 | 6.67 | 8.33 | 11.67 |
| 24 months but less than 36 months | 1.33 | 3.33 | 6.67 | 8.33 | 10.00 | 13.33 |
| 36 months but less than 48 months | 2.00 | 4.00 | 8.33 | 10.00 | 11.67 | 15.00 |
| 48 months but less than 60 months | 2.67 | 4.67 | 10.00 | 11.67 | 13.33 | 16.67 |
| 60 months but less than 72 months | 3.67 | 5.67 | 11.67 | 13.33 | 15.00 | 18.33 |
| 72 months but less than 84 months | 4.67 | 6.67 | 13.33 | 15.00 | 16.67 | 20.00 |
| 84 months but less than 120 months | 5.67 | 10.00 | 15.00 | 16.67 | 18.33 | 26.67 |
| 120 months and longer | 6.67 | 13.33 | 16.67 | 18.33 | 20.00 | 33.33 |

(*2*) *Long positions (purchasing protection).* In the case of an uncleared swap that is a long credit default swap referencing a broad-based security index, deducting 50 percent of the deduction that would be required by paragraph (c)(5)(iii)(A)(*1*) of this section if the swap was a short credit default swap, each such deduction not to exceed the current market value of the long position.

(*3*) *Long and short positions.* (*i*) *Long and short uncleared credit default swaps referencing the same broad-based security index.* In the case of uncleared swaps that are long and short credit default swaps referencing the same broad-based security index, have the same credit events which would trigger payment by the seller of protection, have the same basket of obligations which would determine the amount of payment by the seller of protection upon the occurrence of a credit event, that are in the same or adjacent spread category and have a maturity date within three months of the other maturity category, deducting the percentage of the notional amounts specified in the higher maturity category under paragraph (c)(5)(iii)(A)(*1*) or (c)(5)(iii)(A)(*2*) of this section on the excess of the long or short position.

(*ii*) *Long basket of obligors and uncleared long credit default swap referencing a broad-based securities index.* In the case of an uncleared swap that is a long credit default swap referencing a broad-based security index and the futures commission merchant is long a basket of debt securities comprising all of the components of the security index, deducting 50 percent of the amount specified in § 240.15c3–1(c)(2)(vi) of this title for the component of securities, provided the futures commission merchant can deliver the component securities to satisfy the obligation of the futures commission merchant on the credit default swap.

(*iii*) *Short basket of obligors and uncleared short credit default swap referencing a broad-based securities index.* In the case of an uncleared swap that is a short credit default swap referencing a broad-based security index and the futures commission merchant is short a basket of debt securities comprising all of the components of the security index, deducting the amount specified in § 240.15c3–1(c)(2)(vi) of this title for the component securities.

(B) *Interest rate swaps.* In the case of an uncleared interest rate swap, deducting the percentage deduction specified in § 240.15c3–1(c)(2)(vi)(A) of this title based on the maturity of the interest rate swap, provided that the percentage deduction must be no less than one eighth of 1 percent of the amount of a long position that is netted against a short position in the case of an uncleared interest rate swap with a maturity of three months or more;

(C) *All other uncleared swaps.* (*1*) In the case of any uncleared swap that is not a credit default swap or interest rate swap, deducting the amount calculated by multiplying the notional value of the uncleared swap by:

(*i*) The percentage specified in § 240.15c3–1 of this title applicable to the reference asset if § 240.15c3–1 of this title specifies a percentage deduction for the type of asset and this section does not specify a percentage deduction;

(*ii*) Six percent in the case of a currency swap that references euros, British pounds, Canadian dollars, Japanese yen, or Swiss francs, and twenty percent in the case of currency swaps that reference any other foreign currencies; or

(*iii*) In the case of over-the-counter swap transactions involving commodities, 20 percent of the market value of the amount of the underlying commodities.

(D) *Netting of Swap Market Risk Charges.* The deductions under paragraphs (c)(5)(iii)(B) and (C) of this section may be reduced by an amount equal to any reduction recognized for a comparable long or short position in the reference asset or interest rate under this section or in § 240.15c3–1 of this title.

(iv) Security-based Swaps: In the case of security-based swaps as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)), the percentage as specified in § 240.15c3–1 of this title.

* * * * *

(viii) In the case of a futures commission merchant, for undermargined customer accounts, the amount of funds required in each such account to meet maintenance margin requirements of the applicable board of trade or if there are no such maintenance margin requirements, clearing organization margin requirements applicable to such positions, after application of calls for margin or other required deposits which are outstanding no more than one business day. If there are no such maintenance margin requirements or clearing organization margin requirements, then the amount of funds required to provide margin equal to the amount necessary, after application of calls for margin or other required deposits outstanding no more than one business day, to restore original margin when the original margin has been depleted by 50 percent or more: *Provided,* to the extent a deficit is excluded from current assets in accordance with paragraph (c)(2)(i) of this section such amount shall not also be deducted under this paragraph. In the event that an owner of a customer account has deposited an asset other than cash to margin, guarantee or secure his account, the value attributable to such asset for purposes of this subparagraph shall be the lesser of:

(A) The value attributable to the asset pursuant to the margin rules of the applicable board of trade, or

(B) The market value of the asset after application of the percentage deductions specified in paragraph (c)(5) of this section;

(ix) In the case of a futures commission merchant, for undermargined noncustomer and omnibus accounts the amount of funds required in each such account to meet maintenance margin requirements of the applicable board of trade or if there are no such maintenance margin requirements, clearing organization margin requirements applicable to such positions, after application of calls for margin or other required deposits which are outstanding no more than one business day. If there are no such maintenance margin requirements or clearing organization margin requirements, then the amount of funds required to provide margin equal to the amount necessary after application of calls for margin or other required deposits outstanding no more than one business day to restore original margin when the original margin has been depleted by 50 percent or more: *Provided,* to the extent a deficit is excluded from current assets in accordance with paragraph (c)(2)(i) of this section such amount shall not also be deducted under this paragraph. In the event that an owner of a noncustomer or omnibus account has deposited an asset other than cash to margin, guarantee or secure his account the value attributable to such asset for purposes of this paragraph shall be the lesser of the value attributable to such asset pursuant to the margin rules of the applicable board of trade, or the market value of such asset after application of the percentage deductions specified in paragraph (c)(5) of this section;

(x) In the case of open futures contracts, cleared swaps, and granted (sold) commodity options held in proprietary accounts carried by the applicant or registrant which are not covered by a position held by the applicant or registrant or which are not the result of a ''changer trade'' made in accordance with the rules of a contract market:

(A) For an applicant or registrant which is a clearing member of a clearing organization for the positions cleared by such member, the applicable margin requirement of the applicable clearing organization;

(B) For an applicant or registrant which is a member of a self-regulatory organization, 150 percent of the applicable maintenance margin requirement of the applicable board of trade, or clearing organization, whichever is greater;

(C) For all other applicants or registrants, 200 percent of the applicable maintenance margin requirements of the applicable board of trade or clearing organization, whichever is greater; or

(D) For open contracts or granted (sold) commodity options for which there are no applicable maintenance margin requirements, 200 percent of the applicable initial margin requirement: *Provided,* the equity in any such proprietary account shall reduce the deduction required by this paragraph (c)(5)(x) if such equity is not otherwise includable in adjusted net capital;

* * * * *

(xiv) For securities brokers and dealers, all other deductions specified in § 240.15c3–1 of this title;

(xv) In the case of a futures commission merchant that is also a registered swap dealer, the amount of funds required from each swap counterparty and security-based swap counterparty to meet initial margin requirements of the Commission or Securities and Exchange Commission, as applicable, after application of calls for margin or other required deposits which are outstanding within the required time frame to collect margin or other required deposits;

(xvi) In the case of a futures commission merchant that is also a registered swap dealer, the amount of initial margin calculated pursuant to § 23.154 of this chapter for the account of a swap counterparty that is subject to a margin exception or exemption under § 23.150 of this chapter, less any margin posted on such account, and the amount of initial margin calculated pursuant to § 240.18a–3(c)(1)(i)(B) of this title for the account of a security-based swap counterparty that is subject to a margin exception or exemption under the rules of the Securities and Exchange Commission, less any margin posted on such account.

(6)(i) *Election of alternative capital deductions that have received approval of Securities and Exchange Commission pursuant to § 240.15c3–1(a)(7) of this title.* Any futures commission merchant that is also registered with the Securities and Exchange Commission as a securities broker or dealer, and who also satisfies the other requirements of this paragraph (c)(6), may elect to compute its adjusted net capital using the alternative capital deductions that, under § 240.15c3–1(a)(7) of this title, the Securities and Exchange Commission has approved by written order in lieu of the deductions that would otherwise be required under this section.

* * * * *

(iv) * * *

(A) Information that the futures commission merchant files on a monthly basis with its designated examining authority or the Securities and Exchange Commission, whether by way of schedules to its FOCUS reports or by other filings, in satisfaction of § 240.17a–5(a)(5) of this title;

* * * * *

(v) *Election of alternative market risk and credit risk capital deductions for a futures commission merchant that is registered as a swap dealer and has received approval of the Commission or a registered futures association for which the futures commission merchant is a member.* For purposes of this paragraph (c)(6)(v) only, all references to futures commission merchant means a futures commission merchant that is also registered as a swap dealer.

(A) A futures commission merchant may apply in writing to the Commission or a registered futures association of which it is a member for approval to compute deductions for market risk and credit risk using internal models in lieu of the standardized deductions otherwise required under this section; *Provided however,* that the Commission must issue a determination that the registered futures association's model requirements and review process are comparable to the Commission's requirements and review process in order for the registered futures association's model approval to be accepted as an alternative means of compliance with this section. The futures commission merchant must file the application in accordance with instructions approved by the Commission and specified on the website of the registered futures association.

(B) A futures commission merchant's application must include the information set forth in Appendix A to Subpart E of Part 23 and the market risk and credit risk charges must be computed in accordance with § 23.102 of this chapter.

(C) The Commission or registered futures association upon obtaining the Commission's determination that its requirements and model approval process are comparable to the Commission's requirements and process, may approve or deny the application, in whole or in part, or approve or deny an amendment to the application, in whole or in part, subject to any conditions or limitations the Commission or registered futures association may require, if the Commission or registered futures association finds the approval to be appropriate in the public interest, after determining, among other things, whether the applicant has met the requirements of § 23.102 of this chapter.

* * * * *

(g)(1) The Commission may by order restrict, for a period of up to twenty business days, any withdrawal by a futures commission merchant of equity capital, or any unsecured advance or loan to a stockholder, partner, limited liability company member, sole proprietor, employee or affiliate if the Commission, based on the facts and information available, concludes that any such withdrawal, advance or loan may be detrimental to the financial integrity of the futures commission merchant, or may unduly jeopardize its ability to meet customer obligations or other liabilities that may cause a significant impact on the markets.

* * * * *

■ 6. Amend § 1.65 by revising paragraph (b) introductory text, paragraphs (d) and (e) to read as follows:

**§ 1.65 Notice of bulk transfers and disclosure obligations to customers.**

* * * * *

(b) *Notice to the Commission.* Each futures commission merchant or introducing broker shall file with the Commission, at least ten business days in advance of the transfer, notice of any transfer of customer accounts carried or introduced by such futures commission merchant or introducing broker that is not initiated at the request of the customer, where the transfer involves the lesser of:

* * * * *

(d) The notice required by paragraph (b) of this section shall be considered filed when submitted to the Director of the Division of Swap Dealer and Intermediary Oversight, in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission.

(e) In the event that the notice required by paragraph (b) of this section cannot be filed with the Commission at least ten days prior to the account transfer, the Commission hereby delegates to the Director of the Division of Swap Dealer and Intermediary Oversight, or such other employee or employees as the Director may designate from time to time, the authority to accept a lesser time period for such notification at the Director's or designee's discretion. In any event, however, the transferee futures commission merchant or introducing broker shall file such notice as soon as practicable and no later than the day of the transfer. Such notice shall include a brief statement explaining the circumstances necessitating the delay in filing.

* * * * *

## PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 7. The authority citation for part 23 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

■ 8. Add section 23.100 to subpart E to read as follows:

**§ 23.100 Definitions applicable to capital requirements.**

For purposes of §§ 23.101 through 23.106 of subpart E, the following terms are defined as follows:

*Actual daily net trading profit and loss.* This term is used in assessing the performance of a swap dealer's VaR measure and refers to changes in the swap dealer's portfolio value that would have occurred were end-of-day positions to remain unchanged (therefore, excluding fees, commissions, reserves, net interest income, and intraday trading).

*Advanced approaches Board-regulated institution.* The term shall have the meaning ascribed to it in 12 CFR part 217.

*BHC equivalent risk-weighted assets.* This term means the risk-weighted assets of a swap dealer that elects to meet the capital requirements in § 23.101(a)(1)(i) calculated as follows:

(1) If the swap dealer is not approved to use internal models to calculate credit risk exposure under § 23.102, it shall calculate its credit risk-weighted assets using the bank holding company regulations in subpart D of 12 CFR part 217, as if the swap dealer itself were a bank holding company, with the swap dealer permitted to calculate its exposure amount for OTC derivative contracts using either the current exposure method or the standardized approach for counterparty credit risk, without regard to the status of any affiliate of the swap dealer as an advanced approaches Board-regulated institution;

(2) If the swap dealer is approved to use internal models to calculate credit risk exposure under § 23.102, it shall calculate its credit risk-weighted assets using the bank holding company regulations in subpart E of 12 CFR part 217, as if the swap dealer itself were a bank holding company, with the swap dealer permitted to calculate its exposure amount for OTC derivative contracts using either the internal models methodology or the standardized approach for counterparty credit risk, without regard to the status of any affiliate of the swap dealer as an advanced approaches Board-regulated institution;

(3) If the swap dealer is not approved to use internal models to calculate market risk exposure under § 23.102, it shall compute a market risk capital charge for the positions that the swap dealer holds in its proprietary accounts using the applicable standardized market risk charges set forth in § 240.18a–1 of this title and § 1.17 of this chapter for such positions, and multiplying that amount by a factor of 12.5;

(4) If the swap dealer is approved to use internal models to calculate market risk exposure under § 23.102, it shall calculate its market risk-weighted assets using subpart F of 12 CFR part 217; *Provided, however,* that the swap dealer may elect to apply either the provisions of such sections that are applicable to advanced approaches Board-regulated institutions or those that are applicable to Board-regulated institutions that are not advanced approaches Board-regulated institutions.

*Credit risk.* This term refers to the risk that the counterparty to an uncleared swap transaction could default before the final settlement of the transaction's cash flows.

*Credit risk exposure requirement.* This term refers to the amount that the swap dealer (other than a swap dealer subject to the minimum capital requirements of § 23.101(a)(1)(i)) is required to compute under § 23.102 if approved to use internal credit risk models, or to compute under § 23.103 if not approved to use internal credit risk models.

*Exempt foreign exchange swaps and foreign exchange forwards* are those foreign exchange swaps and foreign exchange forwards that were exempted from the definition of a swap by the U.S. Department of the Treasury.

*Market risk exposure.* This term means the risk of loss in a position or portfolio of positions resulting from movements in market prices and other factors. Market risk exposure is the sum of:

(1) General market risks including changes in the market value of a particular assets that result from broad market movements, such as a changes in market interest rates, foreign exchange rates, equity prices, and commodity prices;

(2) Specific risk, which includes risks that affect the market value of a specific instrument, such as the credit risk of the issuer of the particular instrument, but do not materially alter broad market conditions;

(3) Incremental risk, which means the risk of loss on a position that could result from the failure of an obligor to make timely payments of principal and interest; and

(4) Comprehensive risk, which is the measure of all material price risks of one or more portfolios of correlation trading positions.

*Market risk exposure requirement.* This term refers to the amount that the swap dealer (other than a swap dealer subject to the minimum capital requirements of § 23.101(a)(1)(i)) is required to compute under § 23.102 if approved to use internal market risk models, or § 23.103 if not approved to use internal market risk models.

*OTC derivative contract.* This term shall have the meaning ascribed to it in 12 CFR part 217.

*Predominantly engaged in non-financial activities.* A swap dealer is predominantly engaged in non-financial activities if: (1) The swap dealer's consolidated annual gross financial revenues, or if the swap dealer is a wholly owned subsidiary, then the swap dealer's consolidated parent's annual gross financial revenues, in either of its two most recently completed fiscal years represents less than 15 percent of the swap dealer's consolidated gross revenue in that fiscal year (''15% revenue test''), and (2) the consolidated total financial assets of the swap dealer, or if the swap dealer is wholly owned subsidiary, the consolidated total financial assets of the swap dealer's parent, at the end of its two most recently completed fiscal years represents less than 15 percent of the swap dealer's consolidated total assets as of the end of the fiscal year (''15% asset test''). For purpose of computing the 15% revenue test or the 15% asset test, a swap dealer's activities or swap dealer's parent's activities shall be deemed financial activities if such activities are defined as financial activities under 12 CFR 242.3 and Appendix A to 12 CFR 242, including lending, investing for others, safeguarding money or securities for others, providing financial or investment advisory services, underwriting or making markets in securities, providing securities brokerage services, and engaging as principal in investing and trading activities; *Provided, however,* a swap dealer may exclude from its financial activities accounts receivable resulting from non-financial activities.

*Prudential regulator.* This term has the same meaning as set forth in section 1a(39) of the Act, and includes the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency, as applicable to a swap dealer or major swap participant.

*Regulatory capital.* This term shall mean:

(1) With respect to the capital requirement under § 23.101(a)(1)(i), the amount of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital maintained by a covered SD, computed in accordance with § 23.101(a)(1)(i);

(2) With respect to the capital requirement under § 23.101(a)(1)(ii), the amount of tentative net capital and net capital maintained by a covered SD, computed in accordance with § 23.101(a)(1)(ii);

(3) With respect to the capital requirement under § 23.101(a)(2)(i), the amount of tangible net worth as defined in this section and maintained by a covered SD; and

(4) With respect to the capital requirement under 23.101(b), the amount of tangible net worth as defined in this section and maintained by a major swap participant.

*Regulatory capital requirement.* This term refers to each of the capital requirements that § 23.101 applies to a swap dealer or major swap participant.

*Tangible net worth.* This term means the net worth of a swap dealer or major swap participant as determined in accordance with generally accepted accounting principles in the United States, excluding goodwill and other intangible assets. In determining net worth, all long and short positions in swaps, security-based swaps and related positions must be marked to their market value. A swap dealer or major swap participant must include in its computation of tangible net worth all liabilities or obligations of a subsidiary or affiliate that the swap dealer or major swap participant guarantees, endorses, or assumes either directly or indirectly.

*Uncleared swap margin.* This term means the amount of initial margin, computed in accordance with § 23.154, that a swap dealer would be required to collect from each counterparty for each outstanding swap position of the swap dealer. A swap dealer must include all swap positions in the calculation of the uncleared swap margin amount, including swaps that are exempt or excluded from the scope of the Commission's margin regulations for uncleared swaps pursuant to § 23.150, exempt foreign exchange swaps or foreign exchange forwards, or netting set of swaps or foreign exchange swaps, for each counterparty, as if that counterparty was an unaffiliated swap dealer. Furthermore, in computing the uncleared swap margin amount, a swap dealer may not exclude the *initial margin threshold amount* or *minimum transfer amount* as such terms are defined in § 23.151.

■ 9. Add section 23.101 to subpart E to read as follows:

**§ 23.101 Minimum financial requirements for swap dealers and major swap participants.**

(a)(1) Except as provided in paragraphs (a)(2) through (a)(5) of this section, each swap dealer must elect to be subject to the minimum capital requirements set forth in either paragraphs (a)(1)(i) or (a)(1)(ii) of this section:

(i) A swap dealer that elects to meet the capital requirements in this paragraph (a)(1)(i) must at all times maintain regulatory capital that meets the following:

(A) $20 million of common equity tier 1 capital, as defined under the bank holding company regulations in 12 CFR 217.20, as if the swap dealer itself were a bank holding company subject to 12 CFR part 217;

(B) An aggregate of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital, all as defined under the bank holding company regulations in 12 CFR 217.20, equal to or greater than eight percent of the swap dealer's BHC equivalent risk-weighted assets; *provided, however,* that the swap dealer must maintain a minimum of common equity tier 1 capital equal to six point five percent of its BHC equivalent risk-weighted assets; *provided further,* that any capital that is subordinated debt under 12 CFR 217.20 and that is included in the swap dealer's capital for purposes of this paragraph (a)(1)(i)(B) must qualify as subordinated debt under § 240.18a–1d of this title;

(C) An aggregate of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital, all as defined under the bank holding company regulations in 12 CFR 217.20, equal to or greater than eight percent of the amount of uncleared swap margin, as that term is defined in § 23.100 of this part, for each uncleared swap position open on the books of the swap dealer, computed on a counterparty by counterparty basis pursuant to § 23.154 of this part; and

(D) The amount of capital required by a registered futures association of which the swap dealer is a member.

(ii)(A) A swap dealer that elects to meet the capital requirements in this paragraph (a)(1)(ii) must at all times maintain net capital, as defined and computed in accordance with

§ 240.18a–1 of this title as if the swap dealer were a security-based swap dealer registered with the Securities and Exchange Commission and subject to § 240.18a–1 of this title, that equals or exceeds the greater of:

(*1*) $20 million; *provided however,* that if the swap dealer is approved under § 23.102 of this part to use internal models to compute market risk capital charges or credit risk capital charges it must maintain tentative net capital, as defined and computed in accordance with § 240.18a–1 of this title as if the swap dealer were a security-based swap dealer registered with the Securities and Exchange Commission and subject to § 240.18a–1 of this title, of not less than $100 million and net capital of $20 million;

(*2*) Two percent of the uncleared swap margin, as defined in § 23.100 of this part; or

(*3*) The amount of capital required by a registered futures association of which the swap dealer is a member.

(B) A swap dealer that uses internal models to compute market risk for its proprietary positions under § 240.18a–1(d) of this title must calculate the total market risk as the sum of the VaR measure, stressed VaR measure, specific risk measure, comprehensive risk measure, and incremental risk measure of the portfolio of proprietary positions in accordance with § 23.102 of this part and Appendix A to Subpart E of Part 23; and

(C) A swap dealer may recognize as a current asset, receivables from third-party custodians that maintain the swap dealer's initial margin deposits associated with uncleared swap and security-based swap transactions pursuant to the margin rules of the Commission, the Securities and Exchange Commission, a prudential regulator, as defined in section 1a(39) of the Act, or a foreign jurisdiction that has received a margin Comparability Determination under § 23.160 of this chapter.

(2)(i) A swap dealer that is ''predominantly engaged in non-financial activities'' as defined in § 23.100 of this part may elect to meet the minimum capital requirements in this paragraph (a)(2) in lieu of the capital requirements in paragraph (a)(1) of this section.

(ii) A swap dealer that satisfies the requirements of paragraph (a)(2)(i) of this section and elects to meet the requirements of this paragraph (a)(2) must maintain tangible net worth, as defined in § 23.100 of this part, equal to or in excess of the greatest of the following:

(A) $20 million plus the amount of the swap dealer's market risk exposure requirement (as defined in § 23.100 of this part) and its credit risk exposure requirement (as defined in § 23.100 of this part) associated with the swap dealer's swap and related hedge positions that are part of the swap dealer's swap dealing activities. The swap dealer shall compute its market risk exposure requirement and credit risk exposure requirement for its swap positions in accordance with § 23.102 of this part if the swap dealer has obtained approval to use internal capital models. The swap dealer shall compute its market risk exposure requirement and credit risk exposure requirement in accordance with the standardized approach of paragraphs (b)(1) and (c)(1) of § 23.103 of this part if it has not been approved to use internal capital models;

(B) Eight percent of the amount of uncleared swap margin, as that term is defined in § 23.100 of this part, for each uncleared swap positions open on the books of the swap dealer, computed on a counterparty by counterparty basis pursuant to § 23.154 of this part; or

(C) The amount of capital required by a registered futures association of which the swap dealer is a member.

(3) A swap dealer that is subject to minimum capital requirements established by the rules or regulations of a prudential regulator pursuant to section 4s(e) of the Act is not subject to the regulatory capital requirements set forth in paragraph (a)(1) or (2) of this section.

(4) A swap dealer that is a futures commission merchant is subject to the minimum capital requirements of § 1.17 of this title, and is not subject to the regulatory capital requirements set forth in paragraph (a)(1) or (2) of this section.

(5) A swap dealer that is organized and domiciled outside of the United States, including a swap dealer that is an affiliate of a person organized and domiciled in the United States, may satisfy its requirements for capital adequacy under paragraphs (a)(1) or (2) of this section by substituted compliance with the capital adequacy requirement of its home country jurisdiction. In order to qualify for substituted compliance, a swap dealer's home country jurisdiction must receive from the Commission a Capital Comparability Determination under § 23.106 of this part. A swap dealer that is a registered futures commission merchant may not apply for a Capital Comparability Determination and must comply with the minimum capital requirements set forth in § 1.17 of this chapter.

(6) A swap dealer that elects to meet the capital requirements of paragraph (a)(1)(i), (a)(1)(ii), or (a)(2) of this section may not subsequently change its election without the prior written approval of the Commission. A swap dealer that wishes to change its election must submit a written request to the Commission and must provide any additional information and documentation requested by the Commission.

(b)(1) Every major swap participant for which there is not a prudential regulator must at all time have and maintain positive tangible net worth.

(2) Notwithstanding paragraph (b)(1) of this section, each major swap participant for which there is no prudential regulator must meet the minimum capital requirements established by a registered futures association of which the major swap participant is a member.

(3) Notwithstanding paragraphs (b)(1) and (2) of this section, a major swap participant that is a futures commission merchant is subject to the minimum capital requirements of § 1.17 of this chapter, and is not subject to the regulatory capital requirements set forth in paragraph (b)(1) and (2) of this section.

(4) A major swap participant that is organized and domiciled outside of the United States, including a major swap participant that is an affiliate of a person organized and domiciled in the United States, may satisfy its requirements for capital adequacy under paragraphs (b)(1) and (2) of this section by substituted compliance with the capital adequacy requirement of its home country jurisdiction. In order to qualify for substituted compliance, a major swap participant's home country jurisdiction must receive from the Commission a Capital Comparability Determination under § 23.106 of this part. A major swap participant that is a registered futures commission merchant may not apply for a Capital Comparability Determination and must comply with the minimum capital requirements set forth in § 1.17 of this chapter.

(c)(1) Before any applicant may be registered as a swap dealer or major swap participant, the applicant must demonstrate to the satisfaction of a registered futures association of which it is a member, or applying for membership, one of the following:

(i) That the applicant complies with the applicable regulatory capital requirements in paragraphs (a)(1), (a)(2), (b)(1), or (b)(2) of this section;

(ii) That the applicant is a futures commission merchant that complies with § 1.17 of this chapter;

(iii) That the applicant is subject to minimum capital requirements established by the rules or regulations of a prudential regulator under paragraph (a)(3) of this section;

(iv) That the applicant is organized and domiciled in a non-U.S. jurisdiction and is regulated in a jurisdiction for which the Commission has issued a Capital Comparability Determination under § 23.106 of this part, and the non-U.S. person has obtained confirmation from the Commission that it may rely upon the Commission's Comparability Determination under § 23.106 of this part.

(2) Each swap dealer and major swap participant subject to the minimum capital requirements set forth in paragraphs (a) and (b) of this section must be in compliance with such requirements at all times, and must be able to demonstrate such compliance to the satisfaction of the Commission and to the registered futures association of which the swap dealer or major swap participant is a member.

■ 10. Add section 23.102 to subpart E to read as follows:

**§ 23.102 Calculation of market risk exposure requirement and credit risk exposure requirement using internal models**

(a) A swap dealer may apply to the Commission or to a registered futures association of which the swap dealer is a member to obtain approval to use internal models under terms and conditions required by the Commission or the registered futures association and by these regulations, when calculating the swap dealer's market risk exposure and credit risk exposure under §§ 23.101(a)(1)(i)(B), 23.101(a)(1)(ii)(A), or 23.101(a)(2)(ii)(A); *Provided however,* that the Commission must issue a determination that the registered futures association's model requirements and review process are comparable to the Commission's requirements and review process in order for the registered futures association's model approval to be accepted as an alternative means of compliance with this section.

(b) The swap dealer's application to use internal models to compute market risk exposure and credit risk exposure must be in writing and must be filed with the Commission and with a registered futures association of which the swap dealer is a member. The swap dealer must file the application in accordance with instructions established by the Commission and the registered futures association.

(c) A swap dealer's application must include the following:

(1) In the case of a swap dealer subject to the minimum capital requirements in § 23.101(a)(1)(i) applying to use internal models to compute market risk exposure, the information required under subpart F of 12 CFR part 217, as if the swap dealer were itself a bank holding company subject to 12 CFR part 217.

(2) In the case of a swap dealer subject to the minimum capital requirements in § 23.101(a)(1)(i) applying to use internal models to compute credit risk exposure, the information required under subpart E of 12 CFR part 217 in order to calculate credit risk-weighted assets in accordance with sections 217.131 through 217.155 of that subpart, as if the swap dealer were itself a bank holding company subject to 12 CFR part 217.

(3) In the case of a swap dealer subject to the minimum capital requirements in § 23.101(a)(ii) or § 23.101(a)(2), the information set forth in Appendix A to Subpart E of Part 23.

(d) The Commission, or registered futures association upon obtaining the Commission's determination that its requirements and model approval process are comparable to the Commission's requirements and process, may approve or deny the application, or approve or deny an amendment to the application, in whole or in part, subject to any conditions or limitations the Commission or registered futures association may require, if the Commission or registered futures association finds the approval to be appropriate in the public interest, after determining, among other things, whether the applicant has met the requirements of this section. A swap dealer that has received Commission or registered futures association approval to compute market risk exposure requirements and credit risk exposure requirements pursuant to internal models must compute such charges in accordance with Appendix A to Subpart E of Part 23.

(e) A swap dealer must cease using internal models to compute its market risk exposure requirement and credit risk exposure requirement, upon the occurrence of any of the following:

(1) The swap dealer has materially changed a mathematical model described in the application or materially changed its internal risk management control system without first submitting amendments identifying such changes and obtaining the approval of the Commission or the registered futures association for such changes;

(2) The Commission or the registered futures association of which the swap dealer is a member determines that the internal models are no longer sufficient for purposes of the capital calculations of the swap dealer as a result of changes in the operations of the swap dealer;

(3) The swap dealer fails to come into compliance with its requirements under this section, after having received from the Director of the Commission's Division of Swap Dealer and Intermediary Oversight, or from the registered futures association of which the swap dealer is a member, written notification that the swap dealer is not in compliance with its requirements, and must come into compliance by a date specified in the notice; or

(4) The Commission by written order finds that permitting the swap dealer to continue to use the internal models is no longer appropriate.

(f)(1) Notwithstanding paragraphs (a) through (d) of this section, a swap dealer may use internal market risk or credit risk models upon the submission to the Commission and the registered futures association of which the swap dealer is a member a certification, signed by the Chief Executive Officer, Chief Financial Officer, or other appropriate official with knowledge of the swap dealer's capital requirements and the capital models, that such models are in substantial compliance with Commission's model requirements and have been approved for use in computing capital by the swap dealer, or an affiliate of the swap dealer, by the Securities and Exchange Commission, a prudential regulator (as defined in § 1.3 of this chapter), a foreign regulatory authority in a jurisdiction that the Commission has found to be eligible for substituted compliance under § 23.106, or a foreign regulatory authority whose capital adequacy requirements are consistent with the capital requirements issued by the Basel Committee on Banking Supervision. A swap dealer also must file an application containing the information required under paragraph (c) of this section with the Commission with its certification. A swap dealer may use such models pending the subsequent approval or denial of the swap dealer's capital model application by the Commission or the registered futures association of which the swap dealer is a member.

(2) A swap dealer shall revise the certification required under paragraph (f)(1) of this section to address any material changes or revisions to the models, or to reflect any regulatory restrictions placed on the models since the certification was submitted.

(3) A swap dealer shall cease using capital models subject to the certification under paragraph (f)(1) of this section if the regulatory authority that previously approved the models for use by the swap dealer, or by the swap dealer's affiliate, has withdrawn its approval and the Commission or a registered futures association has not approved the models.

■ 11. Add section 23.103 to subpart E to read as follows:

**§ 23.103 Calculation of market risk exposure requirement and credit risk requirement when models are not approved.**

(a) *Non-model approach.* A swap dealer that:

(1) Does not compute its regulatory capital requirements under § 23.101(a)(1)(i), and

(2) Either:

(A) has not received approval from the Commission or from a registered futures association of which the swap dealer is a member to compute its market risk exposure requirement and/or credit risk exposure requirement pursuant to internal models under § 23.102, or

(B) has had its approval to compute its market risk exposure requirement and/or credit risk exposure requirement pursuant to internal models under § 23.102 revoked by the Commission or registered futures association must compute its market risk exposure requirement and/or credit risk exposure requirement pursuant to paragraphs (b) and/or (c) of this section.

(b) *Market risk exposure requirements.* (1) A swap dealer that computes its regulatory capital under § 23.101(a)(1)(ii) or (a)(2) shall compute a market risk capital charge for the positions that the swap dealer holds in its proprietary accounts using the applicable standardized market risk charges set forth in § 240.18a–1 of this title and § 1.17 of this chapter for such positions.

(2) In computing its net capital under § 23.101(a)(1)(ii), a swap dealer shall deduct from its tentative net capital the sum of the market risk capital charges computed under paragraph (b)(1) of this section.

(3) In computing its minimum capital requirement under § 23.101(a)(2), a swap dealer must add the amount of the market risk capital charge computed under this section to the $20 million minimum capital requirement.

(c) *Credit risk charges.* (1) A swap dealer that computes regulatory capital under § 23.101(a)(1)(ii) shall compute counterparty credit risk charges using the applicable standardized credit risk charges set forth in § 240.18a–1 of this title and § 1.17 of this chapter for such positions.

(2) In computing its net capital under § 23.101(a)(1)(ii), a swap dealer shall reduce its tentative net capital by the sum of the counterparty credit risk charges computed under paragraph (c)(1) of this section.

(3) In computing its minimum capital requirement under § 23.101(a)(2), a swap dealer must add the amount of the credit risk charge computed under this section to the $20 million minimum capital requirement.

■ 12. Add section 23.104 to subpart E to read as follows:

**§ 23.104 Equity Withdrawal Restrictions.**

(a) *Equity withdrawal restrictions.* The capital of a swap dealer, including the capital of any affiliate or subsidiary whose liabilities or obligations are guaranteed, endorsed, or assumed by the swap dealer may not be withdrawn by action of the swap dealer or its equity holders, or by redemption of shares of stock by the swap dealer or by such affiliates or subsidiaries, or through the payment of dividends or any similar distribution, nor may any unsecured advance or loan be made to an equity holder or employee if, after giving effect thereto and to any other such withdrawals, advances, or loans which are scheduled to occur within six months following such withdrawal, advance or loan, the swap dealer's regulatory capital is less than 120 percent of the minimum regulatory capital required under § 23.101 of this part. The equity withdrawal restrictions, however, do not preclude a swap dealer from making required tax payments or from paying reasonable compensation to equity holders. The Commission may, upon application by the swap dealer, grant relief from this paragraph (a) if the Commission deems such relief to be in the public interest.

(b) *Temporary equity withdrawal restrictions by Commission order.* (1) The Commission may by order restrict, for a period of up to twenty business days, any withdrawal by a swap dealer of capital or any unsecured loan or advance to a stockholder, partner, member, employee or affiliate under such terms and conditions as the Commission deems appropriate in the public interest if the Commission, based on the information available, concludes that such withdrawal, loan or advance may be detrimental to the financial integrity of the swap dealer, or may unduly jeopardize the swap dealer's ability to meet its financial obligations to counterparties or to pay other liabilities which may cause a significant impact on the markets or expose the counterparties and creditors of the swap dealer to loss.

(2) An order temporarily prohibiting the withdrawal of capital shall be rescinded if the Commission determines that the restriction on capital withdrawal should not remain in effect. A hearing on an order temporarily prohibiting withdrawal of capital will be held within two business days from the date of the request in writing by the swap dealer.

■ 13. Add section 23.105 to subpart E to read as follows:

**§ 23.105 Financial recordkeeping, reporting and notification requirements for swap dealers and major swap participants.**

(a) *Scope.* (1) Except as provided in paragraphs (a)(2) and (a)(3) of this section, a swap dealer or major swap participant must comply with the applicable requirements set forth in paragraphs (b) through (p) of this section.

(2) The requirements in paragraphs (b) through (o) of this section do not apply to any swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator.

(3) The requirements in paragraph (p) of this section do not apply to any swap dealer or major swap participant that is subject to the capital requirements of the Commission.

(b) *Current books and records.* A swap dealer or major swap participant shall prepare and keep current ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each transaction affecting its asset, liability, income, expense, and capital accounts, and in which all its asset, liability, and capital accounts are classified in accordance with U.S. generally accepted accounting principles, and as otherwise may be necessary for the capital calculations required under § 23.101 of this part: *Provided, however,* that a swap dealer or major swap participant that is not otherwise required to prepare financial statements in accordance with U.S. generally accepted accounting principles, may prepare and keep records required by this section in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board. Such records must be maintained in accordance with § 1.31 of this chapter.

(c) *Notices.* (1) A swap dealer or major swap participant who knows or should have known that its regulatory capital at any time is less than the minimum required by § 23.101 of this part, must:

(i) Provide immediate written notice to the Commission and to the registered futures association of which it is a member that the swap dealer's or major swap participant's regulatory capital is less than that required by § 23.101 of this part; and

(ii) Provide together with such notice, documentation in such form as necessary to adequately reflect the swap dealer's or major swap participant's regulatory capital condition as of any date such person's regulatory capital is less than the minimum required. The swap dealer or major swap participant must provide similar documentation for other days as the Commission or registered futures association may request.

(2) A swap dealer or major swap participant who knows or should have known that its regulatory capital at any time is less than 120 percent of its minimum regulatory capital requirement as determined under § 23.101 of this part, must provide written notice to the Commission and to the registered futures association of which it is a member to that effect within 24 hours of such event.

(3) If a swap dealer or major swap participant at any time fails to make or to keep current the books and records required by these regulations, such swap dealer or major swap participant must, on the same day such event occurs, provide written notice to the Commission and to the registered futures association of which it is a member of such fact, specifying the books and records which have not been made or which are not current, and within 48 hours after giving such notice file a written report stating what steps have been and are being taken to correct the situation.

(4) A swap dealer or major swap participant must provide written notice to the Commission and to the registered futures association of which it is a member of a substantial reduction in capital as compared to that last reported in a financial report filed with the Commission pursuant to this section. The notice shall be provided if the swap dealer or major swap participant experiences a 30 percent or more decrease in the amount of capital that the swap dealer or major swap participant holds in excess of its regulatory capital requirement as computed under § 23.101 of this part.

(5) A swap dealer or major swap participant must provide written notice to the Commission and to the registered futures association of which it is a member two business days prior to the withdrawal of capital by action of the equity holders of the swap dealer or major swap participant where the withdrawal exceeds 30 percent of the swap dealer's or major swap participant's excess regulatory capital as computed under § 23.101 of this part.

(6) A swap dealer or major swap participant that is registered with the Securities and Exchange Commission as a security-based swap dealer or as a major security-based swap participant and files a notice with the Securities and Exchange Commission under 17 CFR 240.18a–8 or 17 CFR 240.17a–11, as applicable, must file a copy of such notice with the Commission and with the registered futures association of which it is a member at the time the security-based swap dealer or major security-based swap participant files the notice with the Securities and Exchange Commission.

(7) A swap dealer or major swap participant must submit a written notice to the Commission and to the registered futures association of which it is a member within 24 hours of the occurrence of any of the following events:

(i) A single counterparty, or group of counterparties that are under common ownership or control, fails to post initial margin or pay variation margin to the swap dealer or major swap participant for swap positions in compliance with § 23.152 and § 23.153 of this part and security-based swap positions in compliance with 17 CFR 240.18a–3(c)(1)(ii) and 17 CFR 240.18a–3(c)(2)(ii), and such initial margin and variation margin, in the aggregate, is equal to or greater than 25 percent of the swap dealer's minimum capital requirement or 25 percent of the major swap participant's tangible net worth;

(ii) Counterparties fail to post initial margin or pay variation margin to the swap dealer or major swap participant for swap positions in compliance with § 23.152 and § 23.153 of this part and security-based swap positions in compliance with 17 CFR 240.18a–3(c)(1)(ii) and 17 CFR 240.18a–3(c)(2)(ii) in an amount that, in the aggregate, exceeds 50 percent of the swap dealer's minimum capital requirement or 50 percent of the major swap participant's tangible net worth;

(iii) A swap dealer or major swap participant fails to post initial margin or pay variation margin to a single counterparty or group of counterparties under common ownership and control for swap positions in compliance with § 23.152 and § 23.153 of this part and security-based swap positions in compliance with 17 CFR 240.18a–3(c)(1)(ii) and 17 CFR 240.18a–3(c)(2)(ii), and such initial margin and variation margin, in the aggregate, exceeds 25 percent of the swap dealer's minimum capital requirement or 25 percent of the major swap participant's tangible net worth; or

(iv) A swap dealer or major swap participant fails to post initial margin or pay variation margin to counterparties for swap positions in compliance with § 23.152 and § 23.153 of this part and security-based swap positions in compliance with 17 CFR 240.18a–3(c)(1)(ii) and 17 CFR 240.18a–3(c)(2)(ii) in an amount that, in the aggregate, exceeds 50 percent of the swap dealer's s minimum capital requirement or 50 percent of the major swap participants tangible net worth.

(d) *Unaudited financial reports.* (1) A swap dealer or major swap participant shall file with the Commission and with a registered futures association of which it is a member monthly financial reports meeting the requirements in paragraph (d)(2) of this section as of the close of business each month; *Provided, however,* that a swap dealer or major swap participant who is subject to the minimum capital requirements of § 23.101(a)(2) or (b), respectively, may file quarterly financial reports meeting the requirements of paragraph (d)(2) of this section as of the close of business each quarter end. Such financial reports must be filed no later than 17 business days after the date for which the report is made.

(2) The financial reports required by this section must be prepared in the English language and be denominated in United States dollars. The financial reports shall include a statement of financial condition, a statement of income/loss, a statement of changes in liabilities subordinated to the claims of general creditors, a statement of changes in ownership equity, a statement demonstrating compliance with and calculation of the applicable regulatory capital requirement under § 23.101, and such further material information as may be necessary to make the required statements not misleading. The monthly report and schedules must be prepared in accordance with generally accepted accounting principles as established in the United States*; Provided, however,* that a swap dealer or major swap participant that is not otherwise required to prepare financial statements in accordance with U.S. generally accepted accounting principles, may prepare the monthly report and schedules required by this section in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board.

(3) A swap dealer or major swap participant that is also registered with

the Securities and Exchange Commission as a broker or dealer, security-based swap dealer, or a major security-based swap participant and files a monthly Form X–17A–5 FOCUS Report Part II with the Securities and Exchange Commission pursuant to 17 CFR 240.18a–7 or 17 CFR 240.17a–5, as applicable, may file such Form X–17A–5 FOCUS Report Part II with the Commission and with the registered futures association in lieu of the financial reports required under paragraphs (d)(1) and (2) of the section. The swap dealer or major swap participant must file the form with the Commission and registered futures association when it files the Form X–17A–5 FOCUS Report Part II with the Securities and Exchange Commission, *provided, however,* that the swap dealer or major swap participant must file the Form X–17A–5 FOCUS Report Part II with the Commission and registered futures association no later than 17 business days after the end of each month.

(4) A swap dealer or major swap participant that is also registered with the Commission as a futures commission merchant may file a Form 1–FR–FCM in lieu of the monthly financial reports required under paragraphs (d)(1) and (2) of the section.

(e) *Annual audited financial report.* (1) A swap dealer or major swap participant shall file with the Commission and with a registered futures association of which it is a member an annual financial report as of the close of its fiscal year, certified in accordance with paragraph (e)(2) of this section, and including the information specified in paragraph (e)(3) of this section no later than 60 days after the close of the swap dealer's or major swap participant's fiscal year-end: *Provided, however,* that a swap dealer or major swap participant who is subject to the minimum capital requirements of § 23.101(a)(2) or (b), respectively, of this part may file an annual financial report no later than 90 days after the close of the swap dealer's and major swap participant's fiscal year-end.

(2) The annual financial report shall be audited and reported upon with an opinion expressed by an independent certified public accountant or independent licensed accountant that is in good standing in the accountant's home jurisdiction.

(3) The annual financial reports shall be prepared in accordance with generally accepted accounting principles as established in the United States, be prepared in the English language, and denominated in United States dollars: *Provided, however,* that a swap dealer or major swap participant that does not otherwise prepare financial statements in accordance with U.S. generally accepted accounting principles, may prepare the annual financial report required by this section in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board.

(4) The annual financial report must include the following:

(i) A statement of financial condition as of the date for which the report is made;

(ii) Statements of income (loss), cash flows, changes in ownership equity for the period between the date of the most recent certified statement of financial condition filed with the Commission and registered futures association and the date for which the report is made, and changes in liabilities subordinated to claims of general creditors;

(iii) Appropriate footnote disclosures;

(iv) A statement demonstrating the swap dealer's or major swap participant's compliance with and calculation of the applicable regulatory capital requirement under § 23.101 of this part;

(v) A reconciliation of any material differences from the unaudited financial report prepared as of the swap dealer's or major swap participant's year-end date under paragraph (d) of this section and the swap dealer's or major swap participant's annual financial report prepared under this paragraph (e); and

(vi) Such further material information as may be necessary to make the required statements not misleading.

(5) A swap dealer or major swap participant that is also registered with the Securities and Exchange Commission as a broker or dealer, security-based swap dealer, or a major security-based swap participant and files an annual financial report with the Securities and Exchange Commission pursuant to 17 CFR 240.18a–7 or 17 CFR 240.17a–5, as applicable, may file such annual financial report with the Commission and the registered futures association in lieu of the annual financial report required under this paragraph (e). The swap dealer or major swap participant must file its annual financial report with the Commission and the registered futures association at the same time that it files the annual financial report with the Securities and Exchange Commission, provided that the annual financial report is filed with the Commission and registered futures association no later than 60 days from the swap dealer's or major swap participant's fiscal year-end date.

(6) A swap dealer or major swap participant that is also registered with the Commission as a futures commission merchant may file an audited Form 1–FR–FCM in lieu of the annual financial report required under this paragraph (e).

(f) *Oath or affirmation.* Attached to each unaudited and audited financial report must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the information contained in the financial report is true and correct. The individual making such oath or affirmation must be: If the swap dealer or major swap participant is a sole proprietorship, the proprietor; if a partnership, any general partner; if a corporation, the duly authorized officer; and, if a limited liability company or limited liability partnership, the chief executive officer, the chief financial officer, the manager, the managing member, or those members vested with the management authority for the limited liability company or limited liability partnership.

(g) *Change of fiscal year-end.* A swap dealer or major swap participant may not change the date of its fiscal year-end from that used in its most recent annual financial report filed under paragraph (e) of this section unless the swap dealer or major swap participant has requested and received written approval for the change from a registered futures association of which it is a member.

(h) *Additional information requirements.* From time to time the Commission or a registered futures association, may, by written notice, require any swap dealer or major swap participant to file financial or operational information on a daily basis or at such other times as may be specified by the Commission or registered futures association. Such information must be furnished in accordance with the requirements included in the written Commission or registered futures association notice.

(i) *Public disclosure and nonpublic treatment of reports.* (1) A swap dealer or major swap participant must no less than six months after the date of the most recent annual audited financial report make publicly available on its website the following unaudited information:

(i) The statement of financial condition; and

(ii) A statement disclosing the amount of the swap dealer's or major swap participant's regulatory capital as of the end of the quarter and the amount of its minimum regulatory capital requirement, computed in accordance with § 23.101.

(2) A swap dealer or major swap participant must no less than annually make publicly available on its website the following information:

(i) The statement of financial condition from the swap dealer or major swap participant's audited annual financial report including applicable footnotes; and

(ii) A statement disclosing the amount of the swap dealer's or major swap participant's regulatory capital as of the fiscal year end and its minimum regulatory capital requirement, computed in accordance with § 23.101.

(3) Financial information required to be made publicly available pursuant to paragraph (i)(2) of this section must be posted within 10 business days after the firm is required to file with the Commission the reports required under paragraph (e)(1).

(4) Financial information required to be made publicly available pursuant to paragraph (i)(1) of this section must be posted within 30 calendar days of the date of the statements required under paragraph (d)(1).

(5) Financial information required to be filed with the Commission pursuant to this section, and not otherwise publicly available, will be treated as exempt from mandatory public disclosure for purposes of the Freedom of Information Act and the Government in the Sunshine Act and parts 145 and 147 of this chapter; *Provided, however,* that all information that is exempt from mandatory public disclosure will be available for official use by any official or employee of the United States or any State, by the National Futures Association and by any other person to whom the Commission believes disclosure of such information is in the public interest.

(j) *Extension of time to file financial reports.* A swap dealer or major swap participant may file a request with the registered futures association of which it is a member for an extension of time to file a monthly unaudited financial report or an annual audited financial report required under paragraphs (d) and (e) of this section. Such request will be approved, conditionally or unconditionally, or disapproved by the registered futures association.

(k) *Additional reporting requirements for swap dealers approved to use models to calculate market risk and credit risk for computing capital requirements.* (1) A swap dealer that has received approval or filed an application for provisional approval under § 23.102(d) from the Commission, or from a registered futures association of which the swap dealer is a member, to use internal models to compute its market risk exposure requirement and credit risk exposure requirement in computing its regulatory capital under § 23.101 must file with the Commission and with the registered futures association of which the swap dealer is a member the following information within 17 business days of the end of each month:

(i) For each product for which the swap dealer calculates a deduction for market risk other than in accordance with a model approved or for which an application of provisional approval has been filed pursuant to § 23.102(d), the product category and the amount of the deduction for market risk;

(ii) A graph reflecting, for each business line, the daily intra-month VaR;

(iii) The aggregate VaR for the swap dealer;

(iv) For each product for which the swap dealer uses scenario analysis, the product category and the deduction for market risk;

(v) Credit risk information on swap, mixed swap and security-based swap exposures including:

(A) Overall current exposure;

(B) Current exposure (including commitments) listed by counterparty for the 15 largest exposures;

(C) The 10 largest commitments listed by counterparty;

(D) The swap dealer's maximum potential exposure listed by counterparty for the 15 largest exposures;

(E) The swap dealer's aggregate maximum potential exposure;

(F) A summary report reflecting the swap dealer's current and maximum potential exposures by credit rating category; and

(G) A summary report reflecting the swap dealer's current exposure for each of the top ten countries to which the swap dealer is exposed (by residence of the main operating group of the counterparty).

(2) A swap dealer that has received approval or filed an application of provisional approval under § 23.102(d) from the Commission or from a registered futures association of which the swap dealer is a member to use internal models to compute its market risk exposure requirement and credit risk exposure requirement in computing its regulatory capital under § 23.101 must file with the Commission and with the registered futures association of which the swap dealer is member the following information within 17 business days of the end of each calendar quarter:

(i) A report identifying the number of business days for which the actual daily net trading loss exceeded the corresponding daily VaR; and

(ii) The results of back-testing of all internal models used to compute allowable capital, including VaR, and credit risk models, indicating the number of back-testing exceptions.

(l) *Additional position and counterparty reporting requirements.* A swap dealer or major swap participant must provide on a monthly basis to the Commission and to the registered futures association of which the swap dealer or major swap participant is a member the specific information required in Appendix B to Subpart E of this part.

(m) *Margin reporting.* A swap dealer or major swap participant must file with the Commission and with the registered futures association of which the swap dealer or major swap participant is a member the following information as of the end of each month within 17 business days of the end of each month:

(1) The name and address of each custodian holding initial margin or variation margin collected by the swap dealer or major swap participant for uncleared swap transactions pursuant to §§ 23.152 and 23.153;

(2) The amount of initial margin and variation margin collected by the swap dealer or major swap participant that is held by each custodian listed in paragraph (m)(1) of this section;

(3) The aggregate amount of initial margin that the swap dealer or major swap participant is required to collect from swap counterparties pursuant to § 23.152(a);

(4) The name and address of each custodian holding initial margin or variation margin posted by the swap dealer or major swap participant for uncleared swap transaction pursuant to §§ 23.152 and 23.153;

(5) The amount of initial margin and variation margin posted by the swap dealer or major swap participant that is held by each custodian listed in paragraph (m)(4) of this section; and

(6) The aggregate amount of initial margin that the swap dealer or majors swap participant is required to post to its swap counterparties pursuant to § 23.152(b).

(n) *Electronic filing.* All filings of financial reports, notices and other information required to be submitted to the Commission or registered futures association under paragraphs (b) through (m) of this section must be filed in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission or registered futures association, and otherwise in accordance with

instructions issued by or approved by the Commission or registered futures association.

A swap dealer or major swap participant must provide the Commission or registered futures association with the means necessary to read and to process the information contained in such report. Any such electronic submission must clearly indicate the swap dealer or major swap participant on whose behalf such filing is made and the use of such user authentication in submitting such filing will constitute and become a substitute for the manual signature of the authorized signer. In the case of a financial report required under paragraphs (d), (e), or (h) of this section and filed via electronic transmission in accordance with procedures established by or approved by the Commission or registered futures association, such transmission must be accompanied by the user authentication assigned to the authorized signer under such procedures, and the use of such user authentication will constitute and become a substitute for the manual signature of the authorized signer for the purpose of making the oath or affirmation referred to in paragraph (f) of this section.

(o) *Comparability determination for certain financial reporting.* A swap dealer or major swap participant that is subject to the monthly financial reporting requirements of paragraph (d) of this section and the annual financial reporting requirements of paragraph (e) of this section may petition the Commission for a Capital Comparability Determination under § 23.106 to file monthly financial reports and/or annual financial reports prepared in accordance with the rules a foreign regulatory authority in lieu of the requirements contained in this section.

(p) *Quarterly financial reporting and notification provisions for swap dealers and major swap participants that are subject to the capital requirements of a prudential regulator.* (1) *Scope.* A swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator must comply with the requirements of this paragraph.

(2) *Financial report and position information.* A swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator shall file on a quarterly basis with the Commission the financial reports and specific position information set forth in Appendix C to subpart E of this part. The swap dealer or major swap participant must file Appendix B to subpart E of this part with the Commission within 30 calendar days of the date of the end of the swap dealer's or major swap participant's fiscal quarter.

(3) *Notices.* A swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator must comply with the following written notice provisions:

(i) A swap dealer or major swap participant that files a notice of adjustment of its reported capital category with the Federal Reserve Board, the Office of the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or files a similar notice with its home country supervisor(s), must give written notice of this fact that same day by transmitting a copy of the notice of the adjustment of reported capital category, or the similar notice provided to its home country supervisor(s), to the Commission and with a registered futures association of which it is a member.

(ii) A swap dealer or major swap participant must provide immediate written notice to the Commission and with a registered futures association of which it is a member that the swap dealer's or major swap participant's regulatory capital is less than the applicable minimum capital requirements set forth in 12 CFR 217.10, 12 CFR 3.10, or 12 CFR 324.10, or the minimum capital requirements established by its home country supervisor(s).

(iii) If a swap dealer or major swap participant at any time fails to make or to keep current the books and records necessary to produce reports required under paragraph (p)(2) of this section, such swap dealer or major swap participant must, on the same day such event occurs, provide written notice to the Commission and with a registered futures association of which it is a member of such fact, specifying the books and records which have not been made or which are not current, and within 48 hours after giving such notice file a written report stating what steps have been and are being taken to correct the situation.

(4) *Additional information.* From time to time the Commission may, by written notice, require a swap dealer or major swap participant that is subject to the capital rules of a prudential regulator to file financial or operational information on a daily basis or at such other times as may be specified by the Commission. Such information must be furnished in accordance with the requirements included in the written Commission notice.

(5) *Oath or affirmation.* Attached to each financial report, must be an oath or affirmation that to the best knowledge and belief of the individual making such oath or affirmation the information contained in the filing is true and correct. The individual making such oath or affirmation must be: If the swap dealer or major swap participant is a sole proprietorship, the proprietor; if a partnership, any general partner; if a corporation, the duly authorized officer; and, if a limited liability company or limited liability partnership, the chief executive officer, the chief financial officer, the manager, the managing member, or those members vested with the management authority for the limited liability company or limited liability partnership.

(6) *Electronic filing.* All filings of financial reports, notices, and other information made pursuant to this paragraph (p) must be submitted to the Commission in electronic form using a form of user authentication assigned in accordance with procedures established by or approved by the Commission, and otherwise in accordance with instructions issued by or approved by the Commission. Each swap dealer and major swap participant must provide the Commission with the means necessary to read and to process the information contained in such report. Any such electronic submission must clearly indicate the swap dealer or major swap participant on whose behalf such filing is made and the use of such user authentication in submitting such filing will constitute and become a substitute for the manual signature of the authorized signer. In the case of a financial report required under this paragraph (p) and filed via electronic transmission in accordance with procedures established by or approved by the Commission, such transmission must be accompanied by the user authentication assigned to the authorized signer under such procedures, and the use of such user authentication will constitute and become a substitute for the manual signature of the authorized signer for the purpose of making the oath or affirmation referred to in paragraph (p)(5) of this paragraph. Every notice or report required to be transmitted to the Commission pursuant to this paragraph (p) must also be filed with the Securities and Exchange Commission if the swap dealer or major swap participant also is registered with the Securities and Exchange Commission.

(7) A swap dealer or major swap participant that is subject to rules of a prudential regulator and is also registered with the Securities and Exchange Commission as a security-based swap dealer or a major security-

based swap participant and files a quarterly Form X–17A–5 FOCUS Report Part IIC with the Securities and Exchange Commission pursuant to 17 CFR 240.18a–7, may file such Form X–17A–5 FOCUS Report Part IIC with the Commission in lieu of the financial reports required under paragraphs (p)(2) of this section. The swap dealer or major swap participant must file the form with the Commission when it files the Form X–17A–5 FOCUS Report Part IIC with the Securities and Exchange Commission, *provided, however,* that the swap dealer or major swap participant must file the Form X–17A–5 FOCUS Report Part IIC with the Commission no later than 30 calendar days from the date the report is made.

■ 14. Add section 23.106 to subpart E to read as follows:

**§ 23.106 Substituted compliance for swap dealer's and major swap participant's capital and financial reporting.**

(a)(1) *Eligibility requirements.* The following persons may, either individually or collectively, request a Capital Comparability Determination with respect to the Commission's capital adequacy and financial reporting requirements for swap dealers or major swap participants:

(i) A swap dealer or major swap participant that is eligible for substituted compliance under § 23.101 or a trade association or other similar group on behalf of its members who are swap dealers or major swap participants; or

(ii) A foreign regulatory authority that has direct supervisory authority over one or more swap dealers or major swap participants that are eligible for substituted compliance under § 23.101, and such foreign regulatory authority is responsible for administering the relevant foreign jurisdiction's capital adequacy and financial reporting requirements over the swap dealer or major swap participant.

(2) *Submission requirements.* A person requesting a Capital Comparability Determination must electronically submit to the Commission:

(i) A description of the objectives of the relevant foreign jurisdiction's capital adequacy and financial reporting requirements over entities that are subject to the Commission's capital adequacy and financial reporting requirements in this part;

(ii) A description (including specific legal and regulatory provisions) of how the relevant foreign jurisdiction's capital adequacy and financial reporting requirements address the elements of the Commission's capital adequacy and financial reporting requirements for swap dealers and major swap participants, including, at a minimum, the methodologies for establishing and calculating capital adequacy requirements and whether such methodologies comport with any international standards, including Basel-based capital requirements for banking institutions; and

(iii) A description of the ability of the relevant foreign regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements. Such description should discuss the powers of the foreign regulatory authority or authorities to supervise, investigate, and discipline entities for compliance with capital adequacy and financial reporting requirements, and the ongoing efforts of the regulatory authority or authorities to detect and deter violations, and ensure compliance with capital adequacy and financial reporting requirements. The description should address how foreign authorities and foreign laws and regulations address situations where a swap dealer or major swap participant is unable to comply with the foreign jurisdictions capital adequacy or financial reporting requirements.

(iv) Upon request, such other information and documentation that the Commission deems necessary to evaluate the comparability of the capital adequacy and financial reporting requirements of the foreign jurisdiction.

(v) All supplied documents shall be provided in English, or provided translated to the English language, with currency amounts stated in or converted to USD (conversions to be noted with applicable date).

(3) *Standard of Review.* The Commission will issue a Capital Comparability Determination to the extent that it determines that some or all of the relevant foreign jurisdiction's capital adequacy and financial reporting requirements and related financial recordkeeping and reporting requirements for swap dealing financial intermediaries are comparable to the Commission's corresponding capital adequacy and financial recordkeeping and reporting requirements. In determining whether the requirements are comparable, the Commission may consider all relevant factors, including:

(i) The scope and objectives of the foreign jurisdiction's capital adequacy and financial reporting requirements;

(ii) Whether the relevant foreign jurisdiction's capital adequacy and financial reporting requirements achieve comparable outcomes to the Commission's corresponding capital adequacy and financial reporting requirements for swap dealers and major swap participants;

(iii) The ability of the relevant regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements; and

(iv) Any other facts or circumstances the Commission deems relevant.

(4) *Reliance.* (i) A swap dealer or major swap participant that is subject to the supervision of a foreign jurisdiction that has received a Capital Comparability Determination from the Commission must file a notice of its intent to comply with the capital adequacy and financial reporting requirements of the foreign jurisdiction with the Commission.

(ii) Any swap dealer or major swap participant that has filed the notice set forth in paragraph (a)(4)(i) of this section and has received confirmation from the Commission that it may comply with a foreign jurisdiction's capital adequacy and financial reporting requirements will be deemed to be in compliance with the Commission's corresponding capital adequacy and financial reporting requirements. Accordingly, if a swap dealer or major swap participant has failed to comply with the foreign jurisdiction's capital adequacy and financial reporting requirements, the Commission may initiate an action for a violation of the Commission's corresponding requirements. All swap dealers and major swap participants, regardless of whether they rely on a Capital Comparability Determination, remain subject to the Commission's examination and enforcement authority.

(5) *Conditions.* In issuing a Capital Comparability Determination, the Commission may impose any terms and conditions it deems appropriate, including certain capital adequacy and financial reporting requirements on swap dealers or major swap participants. The violation of such terms and conditions may constitute a violation of the Commission's capital adequacy or financial reporting requirements and/or result in the modification or revocation of the Capital Comparability Determination.

(6) *Modifications.* The Commission reserves the right to further condition, modify, suspend or terminate or otherwise restrict a Capital Comparability Determination in the Commission's discretion.

■ 15. Add Appendix A to subpart E of part 23 to read as follows:

## Appendix A to Subpart E of Part 23—Application for Internal Models To Compute Market Risk Exposure Requirement and Credit Risk Exposure Requirement

(a) A swap dealer that is requesting the approval of the Commission or the approval of a registered futures association of which the swap dealer is a member to use internal models to compute its market risk exposure requirement and credit risk exposure requirement under § 23.102 must include the following information as part of its application:

(1) An executive summary of the information within its application and, if applicable, an identification of the ultimate holding company of the swap dealer;

(2) A list of the categories of positions that the swap dealer holds in its proprietary accounts and a brief description of the methods that the swap dealer will use to calculate deductions for market risk and credit risk on those categories of positions;

(3) A description of the mathematical models used by the swap dealer under this Appendix A to compute the VaR of the swap dealer's positions; the stressed VaR of the swap dealer's positions; the specific risk of the swap dealer's positions subject to specific risk; comprehensive risk of the swap dealer's positions; and the incremental risk of the swap dealer's positions, and deductions for credit risk exposure. The description should encompass the creation, use, and maintenance of the mathematical models; a description of the swap dealer's internal risk management controls over the models, including a description of each category of persons who may input data into the models; if a mathematical model incorporates empirical correlations across risk categories, a description of the process for measuring correlations; a description of the back-testing procedures the swap dealer will use to back-test the mathematical models; a description of how each mathematical model satisfies the applicable qualitative and quantitative requirements set forth in this Appendix A and a statement describing the extent to which each mathematical model used to compute deductions for market risk exposures and credit risk exposures will be used as part of the risk analyses and reports presented to senior management;

(4) If the swap dealer is applying to the Commission for approval or a registered futures association to use scenario analysis to calculate deductions for market risk for certain positions, a list of those types of positions, a description of how those deductions will be calculated using scenario analysis, and an explanation of why each scenario analysis is appropriate to calculate deductions for market risk on those types of positions;

(5) A description of how the swap dealer will calculate current exposure;

(6) A description of how the swap dealer will determine internal credit ratings of counterparties and internal credit risk-weights of counterparties, if applicable;

(7) For each instance in which a mathematical model to be used by the swap dealer to calculate a deduction for market risk exposure or to calculate maximum potential exposure for a particular product or counterparty differs from the mathematical model used by the swap dealer's ultimate holding company or the swap dealer's affiliates (if applicable) to calculate an allowance for market risk exposure or to calculate maximum potential exposure for that same product or counterparty, a description of the difference(s) between the mathematical models;

(8) A description of the swap dealer's process of re-estimating, re-evaluating, and updating internal models to ensure continued applicability and relevance; and

(9) Sample risk reports that are provided to management at the swap dealer who are responsible for managing the swap dealer's risk.

(b) The application of the swap dealer shall be supplemented by other information relating to the internal risk management control system, mathematical models, and financial position of the swap dealer that the Commission or a registered futures association may request to complete its review of the application.

(c) A person who files an application with the Commission pursuant to this appendix for which it seeks confidential treatment may clearly mark each page or segregable portion of each page with the words ''Confidential Treatment Requested.'' All information submitted in connection with the application will be accorded confidential treatment by the Commission, to the extent permitted by law.

(d) If any of the information filed with the Commission or a registered futures association as part of the application of the swap dealer is found to be or becomes inaccurate before the Commission or a registered futures association approves the application, the swap dealer must notify the Commission or the registered futures association promptly and provide the Commission or the registered futures association with a description of the circumstances in which the information was found to be or has become inaccurate along with updated, accurate information.

(e) The Commission or the registered futures association may approve the application or an amendment to the application, in whole or in part, subject to any conditions or limitations the Commission or the registered futures association may require if the Commission or the registered futures association finds the approval to be appropriate in the public interest, after determining, among other things, whether the swap dealer has met all the requirements of this Appendix A.

(f) A swap dealer shall amend its application under this Appendix A and submit the amendment to the Commission and the registered futures association for approval before it may materially change a mathematical model used to calculate market risk exposure requirements or credit risk exposure requirements or before it may materially change its internal risk management control system with respect to such model.

(g) As a condition for a swap dealer to use internal models to compute deductions for market risk exposure and credit risk exposure under this Appendix A, the swap dealer agrees that:

(1) It will notify the Commission and the registered futures association 45 days before it ceases to use internal models to compute deductions for market risk exposure and credit risk exposure under this Appendix A; and

(2) The Commission or the registered futures association may determine that the notice will become effective after a shorter or longer period of time if the swap dealer consents or if the Commission determines that a shorter or longer period of time is appropriate in the public interest.

(h) The Commission or the registered futures association may by written order revoke a swap dealer's approval to use internal models to compute market risk exposures and credit risk exposures on certain credit exposures arising from transactions in derivatives instruments if the Commission or the registered futures association finds that such approval is no longer appropriate in the public interest. In making its finding, the Commission or the registered futures association will consider the compliance history of the swap dealer related to its use of models and the swap dealer's compliance with its internal risk management controls. If the Commission or the registered futures association withdraws all or part of a swap dealer's approval to use internal models, the swap dealer shall compute market risk exposure requirements and credit risk exposure requirements in accordance with § 23.103.

(i) *VaR models.* A value-at-risk (''VaR'') model must meet the following minimum requirements in order to be approved:

(1) *Qualitative requirements.* (i) The VaR model used to calculate market risk exposure or credit risk exposure for a position must be integrated into the daily internal risk management system of the swap dealer;

(ii) The VaR model must be reviewed both periodically and annually. The periodic review may be conducted by personnel of the swap dealer that are independent from the personnel that perform the VaR model calculations. The annual review must be conducted by a qualified third party service. The review must include:

(A) An evaluation of the conceptual soundness of, and empirical support for, the internal models;

(B) An ongoing monitoring process that includes verification of processes and the comparison of the swap dealer's model outputs with relevant internal and external data sources or estimation techniques; and

(C) An outcomes analysis process that includes back-testing. This process must include a comparison of the changes in the swap dealer's portfolio value that would have occurred were end-of-day positions to remain unchanged (therefore, excluding fees, commissions, reserves, net interest income, and intraday trading) with VaR-based measures during a sample period not used in model development.

(iii) For purposes of computing market risk, the swap dealer must determine the appropriate multiplication factor as follows:

(A) Beginning three months after the swap dealer begins using the VaR model to

calculate the market risk exposure, the swap dealer must conduct monthly back-testing of the model by comparing its actual daily net trading profit or loss with the corresponding VaR measure generated by the VaR model, using a 99 percent, one-tailed confidence level with price changes equivalent to a one business-day movement in rates and prices, for each of the past 250 business days, or other period as may be appropriate for the first year of its use;

(B) On the last business day of each quarter, the swap dealer must identify the number of back-testing exceptions of the VaR model using actual daily net trading profit and loss, as that term is defined in §§ 23.100. An exception has occurred when for a business day the actual net trading loss, if any, exceeds the corresponding VaR measure. The counting period shall be for the prior 250 business days except that during the first year of use of the model another appropriate period may be used; and

(C) The swap dealer must use the multiplication factor indicated in Table 1 of this Appendix A in determining its market risk until it obtains the next quarter's back-testing results;

TABLE 1—MULTIPLICATION FACTOR BASED ON THE NUMBER OF BACK-TESTING EXCEPTIONS OF THE VAR MODEL

| Number of exceptions | Multiplication factor |
|---|---|
| 4 or fewer | 3.00 |
| 5 | 3.40 |
| 6 | 3.50 |
| 7 | 3.65 |
| 8 | 3.75 |
| 9 | 3.85 |
| 10 or more | 4.00 |

(iv) For purposes of computing the credit equivalent amount of the swap dealer's exposures to a counterparty, the swap dealer must determine the appropriate multiplication factor as follows:

(A) Beginning three months after it begins using the VaR model to calculate maximum potential exposure, the swap dealer must conduct back-testing of the model by comparing, for at least 80 counterparties (or the actual number of counterparties if the swap dealer does not have 80 counterparties) with widely varying types and sizes of positions with the firm, the ten business day change in its current exposure to the counterparty based on its positions held at the beginning of the ten-business day period with the corresponding ten-business day maximum potential exposure for the counterparty generated by the VaR model;

(B) As of the last business day of each quarter, the swap dealer must identify the number of back-testing exceptions of the VaR model, that is, the number of ten-business day periods in the past 250 business days, or other period as may be appropriate for the first year of its use, for which the change in current exposure to a counterparty, assuming the portfolio remains static for the ten-business day period, exceeds the corresponding maximum potential exposure; and

(C) The swap dealer will propose, as part of its application, a schedule of multiplication factors, which must be approved by the Commission, or a registered futures association of which the swap dealer is a member, based on the number of back-testing exceptions of the VaR model. The swap dealer must use the multiplication factor indicated in the approved schedule in determining the credit equivalent amount of its exposures to a counterparty until it obtains the next quarter's back-testing results, unless the Commission or the registered futures association determines, based on, among other relevant factors, a review of the swap dealer's internal risk management control system, including a review of the VaR model, that a different adjustment or other action is appropriate.

(2) *Quantitative requirements.* (i) For purposes of determining market risk exposure, the VaR model must use a 99 percent, one-tailed confidence level with price changes equivalent to a ten business-day movement in rates and prices;

(ii) For purposes of determining maximum potential exposure, the VaR model must use a 99 percent, one-tailed confidence level with price changes equivalent to a one-year movement in rates and prices; or based on a review of the swap dealer's procedures for managing collateral and if the collateral is marked to market daily and the swap dealer has the ability to call for additional collateral daily, the Commission, or the registered futures association of which the swap dealer is a member, may approve a time horizon of not less than ten business days;

(iii) The VaR model must use an effective historical observation period of at least one year. The swap dealer must consider the effects of market stress in its construction of the model. Historical data sets must be updated at least monthly and reassessed whenever market prices or volatilities change significantly or portfolio composition warrant; and

(iv) The VaR model must take into account and incorporate all significant, identifiable market risk factors applicable to positions in the accounts of the swap dealer, including:

(A) Risks arising from the non-linear price characteristics of derivatives and the sensitivity of the fair value of those positions to changes in the volatility of the derivatives' underlying rates, prices, or other material risk factors. A swap dealer with a large or complex portfolio with non-linear derivatives (such as options or positions with embedded optionality) must measure the volatility of these positions at different maturities and/or strike prices, where material;

(B) Empirical correlations within and across risk factors provided that the swap dealer validates and demonstrates the reasonableness of its process for measuring correlations, if the VaR-based measure does not incorporate empirical correlations across risk categories, the swap dealer must add the separate measures from its internal models used to calculate the VaR-based measure for the appropriate risk categories (interest rate risk, credit spread risk, equity price risk, foreign exchange rate risk, and/or commodity price risk) to determine its aggregate VaR-based measure, or, alternatively, risk factors sufficient to cover all the market risk inherent in the positions in the proprietary or other trading accounts of the swap dealer, including interest rate risk, equity price risk, foreign exchange risk, and commodity price risk; and

(C) Spread risk, where applicable, and segments of the yield curve sufficient to capture differences in volatility and imperfect correlation of rates along the yield curve for securities and derivatives that are sensitive to different interest rates. For material positions in major currencies and markets, modeling techniques must incorporate enough segments of the yield curve—in no case less than six—to capture differences in volatility and less than perfect correlation of rates along the yield curve.

(j) *Stressed VaR-based Measure.* A stressed VaR model must meet the following minimum requirements in order to be approved:

(1) *Requirements for stressed VaR-based measure.* (i) A swap dealer must calculate a stressed VaR-based measure for its positions using the same model(s) used to calculate the VaR-based measure under paragraph (i) of this appendix, subject to the same confidence level and holding period applicable to the VaR-based measure, but with model inputs calibrated to historical data from a continuous 12-month period that reflects a period of significant financial stress appropriate to the swap dealer's current portfolio.

(ii) The stressed VaR-based measure must be calculated at least weekly and be no less than the swap dealer's VaR-based measure.

(iii) A swap dealer must have policies and procedures that describe how it determines the period of significant financial stress used to calculate the swap dealer's stressed VaR-based measure under this appendix and must be able to provide empirical support for the period used. The swap dealer must obtain the prior approval of the Commission, or a registered futures association of which the swap dealer is a member, if the swap dealer makes any material changes to these policies and procedures. The policies and procedures must address:

(A) How the swap dealer links the period of significant financial stress used to calculate the stressed VaR-based measure to the composition and directional bias of its current portfolio; and

(B) The swap dealer's process for selecting, reviewing, and updating the period of significant financial stress used to calculate the stressed VaR-based measure and for monitoring the appropriateness of the period to the swap dealer's current portfolio.

(iv) Nothing in this appendix prevents the Commission or the registered futures association of which the swap dealer is a member from requiring a swap dealer to use a different period of significant financial stress in the calculation of the stressed VaR-based measure.

(k) *Specific Risk.* A specific risk model must meet the following minimum requirements in order to be approved:

(1) *General requirement.* A swap dealer must use one of the methods in this

paragraph (k) to measure the specific risk for each of its debt, equity, and securitization positions with specific risk.

(2) *Modeled specific risk.* A swap dealer may use models to measure the specific risk of its proprietary positions. A swap dealer must use models to measure the specific risk of correlation trading positions that are modeled under paragraph (m) of this appendix.

(i) *Requirements for specific risk modeling.* (A) If a swap dealer uses internal models to measure the specific risk of a portfolio, the internal models must:

(*1*) Explain the historical price variation in the portfolio;

(*2*) Be responsive to changes in market conditions;

(*3*) Be robust to an adverse environment, including signaling rising risk in an adverse environment; and

(*4*) Capture all material components of specific risk for the debt and equity positions in the portfolio. Specifically, the internal models must:

(*i*) Capture name-related basis risk;

(*ii*) Capture event risk and idiosyncratic risk; and

(*iii*) Capture and demonstrate sensitivity to material differences between positions that are similar but not identical and to changes in portfolio composition and concentrations.

(B) If a swap dealer calculates an incremental risk measure for a portfolio of debt or equity positions under paragraph (l) of this appendix, the swap dealer is not required to capture default and credit migration risks in its internal models used to measure the specific risk of those portfolios.

(C) A swap dealer shall validate a specific risk model through back-testing.

(ii) *Specific risk fully modeled for one or more portfolios.* If the swap dealer's VaR-based measure captures all material aspects of specific risk for one or more of its portfolios of debt, equity, or correlation trading positions, the swap dealer has no specific risk add-on for those portfolios.

(3) *Specific risk not modeled.* (i) If the swap dealer's VaR-based measure does not capture all material aspects of specific risk for a portfolio of debt, equity, or correlation trading positions, the swap dealer must calculate a specific-risk add-on for the portfolio under the standardized measurement method as described in 12 CFR 217.210.

(ii) A swap dealer must calculate a specific risk add-on under the standardized measurement method as described in 12 CFR 217.200 for all of its securitization positions that are not modeled under this paragraph (k).

(l) *Incremental Risk.* An incremental risk model must meet the following minimum requirements in order to be approved:

(1) *General requirement.* A swap dealer that measures the specific risk of a portfolio of debt positions under paragraph (k) of this appendix using internal models must calculate at least weekly an incremental risk measure for that portfolio according to the requirements in this appendix. The incremental risk measure is the swap dealer's measure of potential losses due to incremental risk over a one-year time horizon at a one-tail, 99.9 percent confidence level, either under the assumption of a constant level of risk, or under the assumption of constant positions. With the prior approval of the Commission or a registered futures association of which the swap dealer is a member, a swap dealer may choose to include portfolios of equity positions in its incremental risk model, provided that it consistently includes such equity positions in a manner that is consistent with how the swap dealer internally measures and manages the incremental risk of such positions at the portfolio level. If equity positions are included in the model, for modeling purposes default is considered to have occurred upon the default of any debt of the issuer of the equity position. A swap dealer may not include correlation trading positions or securitization positions in its incremental risk measure.

(2) *Requirements for incremental risk modeling.* For purposes of calculating the incremental risk measure, the incremental risk model must:

(i) Measure incremental risk over a one-year time horizon and at a one-tail, 99.9 percent confidence level, either under the assumption of a constant level of risk, or under the assumption of constant positions.

(A) A constant level of risk assumption means that the swap dealer rebalances, or rolls over, the swap dealer's trading positions at the beginning of each liquidity horizon over the one-year horizon in a manner that maintains the swap dealer's initial risk level. The swap dealer must determine the frequency of rebalancing in a manner consistent with the liquidity horizons of the positions in the portfolio. The liquidity horizon of a position or set of positions is the time required for a swap dealer to reduce its exposure to, or hedge all of its material risks of, the position(s) in a stressed market. The liquidity horizon for a position or set of positions may not be less than the shorter of three months or the contractual maturity of the position.

(B) A constant position assumption means that the swap dealer maintains the same set of positions throughout the one-year horizon. If a swap dealer uses this assumption, it must do so consistently across all portfolios.

(C) A swap dealer's selection of a constant position or a constant risk assumption must be consistent between the swap dealer's incremental risk model and its comprehensive risk model described in paragraph (m) of this appendix, if applicable.

(D) A swap dealer's treatment of liquidity horizons must be consistent between the swap dealer's incremental risk model and its comprehensive risk model described in paragraph (m) of this appendix, if applicable.

(ii) Recognize the impact of correlations between default and migration events among obligors.

(iii) Reflect the effect of issuer and market concentrations, as well as concentrations that can arise within and across product classes during stressed conditions.

(iv) Reflect netting only of long and short positions that reference the same financial instrument.

(v) Reflect any material mismatch between a position and its hedge.

(vi) Recognize the effect that liquidity horizons have on dynamic hedging strategies. In such cases, a swap dealer must:

(A) Choose to model the rebalancing of the hedge consistently over the relevant set of trading positions;

(B) Demonstrate that including rebalancing results in a more appropriate risk measurement;

(C) Demonstrate that the market for the hedge is sufficiently liquid to permit rebalancing during periods of stress; and

(D) Capture in the incremental risk model any residual risks arising from such hedging strategies.

(vii) Reflect the nonlinear impact of options and other positions with material nonlinear behavior with respect to default and migration changes.

(viii) Maintain consistency with the swap dealer's internal risk management methodologies for identifying, measuring, and managing risk.

(m) *Comprehensive Risk.* A comprehensive risk model must meet the following minimum requirements in order to be approved:

(1) *General requirement.* (i) Subject to the prior approval of the Commission or a registered futures association of which the swap dealer is a member, a swap dealer may use the method in this paragraph to measure comprehensive risk, that is, all price risk, for one or more portfolios of correlation trading positions.

(ii) A swap dealer that measures the price risk of a portfolio of correlation trading positions using internal models must calculate at least weekly a comprehensive risk measure that captures all price risk according to the requirements of this paragraph (m). The comprehensive risk measure is either:

(A) The sum of:

(*1*) The swap dealer's modeled measure of all price risk determined according to the requirements in paragraph (m)(2) of this appendix; and

(*2*) A surcharge for the swap dealer's modeled correlation trading positions equal to the total specific risk add-on for such positions as calculated under paragraph (k) of this appendix multiplied by 8.0 percent; or

(B) With approval of the Commission, or the registered futures association of which the swap dealer is a member, and provided the swap dealer has met the requirements of this paragraph (m) for a period of at least one year and can demonstrate the effectiveness of the model through the results of ongoing model validation efforts including robust benchmarking, the greater of:

(*1*) The swap dealer's modeled measure of all price risk determined according to the requirements in paragraph (b) of this appendix; or

(*2*) The total specific risk add-on that would apply to the swap dealer's modeled correlation trading positions as calculated under paragraph (k) of this appendix multiplied by 8.0 percent.

(2) *Requirements for modeling all price risk.* If a swap dealer uses an internal model to measure the price risk of a portfolio of correlation trading positions:

(i) The internal model must measure comprehensive risk over a one-year time

horizon at a one-tail, 99.9 percent confidence level, either under the assumption of a constant level of risk, or under the assumption of constant positions.

(ii) The model must capture all material price risk, including but not limited to the following:

(A) The risks associated with the contractual structure of cash flows of the position, its issuer, and its underlying exposures;

(B) Credit spread risk, including nonlinear price risks;

(C) The volatility of implied correlations, including nonlinear price risks such as the cross-effect between spreads and correlations;

(D) Basis risk;

(E) Recovery rate volatility as it relates to the propensity for recovery rates to affect tranche prices; and

(F) To the extent the comprehensive risk measure incorporates the benefits of dynamic hedging, the static nature of the hedge over the liquidity horizon must be recognized. In such cases, a swap dealer must:

(*1*) Choose to model the rebalancing of the hedge consistently over the relevant set of trading positions;

(*2*) Demonstrate that including rebalancing results in a more appropriate risk measurement;

(*3*) Demonstrate that the market for the hedge is sufficiently liquid to permit rebalancing during periods of stress; and

(*4*) Capture in the comprehensive risk model any residual risks arising from such hedging strategies;

(iii) The swap dealer must use market data that are relevant in representing the risk profile of the swap dealer's correlation trading positions in order to ensure that the swap dealer fully captures the material risks of the correlation trading positions in its comprehensive risk measure in accordance with this appendix; and

(iv) The swap dealer must be able to demonstrate that its model is an appropriate representation of comprehensive risk in light of the historical price variation of its correlation trading positions.

(3) *Requirements for stress testing.* (i) A swap dealer must at least weekly apply specific, supervisory stress scenarios to its portfolio of correlation trading positions that capture changes in:

(A) Default rates;

(B) Recovery rates;

(C) Credit spreads;

(D) Correlations of underlying exposures; and

(E) Correlations of a correlation trading position and its hedge.

(ii) *Other requirements.* (A) A swap dealer must retain and make available to the Commission and to the registered futures association of which the swap dealer is a member the results and all assumptions and parameters of the supervisory stress testing, including comparisons with the capital requirements generated by the swap dealer's comprehensive risk model.

(B) A swap dealer must report promptly to the Commission and to the registered futures association of which it is a member any instances where the stress tests indicate any material deficiencies in the comprehensive risk model.

(n) *Securitization Exposures.* (1) To use the simplified supervisory formula approach (SSFA) to determine the specific risk-weighting factor for a securitization position, a swap dealer must have data that enables it to assign accurately the parameters described in paragraph (n)(2) of this appendix. Data used to assign the parameters described in paragraph (n)(2) of this appendix must be the most currently available data; if the contracts governing the underlying exposures of the securitization require payments on a monthly or quarterly basis, the data used to assign the parameters described in paragraph (n)(2) of this appendix must be no more than 91 calendar days old. A swap dealer that does not have the appropriate data to assign the parameters described in paragraph (n)(2) of this appendix must assign a specific risk-weighting of 100 percent to the position.

(2) *SSFA parameters.* To calculate the specific risk-weighting factor for a securitization position using the SSFA, a swap dealer must have accurate information on the five inputs to the SSFA calculation described in paragraphs (n)(2)(i) through (n)(2)(v) of this appendix.

(i) $K_G$ is the weighted-average (with unpaid principal used as the weight for each exposure) total capital requirement of the underlying exposures calculated for a swap dealer's credit risk. $K_G$ is expressed as a decimal value between zero and one (that is, an average risk weight of 100 percent presents a value of $K_G$ equal to 0.08).

(ii) Parameter W is expressed as a decimal value between zero and one. Parameter W is the ratio of the sum of the dollar amounts of any underlying exposures of the securitization that meet any of the criteria as set forth in paragraphs (n)(2)(ii)(A) through (F) of this appendix to the balance, measured in dollars, of underlying exposures:

(A) Ninety days or more past due;

(B) Subject to a bankruptcy or insolvency proceeding;

(C) In the process of foreclosure;

(D) Held as real estate owned;

(E) Has contractually deferred payments for 90 days or more, other than principal or interest payments deferred on;

(*1*) Federally-guaranteed student loans, in accordance with the terms of those guarantee programs; or

(*2*) Consumer loans, including non-federally guaranteed student loans, provided that such payments are deferred pursuant to provisions included in the contract at the time funds are disbursed that provide for period(s) of deferral that are not initiated based on changes in the creditworthiness of the borrower; or

(F) Is in default.

(iii) Parameter A is the attachment point for the position, which represents the threshold at which credit losses will first be allocated to the position. Except as provided in 12 CFR 217.210(b)(2)(vii)(D) for nth to default derivatives, parameter A equals the ratio of the current dollar amount of underlying exposures that are subordinated to the position of the swap dealer to the current dollar amount of underlying exposures. Any reserve account funded by the accumulated cash flows from the underlying exposures that is subordinated to the position that contains the swap dealer's securitization exposure may be included in the calculation of parameter A to the extent that cash is present in the account. Parameter A is expressed as a decimal value between zero and one.

(iv) Parameter D is the detachment point for the position, which represents the threshold at which credit losses of principal allocated to the position would result in a total loss of principal. Except as provided in 12 CFR 210(b)(2)(vii)(D) for nth-to-default credit derivatives, parameter D equals parameter A plus the ratio of the current dollar amount of the securitization positions that are pari passu with the position (that is, have equal seniority with respect to credit risk) to the current dollar amount of the underlying exposures. Parameter D is expressed as a decimal value between zero and one.

(v) A supervisory calibration parameter, p, is equal to 0.5 for securitization positions that are not resecuritization positions and equal to 1.5 for resecuritization positions.

(3) *Mechanics of the SSFA.* $K_G$ and W are used to calculate $K_A$, the augmented value of $K_G$, which reflects the observed credit quality of the underlying exposures. $K_A$ is defined in paragraph (n)(4) of this appendix. The values of parameters A and D, relative to $K_A$ determine the specific risk-weighting factor assigned to a securitization position, or portion of a position, as appropriate, is the larger of the specific risk-weighting factor determined in accordance with this paragraph (n)(3), paragraph (n)(4) of this appendix, and a specific risk-weighting factor of 1.6 percent.

(i) When the detachment point, parameter D, for a securitization position is less than or equal to $K_A$, the position must be assigned a specific risk-weighting factor of 100 percent.

(ii) When the attachment point, parameter A, for a securitization position is greater than or equal to $K_A$, the swap dealer must calculate the specific risk-weighting factor in accordance with paragraph (n)(4) of this appendix.

(iii) When A is less than $K_A$ and D is greater than $K_A$, the specific risk-weighting factor is a weighted-average of 1.00 and $K_{SSFA}$ calculated under paragraphs (n)(3)(iii)(A) and (3)(iii)(B) of this appendix. For the purpose of this calculation:

(A) The weight assigned to 1.00 equals

(B) The weight assigned to $K_{SSFA}$ equals $\frac{D-K_A}{D-A}$. The specific risk-weighting factor is equal to: SRWF = $100 \cdot [(\frac{K_A-A}{D-A}) \cdot 1.00] + [(\frac{D-K_A}{D-A}) \cdot K_{SSFA}]$

(4) *SSFA equation.* (i) The swap dealer must define the following parameters:

$$K_A = (1 - W) \cdot K_G + (0.5 \cdot W)$$

$$a = -\frac{1}{p \cdot K_A}$$

$$u = D - K_A$$

$$l = \max(A - K_A, 0)$$

$e = 2.71828$, the base of the natural logarithms

(ii) Then the swap dealer must calculate $K_{SSFA}$ according to the following formula:

$$K_{SSFA} = \frac{e^{a \cdot u} - e^{a \cdot l}}{a \cdot (u - l)}$$

(iii) The specific risk-weighting factor for the position (expressed as a percent) is equal to $K_{SSFA} \times 100$.

(o) *Additional conditions.* As a condition for the swap dealer to use this Appendix A to calculate certain of its capital charges, the Commission, or registered futures association of which the swap dealer is a member, may impose additional conditions on the swap dealer, which may include, but are not limited to restricting the swap dealer's business on a product-specific, category-specific, or general basis; submitting to the Commission or the registered futures association a plan to increase the swap dealer's regulatory capital; filing more frequent reports with the Commission or the registered futures association; modifying the swap dealer's internal risk management control procedures; or computing the swap dealer's deductions for market and credit risk in accordance with §§ 23.102 as appropriate. If the Commission or registered futures association finds it is necessary or appropriate in the public interest, the Commission or registered futures association may impose additional conditions on the swap dealer, if:

(1) The swap dealer is required to provide notice to the Commission or the registered futures association that the swap dealer's regulatory capital is less than $100 million;

(2) The swap dealer fails to meet the reporting requirements set forth in § 23.105;

(3) Any event specified in § 23.105 occurs;

(4) There is a material deficiency in the internal risk management control system or in the mathematical models used to price securities or to calculate deductions for market and credit risk or allowances for market and credit risk, as applicable, of the swap dealer;

(5) The swap dealer fails to comply with this Appendix A; or

(6) The Commission finds that imposition of other conditions is necessary or appropriate in the public interest.

■ 16. Add Appendix B to Subpart E of Part 23 to read as follows:

**Appendix B to Subpart E of Part 23—Swap Dealer and Major Swap Participant Position Information**

BILLING CODE 6351–01–P

Reg. 23.105 (l)
Appendix
B

SCHEDULE 1 – AGGREGATE SECURITIES, COMMODITIES, AND SWAPS POSITIONS

Items on this page to be reported by: Swap Dealers
Major Swap Participants

| Aggregate Securities, Commodities, and Swaps Positions | LONG/BOUGHT | | SHORT/SOLD | |
|---|---|---|---|---|
| 1. U.S. treasury securities | $ | 8200 | $ | 8201 |
| 2. U.S. government agency and U.S. government-sponsored enterprises | $ | 8210 | $ | 8211 |
| A. Mortgage-backed securities issued by U.S. government agency and U.S. government-sponsored enterprises | $ | 18001 | $ | 18002 |
| B. Debt securities issued by U.S. government agency and U.S. government-sponsored enterprises | $ | 18003 | $ | 18004 |
| 3. Securities issued by states and political subdivisions in the U.S | $ | 8220 | $ | 8221 |
| 4. Foreign securities | | | | |
| A. Debt securities | $ | 8230 | $ | 8231 |
| B. Equity securities | $ | 8235 | $ | 8236 |
| 5. Money market instruments | $ | 8240 | $ | 8241 |
| 6. Private label mortgage backed securities | $ | 8250 | $ | 8251 |
| 7. Other asset-backed securities | $ | 8260 | $ | 8261 |
| 8. Corporate obligations | $ | 8270 | $ | 8271 |
| 9. Stocks and warrants (other than arbitrage positions) | $ | 8280 | $ | 8281 |
| 10. Arbitrage | $ | 8290 | $ | 8291 |
| 11. Spot commodities | $ | 8330 | $ | 8331 |
| 12. Other securities and commodities | $ | 8360 | $ | 8361 |
| 13. Securities with no ready market | | | | |
| A. Equity | $ | 8340 | $ | 8341 |
| B. Debt | $ | 8345 | $ | 8346 |
| C. Other | $ | 8350 | $ | 8351 |
| D. Total securities with no ready market | $ | 12777 | $ | 12782 |
| 14. Total net securities and spot commodities (sum of Lines 1-12 and 13D) | $ | 12778 | $ | 12783 |
| 15. Security-based swaps | | | | |
| A. Cleared | $ | 12106 | $ | 12114 |
| B. Non-cleared | $ | 12107 | $ | 12115 |
| 16. Mixed swaps | | | | |
| A. Cleared | $ | 12108 | $ | 12116 |
| B. Non-cleared | $ | 12109 | $ | 12117 |
| 17. Swaps | | | | |
| A. Cleared | $ | 12110 | $ | 12118 |
| B. Non-cleared | $ | 12111 | $ | 12119 |
| 18. Other derivatives and options | $ | 8295 | $ | 8296 |
| 19. Counterparty netting | $ | 12779 | $ | 12784 |
| 20. Cash collateral netting | $ | 12780 | $ | 12785 |
| 21. Total derivative receivables and payables (sum of Lines 15-20) | $ | 12781 | $ | 12786 |
| 22. Total net securities, commodities, and swaps positions (sum of Lines 14 and 21) | $ | 8370 | $ | 8371 |

Name of firm: _____
As of: _____

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

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Appendix
B

SCHEDULE 2 – CREDIT CONCENTRATION REPORT FOR FIFTEEN LARGEST EXPOSURES IN DERIVATIVES

Items on this page to be reported by: Swap Dealers (Authorized to use models)
Major Swap Participants

**I. By Current Net Exposure**

| Counterparty Identifier | | Gross Replacement Value Receivable (Gross Gain) | Gross Replacement Value Payable (Gross Loss) | Net Replacement Value | Current Net Exposure | Current Net and Potential Exposure | Margin Collected |
|---|---|---|---|---|---|---|---|
| 1. | 12120 | $ 12135 | $ 12151 | $ 12167 | $ 12183 | $ 12199 | $ 12215 |
| 2. | 12121 | $ 12136 | $ 12152 | $ 12168 | $ 12184 | $ 12200 | $ 12216 |
| 3. | 12122 | $ 12137 | $ 12153 | $ 12169 | $ 12185 | $ 12201 | $ 12217 |
| 4. | 12123 | $ 12138 | $ 12154 | $ 12170 | $ 12186 | $ 12202 | $ 12218 |
| 5. | 12124 | $ 12139 | $ 12155 | $ 12171 | $ 12187 | $ 12203 | $ 12219 |
| 6. | 12125 | $ 12140 | $ 12156 | $ 12172 | $ 12188 | $ 12204 | $ 12220 |
| 7. | 12126 | $ 12141 | $ 12157 | $ 12173 | $ 12189 | $ 12205 | $ 12221 |
| 8. | 12127 | $ 12142 | $ 12158 | $ 12174 | $ 12190 | $ 12206 | $ 12222 |
| 9. | 12128 | $ 12143 | $ 12159 | $ 12175 | $ 12191 | $ 12207 | $ 12223 |
| 10. | 12129 | $ 12144 | $ 12160 | $ 12176 | $ 12192 | $ 12208 | $ 12224 |
| 11. | 12130 | $ 12145 | $ 12161 | $ 12177 | $ 12193 | $ 12209 | $ 12225 |
| 12. | 12131 | $ 12146 | $ 12162 | $ 12178 | $ 12194 | $ 12210 | $ 12226 |
| 13. | 12132 | $ 12147 | $ 12163 | $ 12179 | $ 12195 | $ 12211 | $ 12227 |
| 14. | 12133 | $ 12148 | $ 12164 | $ 12180 | $ 12196 | $ 12212 | $ 12228 |
| 15. | 12134 | $ 12149 | $ 12165 | $ 12181 | $ 12197 | $ 12213 | $ 12229 |
| All other counterparties | | $ 12150 | $ 12166 | $ 12182 | $ 12198 | $ 12214 | $ 12230 |
| Totals: | | $ 7810 | $ 7811 | $ 7812 | $ 7813 | $ 7814 | $ 12231 |

**II. By Current Net and Potential Exposure**

| Counterparty Identifier | | Gross Replacement Value Receivable (Gross Gain) | Gross Replacement Value Payable (Gross Loss) | Net Replacement Value | Current Net Exposure | Current Net and Potential Exposure | Margin Collected |
|---|---|---|---|---|---|---|---|
| 1. | 12232 | $ 12247 | $ 12264 | $ 12281 | $ 12298 | $ 12315 | $ 12332 |
| 2. | 12233 | $ 12248 | $ 12265 | $ 12282 | $ 12299 | $ 12316 | $ 12333 |
| 3. | 12234 | $ 12249 | $ 12266 | $ 12283 | $ 12300 | $ 12317 | $ 12334 |
| 4. | 12235 | $ 12250 | $ 12267 | $ 12284 | $ 12301 | $ 12318 | $ 12335 |
| 5. | 12236 | $ 12251 | $ 12268 | $ 12285 | $ 12302 | $ 12319 | $ 12336 |
| 6. | 12237 | $ 12252 | $ 12269 | $ 12286 | $ 12303 | $ 12320 | $ 12337 |
| 7. | 12238 | $ 12253 | $ 12270 | $ 12287 | $ 12304 | $ 12321 | $ 12338 |
| 8. | 12239 | $ 12254 | $ 12271 | $ 12288 | $ 12305 | $ 12322 | $ 12339 |
| 9. | 12240 | $ 12255 | $ 12272 | $ 12289 | $ 12306 | $ 12323 | $ 12340 |
| 10. | 12241 | $ 12256 | $ 12273 | $ 12290 | $ 12307 | $ 12324 | $ 12341 |
| 11. | 12242 | $ 12257 | $ 12274 | $ 12291 | $ 12308 | $ 12325 | $ 12342 |
| 12. | 12243 | $ 12258 | $ 12275 | $ 12292 | $ 12309 | $ 12326 | $ 12343 |
| 13. | 12244 | $ 12259 | $ 12276 | $ 12293 | $ 12310 | $ 12327 | $ 12344 |
| 14. | 12245 | $ 12260 | $ 12277 | $ 12294 | $ 12311 | $ 12328 | $ 12345 |
| 15. | 12246 | $ 12261 | $ 12278 | $ 12295 | $ 12312 | $ 12329 | $ 12346 |
| All other counterparties | | $ 12262 | $ 12279 | $ 12296 | $ 12313 | $ 12330 | $ 12347 |
| Totals: | | $ 12263 | $ 12280 | $ 12297 | $ 12314 | $ 12331 | $ 12348 |

Name of firm: _____
As of: _____

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Reg. 23.105 (l)
Appendix
B

SCHEDULE 3 – PORTFOLIO SUMMARY OF DERIVATIVES EXPOSURES BY INTERNAL CREDIT RATING

Items on this page to be reported by: Swap Dealers (Authorized to use models)
Major Swap Participants

| Internal Credit Rating | | Gross Replacement Value Receivable | | Gross Replacement Value Payable | | Net Replacement Value | | Current Net Exposure | | Current Net and Potential Exposure | | Margin Collected | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. | 12349 | $ | 12386 | $ | 12423 | $ | 12460 | $ | 12497 | $ | 12534 | $ | 12572 |
| 2. | 12350 | $ | 12387 | $ | 12424 | $ | 12461 | $ | 12498 | $ | 12535 | $ | 12573 |
| 3. | 12351 | $ | 12388 | $ | 12425 | $ | 12462 | $ | 12499 | $ | 12536 | $ | 12574 |
| 4. | 12352 | $ | 12389 | $ | 12426 | $ | 12463 | $ | 12500 | $ | 12537 | $ | 12575 |
| 5. | 12353 | $ | 12390 | $ | 12427 | $ | 12464 | $ | 12501 | $ | 12538 | $ | 12576 |
| 6. | 12354 | $ | 12391 | $ | 12428 | $ | 12465 | $ | 12502 | $ | 12539 | $ | 12577 |
| 7. | 12355 | $ | 12392 | $ | 12429 | $ | 12466 | $ | 12503 | $ | 12540 | $ | 12578 |
| 8. | 12356 | $ | 12393 | $ | 12430 | $ | 12467 | $ | 12504 | $ | 12541 | $ | 12579 |
| 9. | 12357 | $ | 12394 | $ | 12431 | $ | 12468 | $ | 12505 | $ | 12542 | $ | 12580 |
| 10. | 12358 | $ | 12395 | $ | 12432 | $ | 12469 | $ | 12506 | $ | 12543 | $ | 12581 |
| 11. | 12359 | $ | 12396 | $ | 12433 | $ | 12470 | $ | 12507 | $ | 12544 | $ | 12582 |
| 12. | 12360 | $ | 12397 | $ | 12434 | $ | 12471 | $ | 12508 | $ | 12545 | $ | 12583 |
| 13. | 12361 | $ | 12398 | $ | 12435 | $ | 12472 | $ | 12509 | $ | 12546 | $ | 12584 |
| 14. | 12362 | $ | 12399 | $ | 12436 | $ | 12473 | $ | 12510 | $ | 12547 | $ | 12585 |
| 15. | 12363 | $ | 12400 | $ | 12437 | $ | 12474 | $ | 12511 | $ | 12548 | $ | 12586 |
| 16. | 12364 | $ | 12401 | $ | 12438 | $ | 12475 | $ | 12512 | $ | 12549 | $ | 12587 |
| 17. | 12365 | $ | 12402 | $ | 12439 | $ | 12476 | $ | 12513 | $ | 12550 | $ | 12588 |
| 18. | 12366 | $ | 12403 | $ | 12440 | $ | 12477 | $ | 12514 | $ | 12551 | $ | 12589 |
| 19. | 12367 | $ | 12404 | $ | 12441 | $ | 12478 | $ | 12515 | $ | 12552 | $ | 12590 |
| 20. | 12368 | $ | 12405 | $ | 12442 | $ | 12479 | $ | 12516 | $ | 12553 | $ | 12591 |
| 21. | 12369 | $ | 12406 | $ | 12443 | $ | 12480 | $ | 12517 | $ | 12554 | $ | 12592 |
| 22. | 12370 | $ | 12407 | $ | 12444 | $ | 12481 | $ | 12518 | $ | 12555 | $ | 12593 |
| 23. | 12371 | $ | 12408 | $ | 12445 | $ | 12482 | $ | 12519 | $ | 12556 | $ | 12594 |
| 24. | 12372 | $ | 12409 | $ | 12446 | $ | 12483 | $ | 12520 | $ | 12557 | $ | 12595 |
| 25. | 12373 | $ | 12410 | $ | 12447 | $ | 12484 | $ | 12521 | $ | 12558 | $ | 12596 |
| 26. | 12374 | $ | 12411 | $ | 12448 | $ | 12485 | $ | 12522 | $ | 12559 | $ | 12597 |
| 27. | 12375 | $ | 12412 | $ | 12449 | $ | 12486 | $ | 12523 | $ | 12560 | $ | 12598 |
| 28. | 12376 | $ | 12413 | $ | 12450 | $ | 12487 | $ | 12524 | $ | 12561 | $ | 12599 |
| 29. | 12377 | $ | 12414 | $ | 12451 | $ | 12488 | $ | 12525 | $ | 12562 | $ | 12600 |
| 30. | 12378 | $ | 12415 | $ | 12452 | $ | 12489 | $ | 12526 | $ | 12563 | $ | 12601 |
| 31. | 12379 | $ | 12416 | $ | 12453 | $ | 12490 | $ | 12527 | $ | 12564 | $ | 12602 |
| 32. | 12380 | $ | 12417 | $ | 12454 | $ | 12491 | $ | 12528 | $ | 12565 | $ | 12603 |
| 33. | 12381 | $ | 12418 | $ | 12455 | $ | 12492 | $ | 12529 | $ | 12566 | $ | 12604 |
| 34. | 12382 | $ | 12419 | $ | 12456 | $ | 12493 | $ | 12530 | $ | 12567 | $ | 12605 |
| 35. | 12383 | $ | 12420 | $ | 12457 | $ | 12494 | $ | 12531 | $ | 12568 | $ | 12606 |
| 36. | 12384 | $ | 12421 | $ | 12458 | $ | 12495 | $ | 12532 | $ | 12569 | $ | 12607 |
| Unrated | 12385 | $ | 12422 | $ | 12459 | $ | 12496 | $ | 12533 | $ | 12570 | $ | 12608 |
| Totals: | | $ | 7822 | $ | 7823 | $ | 7821 | $ | 7820 | $ | 12571 | $ | 12609 |

Name of firm: _____
As of: _____

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

| Reg. 23.105 (l) Appendix B | SCHEDULE 4 – GEOGRAPHIC DISTRIBUTION OF DERIVATIVES EXPOSURES FOR TEN LARGEST COUNTRIES |
|---|---|
| | Items on this page to be reported by: Swap Dealers (Authorized to use models) Major Swap Participants |

**I. By Current Net Exposure**

| Country | | Gross Replacement Value Receivable | Gross Replacement Value Payable | Net Replacement Value | Current Net Exposure | Current Net and Potential Exposure | Margin Collected |
|---|---|---|---|---|---|---|---|
| 1. | 12610 | $ 12620 | $ 12630 | $ 12640 | $ 12650 | $ 12661 | $ 12671 |
| 2. | 12611 | $ 12621 | $ 12631 | $ 12641 | $ 12651 | $ 12662 | $ 12672 |
| 3. | 12612 | $ 12622 | $ 12632 | $ 12642 | $ 12652 | $ 12663 | $ 12673 |
| 4. | 12613 | $ 12623 | $ 12633 | $ 12643 | $ 12653 | $ 12664 | $ 12674 |
| 5. | 12614 | $ 12624 | $ 12634 | $ 12644 | $ 12654 | $ 12665 | $ 12675 |
| 6. | 12615 | $ 12625 | $ 12635 | $ 12645 | $ 12655 | $ 12666 | $ 12676 |
| 7. | 12616 | $ 12626 | $ 12636 | $ 12646 | $ 12656 | $ 12667 | $ 12677 |
| 8. | 12617 | $ 12627 | $ 12637 | $ 12647 | $ 12657 | $ 12668 | $ 12678 |
| 9. | 12618 | $ 12628 | $ 12638 | $ 12648 | $ 12658 | $ 12669 | $ 12679 |
| 10. | 12619 | $ 12629 | $ 12639 | $ 12649 | $ 12659 | $ 12670 | $ 12680 |
| Totals: | | $ 7803 | $ 7804 | $ 7802 | $ 12660 | $ 7801 | $ 12681 |

**II. By Current Net and Potential Exposure**

| Country | | Gross Replacement Value Receivable | Gross Replacement Value Payable | Net Replacement Value | Current Net Exposure | Current Net and Potential Exposure | Margin Collected |
|---|---|---|---|---|---|---|---|
| 1. | 12682 | $ 12692 | $ 12703 | $ 12714 | $ 12725 | $ 12736 | $ 12747 |
| 2. | 12683 | $ 12693 | $ 12704 | $ 12715 | $ 12726 | $ 12737 | $ 12748 |
| 3. | 12684 | $ 12694 | $ 12705 | $ 12716 | $ 12727 | $ 12738 | $ 12749 |
| 4. | 12685 | $ 12695 | $ 12706 | $ 12717 | $ 12728 | $ 12739 | $ 12750 |
| 5. | 12686 | $ 12696 | $ 12707 | $ 12718 | $ 12729 | $ 12740 | $ 12751 |
| 6. | 12687 | $ 12697 | $ 12708 | $ 12719 | $ 12730 | $ 12741 | $ 12752 |
| 7. | 12688 | $ 12698 | $ 12709 | $ 12720 | $ 12731 | $ 12742 | $ 12753 |
| 8. | 12689 | $ 12699 | $ 12710 | $ 12721 | $ 12732 | $ 12743 | $ 12754 |
| 9. | 12690 | $ 12700 | $ 12711 | $ 12722 | $ 12733 | $ 12744 | $ 12755 |
| 10. | 12691 | $ 12701 | $ 12712 | $ 12723 | $ 12734 | $ 12745 | $ 12756 |
| Totals: | | $ 12702 | $ 12713 | $ 12724 | $ 12735 | $ 12746 | $ 12757 |

Name of firm: _____
As of: _____

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

■ 17. Add Appendix C to Subpart E of Part 23 to read as follows:

## Appendix C to Subpart E of Part 23—Financial Reports and Specific Position Information for Swap Dealers and Major Swap Participants Subject to the Capital Requirements of a Prudential Regulator

| Reg. 23.105 (p) Appendix C | BALANCE SHEET (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RC) |
|---|---|
| | Items on this page to be reported by a: Bank SD<br>Bank MSP |

| Assets | | Totals | |
|---|---|---|---|
| 1. Cash and balances due from depository institutions (from FFIEC Form 031's Schedule RC-A) | | | |
| A. Noninterest-bearing balances and currency and coin | | $ _____ | 0081b |
| B. Interest-bearing balances | | $ _____ | 0071b |
| 2. Securities | | | |
| A. Held-to-maturity securities | | $ _____ | 1754b |
| B. Available-for-sale securities | | $ _____ | 1773b |
| 3. Federal funds sold and securities purchased under agreements to resell | | | |
| A. Federal funds sold in domestic offices | | $ _____ | B987b |
| B. Securities purchased under agreements to resell | | $ _____ | B989b |
| 4. Loans and lease financing receivables (from FFIEC Form 031's Schedule RC-C) | | | |
| A. Loans and leases held for sale | | $ _____ | 5369b |
| B. Loans and leases, net of unearned income | $ _____ B528b | | |
| C. LESS: Allowance for loan and lease losses | $ _____ 3123b | | |
| D. Loans and leases, net of unearned income and allowance (Line 4B minus Line 4C) | | $ _____ | B529b |
| 5. Trading assets (from FFIEC Form 031's Schedule RC-D) | | $ _____ | 3545b |
| 6. Premises and fixed assets (including capitalized leases) | | $ _____ | 2145b |
| 7. Other real estate owned (from FFIEC Form 031's Schedule RC-M) | | $ _____ | 2150b |
| 8. Investments in unconsolidated subsidiaries and associated companies | | $ _____ | 2130b |
| 9. Direct and indirect investments in real estate ventures | | $ _____ | 3656b |
| 10. Intangible assets | | | |
| A. Goodwill | | $ _____ | 3163b |
| B. Other intangible assets (from FFIEC Form 031's Schedule RC-M) | | $ _____ | 0426b |
| 11. Other assets (from FFIEC Form 031's Schedule RC-F) | | $ _____ | 2160b |
| 12. Total assets (sum of Lines 1 through 11) | | $ _____ | 2170b |

Name of firm: _____
As of: _____

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

| Reg. 23.105 (p) Appendix C | BALANCE SHEET (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RC) |
|---|---|
| | Items on this page to be reported by a: Bank SD<br>Bank MSP |

| Liabilities | | | Totals | |
|---|---|---|---|---|
| 13. Deposits | | | | |
| A. In domestic offices (sum of totals of Columns A and C from FFIEC Form 031's Schedule RC-E, part I) | | | $ | 2200b |
| 1. Noninterest-bearing | $ | 6631b | | |
| 2. Interest-bearing | $ | 6636b | | |
| B. In foreign offices, Edge and Agreement subsidiaries, and IBFs (from FFIEC Form 031's Schedule RC-E, part II) | | | $ | 2200b |
| 1. Noninterest-bearing | $ | 6631b | | |
| 2. Interest-bearing | $ | 6636b | | |
| 14. Federal funds purchased and securities sold under agreements to repurchase | | | | |
| A. Federal funds purchased in domestic offices | | | $ | B993b |
| B. Securities sold under agreements to repurchase | | | $ | B995b |
| 15. Trading liabilities | | | $ | 3548b |
| 16. Other borrowed money (includes mortgage indebtedness and obligations under capitalized leases) (from FFIEC Form 031's Schedule RC-M) | | | $ | 3190b |
| 17. Not applicable. | | | | |
| 18. Not applicable. | | | | |
| 19. Subordinated notes and debentures | | | $ | 3200b |
| 20. Other liabilities (from FFIEC Form 031's Schedule RC-G) | | | $ | 2930b |
| 21. Total liabilities (sum of Lines 13 through 20) | | | $ | 2948b |
| 22. Not applicable. | | | | |
| **Equity Capital** | | | | |
| 23. Perpetual preferred stock and related surplus | | | $ | 3838b |
| 24. Common stock | | | $ | 3230b |
| 25. Surplus (exclude all surplus related to preferred stock) | | | $ | 3839b |
| 26 A. Retained earnings | | | $ | 3632b |
| B. Accumulated other comprehensive income | | | $ | B530b |
| C. Other equity capital components | | | $ | A130b |
| 27A. Total bank equity capital (sum of Lines 23 through 26.C) | | | $ | 3210b |
| B. Non-controlling (minority) interests in consolidated subsidiaries | | | $ | 3000b |
| 28. Total equity capital (sum of Lines 27A and 27B) | | | $ | G105b |
| 29. Total liabilities and equity capital (sum of Lines 21 and 28) | | | $ | 3300b |

Name of firm: _____
As of: _____

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

| Reg. 23.105 (p) Appendix C | REGULATORY CAPITAL (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RC-R) |
|---|---|
| | Items on this page to be reported by a: Bank SD |

| **Capital** | **Totals** |
|---|---|
| 1. Total bank equity capital (from FFIEC Form 031's Schedule RC, Line 27A) | $ _____ 3210b |
| 2. Tier 1 capital | $ _____ 8274b |
| 3. Tier 2 capital | $ _____ 5311b |
| 4. Tier 3 capital allocated for market risk | $ _____ 1395b |
| 5. Total risk-based capital | $ _____ 3792b |
| 6. Total risk-weighted assets | $ _____ A223b |
| 7. Total assets for the leverage ratio | $ _____ A224b |

| **Capital Ratios** (Column B is to be completed by all banks. Column A is to be completed by banks with financial subsidiaries.) | **Column A** | **Column B** |
|---|---|---|
| 8. Tier 1 leverage ratio | $ _____ 7204b | |
| 9. Tier 1 risk-based capital ratio | _____ 7206b | $ _____ 7206b |
| 10. Total risk-based capital ratio | _____ 7205b | $ _____ 7205b |

Name of firm: _____
As of: _____

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

| Reg. 23.105 (p) Appendix C | SCHEDULE 1 - AGGREGATE SECURITY-BASED SWAP AND SWAP POSITIONS |
|---|---|
| | Items on this page to be reported by a: Bank SDs<br>Bank MSPs |

| Aggregate Positions | LONG/BOUGHT | | SHORT/SOLD | |
|---|---|---|---|---|
| 1. Security-based swaps | | | | |
| A. Cleared | $ _____ | 12801 | $ _____ | 12809 |
| B. Non-cleared | $ _____ | 12802 | $ _____ | 12810 |
| 2. Mixed swaps | | | | |
| A. Cleared | $ _____ | 12803 | $ _____ | 12811 |
| B. Non-cleared | $ _____ | 12804 | $ _____ | 12812 |
| 3. Swaps | | | | |
| A. Cleared | $ _____ | 12805 | $ _____ | 12813 |
| B. Non-cleared | $ _____ | 12806 | $ _____ | 12814 |
| 4. Other derivatives | $ _____ | 12807 | $ _____ | 12815 |
| 5. Total (sum of Lines 1-4) | $ _____ | 12808 | $ _____ | 12816 |

Name of firm: _____
As of: _____

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

BILLING CODE 6351–01–C

## PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

■ 18. The authority citation for part 140 continues to read as follows:

**Authority:** 7 U.S.C. 2(a)(12), 12a, 13(c), 13(d), 13(e), and 16(b).

■ 19. In § 140.91, redesignate paragraphs (a)(11) and (12) as paragraphs (a)(12) and (13), and add a new paragraph (a)(11) to read as follows:

**§ 140.91 Delegation of authority to the Director of the Division of Clearing and Risk and to the Director of the Division of Swap Dealer and Intermediary Oversight.**

(a) * * *

(11) All functions reserved to the Commission in § 23.100–106 of this chapter, except for those related to the revocation of a swap dealer's or major swap participant's approval to use internal models to compute capital requirements under § 23.102 of this chapter, those related to the Commission's order under § 23.104 of this chapter, and the issuance of Capital Comparability Determinations under § 23.106 of this chapter.

* * * * *

Issued in Washington, DC, on July 24, 2020, by the Commission.

**Robert Sidman,**

*Deputy Secretary of the Commission.*

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

## Appendices to Capital Requirements of Swap Dealers and Major Swap Participants—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

## Appendix 1—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz and Stump voted in the affirmative. Commissioners Behnam and Berkovitz voted in the negative.

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

Today marks 10 years and a day since the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') was signed into law. Much has changed during the past decade—our derivatives markets today are faster, increasingly digital, and more deeply connected to the global economy than they were in 2010. Yet amidst these changes, there has been at least one constant: The absence of capital requirements for swap dealers and major swap participants for which the CFTC is responsible.[1] As a response to the credit crisis of 2008, Section 731 of the Dodd-Frank Act amended the Commodity Exchange Act (''CEA''), providing that the CFTC ''shall adopt'' capital and financial reporting requirements for these entities.[2] It is high time to fulfill this mandate and close the book on our Dodd-Frank Act responsibilities.[3] After all, ''late'' is always better than ''too late.''

There is another compelling reason to finalize a capital rule that is more than a decade in the making:[4] Certainty. One of our strategic goals as an agency is to enhance the regulatory experience for market participants at home and abroad.[5] Certainty is the bedrock of this goal. Our swap dealers cannot effectively plan for compliance without clarity from us about what their capital obligations will look like. Today we lift this cloud of uncertainty by finalizing a capital rule that carefully accounts for the differences among our swap dealers.

The final capital rule is designed to enhance customer protection and reduce systemic risk in the financial system. Capital requirements are the ultimate backstop, ensuring that customers are protected and the financial system remains sound in the event that all other measures fail. While our uncleared margin rules have effectively absorbed the shocks of recent pandemic-driven volatility,[6] a capital regime will provide further assurances that our markets and their participants can weather new storms.

### Determining Capital

The final capital rule requires swap dealers and major swap participants to maintain a level of minimum capital based on one of three basic approaches. Each approach incorporates minimum amounts of capital based on various criteria, including a $20 million floor, a level of capital required by the National Futures Association, and the amount of margin on uncleared swap transactions. The three basic approaches will be the focus of my remarks because they are effectively tailored to the distinctive type of swap dealer involved.

### Regulatory Flexibility

Our derivatives markets are vibrant in large part because of the diversity of swap dealers and other market participants. Of the 108 provisionally registered swap dealers, 56 will be subject to the capital requirements. Of those, four are futures commission merchants that are dually registered with the SEC as broker-dealers and 12 are non-bank subsidiaries of bank holding companies. Others are non-banks that deal in financial swaps involving interest rates, foreign currency, credit, and the like; still more are primarily engaged in agricultural and energy businesses; and several are subject to the laws and regulations of other countries.

The final capital rule applies to entities with a variety of business structures, asset profiles, and risk levels. For example, a swap dealer primarily involved in the energy business is fundamentally different from a large bank involved in financial swaps. A ''one-size-fits-all'' approach would be incompatible with the rich gradations in our derivatives markets. As a result, the final capital requirements offer regulatory flexibility by accounting for key differences among covered entities. This flexible approach is designed to enhance the regulatory experience for our market participants[7] while safeguarding the markets, as more fully discussed below.

#### *1. Capital Requirements for FCM Swap Dealers*

The CFTC has longstanding capital requirements for Futures Commission Merchants (''FCMs'') to ensure customer funds are protected in the event of an FCM failure.[8] The final rule preserves existing FCM capital rules for swap dealers that are also registered as FCMs, but makes a few key adjustments to better address risk and customer protection associated with dealing in swaps.

The final rule requires FCM swap dealers to maintain minimum capital equal to or greater than the sum of: (i) The current FCM risk margin amount of 8% of customer and noncustomer cleared futures, cleared foreign futures, and cleared swaps positions; and (ii) 2% of the total margin amount associated with uncleared swaps. Security-based swaps are excluded from both margin amounts. In addition, the final rule increases the $1 million minimum capital ''floor'' for FCMs to $20 million for FCM swap dealers.

These changes reflect sound policy. In particular, excluding security-based swaps comports with the CFTC's longstanding respect for the SEC's jurisdiction over those products. Moreover, excluding cleared swaps from the 2% risk margin amount brings our capital requirements in line with the lower credit risk posed by cleared products. This approach is also consistent with the CFTC's net capital requirement for Registered

[1] The CFTC does not have jurisdiction to establish capital requirements for swap dealers subject to the jurisdiction of a federal banking regulator as identified in Section 1a(39) of the CEA, 7 U.S.C. 1(a)(39) (2018).

[2] *See* Section 4s(e) and 4s(f)(2) of the CEA, 7 U.S.C. 6s(e), 6s(f)(2) (2018).

[3] Section 731 of the Dodd-Frank Act also required the CFTC to establish initial and variation margin requirements for uncleared swaps, which are being implemented on a phased schedule that currently extends to all but the smallest swap market participants. *See* Statement of Chairman Heath P. Tarbert in Support of Extending the Phase 5 Initial Margin Compliance Deadline (May 28, 2020), *https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement052820c.*

[4] The capital rule was first proposed in 2011 and re-proposed in 2016. *See Capital Requirements of Swap Dealers and Major Swap Participants,* 76 FR 27802 (May 12, 2011); *see also Capital Requirements of Swap Dealers and Major Swap Participants,* 81 FR 91252 (Dec. 16, 2016). The comment period was re-opened in December 2019, allowing the Commission to glean additional insights from market participants prior to presenting today's final rule. *See Capital Requirements of Swap Dealers and Major Swap Participants,* 84 FR 69664 (Dec. 16, 2019).

[5] *See* CFTC Strategic Plan 2020–2024, at 4 (discussing Strategic Goal 3), *https://www.cftc.gov/media/3871/CFTC2020_2024StrategicPlan/download.*

[6] Heath Tarbert, *Volatility Ain't What it Used to Be,* Wall Street Journal (Mar. 23, 2020), *https://www.wsj.com/articles/volatility-aint-what-it-used-to-be-11585004897.*

[7] *See* CFTC Strategic Plan, *supra* note 5, at 4.

[8] *See* Regulation 1.17, 17 CFR 1.17 (2019).

Foreign Exchange Dealers,[9] as well as the SEC's capital rules for broker dealers.[10]

*2. Capital Requirements for Non-FCM Swap Dealers*

Well-crafted rules must account for the differences among our market participants. For swap dealers that are not FCMs, the final rule provides three methods of determining minimum capital that respond to their different business models, risk profiles, and capital structures.[11]

a. The Net Liquid Assets Approach

Some swap dealers have responsibility for customer funds, such as those that are dually registered with the SEC as broker dealers. For these swap dealers, capital requirements can advance customer protection where all else has failed, by providing a ''cushion'' for orderly liquidation.[12] An effective cushion requires liquidity, which can be analogized to the readily available cash in one's wallet. Consistent with this analogy, swap dealers may select the Net Liquid Assets approach in the final rule—requiring them to maintain 2% of the margin amount associated with uncleared swaps—which we believe is sufficient to protect customer funds in the event of a liquidation.

The Net Liquid Assets approach is not only about customer protection: It also facilitates sensible harmonization with SEC capital requirements for dual registrants. In doing so, the Net Liquid Assets approach supports the CFTC's strategic goal of improving the regulatory experience for market participants.[13]

b. The Bank-Based Approach

Banks are the backbone of our financial system, and are subject to a specific statutory regime managed by the Federal Reserve Board and other federal banking regulators. Banks—and by extension their non-bank swap dealer subsidiaries—naturally raise greater systemic risk concerns than other types of swap dealers.

While the cash in one's wallet is the appropriate analogy when thinking about capital as a measure of customer protection, the central role banks play in our financial system requires us to consider a much bigger picture. For banks, capital must facilitate safety and soundness, ensuring that they act prudently.[14] The personal finance analogy for assessing bank capital, therefore, is not just cash-in-wallet, but also savings accounts, checking accounts, retirement funds, and other assets.

This broad view of bank capital as a window into solvency is designed to reduce overall risk in the financial system, advancing a strategic goal of the CFTC.[15] As stated in the agency's 2020–2024 Strategic Plan, ''[t]aking steps to avoid systemic risk will not only protect market participants, but increase confidence in the soundness of U.S. derivatives markets.'' [16] Our bank-based capital approach is designed to meet this goal.

Accordingly, swap dealers selecting the Bank-Based Approach may satisfy their capital requirements by retaining (i) 8% of risk-weighted assets (''RWA''), composed of at least 6.5% of tier 1 common equity (''CET1''), and (ii) 8% of their uncleared swap margin amount. Requiring at least 6.5% of a swap dealer's RWA to be composed of CET1—the highest-quality regulatory capital—addresses potential systemic risk by ensuring that available capital can immediately stem losses, avoiding financial contagion. Second, the requirement that swap dealers electing the Bank-Based Approach must retain 8% of margin for uncleared swaps reflects the uniquely critical role they play in the financial system.

c. The Tangible Net Worth Approach

Finally, some swap dealers are not financial entities, but rather commercial businesses engaged in the agriculture and energy sectors. These swap dealers help American families put food on the table and gas in the car. Unlike financial entities, their balance sheets often contain significant physical assets, such as oil refineries, grain warehouses, and even railroad rolling stock. Net worth—inclusive of physical assets—is the appropriate measure to assess minimum capital for these commercial entities. In extending our analogy, capital for these swap dealers must be inclusive not just of cash or retirement account holdings, but one's house and car—the assets that could be pledged as collateral in borrowing.

The final capital rule recognizes that commercial entities are fundamentally different from other swap dealers. This is reflected in the Tangible Net Worth (''TNW'') approach, which sets minimum capital at 8% of the margin amount for uncleared swaps. Eligibility for the TNW approach is determined at the consolidated parent level, which allows a financial subsidiary of a commercial entity that is registered as a swap dealer to elect the approach.

*3. Market and Credit Risk Models*

In addition to capital requirements, today's final rule makes important adjustments to the requirements that swap dealers must satisfy to rely on internal market and credit risk models rather than the standardized models provided in Regulation 1.17. Like minimum capital requirements, market and credit risk models will be most effective when they reflect a swap dealer's unique business and risk profile. In addition, internal models specific to a swap dealer's portfolio can provide a more nuanced view of risk than standardized models.

That said, the final rule provides a certification process for swap dealers relying on internal market and credit risk models, ensuring flexibility while retaining oversight through the National Futures Association. Permitting swap dealers to rely on bespoke models that best account for their particular situations is good governance and enhances the regulatory experience.[17] At the same time, by subjecting those models to objective validation by the National Futures Association (and potentially other domestic and foreign regulators), there is a check on that flexibility. Further, this approach makes the CFTC's model approval process more closely aligned with the SEC and federal banking regulators.[18]

Allowing swap dealers to rely on internal risk models is also an appropriate instance of principles-based regulation,[19] as prescriptive requirements that do not account for differences among firms simply cannot measure risk as accurately as internal models that account for key differences among swap dealers.

*4. Financial Reporting*

Today's final rule also adopts financial reporting, recordkeeping, and notification requirements for swap dealers and major swap participants. These requirements include the obligation to provide financial statements and reports to the CFTC and the National Futures Association. Most importantly, covered entities must alert us when there is undercapitalization, a books and records problem, and/or a specified triggering event, such as the failure to post required margin. The rule also includes public reporting requirements for those swap dealers not subject to the jurisdiction of a banking regulator.

These reporting requirements should serve as early warning systems for systemic risk, allowing the CFTC to react quickly to emerging threats to financial stability. At the same time, the reporting requirements are designed to harmonize, as appropriate, with existing financial reporting requirements for FCMs, bank swap dealers, and SEC-registered entities. The final rule also eliminates weekly position reporting, which does not materially advance our ability to monitor systemic risk. In short, balance is the touchstone of the financial reporting rules, allowing us to achieve greater insight into potential systemic risk without placing undue burdens on market participants.

*5. Substituted Compliance*

Last, our final rule today accounts for non-U.S. domiciled swap dealers by allowing them to petition the CFTC for substituted compliance in satisfaction of their capital and financial reporting requirements. These swap dealers may seek a comparability determination based on the capital and

[9] *See* Section 2(c)(2)(C) of the CEA, 7 U.S.C. 2(c)(2)(C) (2018), and Regulation 5.7(a), 17 CFR 5.7(a) (2019).

[10] *See* SEC Rule 240.15c3–1, 17 CFR 240.15C3–1 (2019).

[11] *See* Regulation 23.101.

[12] Former SEC Commissioner Dan Gallagher, ''The Philosophies of Capital Requirements'' (speech in Washington, DC, Jan. 15, 2014) at 1, *https://www.sec.gov/news/speech/2014-spch011514dmg.*

[13] *See* CFTC Strategic Plan, *supra* note 5 at 4 (discussing Strategic Goal 3).

[14] *See* Gallagher, *supra* note 12, at 1.

[15] *See* CFTC Strategic Plan, *supra* note 5, at 5 (discussing Strategic Goal 1, which is to strengthen the resilience and integrity of our derivatives markets while fostering their vibrancy).

[16] *Id.*

[17] *See* CFTC Strategic Plan, *supra* note 5, at 7.

[18] The market and credit risk model approval process in the final rule is similar to the requirements established by the Federal Reserve Board for bank holding companies, as well as the SEC's requirements for security-based swap dealers.

[19] For a discussion of the circumstances in which to apply principles vs. rules, *see* Heath P. Tarbert, *Rules for Principles and Principles for Rules: Tools for Crafting Sound Financial Regulation,* 10 Harvard Business Law Review (2020).

financial reporting rules of their home jurisdictions, provided certain conditions are met. In providing this option, the final rule supports international comity while enhancing the regulatory experience for market participants abroad.[20]

**Conclusion**

Today we mark a decade and a day following the enactment of the Dodd-Frank Act by completing the CFTC's required rulemakings under Section 731. The final capital rule is flexible and tailored, to accommodate the wide array of swap dealers that touch every corner of our markets. The final rule is also long on customer protection and systemic risk mitigation, advancing the CFTC's mission of promoting the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation. After 10 years of hard work by CFTC staff, I am pleased to support the final rule and the long-awaited certainty it brings to our markets. Given the current economic crisis the world faces in light of the continuing COVID–19 pandemic, we are fortunate to have a final rule that has come late, but not too late.

## Appendix 3—Supporting Statement of Commissioner Brian D. Quintenz

Ten years and one day ago, the Dodd-Frank Act Wall Street Reform and Consumer Protection Act was enacted. I am proud to vote for today's final rule which, in my view, is the capstone of the Commodity Futures Trading Commission's (CFTC or Commission) work to appropriately calibrate the post-crisis reforms. Capital ensures that firms are able to continue to operate during times of economic and financial stress by providing an adequate cushion to protect them from losses. Just as important as the safety and soundness of individual firms, capital is designed to give the marketplace confidence that any given firm has a high probability of surviving the next crisis.

But, capital requirements also create important incentives that drive market behavior. The cost of capital may be the most determinative factor in a firm's decision to remain, or become, a swap dealer (SD), or to continue to provide clearing services to clients, in the case of a futures commission merchant (FCM). If capital costs are too expensive, firms will restrict certain business activities, end unprofitable business lines, or, in some cases, exit the swaps or futures markets altogether. As a result, over time, the swaps and futures markets will become less liquid, less accessible to end users, more heavily concentrated, and less competitive. These are not the hallmarks of a healthy financial system. This is why I have always regarded the finalization of capital requirements for SDs and FCMs to be the most consequential rulemaking of the post-crisis reforms.

I believe the final capital regulations for SDs and FCMs adopted today establish minimum capital requirements that will ensure the safety and soundness of these firms for years to come, through periods of economic growth and stability and through periods of market contraction and extreme volatility. They are appropriately calibrated to the true risks posed by an SD's or FCM's business and ensure these firms have the capital necessary to support their active participation in the markets and servicing of clients. They are also largely harmonized with the capital approaches of the prudential regulators and the Securities and Exchange Commission (SEC), which should reduce unnecessary burdens and facilitate compliance.

No rule is perfect. I expect there will be aspects of this rule that need to be revised or recalibrated in the future—and I specifically discuss some areas below which I would like to see revisited. Nevertheless, it is a common saying that you cannot build a great house without a solid foundation. I am confident that today's capital regulations provide that foundation and will support vibrant, healthy derivatives markets, with future Commissions able to build upon this progress in the years to come. I would like to highlight a few aspects of the final rule below.

*The risk margin amount.* We heard from many commenters that, of all the alternatives, the proposed eight percent risk margin amount would act not as a capital floor as intended, but rather as the primary driver of firms' capital requirements and as a potential binding constraint on their businesses. The final rule appropriately recalibrates the scope of products included in this calculation, while also adopting a risk margin amount percentage that is appropriately tailored to the capital approach elected by the firm. Specifically, the final rule maintains the existing minimum capital requirements for standalone FCMs, with those firms continuing to maintain minimum capital equal to or greater than 8% of the risk margin amount for customer futures and cleared swaps. For FCM–SDs, the final rule establishes a minimum capital requirement equal to or greater than (i) 8% of the risk margin amount for customer futures and cleared swaps, plus (ii) 2% of the risk margin amount for the FCM–SD's uncleared swaps. For non-FCM SDs that elect the Net Liquid Assets Approach, the Final Rule requires the firm to maintain minimum capital equal to or greater than 2% of the SD's uncleared swap margin. For non-FCM SDs electing either the Bank-Based Approach or the Tentative Net Worth Approach, the final rule establishes a minimum capital requirement equal to or greater than 8% of the firm's uncleared swap margin. For the reasons discussed below, I believe each of these adjustments from the proposal represents an improvement that more precisely tailors the capital requirements of a firm to its particular business and its selected capital approach.

I support the removal of a firm's cleared and uncleared security-based swaps (SBS) from the risk margin amount calculation. It is appropriate that the Commission maintain its historical approach and establish minimum capital requirements for registrants that are based upon products within the CFTC's jurisdiction. I am also very pleased that proprietary cleared futures and swaps were removed from the risk margin amount. FCMs, FCM–SDs, and SDs electing the Net Liquid Assets Approach are all subject to rigorous market and credit risk capital charges on these proprietary cleared positions. I believe these capital charges adequately account for the risk of these positions and there is no reason to account for them yet again in the firm's minimum capital requirement. Moreover, for SDs that elect one of the other capital approaches, I also believe it is appropriate to exclude proprietary cleared positions given that the SD's credit exposure on such positions is limited to either a clearing organization or to the FCM that carries the SD's account.

Finally, I also support the reduced 2% risk margin multiplier amount on uncleared swap margin for FCMs, FCM–SDs, and SDs electing the Net Liquid Assets Approach, while maintaining the 8% multiplier for other types of standalone SDs. Under the FCM capital rules and the Net Liquid Assets Capital Approach for standalone SDs, the types of capital that may be used to meet a firm's minimum capital requirement are significantly more conservative than the types of capital that may be used under the Bank-Based Capital Approach and the Tangible Net Worth Capital Approach. The Net Liquid Assets Approach is liquidity-focused and generally requires the firm to hold at least one dollar of highly liquid assets for each dollar of the firm's liabilities. As a result, when computing what qualifies as eligible capital under this approach, firms must subtract all illiquid assets, such as fixed assets and intangible assets. In contrast, the other capital approaches focus on the solvency of the firm and require the firms to maintain positive balance sheet equity. Under these approaches, firms are not required to subtract illiquid assets or fixed assets from their balance sheet equity. Given the significantly more restrictive standard for qualifying eligible capital under the Net Liquid Assets Approach, I think it is appropriate to lower the risk margin multiplier to 2% in order to minimize competitive disparities across the other two capital approaches.

The final rule also expresses the Commission's ongoing commitment to monitor, and if necessary, adjust, the risk margin percentage. This should only be done, however, with a wealth of data and a highly robust economic analysis. With the benefit of the financial reporting the Commission will soon receive from SDs, the Commission may be able to further refine this metric to promote consistency across the possible SD capital approaches.

*Bank-based capital approach.* In response to commenters, the final rule now permits firms to use a combination of common equity tier 1, additional tier 1, and tier 2 capital to meet its minimum capital requirements under both the 8% of risk-weighted assets and 8% of uncleared swap margin alternatives. In particular, with respect to the 8% of uncleared swap margin alternative, the rule does not limit the amounts of additional tier 1 or tier 2 capital the firm can use to meet the requirement. Because of this additional flexibility, the final rule requires firms electing this approach to satisfy *all* of the four possible minimum capital alternatives.

[20] *See* CFTC Strategic Plan, *supra* note 5, at 4 (discussing Strategic Goal 3).

The Commission will need to closely observe the impact of this change to ensure it does not create any competitive disadvantages for firms electing this approach. I anticipate that if additional data and analysis shows this outcome creates unintended consequences, the Commission will take action to address them.

*Model approval process.* I am also pleased with the model approval process established in the final rule, which allows the Commission to realize the benefits of the NFA's considerable expertise and resources. Once the Commission, or the Director of the Division of Swap Dealer and Intermediary Oversight (DSIO) pursuant to delegated authority, makes a determination that the NFA's model review process is comparable to the Commission's process, the NFA's approval of a model will satisfy the Commission's model approval requirement. In addition, for a firm utilizing a model that has already been approved by its relevant regulator, the final rule provides a process whereby, upon making certain representations, the firm can continue to use the model pending approval by the Commission or NFA. These steps help ensure that firms seeking to use models will be able to do so by the rule's compliance date.

*Areas for further improvement.* As I noted above, no rule is perfect. I would like to briefly highlight three areas not addressed in this final rule that I hope the Commission will address in the future.

*Standardized market risk capital charges.* First, this final rule does not adjust any of the standardized market risk charges under Regulation 1.17. I believe that many of these standardized charges are too high given the liquidity and actual risks of the product. For example, the final rule applies a 20% notional standardized market risk charge on uncleared foreign exchange non-deliverable forwards. In contrast, the Commission's uncleared margin rules apply a 6% notional charge on these products for purposes of the standardized initial margin calculation. I hope that in the future the Commission can work with the SEC to recalibrate and update these charges to better reflect the risks of the underlying products.

*Alternative forms of collateral.* Second, I hope that with the benefit of experience and information received from financial reporting, the Commission will consider modifying its rules to recognize alternative forms of collateral, such as letters of credit or liens, provided by commercial end users that are exempt from clearing and margin requirements when computing credit risk charges. Alternative collateral arrangements are frequently used by SDs in commodity derivatives transactions with end users to create ''right way'' risk and can be effective means of managing the credit risk of certain derivatives transactions. I think it would be beneficial for the Commission's capital regime to recognize, as appropriate, the risk-reducing nature of these arrangements.

*Net liquid assets approach.* Third, I am also interested in continuing to explore commenters' suggestion that firms electing the Net Liquid Assets Approach be required to maintain tentative net capital in excess of the risk margin amount, as opposed to the current net capital requirement. I continue to have concerns that in periods of high volatility, the procyclicality of increasing margin requirements may cause unnecessary stress on these firms, as their capital charges for positions increase at the same time as their minimum capital requirement. I am interested in looking at possible adjustments that could be made to address this issue.

In closing, I believe the capital regime adopted today strikes the necessary balance between capital levels that protect firms from losses on certain products, and levels that allow firms to earn an economic benefit from servicing their customers' risk management needs through those products. There is a direct tradeoff between the amount of capital regulators require firms to hold to ensure firms' resilience and viability, and the amount of available capital firms have to deploy in financial markets to support the market's ongoing liquidity and health. The capital standards adopted today protect the safety and soundness of firms, while ensuring they can continue to service their clients and make markets.

I would also like to thank DSIO, in particular Tom Smith, for their thoughtfulness and tireless dedication to getting this rule right. It has truly been a pleasure to work with and learn from you throughout this process.

## Appendix 4—Dissenting Statement of Commissioner Rostin Behnam

I respectfully dissent from the Commodity Futures Trading Commission's (the ''Commission'' or ''CFTC'') rulemaking today regarding Capital Requirements of Swap Dealers and Major Swap Participants (the ''Final Capital Rule'').

### Ten Years of Dodd-Frank

Yesterday marked ten years since Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1] Congress passed Dodd-Frank as a targeted legislative response to the 2008 financial crisis and the near obsolescence of the U.S. financial regulatory framework. The Great Recession wreaked havoc on Main Street Americans and the global economy. Undercapitalization was at the heart of the 2008 crisis, and the swift response to require financial institutions to hold additional capital mitigated both the blunt economic shock we endured this past March, and the substantial weight we continue to shoulder as a result of the Covid-19 pandemic.

Section 731 of the Dodd-Frank Act[2] requires the CFTC to establish capital rules for all registered Swap Dealers (''SDs'') and Major Swap Participants (''MSPs'') that are not banks, as well as associated financial recordkeeping and reporting requirements. The capital requirements in Section 731, which established Section 4s(e) of the Commodity Exchange Act (''the Act''), are clear: ''. . . [t]o offset the greater risk to the swap dealer or major swap participant and the financial system arising from the use of swaps that are not cleared,'' the Commission's capital requirements shall ''help ensure the safety and soundness of the swap dealer or major swap participant'' and ''be appropriate to the risk associated with the non-cleared swaps held as a swap dealer or major swap participant.''[3] There can be no doubt that Congress intended to impose significant new requirements that would contribute to the protection from another financial crisis.

Congress's 2010 response largely incorporated the international financial reform initiatives for over-the-counter derivatives laid out at the 2009 G20 Pittsburgh Summit aimed at improving transparency, mitigating systemic risk, and protecting against market abuse.[4] One of the core initiatives in the G20 statement was the imposition of higher capital requirements. Paragraph 16 of the statement provides the purpose the G20 leaders agreed to aim for: ''*To make sure our regulatory system for banks and other financial firms reins in the excesses that led to the crisis.*''[5] Paragraph 17 then lays out what the G20 leaders agreed to do to rein in the excesses, and the first item is this: ''We committed to act together to raise capital standards.''[6] The G20 leaders said unequivocally that, for over-the-counter derivatives markets, ''[n]on-centrally cleared contracts should be subject to higher capital requirements.''[7] Congress had this same goal in mind when enacting the Dodd-Frank Act a decade ago.[8]

### Three and a Half Years of the Capital Proposal

In 2016, the Commission issued a bipartisan proposal to implement capital requirements as directed by Congress through Section 731 of the Dodd-Frank Act.[9] The Commission now jumps from a proposal issued in 2016 to a significantly different final rule nearly four years later, without any intervening *reproposal* to provide interested market participants clear proposed capital requirements to meaningfully comment upon. In so doing, the Commission undermines the spirit of the Dodd-Frank Act and violates the letter of the Administrative Procedure Act (''APA'').[10]

The preamble to the Final Capital Rule asserts that all of the actions taken today are

[1] *See* The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 124 Stat. 1376 (2010) (the ''Dodd-Frank Act'').

[2] *Id.*at section 731(e), 124 Stat. at 1704–6.

[3] Section 4s(e)(3) of the Commodity Exchange Act (''the Act''), 7 U.S.C. 6s(e)(3).

[4] G20, *Leaders' Statement, The Pittsburgh Summit* (Sept. 24–25, 2009), *available at https://www.oecd.org/g20/summits/pittsburgh/.*

[5] *Id.* at 2.

[6] *Id.*

[7] *Id.* at 9.

[8] *See* Statement of Sen. Christopher Dodd, Cong. Rec., Vol. 156, Issue 104, S5828, S5832 (July 14, 2010) (''Derivatives are vitally important if utilized properly in terms of wealth creation and growing an economy. But what was once a way for companies to hedge against sudden price shocks has become a profit center in and of itself, and it can be a dangerous one as well, when dealers and other large market participants don't hold enough capital to back up their risky bets and regulators don't have information about where the risks lie.'').

[9] Capital Requirements of Swap Dealers and Major Swap Participants, 81 FR 91252 (proposed Dec. 16, 2016) (the ''2016 Proposal'').

[10] 5 U.S.C. 551 *et seq.*

a ''logical outgrowth'' from the 2016 Proposal.[11] The preamble even goes a step further, arguing that ''modifications described in the *2019 Capital Reopening,* including a discussion and specific inclusion of potential rule language, were logical outgrowths'' of the 2016 Proposal.[12] This simply cannot be true if the requirement that a final rule is a logical outgrowth of an agency's proposed rule is to have any meaning at all.[13]

The changes in the Final Capital Rule to the amount of capital that a futures commission merchant SD (FCM–SD) must maintain are illustrative of the point. The 2016 Proposal would have required an FCM–SD to maintain regulatory capital equal to or greater than 8% of the initial margin associated with the FCM–SD's proprietary cleared and uncleared futures, foreign futures, swap, and security-based swap positions. In 2019, the Commission reopened the comment period on the 2016 Proposal.[14] In the **Federal Register** release announcing the 2019 reopening, the Commission sought additional public input based on an initial review of comments received from the 2016 Proposal on myriad alternatives, seeking comment ''on all aspects of the proposed risk margin amount, including comments regarding the possible increase or decrease of the risk margin percentage in coordination with the inclusion or exclusion of certain products in order to establish the most optimal capital requirement.'' [15] This, in many respects, is a blank check. Not only does it allow for any conceivable percentage of risk margin, it simultaneously opens up multiple combinations of inputs. The Commission now states that any of the possible outcomes along this sliding scale would have been a logical outgrowth. It is the equivalent of saying that the Final Capital Rule is a logical outgrowth because it imposes any capital requirements at all, and that simply cannot be the case under the legal intent and plain reading of the principle of logical outgrowth.

**A Final Capital Rule (and Five Years of Review)**

Where did the Commission end up? The Commission decides today to set the multiplier for the uncleared swaps of FCM–SDs at 2%, rather than the 8% originally proposed. The Commission also is modifying the final rule from the proposal to *remove* security-based swaps, proprietary futures, foreign futures, and cleared swaps from the risk margin amount calculation. These are significant changes from the 2016 proposal, and they are just one of the possible outcomes suggested in the reopening of the comment period.

I am not sure if 2% is the appropriate landing spot to insulate our markets from outsize risk. And based on the preamble to this Final Capital Rule, I do not think the Commission is certain either. The preamble states that the Commission does not have the data to determine whether or not 2% is the optimal or even adequate percentage.[16] Instead, the Commission chooses 2% with the intent that ''the Commission's decision to modify the final rule by removing cleared and uncleared security-based swaps, as well as proprietary futures, foreign futures, and cleared swaps positions from the risk margin amount calculation, and to set the multiplier at 2% should mitigate many of the commenters' concerns that the proposed 8% risk margin amount calculation was over inclusive of the types of positions included in the calculation and was set at a percentage that was too high.'' [17] Due to this lack of data, the Commission will need to conduct a *5-year* post implementation review ''to assess whether the minimum capital requirements for FCM–SDs are adequately calibrated to ensure their safety and soundness.'' [18] And I applaud the Commission for including this critical regulatory component of the capital regime's implementation. However, this information is exactly the type of data that the Commission would have benefited from during the notice and comment process. By failing to issue a reproposal in 2019, allowing just a few additional months of concrete, data driven deliberation, which could have clearly stated a specific approach, we lost the opportunity to find out whether the minimum capital requirements that we selected are adequately calibrated to ensure safety and soundness.

Because of the lack of clarity in the reopening of the comment period, we again received more general comments that 8% was too high. In justifying the selection of 2%, the preamble states that ''2% should mitigate many of the commenters' concerns that the proposed 8% risk margin amount calculation was over inclusive of the types of positions included in the calculation and was set at a percentage that was too high.'' [19] Because we did not provide a clear alternative, we again received comments on 8% rather than comments on 2%, or on some alternative.

Ultimately, this lack of information gathering impacts the CFTC and results in a Final Capital Rule that has not benefited from fulsome public comment. However, the impacts on our market participants are greater. They have been denied the ability to comment meaningfully. This is particularly true of the cost benefit analysis. Broadly asking stakeholders to comment on any variation results in a situation where no one had an opportunity to comment on anything approximating what the Commission has done in its Final Capital Rule. As a result, this rule ultimately derived from a process that is, in many respects, equivalent to not soliciting comments from the public and market participants at all.[20]

I note that, less than a month ago, the Commission voted to withdraw the Regulation Automated Trading proposal (''Regulation AT''),[21] the most recent iteration of which had been issued in November 2016, a couple of weeks before the 2016 Proposal.[22] At the same time that Regulation AT was withdrawn, the Commission issued a rebranded Electronic Trading Risk Principles proposal intended to ''*accomplish a similar goal*'' to the original Regulation AT.[23] Following the logic set forth today for the Final Capital Rule, the Commission could have simply issued a final rule for Electronic Trading Risk Principles last month, arguing that it was merely a *logical outgrowth* of the latest iteration of Regulation AT. While I disagreed with last month's policy decision, procedurally the Commission did the right thing under the APA. We should have followed the same procedure for capital, and issued a reproposal.[24] If we had done so last December, we could have received meaningful comments from market participants on a clearly stated reproposal, and we could well have been in position to finalize a stronger, more carefully considered Final Capital Rule today that addresses current market conditions in a manner that is more data driven.

**Conclusion**

Before I conclude, I would like to thank staff from the Division of Swap Dealer and Intermediary Oversight for their excellent work on this highly technical and complex rulemaking, and willingness to answer my questions and take feedback.

While I would have liked to stand with my fellow Commissioners today, I cannot justify it under these circumstances. I truly wish that I could support today's Commission action as we mark the tenth anniversary of the Dodd-Frank Act this week. To reiterate sentiments made in my first speech as a CFTC Commissioner,[25] capital is a

[11] Final Capital Rule at 1.B.

[12] *Id.;* Capital Requirements for Swap Dealers and Major Swap Participants, 84 FR 69664 (Dec. 19, 2019).

[13] *See Small Refiner Lead Phase-Down Task Force* v. *United States Envtl. Prot. Agency,* 705 F.2d 506, 548–49 (D.C. Cir. 1983) (''Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking.'').

[14] 84 FR 69664.

[15] *Id.* at 69668.

[16] Final Capital Rule at II.B.2.b. (''The Commission does not have the benefit of . . . comprehensive data regarding the multiplier for the uncleared swaps risk margin amount at this time.'')

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See Texas* v. *United States EPA,* 389 F.Supp. 3d. 497, 505 (S.D. Tex. 2019) (''The APA does not envision requiring interested parties to parse through such vague references like tea leaves to discern an agency's regulatory intent regarding such significant changes to a final rule'').

[21] Press Release Number 8188–20, CFTC, CFTC Approves Two Final Rules and Two Proposed Rules at June 25 Open Meeting (June 25, 2020), *https://www.cftc.gov/PressRoom/PressReleases/8188-20.*

[22] Regulation Automated Trading, 81 FR 85333 (proposed Nov. 25, 2016).

[23] Electronic Trading Risk Principles (proposed Jun. 25, 2020), at I.B.

[24] Statement of Dissent of Commissioner Rostin Behnam, Capital Requirements of Swap Dealers and Major Swap Participants (Dec. 10, 2019), available at *https://www.cftc.gov/PressRoom/Speeches Testimony/behnamstatement121019.*

[25] *See* Rostin Behnam, Commissioner, CFTC, The Dodd-Frank Inflection Point: Building on Derivatives Reform, Remarks of CFTC Commissioner Rostin Behnam at the Georgetown Center for Financial Markets and Policy (Nov. 14, 2017), *https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam.*

cornerstone financial crisis reform [26] that is critical to protecting our financial institutions and our financial system as a whole from systemic risk and contagion. But it is also critical to protection from unintended consequences if capital (and margin) levels are applied and set without due regard to the uniqueness of our financial markets and market participants.

I appreciate that in moving forward, we must fulfill our directive to establish capital standards appropriately, and in consideration of other activities engaged in by SDs and MSPs such that we ensure that we do not penalize commercial end-users who need choices and benefit from competition in our markets. At the same time, we must heed Congressional intent without any compromise, regardless of what *we* think is best, remaining cognizant of the impact that capital requirements have on market stability, and follow APA rulemaking requirements when we do so.

Shortly before the Commission voted on the reopening in December, 2019, Chairman Tarbert gave remarks about *transparency* [27], making many very powerful and important points about the incredible importance of being mindful—as regulators—of ''. . . not only what we do, but how we do it.'' [28] The Chairman ended that particular statement with a wonderful quote from Aristotle. Among many profound lessons from the Greek philosopher, he is also sometimes credited with the statement that ''[p]atience is bitter, but its fruit is sweet.'' In that vein, I simply wish the Commission had devoted a little bit more time to how we fulfill this foundational Dodd-Frank requirement.

The road has been long, far too long in many respects. But, unsure of what deadlines we are racing to meet at this point, or targets we are aiming to hit, I feel strongly the Commission and our markets, would have stood on sturdier ground, and perhaps even have landed at the same conclusion voted on today, if we had practiced a little patience.

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

Today, for the first time, the Commission adopts capital requirements for non-bank swap dealers (''Final Rule''). This is the last major swap dealer regulation required under the Dodd-Frank Act. The Dodd-Frank Act specified that the swap dealer capital requirement ''shall—(i) help ensure the safety and soundness of the swap dealer or major swap participant; and (ii) be appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant.'' [1]

Unfortunately, there is no rational basis to conclude that the minimum capital requirements in the Final Rule meet those standards and serve their intended purpose. The Final Rule is not based on quantitative analysis of data or the appropriate level of capital for the risks presented by a swap dealer. Rather, it appears to be designed with the objective of ensuring that most dealers will not need to raise more capital. In its consideration of costs and benefits, the Commission concludes that, depending on the type of swap dealer, ''the likelihood of . . . needing to raise additional capital due to this rule might be low,'' ''may not be significant,'' or ''that their tangible net worth greatly exceeds the Commission's requirement.'' [2] For this reason, I dissent.

### No Rational Basis To Conclude That Minimum Capital Levels Are Appropriate

The Final Rule permits swap dealers, depending on their characteristics, to select one of three different approaches to calculate their minimum capital requirements. The approaches are identified as the: (1) ''Net Liquid Assets Capital Approach,'' (2) ''Bank-Based Capital Approach,'' and (3) ''Tangible Net Worth Capital Approach.'' The first two approaches are based on existing CFTC, Securities and Exchange Commission (''SEC''), and Federal Reserve capital requirements for futures commission merchants (''FCMs''), securities broker-dealers (''BDs''), and banks. The third approach is designed to accommodate commercial swap dealers whose capital is normally in the form of physical assets.

These methods are based on existing holistic, all-enterprise capital approaches that take into account a broad spectrum of risks. They are not necessarily suited to the swap dealers subject to the CFTC capital requirements, which are mostly stand-alone legal entities for swap dealing. Accordingly, it is not clear that these methodologies will generate capital requirements that are ''appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant.'' [3] However, using those precedents has some advantages in that it allows the different types of swap dealers to manage capital using known structures. While these historical approaches were not specifically designed to be able to meet the statutory standard, it may be possible to achieve the intended outcome using these structures if the specific methods, limits, and other factors had been developed based on the swap dealer specific standard. Unfortunately, this did not happen.

In December 2016, the Commission issued a re-proposal of the previously proposed capital regulations (''2016 Re-Proposal'') [4] that contained minimum capital requirements in each approach that were largely based on existing levels for FCM capital requirements. The 2016 Re-Proposal included cleared and uncleared swaps and uncleared security-based swaps in the calculation of the minimum requirements.

Commenters objected that the 2016 Re-Proposal was too costly and burdensome. At the end of last year the Commission, by a 3–2 vote, issued a second re-proposal (''2019 Second Re-Proposal'') consisting of over 140 mostly open-ended questions designed to invite comments supporting reduced minimum capital requirements or otherwise lower the costs for swap dealers to comply.[5]

Not surprisingly, the Final Rule adopts numerous provisions that are weaker than the 2016 Re-Proposal. The preamble to the Final Rule identifies ''lower capital charges,'' ''harmonization,'' and consistency with ''historical'' precedent as rationales for these provisions.

While the Commission makes conclusory statements that the rule helps ''ensure the safety and soundness'' of the swap dealers, there is little or no analysis supporting these assertions. Similarly, there is no analysis as to how or why these capital levels are ''appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant.''

The capital requirements for dually-registered FCM/BDs that are also swap dealers illustrate how this approach leads to arbitrary results from a risk-based perspective. Under the 2016 Re-Proposal, in addition to capital required to be held for non-swap activity, the FCM/BD swap dealer would be required to hold capital equal to a minimum of 8% of initial margin for uncleared swaps, security-based swaps, and certain futures positions of the swap dealer. As explained in the 2016 Re-Proposal, the 8% multiplier level is drawn from the Commission's experience with its risk-based capital requirements for FCMs.[6]

Based on comments received on the prior proposals, and on the desire to ''harmonize'' with the SEC, the Final Rule lowers the capital add-on multiplier level to 2%, and only applies the multiplier to uncleared swaps initial margin.[7] Security-based swaps are not included in the calculation based on the rationale that only swaps are within the CFTC's jurisdiction. If the entity is also registered with the SEC and the SEC's capital requirements are greater than the CFTC's, then the entity can use the SEC's requirement with no add-on for uncleared swaps. The Commission makes these changes not based on any analysis of the risk to the registrant,

[26] G20, Leaders' Statement, Framework for Strong, Sustainable and Balanced Growth, The Pittsburgh Summit (September 24–25 2009), *http://www.g20.utoronto.ca/2009/2009communique0925.html* (''We committed to act together to raise capital standards . . .'').

[27] Heath P. Tarbert, Chairman, CFTC, Statement of Chairman Heath P. Tarbert Before the December 10, 2019 Open Meeting (Dec. 10, 2019), *https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121019.*

[28] *Id.*

[1] CEA section 4s(e)(3)(A).

[2] Final Capital Rule release, Cost Benefit Considerations, Attachment A. The analysis also notes that a few non-bank financial swap dealers ''might need to raise additional capital and thus might incur significant cost to comply with the Commission's capital requirement.''

[3] CEA section 4s(e)(3)(A).

[4] Proposed Rule, Capital Requirements of Swap Dealers and Major Swap Participants, 81 FR 91252 (Dec. 16, 2016).

[5] For a more in-depth discussion of the procedural and substantive problems inherent in the 2019 Second Re-Proposal, *see* Dissenting Statement of Commissioner Dan M. Berkovitz, ''Proposed'' Rule and ''Request for Additional Comment'' on Capital Requirements of Swap Dealers and Major Swap Participants (Dec. 10, 2019), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatment121019b.*

[6] *See* 17 CFR 1.17(a)(1)(i)(B).

[7] While the Final Capital Rule selectively picks the 2% level purportedly to ''harmonize'' with the SEC's security-based swap dealer capital rule, the final rule uses different formulas and positions for the calculation. Furthermore, the SEC's rule has a built-in increase in the multiplier from 2% to 8% over time. The CFTC Final Capital Rule expressly choses to deviate from that SEC approach and has no such increases.

but because this approach ''maintains a consistency with the long-standing historical approach that the Commission and SEC have followed with respect to dually-registered FCM/BDs.'' [8]

The following example shows how this approach can result in an arbitrary outcome from a risk perspective. Under the Final Rule, if the amount of uncleared swap margin for an FCM that is not a BD is $1 billion, multiplying that amount by 2% yields a minimum capital add-on of $20 million. Similarly, under the SEC's capital rule, for a securities-based swap dealer that is not an FCM with $1 billion of required margin for uncleared security-based swaps, a 2% add-on would be $20 million.[9] Now, let's consider the add-on for a dually-registered FCM/BD. Each of the CFTC and SEC capital rules individually require that the minimum capital requirements include capital based on either the uncleared swap positions or the uncleared security-based swap positions, respectively, but not the aggregate of both types of positions. A dually-registered firm with the same aggregate risk margin amount of $1 billion, but split half to swaps and half to security-based swaps, would be required to reserve $10 million ($500 million * 2%). Thus, the dually-registered firm with a total initial margin requirement of $1 billion held for a portfolio split evenly between swaps and security-based swaps would be required to reserve only half the capital required for the same amount of initial margin held for a portfolio that was either all swaps or all security-based swaps. For such dually-registered firms, the amount of capital required to be held may ultimately be based on irrelevant and arbitrary considerations of ''historical precedent'' and agency jurisdiction rather than swap risk-based calculations.

**Financial Data and Monitoring Capital Sufficiency**

The capital requirements for swap dealers are one of the most complex and highly technical areas in our regulations. The swap dealers subject to the CFTC capital requirements vary significantly and include (i) very large FCMs and/or BDs registered with the CFTC and the SEC; (ii) U.S. and foreign affiliates of banking organizations; (iii) large commercial enterprises and affiliates thereof; and (iv) other financial companies that are not affiliated with banks. Each grouping has unique capital structures. Furthermore, there was little available quantitative financial accounting data for the swap activities of these entities to calibrate the appropriate levels of capital. Given this complex and technical backdrop, the Final Rule notes in several places that the Commission will gather and analyze the new financial reporting data now required under the rule and may reassess components of the rule to determine whether it needs to be amended to be better fit for purpose. I strongly support that effort and will follow this monitoring and analysis closely.

**Substituted Compliance for Capital Requirements**

Under the Final Rule, swap dealers organized and domiciled outside of the United States, including many subsidiaries of U.S. firms, can satisfy the capital requirements by complying with the capital requirements of the country of their domicile if the Commission grants substituted compliance. The methods and standards for such a determination are similar to those to be established in the final cross-border swap regulations scheduled for consideration by the Commission tomorrow. Unfortunately, those methods and standards are substantively weaker than the standards currently used by the Commission and may result in outsourcing swap dealer capital oversight to other jurisdictions where not appropriate.

**Conclusion**

Notwithstanding my dissent, I want to once again acknowledge the complexity and highly technical nature of the capital requirements. Given these difficulties, I would like to recognize the hard-working staff of the CFTC for their efforts in fashioning the Final Rule. Some of you spent many a late night addressing comments and questions and revising the rule release. While I cannot support the outcome, I nonetheless appreciate and thank you for the dedication you bring to your work here at the CFTC.

Unfortunately, the rule the Commission will be adopting today is simply an affirmation of the status quo. This is not what Congress intended when it directed the CFTC to adopt capital requirements ''appropriate for the risk'' presented by uncleared swap activities of swap dealers. For this reason, I dissent.

[FR Doc. 2020–16492 Filed 9–14–20; 8:45 am]

BILLING CODE 6351–01–P

[8] Final Rule release, section II.C.2.

[9] While it is acknowledged that this example is somewhat simplified from the calculations and absolute minimum amounts specified in both the CFTC and SEC capital rules, the example illustrates a possible outcome of the rules.

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Part V

## Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Georgetown and Salado Salamanders; Proposed Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[Docket No. FWS–R2–ES–2020–0048; FF09E21000 FXES11110900000 201]**

**RIN 1018–BE78**

## Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Georgetown and Salado Salamanders

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; revisions and reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are revising our proposed designation of critical habitat for the Georgetown salamander (*Eurycea naufragia*) and Salado salamander (*Eurycea chisholmensis*) in Bell and Williamson Counties, Texas. Based on published genetic analyses, we are revising the distribution of the Georgetown and Salado salamanders and are adjusting previously proposed critical habitat units accordingly. We also propose changes to our description of the physical or biological features essential to the conservation of the species. We propose a total of approximately 1,519 acres (ac) (622 hectares (ha)) of critical habitat for the species in Bell and Williamson Counties, Texas. The total amount of critical habitat we are proposing for both salamanders has increased by approximately 116 ac (47 ha). The reasons for this increase are the addition of a new occupied site for the Salado salamander and refined mapping of previously proposed critical habitat units based on more precise spring locations.

We also announce the availability of a draft economic analysis (DEA) of the revised proposed designation of critical habitat for the Georgetown and Salado salamanders.

**DATES:** We will accept comments received or postmarked on or before November 16, 2020. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by October 30, 2020. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

**ADDRESSES:** *Written comments:* You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

*http://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2020–0048, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R2–ES–2020–0048, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

*Availability of supporting materials:* For the critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the administrative record and are available at *https://www.fws.gov/southwest/es/AustinTexas/ESA_Sp_Salamanders.html* and at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2020–0048. Any additional tools or supporting information that we may develop for the critical habitat designation will also be available at the Service website set out above, and may also be included in the preamble of this document and/or at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Adam Zerrenner, Field Supervisor, U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Rd., Suite 200, Austin, TX 78758; telephone 512–490–0057. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Executive Summary

*Why we need to publish a rule.* Under the Act, to the maximum extent prudent and determinable, we must designate critical habitat for any species that we determine to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species and designation of critical habitat can only be completed by issuing a rule.

*What this document does.* We are revising and reopening the comment period for our proposed designation of critical habitat for the Georgetown and Salado salamanders. We have determined that designating critical habitat, both subsurface and surface, is both prudent and determinable for the Georgetown and Salado salamanders. In this document, we propose a total of approximately 1,519 acres (ac) (622 hectares (ha)) of subsurface and surface critical habitat for the species in Bell and Williamson Counties, Texas.

*The basis for our action.* Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

*We prepared an economic analysis of the proposed designation of critical habitat.* In order to consider economic impacts, we have prepared an economic analysis for the revised proposed critical habitat designation. We hereby announce the availability of the economic analysis and seek public review and comment.

*We will seek peer review.* In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we are seeking the expert opinions of independent specialists to ensure that our critical habitat proposal is based on scientifically sound data and analyses. We invite these peer reviewers to comment on our specific assumptions and conclusions in this revised proposal to designate critical habitat. Because we will consider all comments and

information we receive during the comment period, our final designation may differ from this proposal.

**Information Requested**

We intend that any final action resulting from this revised proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties during this reopened comment period on our proposed designation of critical habitat for the Georgetown and Salado salamanders that was published in the **Federal Register** on August 22, 2012 (77 FR 50768), revisions to the proposed rule published in the **Federal Register** on January 25, 2013 (78 FR 5385), and this revised proposed rule. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

We request that you provide comments specifically on the critical habitat determination and related economic analysis under Docket No. FWS–R2–ES–2020–0048.

We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(5) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including information to inform the following factors that the regulations identify as reasons why designation of critical habitat may be not prudent:

(a) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(b) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(c) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or

(d) No areas meet the definition of critical habitat.

(6) Specific information on:

(a) The amount and distribution of Georgetown and Salado salamander habitat,

(b) What areas, that were occupied at the time of listing and that contain the physical or biological features essential to the conservation of the species, should be included in the designation and why,

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change, and

(d) What areas not occupied at the time of listing are essential for the conservation of the species. We particularly seek comments:

(i) Regarding whether occupied areas are inadequate for the conservation of the species; and

(ii) Providing specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the conservation of the species.

(7) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(8) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(9) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(10) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(11) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Because we will consider all comments and information we receive during the comment period, our final designation may differ from this proposal. Based on the new information we receive (and any comments on that new information), our final designation may not include all areas proposed, may include some additional areas, and may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion. Such final decisions would be a logical outgrowth of this proposal, as long as: (1) We base the decisions on the best scientific and commercial data available and take into consideration the relevant impacts; (2) we articulate a rational connection between the facts found and the conclusions made, including why we changed our conclusion; and (3) we base removal of any areas on a determination either that the area does not meet the definition of ''critical habitat'' or that the benefits of excluding the area will outweigh the benefits of including it in the designation. You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

If you submitted comments or information on the August 22, 2012, proposed rule (77 FR 50768) or during any other comment period, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning critical habitat will take into consideration all written comments and any additional information we received during previous comment periods as well as the comment period that opened when this proposed rule published.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*.

*Public Hearing*

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulation at 50 CFR 424.16(c)(3).

## Previous Federal Actions

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the Georgetown and Salado salamanders in this document. For more information on the Georgetown and Salado salamanders, their habitat, or previous Federal actions, refer to the final listing rule published in the **Federal Register** on February 24, 2014 (79 FR 10236), which is available online at *http://www.regulations.gov* (at Docket No. FWS–R2–ES–2012–0035).

On August 22, 2012, we proposed to list the Georgetown salamander (*Eurycea naufragia*), Salado salamander (*Eurycea chisholmensis*), Jollyville Plateau salamander (*Eurycea tonkawae*), and Austin blind salamander (*Eurycea waterlooensis*) as endangered species and to designate critical habitat for these species under the Act (77 FR 50768). We proposed to designate approximately 1,031 acres (ac) (423 hectares (ha)) in 14 units located in Williamson County, Texas, as critical habitat for the Georgetown salamander, and approximately 372 ac (152 ha) in 4 units located in Bell County, Texas, as critical habitat for the Salado salamander. That proposal had a 60-day comment period, ending October 22, 2012. We held a public meeting and hearing in Round Rock, Texas, on September 5, 2012, and a second public meeting and hearing in Austin, Texas, on September 6, 2012.

On January 25, 2013, we revised the locations of proposed critical habitat units 2, 3, 5, 8, and 12 for the Georgetown salamander based on new information (78 FR 5385). We reopened the public comment period for 45 days to allow comments on the revisions to the proposed critical habitat and the draft economic analysis.

On August 20, 2013, we extended the deadline for our final listing and critical habitat determination for the Georgetown and Salado salamanders for 6 months due to scientific disagreements regarding conservation status of these species and reopened the comment periods on our August 22, 2012 and January 25, 2013 proposals for 30 days (78 FR 51129). In addition, we announced the availability of new information and reopened those comment periods for an additional 30 days on January 7, 2014 (79 FR 800).

On February 24, 2014, we (1) finalized the listing of the Georgetown and Salado salamanders as threatened species under the Act (79 FR 10236); and (2) proposed a rule under section 4(d) of the Act (a proposed ''4(d) rule'') containing regulations necessary and advisable to provide for the conservation of the Georgetown salamander, with a 60-day public comment period, ending April 25, 2014 (79 FR 10077).

On April 9, 2015, we revised the proposed 4(d) rule for the Georgetown salamander and reopened the public comment period for 30 days, ending May 11, 2015 (80 FR 19050). We finalized the 4(d) rule for the Georgetown salamander on August 7, 2015 (80 FR 47418).

## Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions regarding our proposed listing and critical habitat rule (77 FR 50768; August 22, 2012) from 22 knowledgeable individuals with scientific expertise concerning the hydrology, taxonomy, and ecology that is important to these salamander species. We requested expert opinions from taxonomists specifically to review the proposed rule in light of an unpublished report by Forstner (2012, entire) that questioned the taxonomic validity of the four central Texas salamanders as separate species. We received responses from 13 of the peer reviewers.

During the first comment period, we received some contradictory public comments, and we also found new information relative to the listing determination. For these reasons, we conducted a second peer review on: (1) Salamander demographics, and (2) urban development and stream habitat. During this second peer review, we solicited expert opinions from 20 knowledgeable individuals with expertise in the two areas identified above. We received responses from eight peer reviewers during this second review. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final listing and critical habitat rule. Peer reviewer comments were addressed and incorporated into the final listing rule as appropriate.

Finally, we are seeking peer review for a third time from independent specialists on this revised proposed rule during the open comment period (see **DATES**, above).

## Critical Habitat

### Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Designation also does not allow the government or public to access private lands, nor does designation require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species and summarized in the listing rule. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species.

Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

**Prudency Determination**

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

As discussed in the final listing rule for the Georgetown and Salado salamanders (79 FR 10236; February 24, 2014), there is currently no imminent threat of collection or vandalism identified under Factor B for these species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our final listing rule, we determined that the present or threatened destruction, modification, or curtailment of habitat or range is a threat to the Georgetown and Salado salamanders and that those threats in some way can be addressed by section 7(a)(2) consultation measures. These species occur wholly in the jurisdiction of the United States, and we are able to identify areas that meet the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met and because there are no other circumstances the Secretary has identified for which this designation of critical habitat would be not prudent, we have determined that the designation of critical habitat is prudent for the Georgetown and Salado salamanders.

**Critical Habitat Determinability**

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the Georgetown and Salado salamanders is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where these species are located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the Georgetown and Salado salamanders.

**Changes From Previously Proposed Critical Habitat**

In this revised proposal, we are notifying the public of changes to the proposed critical habitat designation for the Georgetown and Salado salamanders. Based on additional information we received during the comment period on our January 25, 2013, revised proposed critical habitat rule (78 FR 5383) and on research published since 2013, we propose to reassign some critical habitat units previously proposed for the Georgetown salamander to the Salado salamander, expand critical habitat, and refine mapped locations of specific spring sites. In addition, based on public comment, we separated the summary of essential physical or biological features (formerly primary constituent elements) for both salamander species into surface and subsurface habitat categories and added additional details in order to clarify habitat needs of both species. We also propose changes to our description of the physical or biological features essential to the conservation of the species.

Research conducted since our initial proposed critical habitat designation (77 FR 50768; August 22, 2012) assessed population structure, phylogeny, and distribution of multiple *Eurycea* species across the Edwards-Trinity Aquifer of west-central Texas through analyses of genome-wide DNA (Devitt et al. 2019a, entire). The results of this work have significant implications for the distribution of the many central Texas *Eurycea* species, including the Georgetown and Salado salamanders. Salado salamanders from the Salado Creek watershed retained their genetic distinctiveness as a species. Salamanders from the Berry Creek watershed, formerly considered as the Georgetown salamander, were more genetically similar to the Salado salamander and assigned to that species (Devitt et al. 2019a, p. 2,629). This reassignment of populations expands the range of the Salado salamander and reduces the range of the Georgetown salamander to those spring sites south and east of Lake Georgetown in the North and Middle Forks of the San Gabriel River watershed (Devitt et al. 2019a, p. 2,629). A single salamander collected from Georgetown Springs, long considered as the Georgetown salamander, was more genetically similar to the Jollyville Plateau salamander and assigned to that species (Devitt et al. 2019a, p. 2,629). This Jollyville Plateau salamander population may no longer be extant, as salamanders have not been observed at Georgetown Springs since 1991 (Devitt et al. 2019a, p. 2,629). In summation, this information changed our understanding of current ranges of both species, with the current range of the Georgetown salamander considered as south and east of Lake Georgetown in the North and Middle Forks of the San Gabriel River watershed, and the Salado salamander occurring north of Lake Georgetown to the Salado Creek watershed (Devitt et al. 2019a, p. 2,629).

Based on analyses from Devitt et al. (2019a, p. 2,629), Units 1, 2, 3, and 5 of previously proposed critical habitat for the Georgetown salamander are now assigned to the Salado salamander. Researchers, including Devitt et al. (2019b, pp. 4, 13), have not genetically assessed salamanders from previously proposed critical habitat Unit 4, Walnut Spring for the Georgetown salamander. Walnut Spring is located north of Lake Georgetown and west of Twin Springs, a site sampled by Devitt et al. (2019b, pp. 13–14) and assigned to the Salado salamander rather than the Georgetown

salamander. Given Walnut Spring's location north of Lake Georgetown, we consider that spring as a site inhabited by the Salado salamander. We propose to treat Walnut Spring as a critical habitat unit for the Salado salamander and not the Georgetown salamander, with no change in amount of critical habitat at Walnut Spring.

Analyses by Devitt et al. (2019a, p. 2,629) further indicate that the *Eurycea* population at Georgetown Springs, previously assigned to the Georgetown salamander (Chippindale et al. 2000), should instead be assigned to the Jollyville Plateau salamander. This site would represent the northern-most record of the Jollyville Plateau salamander in Williamson County. We propose to remove Georgetown Springs, previously proposed as Unit 14 (San Gabriel Springs Unit) of critical habitat for the Georgetown salamander, from further consideration in this proposed rule given the site is now recognized as occupied by the Jollyville Plateau salamander (Devitt et al. 2019a, p. 2,629).

Based on additional information we received during the comment period on our January 25, 2013, publication (78 FR 5383), we propose to expand the extent of surface critical habitat for both the Georgetown and Salado salamanders. In the August 22, 2012, proposed rule (77 FR 50768), surface critical habitat was delineated by starting with the cave or spring point locations that are occupied by the salamanders and extending a line downstream 164 feet (ft) (50 meters (m)), as this was the farthest a salamander has been observed from a spring outlet. However, we are revising the proposed surface critical habitat to include 262 ft (80 m) of stream habitat upstream and downstream from known salamander sites. This revision is based on a study completed by Bendik et al. (2016, p. 9) that found Jollyville Plateau salamander movement occurring up to 262 ft (80 m) from a spring outlet in a single year and the presence of the physical or biological features essential to the conservation of the species in the unit. Due to their similar life histories, this knowledge was applied to the Georgetown and Salado salamanders. Because the surface designation overlays, or is contained within, the subsurface critical habitat, this expansion did not increase the total acreage of critical habitat for either species.

An additional observation from Bendik et al. (2016, p. 9) at Bull Creek in Travis County provided evidence that Jollyville Plateau salamanders can travel up to 1,640 ft (500 m) from a spring outlet over multiple years. However, the unique hydrology where that observation was made leads us to conclude that it should not be extrapolated to the Georgetown and Salado salamanders. The area of Bull Creek where this particular observation was made is known for its alluvial deposits (COA 2012, p. 6), which discharge spring water through non-obvious seeps, instead of open springheads (SWCA 2012, p. 77). This type of hydrology seems to create suitable habitat for salamanders along long stretches of streams, rather than a short stretch of springwater-influenced habitat following an open spring outlet (Bendik 2013, pers. comm.). We have no information indicating that any Georgetown or Salado salamander sites function in the same manner as these Bull Creek alluvial resurgence areas. As currently known, Georgetown and Salado salamanders do not have access to the same extent or nature of aquatic surface habitat as the Jollyville Plateau salamander (Pierce at al. 2010, pp. 14–15). Therefore, we conclude that the 1,640 ft (500 m) distance traveled by a Jollyville Plateau salamander is an observation unique to the hydrological setting and does not apply to the Georgetown or Salado salamander sites.

New information we received during the comment period on our January 25, 2013, publication (78 FR 5383) identified new Georgetown salamander populations and provided additional data that allowed critical habitat units to be mapped more precisely. As critical habitat units were shifted from the Georgetown salamander to the Salado salamander, based on Devitt et al. (2019, entire), critical habitat units for both species were re-numbered. New locations for Salado salamander were also discovered through sampling efforts after January 25, 2013. Georgetown and Salado salamanders are restricted to subterranean spaces in aquifers and on the surface to springs and associated outflow where groundwater emerges from the underlying aquifer emerges. They are not capable of unaided, long-distance surface dispersal between isolated springs given their aquatic life history. Most springs in Bell and Williamson counties, and their underlying aquifer connections, are historical landscape features that predate European settlement of the North American continent (Brune 1981, pp. 65–69, 473–476). Given their limited mobility, and the long-term presence of springs across this landscape, both species certainly occupied these additional locations at the time of listing in 2014 (79 FR 10235). Springs within the Robertson Springs complex, occupied by the Salado salamander, were also mapped to a greater level of detail. We, therefore, propose the following additions and adjustments to specific critical habitat units for these salamander species.

Revision of the Hogg Hollow Spring unit of critical habitat for the Georgetown salamander involves the addition of a new location 1,207 ft (368 m) southeast of Hogg Hollow Spring. As the subsurface habitat of these two locations overlapped, we merged them into one critical habitat unit. Formerly critical habitat Unit 6, the Hogg Hollow Spring unit is renumbered as critical habitat Unit 2 for the Georgetown salamander. We also added an additional Georgetown salamander location (Garey Ranch Spring) 3.4 miles (mi) (5.4 kilometers (km)) southwest of Shadow Canyon Spring.

Revision of the IH–35 Unit (Unit 4) of critical habitat for the Salado salamander includes finer-scale mapping of spring openings within this unit and the addition of new locations for the species at Anderson Spring and Side Spring (Diaz and Montagne 2017, p. 6). A new location for the Salado salamander was also identified at King's Garden Main Spring (Unit 5) by Cambrian (2018, pp. 5–6). Individuals from this site were not sampled by Devitt et al. (2019a, entire), but the site's location north of Lake Georgetown places it within the current range of the Salado salamander defined by Devitt et al. (2019a, p. 2,629). We moved the boundaries of critical habitat at Bat Well Cave (formerly Georgetown salamander critical habitat Unit 3 and renumbered as Salado salamander critical habitat Unit 10) approximately 328 ft (100 m) to the northeast, based on information that stated this is where salamanders were found in the cave underground (Hunter and Russell 1993, p. 7–8). We also re-evaluated Cobbs Well and concluded that this location is part of the same population of Salado salamanders (formerly Georgetown salamanders) as Cobbs Springs rather than its own separate subsurface population, due to its proximity to Cobbs Springs (within the 984-ft (300-m) subsurface habitat of Cobbs Springs). We, therefore, removed Cobbs Well as a separate occupied location from proposed Salado salamander critical habitat Unit 6 (formerly Georgetown salamander critical habitat Unit 1), reducing the subsurface critical habitat acreage for this unit from 83 ac (34 ha) to 68 ac (28 ha). Cobbs Well is still contained within Unit 6 for the Salado salamander.

For the Georgetown salamander, these proposed revisions decrease the total

proposed critical habitat designation by five units and approximately 300 ac (124 ha). The total number of proposed critical habitat units, landownership by type, and size of the proposed critical habitat units for the Georgetown salamander are presented in Table 1, below.

For the Salado salamander, these proposed revisions increase the total proposed critical habitat designation by six units and approximately 415 ac (171 ha). The total number of proposed critical habitat units, landownership by type, and size of the proposed critical habitat units for the Salado salamander are presented in Table 2, below.

The total amount of critical habitat we are proposing for both salamanders has increased by approximately 116 ac (47 ha). The reasons for this increase are the addition of a new occupied site for the Salado salamander and refined mapping of previously proposed critical habitat units based on more precise spring locations.

**Physical or Biological Features Essential to the Conservation of the Species**

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species. In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Based on public comment, we separated the summary of essential physical or biological features (formerly primary constituent elements) for these salamander species into surface and subsurface habitat categories and added additional details in order to clarify habitat needs of both species. We derive the specific physical or biological features essential to the conservation of the Georgetown and Salado salamanders from studies of the species' habitat, ecology, and life history as described in the Critical Habitat section of the proposed rule to designate critical habitat published in the **Federal Register** on August 22, 2012 (77 FR 50768), and in the information presented below. Additional information can be found in the final listing rule for the Georgetown and Salado salamanders (79 FR 10236; February 24, 2014).

Observational and experimental studies on the habitat requirements of Georgetown and Salado salamanders are rare. In the field of aquatic ecotoxicology, it is common practice to apply the results of experiments on common species to other species that are of direct interest (Caro *et al.* 2005, p. 1,823). In addition, the field of conservation biology is increasingly relying on information about surrogate species to predict how related species will respond to stressors (for example, see Caro *et al.* 2005 pp. 1,821–1,826; Wenger 2008, p. 1,565). In instances where information was not available for the Georgetown and Salado salamander specifically, we have provided references for studies conducted on similarly related species, such as the Jollyville Plateau salamander and Barton Springs salamander (*Eurycea sosorum*), which occur within the central Texas area, and other salamander species that occur in other parts of the United States. The similarities among these species may include: (1) A clear systematic (evolutionary) relationship (for example, members of the Family Plethodontidae); (2) shared life-history attributes (for example, the lack of metamorphosis into a terrestrial form); (3) similar morphology and physiology (for example, the lack of lungs for respiration and sensitivity to environmental conditions); (4) similar prey (for example, small invertebrate species); and (5) similar habitat and ecological requirements (for example, dependence on aquatic habitat in or near springs with a rocky or gravel substrate). Depending on the amount and variety of characteristics in which one salamander species can be analogous to another, we used these similarities as a basis to infer further parallels in what Georgetown and Salado salamanders require from their habitat. We have determined that the Georgetown and Salado salamanders require the physical or biological features described below.

*Space for Individual and Population Growth and for Normal Behavior*

Georgetown and Salado Salamanders

The Georgetown salamander occurs in wetted caves and where water emerges from the ground as a spring-fed stream. The Salado salamander occurs where water emerges from the ground as a spring-fed stream. Within the spring ecosystem, salamanders' proximity to the springhead is presumed important because of the appropriate stable water chemistry and temperature, substrate, and flow regime. *Eurycea* salamanders, which includes Georgetown and Salado salamanders, are rarely found more than 66 ft (20 m) from a spring source (TPWD 2011, p. 3). Georgetown salamanders have been found within 164 ft (50 m) of a spring opening (Pierce *et al.* 2011a, p. 4). However, they are most abundant within the first 16 ft (5 m) (Pierce *et al.* 2010, p. 294) of a spring opening. Pierce *et al.* (2013, p. 2) found little movement of Georgetown salamanders within two spring sites, but their study limited the search area to the first 92 ft (28 m) of the spring run. However, Jollyville Plateau salamanders, a closely related species, have been found up to 262 ft (80 m) both upstream and downstream

from a spring outlet (Bendik et al. 2016, p. 9). Bendik et al. (2016, p. 9) demonstrates that *Eurycea* salamanders, such as the Jollyville Plateau salamander, in central Texas can travel greater distances from a discrete spring opening than previously thought, including upstream areas, if suitable habitat is present.

Georgetown and Salado salamanders likely use the subterranean aquifer for habitat throughout the year, similar to other *Eurycea* species (Bendik and Gluesenkamp 2012, pp. 4–5; Bendik et al. 2013, pp. 10–12, 15; Bendik 2017, p. 5,013; Diaz and Bronson-Warren 2018, p. 11; Devitt et al. 2019a, p. 2,625). Morphological forms of Georgetown salamander with cave adaptations have been found at two caves (TPWD 2011, p. 8), indicating that they spend all of their lives underground at these two locations. We assume that the Salado salamander also uses subsurface areas given recruitment of individuals to the surface from the underlying aquifer, with surface recruitment at one occupied spring opening in Bell County estimated at 0.03 salamanders per day (Diaz and Bronson-Warren 2019, p. 7). Therefore, based on the information above, we identify springs, associated streams, and underground spaces within the Northern Segment of the Edwards Aquifer to be physical or biological features essential for individual and population growth and for normal behavior of the Georgetown and Salado salamanders.

*Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements*

Georgetown and Salado Salamanders

No species-specific dietary study has been completed, but the diet of the Georgetown salamander is presumed to be similar to other *Eurycea* species, consisting of small aquatic invertebrates such as amphipods, copepods, isopods, and insect larvae (reviewed in COA 2001, pp. 5–6). Crustaceans from the Class Ostracoda were the most commonly observed prey item for Salado salamanders (Diaz and Bronson-Warren 2018, pp. 8, 14). Other invertebrates consumed by the Salado salamander included amphipods, aquatic snails, and larvae of mayflies and caddisflies (Diaz and Bronson-Warren 2018, p. 14). Flatworms were found to be the primary food source for the related Barton Springs salamander (Gillespie 2013, p. 5), suggesting that flatworms may also contribute to the diet of the Georgetown and Salado salamanders if present in the invertebrate community.

Georgetown and Salado salamanders are strictly aquatic and spend their entire lives submersed in water from the Northern Segment of the Edwards Aquifer (Pierce *et al.* 2010, p. 296; Diaz and Bronson-Warren 2019, p. 7). These salamanders, and the prey that they feed on, require water sourced from the Edwards Aquifer at sufficient flows (quantity) to meet all of their physiological requirements (TPWD 2011, p. 8). This water should be flowing and unchanged in chemistry, temperature, and volume from natural conditions. Normal water temperature at two relatively undisturbed Georgetown salamander sites ranged from 64.1 to 73.1 degrees Fahrenheit (°F) (17.9 to 22.9 degrees Celsius (°C)) throughout the year (Pierce 2012, pp. 7–8). Concentrations of contaminants should be below levels that could exert direct lethal or sublethal effects (such as effects to reproduction, growth, development, or metabolic processes), or indirect effects (such as effects to the Georgetown and Salado salamanders' prey base).

Edwards Aquifer *Eurycea* species are adapted to a lower ideal range of oxygen saturations compared to other salamanders (Turner 2009, p. 11). However, *Eurycea* salamanders need dissolved oxygen concentrations to be above a certain threshold, as the related Barton Springs salamander demonstrates declining abundance with declining dissolved oxygen levels (Turner 2009, p. 14). In addition, low dissolved oxygen concentrations (below 4.5 milligrams per liter (mg/L)) resulted in a number of physiological effects in the related San Marcos salamander including decreased metabolic rates and decreased juvenile growth rates (Woods *et al.* 2010, p. 544). Georgetown salamander sites are characterized by high levels of dissolved oxygen, typically 6 to 8 mg/L (Pierce and Wall 2011, p. 33). Therefore, we presume that the dissolved oxygen level of water is important to the Georgetown and Salado salamanders for respiratory function.

The conductivity of water is also important to salamander physiology. Increased conductivity is associated with increased water contamination and decreased *Eurycea* abundance (Willson and Dorcas 2003, pp. 766–768; Bowles *et al.* 2006, pp. 117–118). The lower limit of observed conductivity in developed Jollyville Plateau salamander sites where salamander densities were lower than undeveloped sites was 800 micro Siemens per cm (µS/cm) (Bowles *et al.* 2006, p. 117). Salamanders were significantly more abundant at undeveloped sites where water conductivity averaged 600 µS/cm (Bowles *et al.* 2006, p. 117). Because of their similar physiology to the Jollyville Plateau salamander, we presume that the Georgetown and Salado salamanders will have a similar response to elevated water conductance. Normal water conductance at a relatively undisturbed Georgetown salamander site ranges from 604 to 721 µS/cm throughout the year (Pierce *et al.* 2010, p. 294). Although one laboratory study on the related San Marcos salamander demonstrated that conductivities up to 2,738 µS/cm had no measurable effect on adult activity (Woods and Poteet 2006, p. 5), it remains unclear how elevated water conductance might affect juveniles or the long-term health of salamanders in the wild. In the absence of better information on the sensitivity of salamanders to changes in conductivity (or other contaminants) in the wild, it is reasonable to presume that salamander survival, growth, and reproduction will be most successful when water quality is unaltered from natural aquifer conditions.

Therefore, based on the information above, we identify aquatic invertebrates and water from the Northern Segment of the Edwards Aquifer, including adequate dissolved oxygen concentration of 6 to 8 mg/L, water conductance of 604 to 721 µS/cm, and water temperature of 64.1 to 73.1 °F (17.9 to 22.9 °C), to be physical or biological features essential for the nutritional and physiological requirements of the Georgetown and Salado salamanders.

*Cover or Shelter*

Georgetown and Salado Salamanders

Similar to other *Eurycea* salamanders in central Texas, Georgetown and Salado salamanders move an unknown depth into the interstitial spaces (empty voids between rocks) within the substrate, using these spaces for foraging habitat and cover from predators (Cole 1995, p. 24; Pierce and Wall 2011, pp. 16–17). These spaces should have minimal sediment, as sediment fills interstitial spaces, eliminating resting places and also reducing habitat of the prey base (small aquatic invertebrates) (O'Donnell *et al.* 2006, p. 34).

Georgetown and Salado salamanders have been observed under rocks, leaf litter, woody debris, and other cover objects (Pierce *et al.* 2010, p. 295; Gluesenkamp 2011a, TPWD, pers. comm.). Georgetown salamanders appear to prefer large rocks over other cover objects (Pierce *et al.* 2010, p. 295), which is consistent with other studies on *Eurycea* habitat (Bowles *et al.* 2006, pp. 114, 116). Although no study has

demonstrated the substrate preference of the Salado salamander, we presume that this species prefers large rocks over other cover objects, similar to other closely related *Eurycea* salamanders. Larger rocks provide more suitable interstitial spaces for foraging and cover.

If springs stop flowing and the surface habitat dries up, Jollyville Plateau salamanders recede with the water table and persist in groundwater refugia until surface flow returns (Bendik 2011a, p. 31). Access to refugia allows populations some resiliency against drought events. Due to the similar life history and habitats of the Georgetown, Salado, and Jollyville Plateau salamanders, we presume that access to subsurface refugia for shelter during drought is also important for the Georgetown and Salado salamanders.

Therefore, based on the information above, we identify rocky substrate, consisting of boulder, cobble, and gravel, with interstitial spaces that have minimal sediment, and access to the subsurface groundwater table to be physical or biological features essential for the cover and shelter for these species.

*Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring*

Georgetown and Salado Salamanders

Little is known about the reproductive habits of these species in the wild. However, the Georgetown and Salado salamanders are fully aquatic, spending all of their life cycles in aquifer and spring waters. Eggs of central Texas *Eurycea* species are rarely seen on the surface, so it is widely assumed that eggs are laid underground (Gluesenkamp 2011a, TPWD, pers. comm.; Bendik 2011b, COA, pers. comm.).

Therefore, based on the information above, we identify access to subsurface or subterranean, water-filled voids of varying sizes (*e.g.,* caves, conduits, fractures, and interstitial spaces) to be a physical or biological feature essential for breeding and reproduction for this species.

*Summary of Essential Physical or Biological Features for the Georgetown and Salado Salamanders*

We derive the specific physical or biological features essential for the Georgetown and Salado salamanders from studies of these species' habitat, ecology, and life history, as described above. We have determined that the following physical or biological features are essential to the conservation of the Georgetown and Salado salamanders:

Georgetown Salamander

(1) For surface habitat:

(A) *Water from the Northern Segment of the Edwards Aquifer.* Groundwater issuing to the surface from the underlying aquifer is similar to natural aquifer conditions as it discharges from natural spring outlets. Concentrations of water quality constituents and contaminants should be below levels that could exert direct lethal or sublethal effects (such as effects to reproduction, growth, development, or metabolic processes), or indirect effects (such as effects to the Georgetown salamander's prey base). The Service is unaware of any studies that specifically define the water quality constituents or contaminants that would have deleterious effects on these salamanders. Hydrologic regimes similar to the historical pattern of the specific sites are present, with at least some surface flow during the year. The water chemistry of aquatic surface habitats is similar to natural aquifer conditions, with temperatures from 64.1 to 73.1 °F (17.9 to 22.8 °C), dissolved oxygen concentrations from 6 to 8 mg/L, and specific water conductance from 604 to 721 μS/cm.

(B) *Rocky substrate with interstitial spaces.* Rocks in the substrate of the salamander's surface aquatic habitat are large enough to provide salamanders with cover, shelter, and foraging habitat. The substrate and interstitial spaces have minimal sedimentation.

(C) *Aquatic invertebrates for food.* The spring environment supports a diverse aquatic invertebrate community that includes crustaceans, insects, and flatworms.

(D) *Subterranean aquifer.* Access to the subsurface water table exists to provide shelter, protection, and space for reproduction. This access can occur in the form of large conduits that carry water to the spring outlet or porous voids between rocks in the streambed that extend down into the water table.

(2) For subsurface habitat:

(A) *Water from the Northern Segment of the Edwards Aquifer.* Groundwater quality is similar to natural aquifer conditions. Concentrations of water quality constituents and contaminants should be below levels that could exert direct lethal or sublethal effects (such as effects to reproduction, growth, development, or metabolic processes), or indirect effects (such as effects to the Georgetown salamander's prey base). Hydrologic regimes similar to the historical pattern of the specific sites are present, with continuous flow. The water chemistry is similar to natural aquifer conditions, with temperatures from 64.1 to 73.1 °F (17.9 to 22.8 °C), dissolved oxygen concentrations from 6 to 8 mg/L, and specific water conductance from 604 to 721 μS/cm.

(B) *Subsurface spaces.* Voids between rocks underground are large enough to provide salamanders with cover, shelter, and foraging habitat. These spaces have minimal sedimentation.

(C) *Aquatic invertebrates for food.* The habitat supports an aquatic invertebrate community that includes crustaceans, insects, or flatworms.

Salado Salamander

(1) For surface habitat:

(A) *Water from the Northern Segment of the Edwards Aquifer.* Groundwater quality issuing to the surface from the underlying aquifer is similar to natural aquifer conditions as it discharges from natural spring outlets. Concentrations of water quality constituents and contaminants are below levels that could exert direct lethal or sublethal effects (such as effects to reproduction, growth, development, or metabolic processes), or indirect effects (such as effects to the Salado salamander's prey base). Hydrologic regimes similar to the historical pattern of the specific sites are present, with at least some surface flow during the year. The water chemistry of aquatic surface habitats is similar to natural aquifer conditions, with temperatures from 64.1 to 73.1 °F (17.9 to 22.8 °C), dissolved oxygen concentrations from 6 to 8 mg/L, and specific water conductance from 604 to 721 μS/cm.

(B) *Rocky substrate with interstitial spaces.* Rocks in the substrate of the salamander's surface aquatic habitat are large enough to provide salamanders with cover, shelter, and foraging habitat. The substrate and interstitial spaces have minimal sedimentation.

(C) *Aquatic invertebrates for food.* The spring environment is capable of supporting a diverse aquatic invertebrate community that includes crustaceans, insects, and flatworms.

(D) *Subterranean aquifer.* Access to the subsurface water table exists to provide shelter, protection, and space for reproduction. This access can occur in the form of large conduits that carry water to the spring outlet or porous voids between rocks in the streambed that extend down into the water table.

(2) For subsurface habitat:

(A) *Water from the Northern Segment of the Edwards Aquifer.* Groundwater quality is similar to natural aquifer conditions. Concentrations of water quality constituents and contaminants are below levels that could exert direct lethal or sublethal effects (such as effects to reproduction, growth,

development, or metabolic processes), or indirect effects (such as effects to the Salado salamander's prey base). Hydrologic regimes similar to the historical pattern of the specific sites are present, with continuous flow. The water chemistry is similar to natural aquifer conditions, with temperatures from 64.1 to 73.1 °F (17.9 to 22.8 °C), dissolved oxygen concentrations from 6 to 8 mg/L, and specific water conductance from 604 to 721 µS/cm.

(B) *Subsurface spaces.* Voids between rocks underground are large enough to provide salamanders with cover, shelter, and foraging habitat. These spaces have minimal sedimentation.

(C) *Aquatic invertebrates for food.* The habitat is capable of supporting an aquatic invertebrate community that includes crustaceans, insects, or flatworms.

**Special Management Considerations or Protection**

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of this species may require special management considerations or protection to reduce the following threats: Water quality degradation from contaminants, alteration to natural flow regimes, and physical habitat modification.

The areas proposed for critical habitat include both surface and subsurface critical habitat components. The surface critical habitat includes the spring outlets and outflow up to the high water line and 150 ft (80 m) of downstream habitat, but does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas); nor does it include upland habitat adjacent to streams. However, the subterranean aquifer may extend below such structures beneath the surface habitat. The subsurface critical habitat includes underground features in a circle with a radius of 984 ft (300 m) around the springs. Most of our proposed critical habitat is a subsurface designation and only includes the physical area beneath any buildings on the surface.

We detailed threats to surface and subsurface habitats in Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range of the final listing rule for the Georgetown and Salado salamanders (79 FR 10235). The Georgetown and Salado salamanders are sensitive to modification of surface (*i.e.,* spring openings and outflow) and subsurface habitats. Due to the connectivity between the surface and subsurface habitats, an impact to one will affect the other. Examples of surface habitat modifications may include (but are not limited to) damage to spring openings, sedimentation due to construction activities, and installation of impoundments. Examples of impacts to subsurface habitat may include (but are not limited to) pipeline construction, replacement, and maintenance, excavation for construction or quarrying, and groundwater depletion that can reduce spring flow. The depth of the subsurface habitat will vary from site to site.

For these salamanders, special management considerations or protections may be needed to address identified threats. Management activities that could ameliorate threats to surface habitat include (but are not limited to): (1) Protecting the quality of cave and spring water by implementing comprehensive programs to control and reduce point sources and non-point sources of pollution throughout the Northern Segment of the Edwards Aquifer; (2) minimizing the likelihood of pollution events or surface runoff from existing and future development that would affect groundwater quality; (3) protecting groundwater and spring flow quantity (for example, by implementing water conservation and drought contingency plans throughout the Northern Segment of the Edwards Aquifer); (4) protecting water quality and quantity from present and future quarrying; (5) excluding cattle and feral hogs from spring openings and outflow through fencing to protect spring habitats from damage; and (6) fencing and signage to protect spring habitats from human vandalism. Some of the management activities listed above, such as those that protect spring flow and groundwater quality, protect both surface and subsurface habitats, as these are interconnected.

Additional management activities that could ameliorate threats that are specific to subsurface habitat include (but are not limited to): (1) The development and implementation of void mitigation plans for construction projects to prevent impacts to salamanders in the event of severed aquifer conduits or interrupted groundwater flow paths; (2) site-specific plans developed by geotechnical engineers to prevent changes to subsurface water flow from construction activities; (3) the presence of environmental monitors during construction, excavation, and drilling activities to monitor spring flow; and (4) post-construction monitoring of spring flow. Because subsurface habitat differs with regard to groundwater flow paths, depth, and amount of water-bearing rocks with voids that can support salamanders, management and mitigation plans to ameliorate threats will need to be developed on a site-specific basis.

**Criteria Used To Identify Critical Habitat**

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. During our preparation for designating critical habitat for the two salamander species, we reviewed: (1) Data for historical and current occurrence; (2) information pertaining to habitat features essential for the conservation of these species; and (3) scientific information on the biology and ecology of the two species. We have also reviewed a number of studies and surveys of the two salamander species that confirm historical and current occurrence of the two species including, but not limited to, Sweet (1978; 1982), Russell (1993), Warton (1997), COA (2001), Chippindale et al. (2000), Hillis et al. (2001), and Devitt et al. (2019). Finally, salamander site locations and observations were verified with the aid of salamander biologists, museum collection records, and site visits.

We are not currently proposing to designate any additional areas outside the geographical area occupied by these species because we have determined that occupied areas are sufficient to conserve the Georgetown and Salado salamanders, although we acknowledge that other areas, such as the recharge zone of the aquifers supporting salamander locations, are very important to the conservation of the species. This critical habitat designation delineates the habitat that is physically occupied and used by the species rather than delineating all land or aquatic areas that influence the species. We also recognize that there may be additional occupied areas outside of the areas designated as critical habitat that we are not aware of at the time of this designation that may be necessary for

the conservation of the species. For the purpose of designating critical habitat for the Georgetown and Salado salamanders, we define an area as occupied based upon the reliable observation of a salamander species by a knowledgeable scientist. It is very difficult to determine whether a salamander population has been extirpated from a spring site due to these species' ability to occupy the inaccessible subsurface habitat. We, therefore, consider any site that had a salamander observation occupied at the time of listing to be currently occupied, unless that spring or cave site had been destroyed.

Based on our review, the critical habitat areas (described below) are within the geographical range occupied by at least one of the two salamander species and meet the definition of critical habitat. The true extent to which the subterranean populations of these species exist below ground away from outlets of the spring system is unknown because the hydrology of central Texas is very complex and information on the hydrology of specific spring sites is largely unknown. We will continue to seek information to increase our understanding of spring hydrology and salamander underground distribution to inform conservation efforts for these species. At the time of this proposed critical habitat rule, the best scientific evidence available suggests that a population of groundwater-dependent *Eurycea* salamanders can extend at least 984 ft (300 m) from the spring opening through underground conduits or voids between rocks. For example, the Austin blind salamander is believed to occur underground throughout the entire Barton Springs complex (Dries 2011, pers. comm.). The spring habitats used by salamanders of the Barton Springs complex are not connected on the surface, so the Austin blind salamander population extends at least 984 feet (ft) (300 meters (m)) underground, as this is the approximate distance between the farthest two outlets within the Barton Springs complex known to be occupied by the species.

We are proposing to designate critical habitat in areas that we have determined are occupied by one of the two salamanders and contain physical or biological features essential for the conservation of the species. We delineated both surface and subsurface critical habitat components. As previously stated, a Jollyville Plateau salamander was observed to have traveled up to 1,640 ft (500 m) after multiple years in Bull Creek (Bendik et al. 2016, p. 9). However, the surface critical habitat component was delineated by starting with the spring point locations that are occupied by the salamanders and extending a line upstream and downstream 262 ft (80 m). This was the furthest distance a *Eurycea* salamander has been observed from a spring outlet in a single year (Bendik et al. 2016, p. 9) and is likely a more reasonable distance for salamander's in common hydrological settings. We applied this maximum distance to account for the potential movement and surface habitat use of Georgetown and Salado salamanders upstream and downstream of spring openings. It is reasonable to consider the downstream and upstream habitat occupied based on the dispersal capabilities observed in individuals of very similar species. When determining surface critical habitat boundaries, we were not able to delineate specific stream segments on the map due to the small size of the streams. Therefore, we drew a circle with a 262-ft (80-m) radius representing the extent the surface population of the site is estimated to exist upstream and downstream. This circle does not include upland habitat adjacent to streams. The surface critical habitat includes the spring outlets and outflow up to the ordinary high water mark (the average amount of water present in nonflood conditions, as defined in 33 CFR 328.3(e)) and 262 ft (80 m) of upstream and downstream habitat (to the extent that this habitat is ever present), including the dry stream channel during periods of no surface flow. We acknowledge that some spring sites occupied by one of the two salamanders are the start of the watercourse, and upstream habitat does not exist for these sites. The surface habitat we are designating as critical habitat does not include human made structures (such as buildings, aqueducts, runways, roads, and other paved areas) within this circle, nor does it include upland habitat adjacent to streams.

We delineated the subsurface critical habitat unit boundaries by starting with the cave or spring point locations that are occupied by the salamanders. Depth to subsurface habitat will vary from site to site based on local geology. From these cave or spring points, we delineated an area with a 984-ft (300-m) radius to create the polygons that capture the extent to which we believe the salamander populations exist through underground habitat. This radial distance comes from observations of the Austin blind salamander, which is believed to occur underground throughout the entire Barton Springs complex (Dries 2011, COA, pers. comm.). The Austin blind salamander is a reasonable surrogate for Salado and Georgetown salamanders as it also inhabits subsurface, water-filled voids in the underlying Edwards Aquifer (Hillis et al. 2001, p. 23). The spring outlets used by salamanders of the Barton Springs complex are not connected on the surface, so the Austin blind salamander population extends a horizontal distance of at least 984 ft (300 m) underground, as this is the approximate distance between the farthest two outlets within the Barton Springs complex known to be occupied by the species. This distance was applied to the Georgetown and Salado salamanders given their reliance on subsurface aquifer habitats (Bendik and Gluesenkamp 2012, pp. 4–5; Bendik et al. 2013, pp. 10–12, 15; Bendik 2017, p. 5,013; Diaz and Bronson-Warren 2018, p. 11; Devitt et al. 2019, p. 2,625). Polygons that were within 98 ft (30 m) of each other were merged together as these areas have the potential to be connected underground (Devitt et al. 2019a, pp. 2,629–2,630). Each merged polygon was then revised by removing extraneous divots or protrusions that resulted from the merge process.

Developed areas of surface habitat, such as lands covered by buildings, pavement, and other structures, lack physical or biological features for the Georgetown and Salado salamanders. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (*i.e.,* currently occupied) and that contain all of the physical or biological features that are essential to support life-history processes of the species.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat

designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0048, and on our internet site *https://www.fws.gov/southwest/es/AustinTexas/ESA_Sp_Salamanders.html.*

**Proposed Critical Habitat Designation**

In Tables 1 and 2 below, we present the revised proposed critical habitat units for the Georgetown and Salado salamanders. All units are considered occupied by the relevant species at the time of listing. We also provide revised unit descriptions for all Georgetown and Salado salamander critical habitat units. The critical habitat areas we describe below constitute our current best assessment of subsurface and surface areas that meet the definition of critical habitat for the Georgetown and Salado salamanders. During periods of drought or dewatering on the surface in and around spring sites, access to the subsurface water table must be provided for shelter and protection. Surface critical habitat includes the spring outlets and outflow up to the high water line and 262 ft (80 m) of downstream habitat, but does not include terrestrial habitats or humanmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule or land adjacent to streams; however, the subterranean aquifer may extend below such structures. The subterranean critical habitat includes underground features in a circle with a radius 984 ft (300 m) around the springs.

TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR THE GEORGETOWN SALAMANDER

| Critical habitat unit | Land ownership by type | Size of unit in acres (hectares) |
|---|---|---|
| 1. Water Tank Cave Unit | Private | 68 (28) |
| 2. Hogg Hollow Spring Unit | Private, Federal | 122 (49) |
| 3. Cedar Hollow Spring Unit | Private | 68 (28) |
| 4. Lake Georgetown Unit | Federal, Private | 134 (54) |
| 5. Buford Hollow Spring Unit | Federal, Private | 68 (28) |
| 6. Swinbank Spring Unit | City, Private | 68 (28) |
| 7. Avant Spring Unit | Private | 68 (28) |
| 8. Shadow Canyon Spring Unit | City, Private | 68 (28) |
| 9. Garey Ranch Spring Unit | Private | 68 (28) |
| Total | | 732 (299) |

**Note:** Area sizes may not sum due to rounding. Area estimates reflect all land within critical habitat unit boundaries.

TABLE 2—PROPOSED CRITICAL HABITAT UNITS FOR THE SALADO SALAMANDER

| Critical habitat unit | Land ownership by type | Size of unit in acres (hectares) |
|---|---|---|
| 1. Hog Hollow Spring Unit | Private | 68 (28) |
| 2. Solana Spring Unit | Private | 68 (28) |
| 3. Cistern Spring Unit | Private | 68 (28) |
| 4. IH–35 Unit | Private, State, City | 175 (71) |
| 5. King's Garden Main Spring Unit | Private | 68 (28) |
| 6. Cobbs Spring Unit | Private | 68 (28) |
| 7. Cowan Creek Spring Unit | Private | 68 (28) |
| 8. Walnut Spring Unit | Private, County | 68 (28) |
| 9. Twin Springs Unit | Private, County | 68 (28) |
| 10. Bat Well Cave Unit | Private | 68 (28) |
| Total | | 787 (323) |

**Note:** Area sizes may not sum due to rounding. Area estimates reflect all land within critical habitat unit boundaries.

*Georgetown Salamander*

Critical habitat units proposed for the Georgetown salamander may require special management because of the potential for groundwater pollution from current and future development in the watershed, present operations and future expansion of quarrying activities, depletion of groundwater, and other threats (see *Special Management Considerations or Protection*). All proposed units are occupied by the Georgetown salamander. The proposed designation includes the spring outlets and outflow up to the high water mark and 262 ft (80 m) of upstream and downstream habitat. Units are further delineated by drawing a circle with a radius of 984 ft (300 m) around the spring, representing the extent of the subterranean critical habitat. For cave populations of the Georgetown salamander, the unit is delineated by drawing a circle with a radius of 984 ft (300 m) around the underground location of the salamanders, representing the extent of the proposed subsurface critical habitat.

Unit 1: Water Tank Cave Unit

Unit 1 consists of approximately 68 ac (28 ha) of private land in west-central Williamson County, Texas. A golf course crosses the unit from northwest to southeast, and there are several roads in the eastern part of the unit. A secondary road crosses the extreme southern portion of the unit, and there are residences in the northwestern, southwestern, and west-central portions of the unit. This unit contains Water Tank Cave, which is occupied by the Georgetown salamander. The unit

contains the physical or biological features essential for the conservation of the species.

Unit 2: Hogg Hollow Spring Unit

Unit 2 consists of approximately 122 ac (49 ha) of U.S. Army Corps of Engineers land and private land in Williamson County, Texas. The unit is located south of Lake Georgetown and is mostly undeveloped. The northwestern part of the unit includes Sawyer Park, part of the Lake Georgetown recreation area. This unit contains two springs: Hogg Hollow Spring and Hogg Hollow 2 Spring, which are occupied by the Georgetown salamander. Hogg Hollow Spring is located on Hogg Hollow, and Hogg Hollow 2 Spring is located on an unnamed stream, both tributaries to Lake Georgetown. The unit contains the physical or biological features essential for the conservation of the species.

Unit 3: Cedar Hollow Spring Unit

Unit 3 consists of approximately 68 ac (28 ha) of private land in west-central Williamson County, Texas. A secondary road crosses the extreme southern portion of the unit, and there are residences in the northwestern, southwestern, and west-central portions of the unit. This unit contains Cedar Hollow Spring, which is occupied by the Georgetown salamander. The spring is located on Cedar Hollow, a tributary to Lake Georgetown. The unit contains the physical or biological features essential for the conservation of the species.

Unit 4: Lake Georgetown Unit

Unit 4 consists of approximately 134 ac (54 ha) of Federal and private land in west-central Williamson County, Texas. Part of the unit is the U.S. Army Corps of Engineers' Lake Georgetown property. There are currently no plans to develop the property. There is some control of public access. Unpaved roads are found in the western portion of the unit, and a trail begins in the central part of the unit and leaves the northeast corner. A secondary road crosses the extreme southern portion of the unit, and there are residences in the northwestern, southwestern, and west-central portions of the unit. A large quarry is located a short distance southeast of the unit. This unit includes two springs, Knight (Crockett Gardens) Spring and Cedar Breaks Hiking Trail Spring, which are occupied by the Georgetown salamander. The springs are located on an unnamed tributary to Lake Georgetown. A portion of the northern part of the unit extends under Lake Georgetown. The unit contains the physical or biological features essential for the conservation of the species.

Unit 5: Buford Hollow Spring Unit

Unit 5 consists of approximately 68 ac (28 ha) of Federal and private land in west-central Williamson County, Texas. The unit is located just below the spillway for Lake Georgetown. The U.S. Army Corps of Engineers owns most of this unit as part of Lake Georgetown. The D.B. Wood Road, a major thoroughfare, crosses the eastern part of the unit. The rest of the unit is undeveloped. This unit contains Buford Hollow Springs, which is occupied by the Georgetown salamander. The spring is located on Buford Hollow, a tributary to the North Fork San Gabriel River. The unit contains the physical or biological features essential for the conservation of the species.

Unit 6: Swinbank Spring Unit

Unit 6 consists of approximately 68 ac (28 ha) of City and private land in west-central Williamson County, Texas. The unit is located near River Road south of Melanie Lane. The northern part of the unit is primarily in residential development, while the southern part of this unit is primarily undeveloped. This unit contains Swinbank Spring, which is occupied by the Georgetown salamander. The spring is located just off the main channel of North Fork San Gabriel River. The unit contains the physical or biological features essential for the conservation of the species. The population of Georgetown salamanders in the spring is being monitored monthly as part of the Williamson County Regional HCP's efforts to conserve the species.

Unit 7: Avant Spring Unit

Unit 7 consists of approximately 68 ac (28 ha) of private land in west-central Williamson County, Texas. The northern part of a large quarry is along the southwestern edge of the unit. The rest of the unit is undeveloped. This unit contains Avant's (Capitol Aggregates) Spring, which is occupied by the Georgetown salamander. The spring is close to the streambed of the Middle Fork of the San Gabriel River. The unit contains the physical or biological features essential for the conservation of the species.

Unit 8: Shadow Canyon Spring Unit

Unit 8 consists of approximately 68 ac (28 ha) of City and private land in west-central Williamson County, Texas. The unit is located just south of State Highway 29. This unit contains Shadow Canyon Spring, which is occupied by the Georgetown salamander. The spring is located on an unnamed tributary of South Fork San Gabriel River. The unit contains the essential physical or biological features for the conservation of the species. The unit is authorized for development under the Shadow Canyon HCP. Impacts to the endangered golden-cheeked warbler (*Dendroica chrysoparia*) and Bone Cave harvestman (*Texella reyesi*) are permitted under the Shadow Canyon HCP; however, impacts to Georgetown salamander are not covered under the HCP.

Unit 9: Garey Ranch Spring Unit

Unit 9 consists of approximately 68 ac (28 ha) of private land in Williamson County, Texas. The unit is located north of RM 2243. The unit is mostly undeveloped. A small amount of residential development enters the southern and eastern parts of the unit. This unit contains Garey Ranch Spring, which is occupied by the Georgetown salamander. It is located on an unnamed tributary to the South Fork San Gabriel River. The unit contains the physical or biological features essential for the conservation of the species.

*Salado Salamander*

Critical habitat units proposed for the Salado salamander may require special management because of the potential for groundwater pollution from current and future development in the watershed, present operations and future expansion of quarrying activities, depletion of groundwater, and other threats (see *Special Management Considerations or Protection*). All proposed units are considered to be occupied by the Salado salamander. The proposed designation includes the spring outlets and outflow up to the high water mark and 262 ft (80 m) of upstream and downstream habitat. Units are further delineated by drawing a circle with a radius of 984 ft (300 m) around the spring, representing the extent of the subterranean critical habitat. For cave populations of the Salado salamander, the unit is delineated by drawing a circle with a radius of 984 ft (300 m) around the underground location of the salamanders, representing the extent of the proposed subsurface critical habitat.

Unit 1: Hog Hollow Spring Unit

Unit 1 consists of approximately 68 ac (28 ha) of private land located in southwestern Bell County, Texas. The unit is primarily undeveloped ranch land. This unit contains Hog Hollow Spring, which is occupied by the Salado salamander. The unit is located on a tributary to Rumsey Creek in the Salado Creek drainage and contains the physical or biological features essential

for the conservation of the species. In 2016, the owners of the spring entered into an agreement with The Nature Conservancy for a perpetual conservation easement that provides long-term protection for this site.

Unit 2: Solana Spring Unit

Unit 2 consists of approximately 68 ac (28 ha) of private land located in southwestern Bell County, Texas. The unit is primarily undeveloped ranch land. This unit contains Solana Spring, which is occupied by the Salado salamander. The unit is located on a tributary to Rumsey Creek in the Salado Creek drainage and contains the physical or biological features essential for the conservation of the species. In 2016, the owners of the spring entered into an agreement with The Nature Conservancy for a perpetual conservation easement that provides long-term protection for this site.

Unit 3: Cistern Spring Unit

Unit 3 consists of approximately 68 ac (28 ha) of private land located in southwestern Bell County, Texas, on the same private ranch as Units 1 and 2 for the Salado salamander. The unit is primarily undeveloped ranch land. This unit contains Cistern Spring, which is occupied by the Salado salamander. The unit is located on a tributary to Rumsey Creek in the Salado Creek drainage and contains the physical or biological features essential for the conservation of the species. In 2016, the owners of the spring entered into an agreement with The Nature Conservancy for a perpetual conservation easement that provides long-term protection for this site.

Unit 4: IH–35 Unit

Unit 4 consists of approximately 175 ac (71 ha) of private, State, and City of Salado land located in southwestern Bell County, Texas, in the southern part of the Village of Salado. The unit extends along Salado Creek on both sides of Interstate Highway 35 (IH 35). The IH 35 right-of-way crosses Salado Creek and is owned by the Texas Department of Transportation. The unit is a mixture of residential and commercial properties on its eastern portion, with some undeveloped ranch land in the western part west of IH–35. This unit contains Robertson Springs complex, located on private property. West of IH–35 consists of two springs, Creek Spring and Sam Bass Spring, and five spring openings, Bathtub, Beaver Upper, Beaver Middle, Headwaters, and Maria, occupied by the Salado salamander. East of IH–35, the Downtown Spring complex of Unit 4 contains five springs, Anderson Spring, Big Boiling Spring, Lazy Days Fish Farm, Lil' Bubbly Spring, and Side Spring, which are all located on private property and occupied by the Salado salamander.

The spring habitat within this unit has been modified. In the fall of 2011, the outflow channels and edges of Big Boiling and Lil' Bubbly Spring were reconstructed by a local organization, with large limestone blocks and mortar, to increase human access and visitation. In addition, in response to other activity in the area, the U.S. Army Corps of Engineers issued a cease-and-desist order to the Salado Chamber of Commerce in October 2011, for unauthorized discharge of dredged or fill material that occurred in this area (Brooks 2011, U.S. Corps of Engineers, in litt.). This order was issued in relation to the need for a section 404 permit under the Clean Water Act (33 U.S.C. 1251 *et seq.*). A citation from a Texas Parks and Wildlife Department (TPWD) game warden was also issued in October 2011, due to the need for a sand and gravel permit from the TPWD for work being conducted within TPWD jurisdiction (Heger 2012a, pers. comm.). The citation was issued because the Salado Chamber of Commerce had been directed by the game warden to stop work within TPWD jurisdiction, which they did temporarily, but work started again contrary to the game warden's directive (Heger 2012a, pers. comm.). A sand and gravel permit was obtained on March 21, 2012. The spring run modifications were already completed by this date, but further modifications in the springs were prohibited by the permit. Additional work on the bank upstream of the springs was permitted and completed (Heger 2012b, pers. comm.).

Unit 5: King's Garden Main Spring Unit

Unit 5 consists of approximately 68 ac (28 ha) of private land in northern Williamson County, Texas. The unit is undeveloped land. The unit contains King's Garden Main Spring, which is occupied by the Salado salamander. The surface population of King's Garden Main Spring has been observed at the spring's outlet. The unit contains the physical or biological features essential for the conservation of the species.

Unit 6: Cobbs Spring Unit

Unit 6 consists of approximately 68 ac (28 ha) of private land located in northwestern Williamson County, Texas. The unit is undeveloped land. This unit contains Cobbs Spring, which is occupied by the Salado salamander. Cobbs Springs is located on Cobbs Springs Branch. The subsurface population of Cobbs Spring has been observed in Cobbs Well (Gluesenkamp 2011a, TPWD, pers. comm.), which is located approximately 328 ft (100 m) to the southwest of the spring. The unit contains the physical or biological features essential for the conservation of the species.

Unit 7: Cowan Creek Spring Unit

Unit 7 consists of approximately 68 ac (28 ha) of private land located in west-central Williamson County, Texas. The northern portion of the unit is residential development; the remainder is undeveloped. This unit contains Cowan Creek Spring, which is occupied by the Salado salamander. The spring is located on Cowan Creek. The unit contains the physical or biological features essential for the conservation of the species.

Unit 8: Walnut Spring Unit

Unit 8 consists of approximately 68 ac (28 ha) of private and Williamson County land located in west-central Williamson County, Texas. The western, eastern, and northeastern portions of the unit contain low-density residential development; the southern and north-central portions are undeveloped. The extreme southeastern corner of the unit is part of Williamson County Conservation Foundation's Twin Springs Preserve. This unit contains Walnut Spring, which is occupied by the Salado salamander. The spring is located on Walnut Spring Hollow. The unit contains the physical or biological features essential for the conservation of the species.

Unit 9: Twin Springs Unit

Unit 9 consists of approximately 68 ac (28 ha) of private and Williamson County land located in west-central Williamson County, Texas. The northern portion of the unit contains low-density residential development; the remainder of the unit is undeveloped. The majority of the unit is part of Williamson County Conservation Foundation's Twin Springs Preserve. The preserve is managed by Williamson Conservation Foundation as a mitigation property for the take of golden-cheeked warbler and Bone Cave harvestman under the Williamson County Regional HCP. The preserve habitat will be undeveloped in perpetuity. Salamander populations are monitored, and there is some control of public access. This unit contains Twin Springs, which is occupied by the Salado salamander. The spring is located on Taylor Ray Hollow, a tributary of Lake Georgetown. The unit contains the physical or biological

features essential for the conservation of the species.

Unit 10: Bat Well Cave Unit

Unit 10 consists of approximately 68 ac (28 ha) of private land located in west-central Williamson County, Texas. The western, northern, and southern portion of the unit contains residential development. This unit contains Bat Well Cave, a cave occupied by the Salado salamander. The cave is located in the Cowan Creek watershed. The unit contains the physical or biological features essential to the conservation of the species.

**Effects of Critical Habitat Designation**

*Section 7 Consultation*

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2), is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation, we have listed a new species or designated critical habitat that may be affected by the Federal action, or the action has been modified in a manner that affects the species or critical habitat in a way not considered in the previous consultation. In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinitiate consultation on specific land management plans after we subsequently list a new species or designate new critical habitat. See the regulations for a description of those exceptions.

*Application of the ''Destruction or Adverse Modification'' Standard*

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that the Service may, during a consultation under section 7(a)(2) of the Act, find are likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would physically disturb the surface or subsurface habitat upon which these two salamander species depend. Such activities could include, but are not limited to, channelization, removal of substrate, clearing of vegetation, construction of commercial and residential development, quarrying, and other activities that result in the physical destruction of habitat or the modification of habitat so that it is not suitable for the species.

(2) Actions that would increase the concentration of sediment or contaminants in the surface or subsurface habitat. Such activities could include, but are not limited to, increases in impervious cover in the surface watershed, inadequate erosion controls on the surface and subsurface watersheds, and release of pollutants into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities could alter water conditions to levels that are harmful to the Georgetown and Salado salamanders or their prey and result in direct, indirect, or cumulative adverse effects to these salamander individuals and

their life cycles. Sedimentation can also adversely affect salamander habitat by reducing access to interstitial spaces.

(3) Actions that would deplete the aquifer to an extent that decreases or stops the flow of occupied springs or that reduces the quantity of subterranean habitat used by the species. Such activities could include, but are not limited to, water withdrawals from aquifers, increases in impervious cover over recharge areas, and channelization or other modification of recharge features that would decrease recharge. These activities could dewater habitat or cause reduced water quality to levels that are harmful to one of the two salamanders or their prey and result in adverse effects to their habitat.

**Exemptions**

*Application of Section 4(a)(3) of the Act*

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation.

**Consideration of Impacts Under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

The first sentence in section 4(b)(2) of the Act requires that we take into consideration the economic, national security, or other relevant impacts of designating any particular area as critical habitat. We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

*Consideration of Economic Impacts*

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.''

The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Georgetown and Salado salamanders (Industrial Economics, Incorporated (IEc) 2020, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographic areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening analysis also assesses whether there are units that may incur probable incremental economic impacts as a result of the designation. The screening analysis also assesses whether units are unoccupied by the species and thus may require additional management or conservation efforts as a result of the critical habitat designation for the species; these additional efforts may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM are what we consider our draft economic analysis (DEA) of the proposed critical habitat designation for the Georgetown and Salado salamanders and is summarized in the narrative below.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If

sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Georgetown and Salado salamanders, first we identified, in the IEM dated April 14, 2020, probable incremental economic impacts associated with the following categories of activities: (1) Future stream/river crossings and bridge replacements and maintenance; (2) pipeline construction, replacement, maintenance, or removal; (3) electrical transmission line construction; (4) stream restoration activities for habitat improvement; (5) herbicide and pesticide use along stream banks; (6) irrigation and water supply system installations; (7) livestock management and livestock facilities construction; (8) bank stabilization projects; (9) disaster debris removal; (10) repairs to existing and damaged roads, bridges, utilities, and parks; (11) construction of tornado safe rooms, and demolition of flood-prone structures; (12) return of land to open space in perpetuity; and (13) removal of hazardous fuels in wildland urban interface to reduce the risk of catastrophic wildfire. We considered each industry or category individually. Additionally, we considered whether their activities may have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the Georgetown or Salado salamander are present, Federal agencies already are required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our IEM, we attempted to clarify the distinction between the effects that result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the Georgetown and Salado salamander's critical habitat. Because all of the units we are proposing to designate as critical habitat for the Georgetown and Salado salamanders are occupied, we do not expect that the critical habitat designation will result in any additional consultations above and beyond those caused by the species' listing. The conservation recommendations provided to address impacts to the occupied critical habitat will be the same as those recommended to address impacts to the species because the habitat tolerances of the Georgetown and Salado salamanders are inextricably linked to the health, growth, and reproduction of the salamanders, which are present and confined year-round in their occupied critical habitat. Furthermore, because the proposed critical habitat and the Georgetown and Salado salamanders' known range are identical, the results of consultation under adverse modification are not likely to differ from the results of consultation under jeopardy. In the event of an adverse modification determination, we expect that reasonable and prudent alternatives to avoid jeopardy to the species would also avoid adverse modification of the critical habitat. The only incremental impact of critical habitat designation that we anticipate is the small (not expected to exceed $38,500 per year) administrative effort required during section 7 consultation to document effects on the physical and biological features of the critical habitat and whether the action appreciably diminishes the value of critical habitat as a whole for the conservation of the listed species (IEc 2020).

The proposed critical habitat designations for the Georgetown and Salado salamanders amount to a total of approximately 1,519 ac (622 ha) in Bell and Williamson Counties, Texas. In these areas, any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the Georgetown and Salado salamanders. While this additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant.

Incremental costs are likely to be minor and primarily limited to administrative efforts that consider adverse modification in consultation. This finding is based on these factors: (1) All activities with a Federal nexus occurring within the proposed critical habitat designations will be subject to section 7 consultation requirements regardless of critical habitat designation due to the presence of listed species; and (2) since the Service predicts that the majority of project modifications avoiding jeopardy and adverse modification overlap, there will only be a limited number of project modification requests that are solely caused by a critical habitat designation (IEc 2020). The estimated $38,500 per year of incremental costs associated with the designation of critical habitat is well below $100 million and, therefore, is unlikely to trigger additional requirements under State or local regulations. Further, while some perceptional effects may arise, they are not expected to result in substantial costs.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of this proposed rule. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

During the development of a final designation, we will consider any additional economic impact information we receive through the public comment period, and, as such, areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

*Consideration of National Security Impacts*

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for Georgetown and Salado salamanders are not owned, managed, or used by the Department of Defense or the Department of Homeland Security, and, therefore, we anticipate no impact on national security or homeland security. However, during the development of a final designation we will consider any additional information received through the public comment period on the impacts of the proposed designation on national security or homeland security to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our

implementing regulations at 50 CFR 424.19.

*Consideration of Other Relevant Impacts*

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. We consider a number of factors including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances, or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that there are currently no HCPs or other management plans for the Georgetown or Salado salamanders, and the proposed designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this proposed critical habitat designation.

During the development of a final designation, we will consider any information currently available or received during the public comment period regarding the economic, national security, or other relevant impacts of the proposed designation and will determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19.

**Required Determinations**

*Clarity of the Rule*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

*Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has waived their review regarding their significance determination of this proposed rule.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in the light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical

habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

*Executive Order 13771*

We do not believe this proposed rule is an E.O. 13771 (''Reducing Regulation and Controlling Regulatory Costs'') (82 FR 9339, February 3, 2017) regulatory action because we believe this rule is not significant under E.O. 12866; however, the Office of Information and Regulatory Affairs has waived their review regarding their E.O. 12866 significance determination of this proposed rule.

*Energy Supply, Distribution, or Use—Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The draft economic analysis states that incremental impacts may occur due to administrative costs of section 7 consultations for development, water management activities, transportation projects, utility projects, mining, and livestock grazing; however, these are not expected to significantly affect small governments. Incremental impacts stemming from various species conservation and development control activities are expected to be borne by the Federal Government, Texas Department of Transportation, City of Austin, Lower Colorado River Authority, Travis and Williamson Counties, Concordia University, and other entities, which are not considered small governments. Consequently, we do not believe that the critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

*Takings—Executive Order 12630*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Georgetown and Salado salamanders in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for Georgetown and Salado salamanders, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

*Federalism—Executive Order 13132*

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation

with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

*Civil Justice Reform—Executive Order 12988*

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the elements of physical or biological features essential to the conservation of the species. The proposed areas of designated critical habitat are presented on maps, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act (42 U.S.C. 4321 et seq.)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We have determined that no tribal lands fall within the boundaries of the proposed critical habitat for the Georgetown or Salado salamanders, so no tribal lands would be affected by the proposed designation.

**References Cited**

A complete list of references cited in this rulemaking is available on the internet at *http://www.regulations.gov* and upon request from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

**Authors**

The primary authors of this proposed rule are the staff members of the Service's Austin Ecological Services Field Office.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.11(h), revise the entries for ''Salamander, Georgetown'' and ''Salamander, Salado'' in the List of Endangered and Threatened Wildlife under ''AMPHIBIANS'' to read as set forth below:

**§ 17.11 Endangered and threatened wildlife.**

* * * * *

(h) * * *

| Common name | Scientific name | Where listed | Status | Listing citations and applicable rules |
|---|---|---|---|---|
| * | * | * | * | * |
| AMPHIBIANS | | | | |
| * | * | * | * | * |
| Salamander, Georgetown | *Eurycea naufragia* | Wherever found | T | 79 FR 10236, 2/24/2014; 50 CFR 17.43(e);[4d] 50 CFR 17.95(d).[CH] |
| * | * | * | * | * |
| Salamander, Salado | *Eurycea chisholmensis* | Wherever found | T | 79 FR 10236, 2/24/2014; 50 CFR 17.95(d).[CH] |
| * | * | * | * | * |

■ 3. Amend § 17.95(d) by adding entries for ''Georgetown Salamander (*Eurycea naufragia*)'' and ''Salado Salamander (*Eurycea chisholmensis*)'' in the same order that these species appear in the table at § 17.11(h) to read as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

* * * * *

(d) *Amphibians.*

* * * * *

Georgetown Salamander (*Eurycea naufragia*)

(1) Critical habitat units are depicted for Williamson County, Texas, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of Georgetown salamander consist of the following components:

(i) For surface habitat:

(A) *Water from the Northern Segment of the Edwards Aquifer.* Groundwater issuing to the surface from the underlying aquifer is similar to natural aquifer conditions as it discharges from natural spring outlets. Concentrations of water quality constituents and contaminants should be below levels that could exert direct lethal or sublethal effects (such as effects to reproduction, growth, development, or metabolic processes), or indirect effects (such as effects to the Georgetown salamander's prey base). The Service is unaware of any studies that specifically define the water quality constituents or contaminants that would have deleterious effects on these salamanders. Hydrologic regimes similar to the historical pattern of the specific sites are present, with at least some surface flow during the year. The water chemistry of aquatic surface habitats is similar to natural aquifer conditions, with temperatures from 64.1 to 73.1 °F (17.9 to 22.8 °C), dissolved oxygen concentrations from 6 to 8 mg/L, and specific water conductance from 604 to 721 µS/cm.

(B) *Rocky substrate with interstitial spaces.* Rocks in the substrate of the salamander's surface aquatic habitat are large enough to provide salamanders with cover, shelter, and foraging habitat. The substrate and interstitial spaces have minimal sedimentation.

(C) *Aquatic invertebrates for food.* The spring environment supports a diverse aquatic invertebrate community that includes crustaceans, insects, and flatworms.

(D) *Subterranean aquifer.* Access to the subsurface water table exists to provide shelter, protection, and space for reproduction. This access can occur in the form of large conduits that carry water to the spring outlet or porous voids between rocks in the streambed that extend down into the water table.

(ii) For subsurface habitat:

(A) *Water from the Northern Segment of the Edwards Aquifer.* Groundwater quality is similar to natural aquifer conditions. Concentrations of water quality constituents and contaminants should be below levels that could exert direct lethal or sublethal effects (such as effects to reproduction, growth, development, or metabolic processes), or indirect effects (such as effects to the Georgetown salamander's prey base). Hydrologic regimes similar to the historical pattern of the specific sites are present, with continuous flow. The water chemistry is similar to natural aquifer conditions, with temperatures from 64.1 to 73.1 °F (17.9 to 22.8 °C), dissolved oxygen concentrations from 6 to 8 mg/L, and specific water conductance from 604 to 721 µS/cm.

(B) *Subsurface spaces.* Voids between rocks underground are large enough to provide salamanders with cover, shelter, and foraging habitat. These spaces have minimal sedimentation.

(C) *Aquatic invertebrates for food.* The habitat supports an aquatic invertebrate community that includes crustaceans, insects, or flatworms.

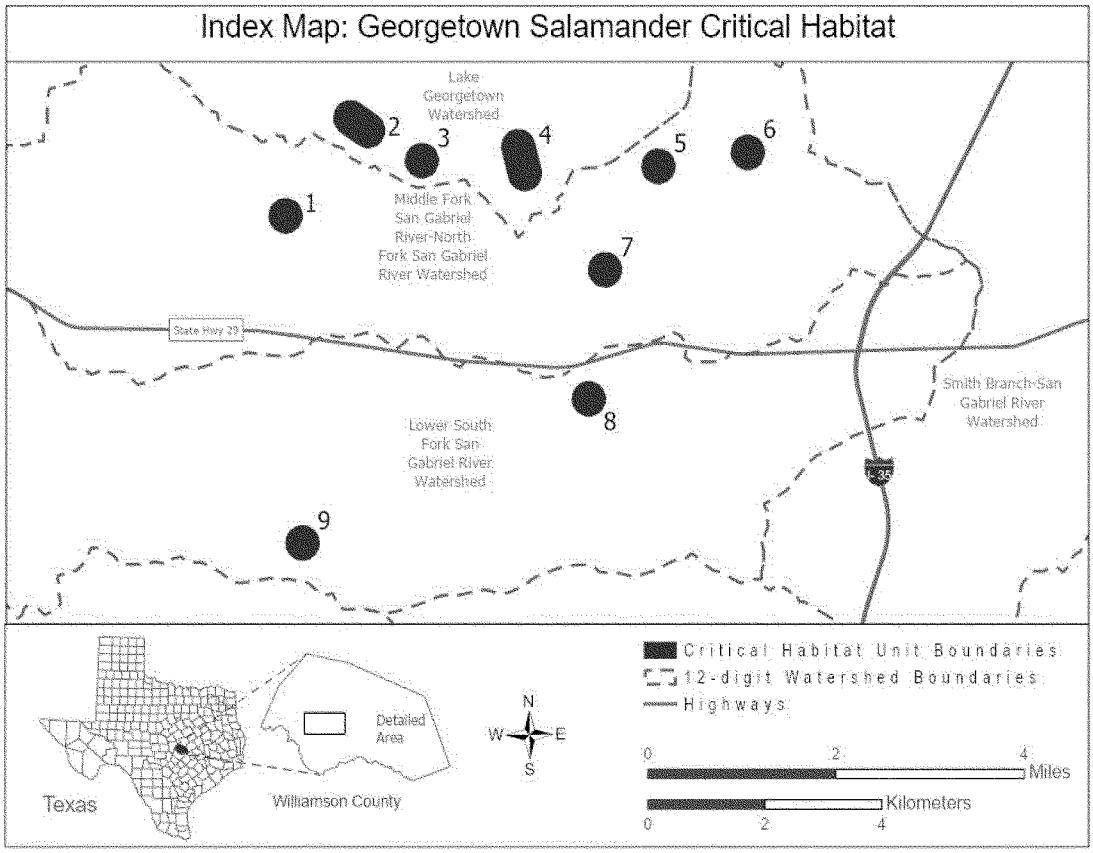
(3) Surface critical habitat includes the spring outlets and outflow up to the high water line and 262 ft (80 m) of upstream and downstream habitat, including the dry stream channel during periods of no surface flow. The surface critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) existing within the legal boundaries on the effective date of this rule; however, the subsurface critical habitat may extend below such structures. The subsurface critical habitat includes underground features in a circle with a radius of 984 ft (300 m) around the springs.

(4) *Critical habitat map units.* Data layers defining map units were created using a geographic information system (GIS), which included species locations, roads, property boundaries, 2011 aerial photography, and U.S. Geological Survey 7.5′ quadrangles. Points were placed on the GIS. We delineated critical habitat unit boundaries by starting with the cave or spring point locations that are occupied by the salamanders. From these cave or springs points, we delineated a 984-ft (300-m) buffer to create the polygons that capture the extent to which we believe the salamander populations exist through underground conduits. The polygons were then simplified to reduce the number of vertices, but still retain the overall shape and extent. Subsequently, polygons that were within 98 ft (30 m) of each other were merged together. Each new merged polygon was then revised to remove extraneous divots or protrusions that resulted from the merge process. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *http://www.fws.gov/southwest/es/AustinTexas/,* at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0048, and at the field office responsible for this designation. You may obtain field office location information by contacting one

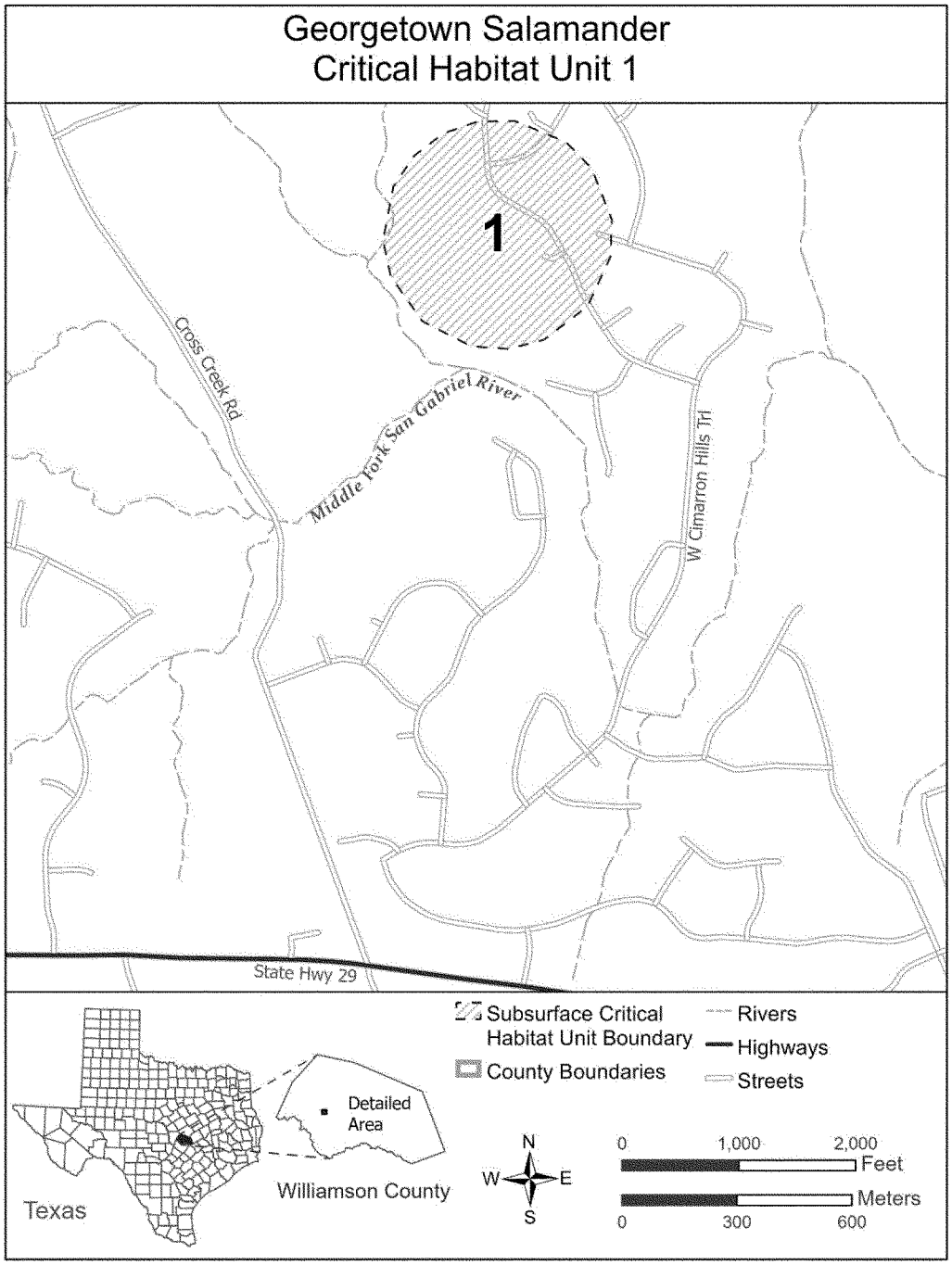
of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Index map follows:

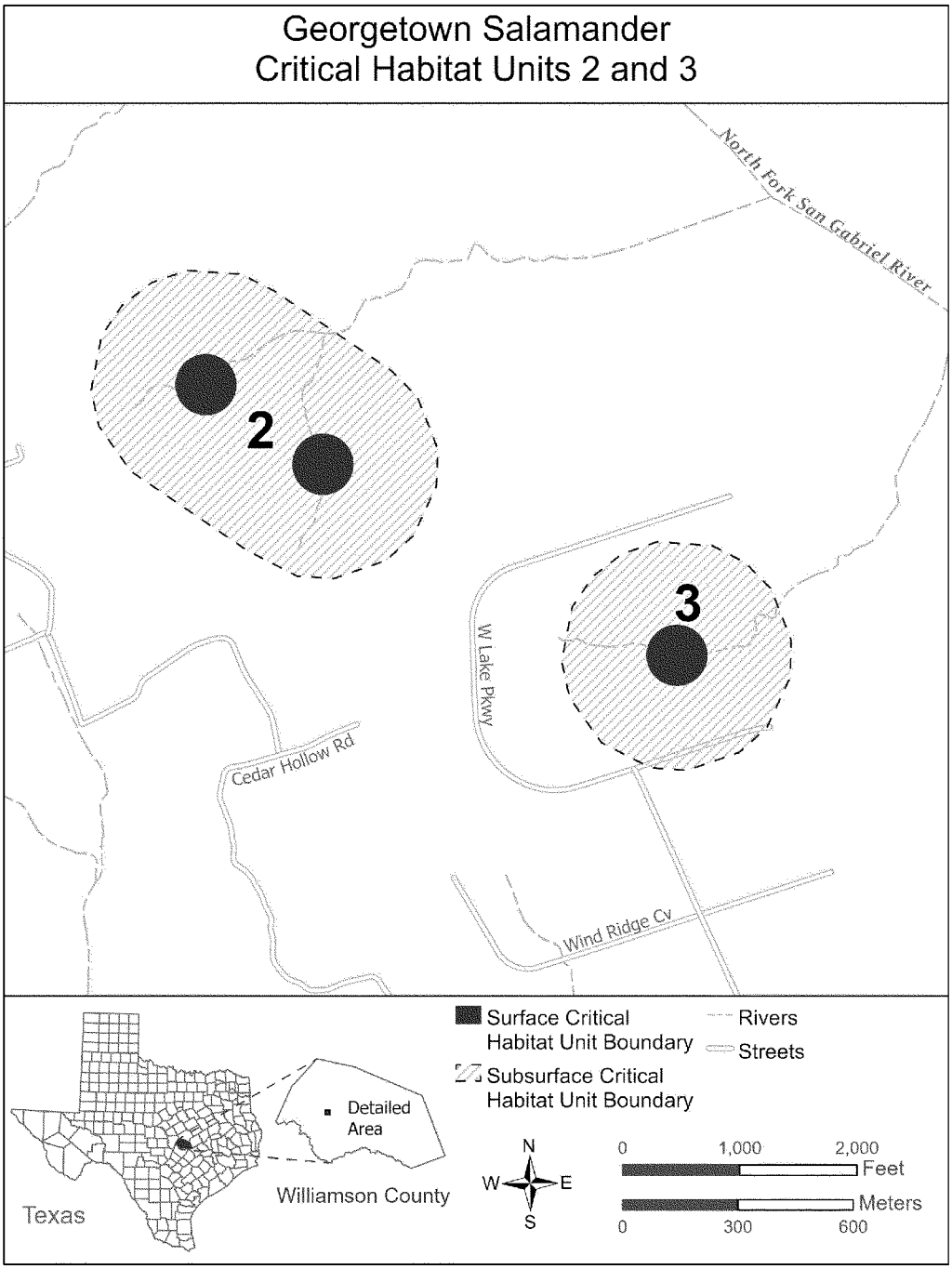
BILLING CODE 4333–15–P




(6) Unit 1: Water Tank Cave Unit, Williamson County, Texas. Map follows:

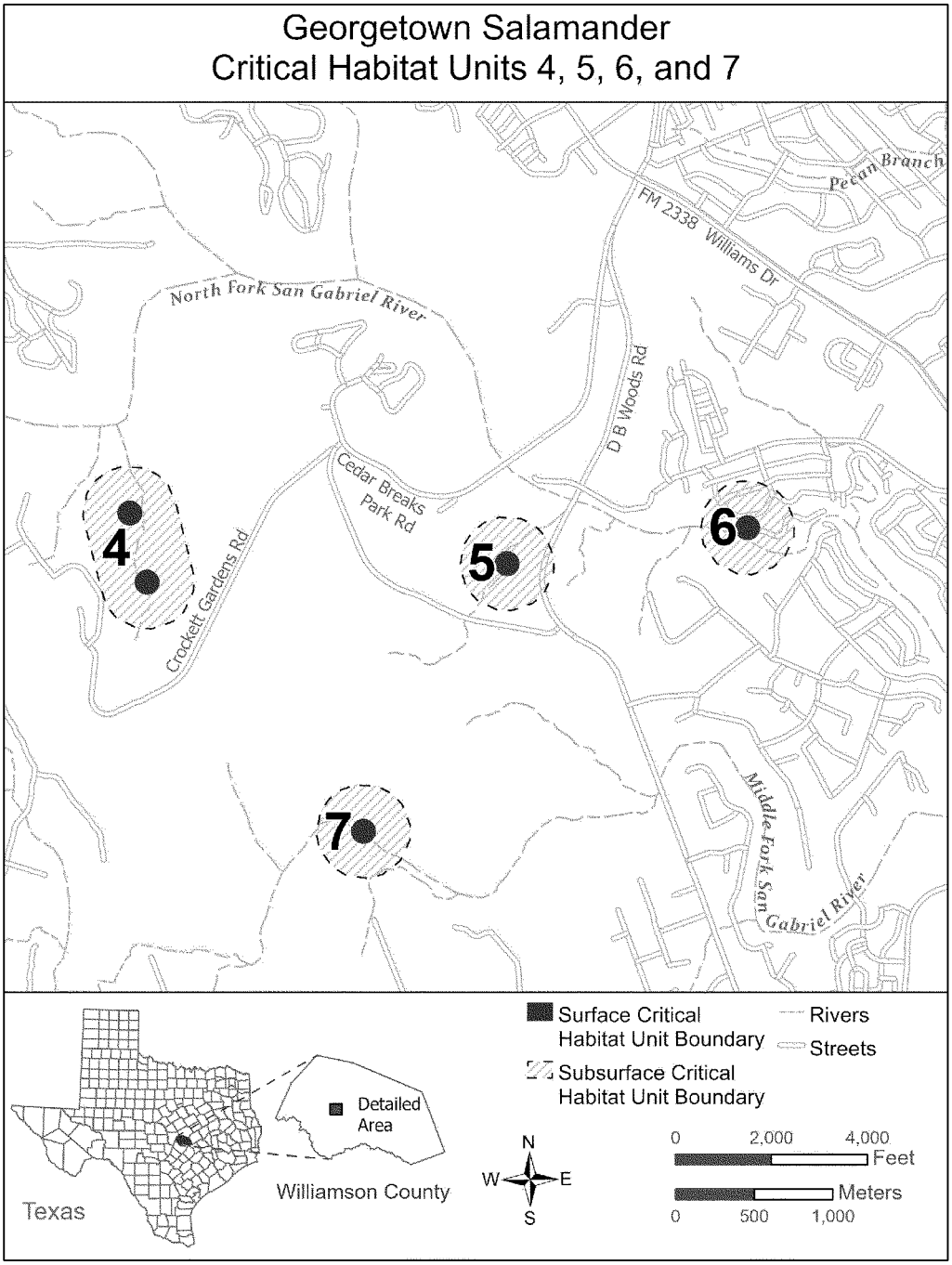



(7) Unit 2: Hogg Hollow Spring Unit, Williamson County, Texas. Map of Units 2 and 3 follows.




(8) Unit 3: Cedar Hollow Spring Unit, Williamson County, Texas. Map of Unit 3 is provided at paragraph (7) of this entry.

(9) Unit 4: Lake Georgetown Unit, Williamson County, Texas. Map of Units 4, 5, 6, and 7 follows:



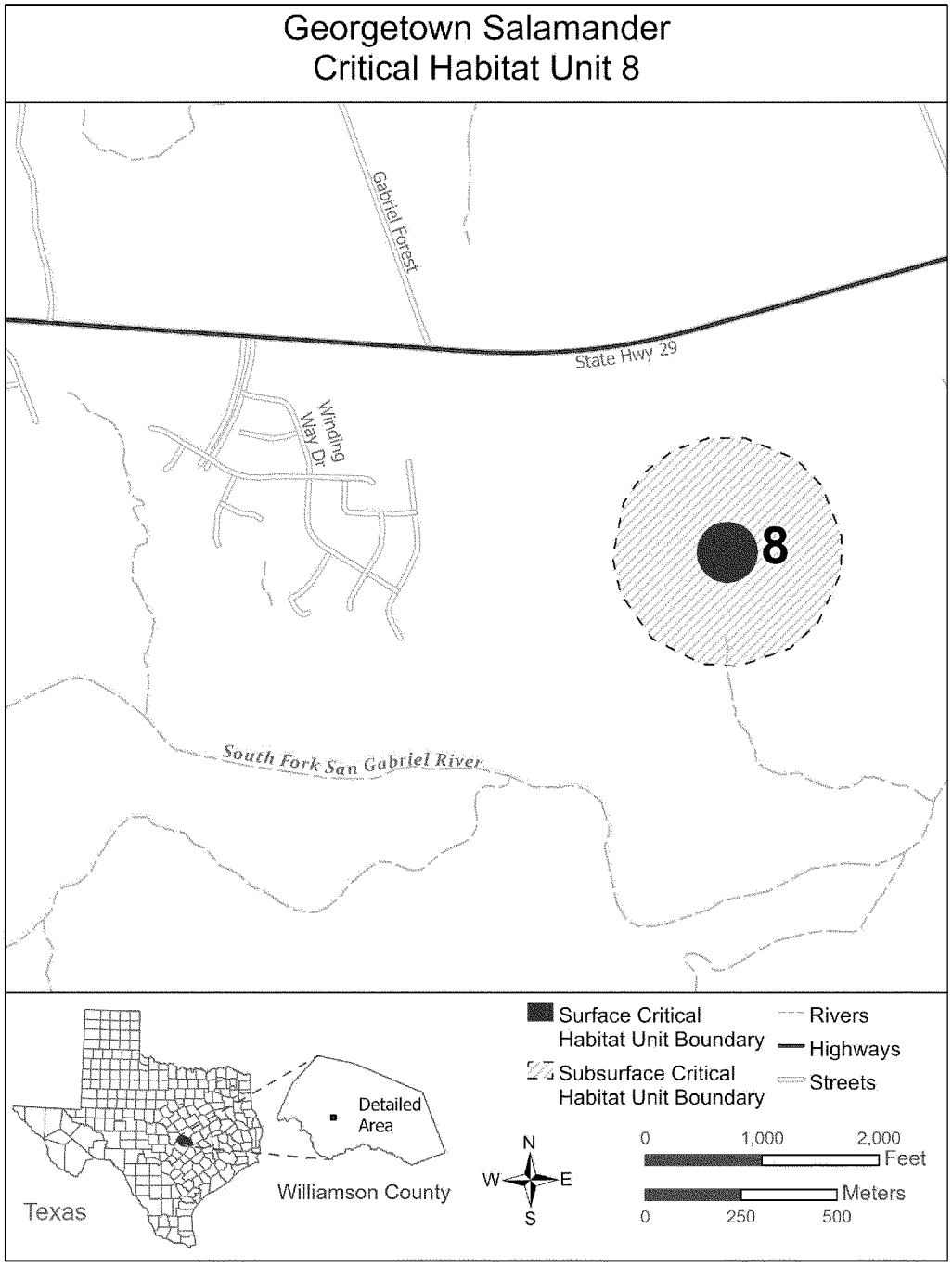

(10) Unit 5: Buford Hollow Spring Unit, Williamson County, Texas. Map of Unit 5 is provided at paragraph (9) of this entry.

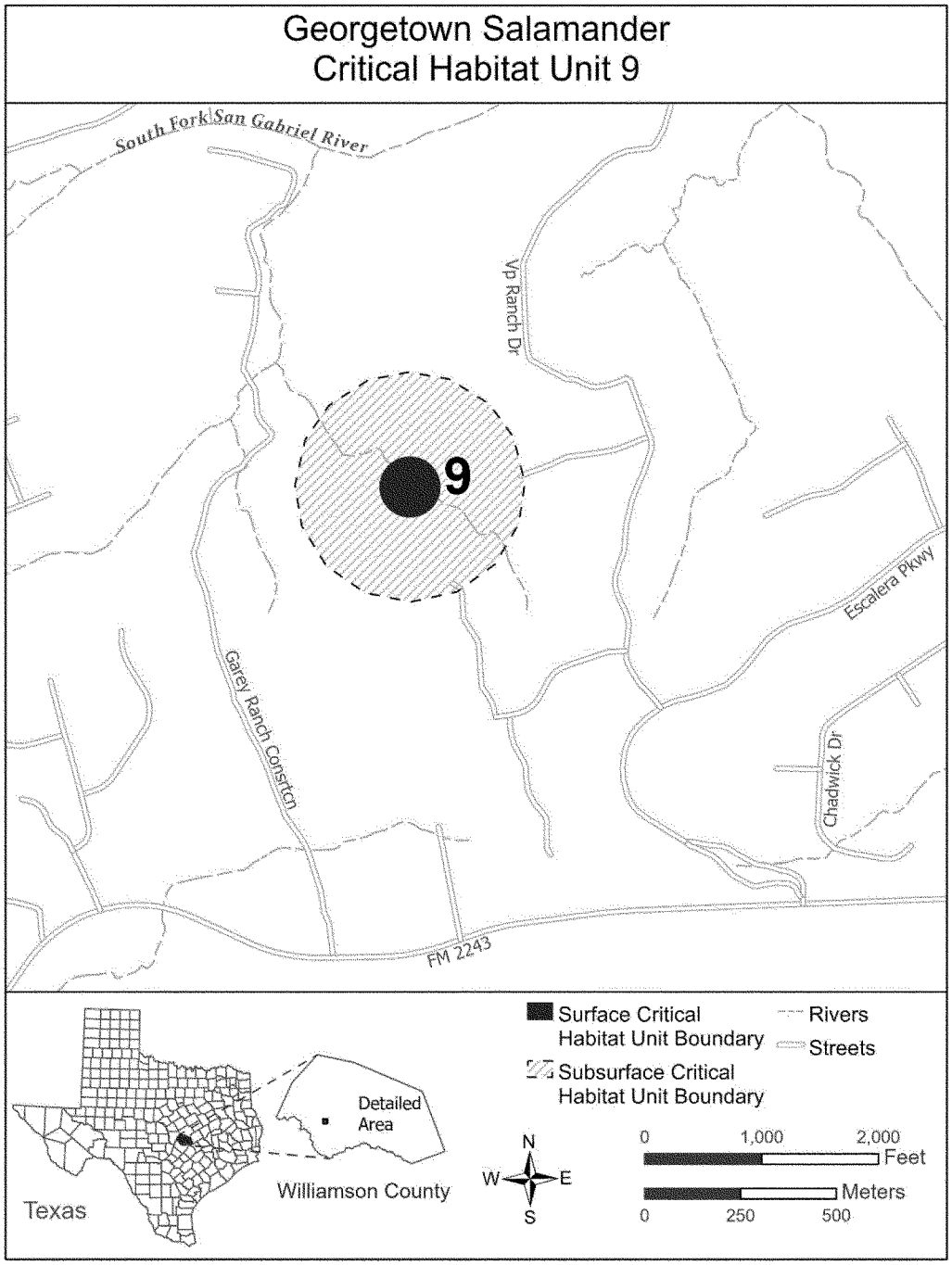
(11) Unit 6: Swinbank Spring Unit, Williamson County, Texas. Map of Unit 6 is provided at paragraph (9) of this entry.

(12) Unit 7: Avant Spring Unit, Williamson County, Texas. Map of Unit 7 is provided at paragraph (9) of this entry.

(13) Unit 8: Shadow Canyon Spring Unit, Williamson County, Texas. Map follows:

(14) Unit 9: Garey Ranch Spring Unit, Williamson County, Texas. Map follows:


Georgetown Salamander
Critical Habitat Unit 8
Gabriel Forest
State Hwy 29
Winding Way Dr.
8
South Fork San Gabriel River
Texas
Detailed Area
Williamson County
Surface Critical Habitat Unit Boundary
Subsurface Critical Habitat Unit Boundary
Rivers
Highways
Streets
N
W
E
S
0
1,000
2,000
Feet
Meters
0
250
500

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* * * * *

Salado Salamander (*Eurycea chisholmensis*)

(1) Critical habitat units are depicted for Bell and Williamson Counties, Texas, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of Salado salamander consist of the following components:

(i) For surface habitat:

(A) *Water from the Northern Segment of the Edwards Aquifer.* Groundwater quality issuing to the surface from the underlying aquifer is similar to natural aquifer conditions as it discharges from natural spring outlets. Concentrations of water quality constituents and contaminants are below levels that could exert direct lethal or sublethal effects (such as effects to reproduction, growth, development, or metabolic processes), or indirect effects (such as effects to the Salado salamander's prey base). Hydrologic regimes similar to the historical pattern of the specific sites are present, with at least some surface flow during the year. The water chemistry of aquatic surface habitats is similar to natural aquifer conditions, with temperatures from 64.1 to 73.1 °F (17.9 to 22.8 °C), dissolved oxygen concentrations from 6 to 8 mg/L, and specific water conductance from 604 to 721 µS/cm.

(B) *Rocky substrate with interstitial spaces.* Rocks in the substrate of the salamander's surface aquatic habitat are large enough to provide salamanders with cover, shelter, and foraging habitat. The substrate and interstitial spaces have minimal sedimentation.

(C) *Aquatic invertebrates for food.* The spring environment is capable of supporting a diverse aquatic invertebrate community that includes crustaceans, insects, and flatworms.

(D) *Subterranean aquifer.* Access to the subsurface water table exists to provide shelter, protection, and space for reproduction. This access can occur in the form of large conduits that carry water to the spring outlet or porous voids between rocks in the streambed that extend down into the water table.

(ii) For subsurface habitat:

(A) *Water from the Northern Segment of the Edwards Aquifer.* Groundwater quality is similar to natural aquifer conditions. Concentrations of water quality constituents and contaminants are below levels that could exert direct lethal or sublethal effects (such as effects to reproduction, growth, development, or metabolic processes), or indirect effects (such as effects to the Salado salamander's prey base). Hydrologic regimes similar to the historical pattern of the specific sites are present, with continuous flow. The water chemistry is similar to natural aquifer conditions, with temperatures from 64.1 to 73.1 °F (17.9 to 22.8 °C), dissolved oxygen concentrations from 6 to 8 mg/L, and specific water conductance from 604 to 721 µS/cm.

(B) *Subsurface spaces.* Voids between rocks underground are large enough to provide salamanders with cover, shelter, and foraging habitat. These spaces have minimal sedimentation.

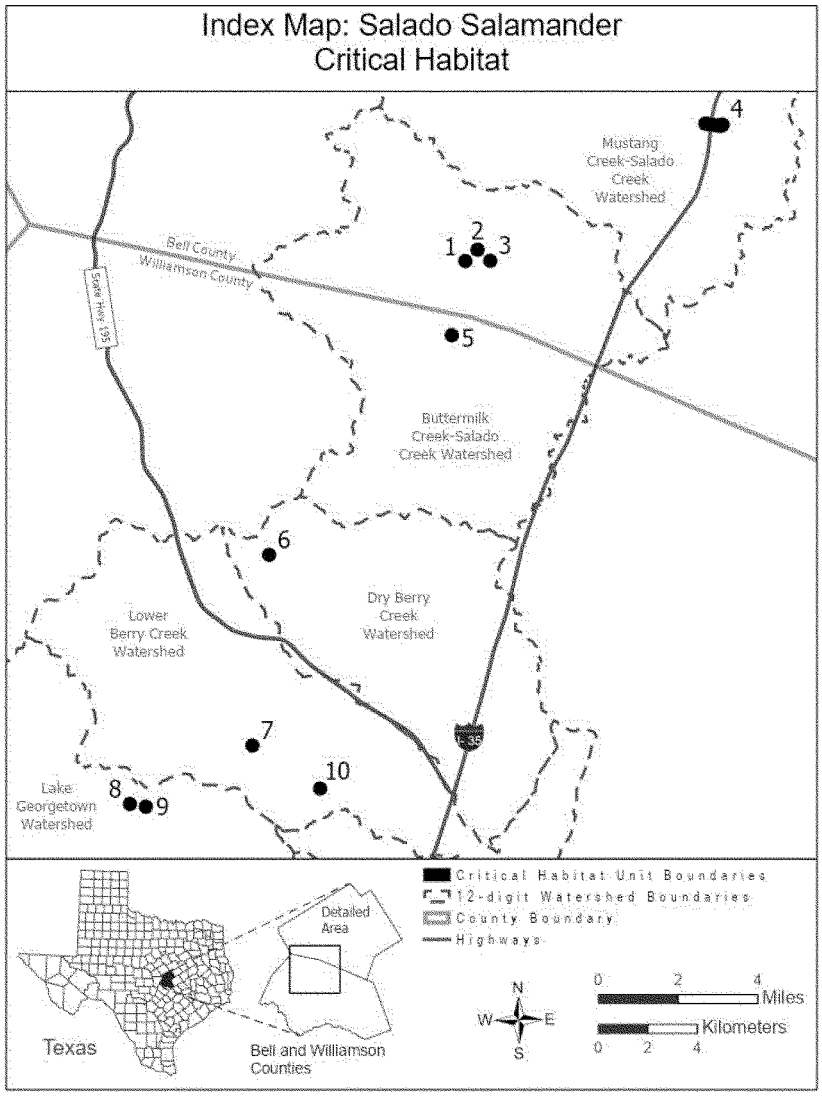
(C) *Aquatic invertebrates for food.* The habitat is capable of supporting an aquatic invertebrate community that includes crustaceans, insects, or flatworms.

(3) Surface critical habitat includes the spring outlets and outflow up to the high water line and 262 ft (80 m) of upstream and downstream habitat, including the dry stream channel during periods of no surface flow. The surface critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) existing within the legal boundaries on the effective date of this rule; however, the subsurface critical habitat may extend below such structures. The subsurface critical habitat includes underground features in a circle with a radius of 984 ft (300 m) around the springs.

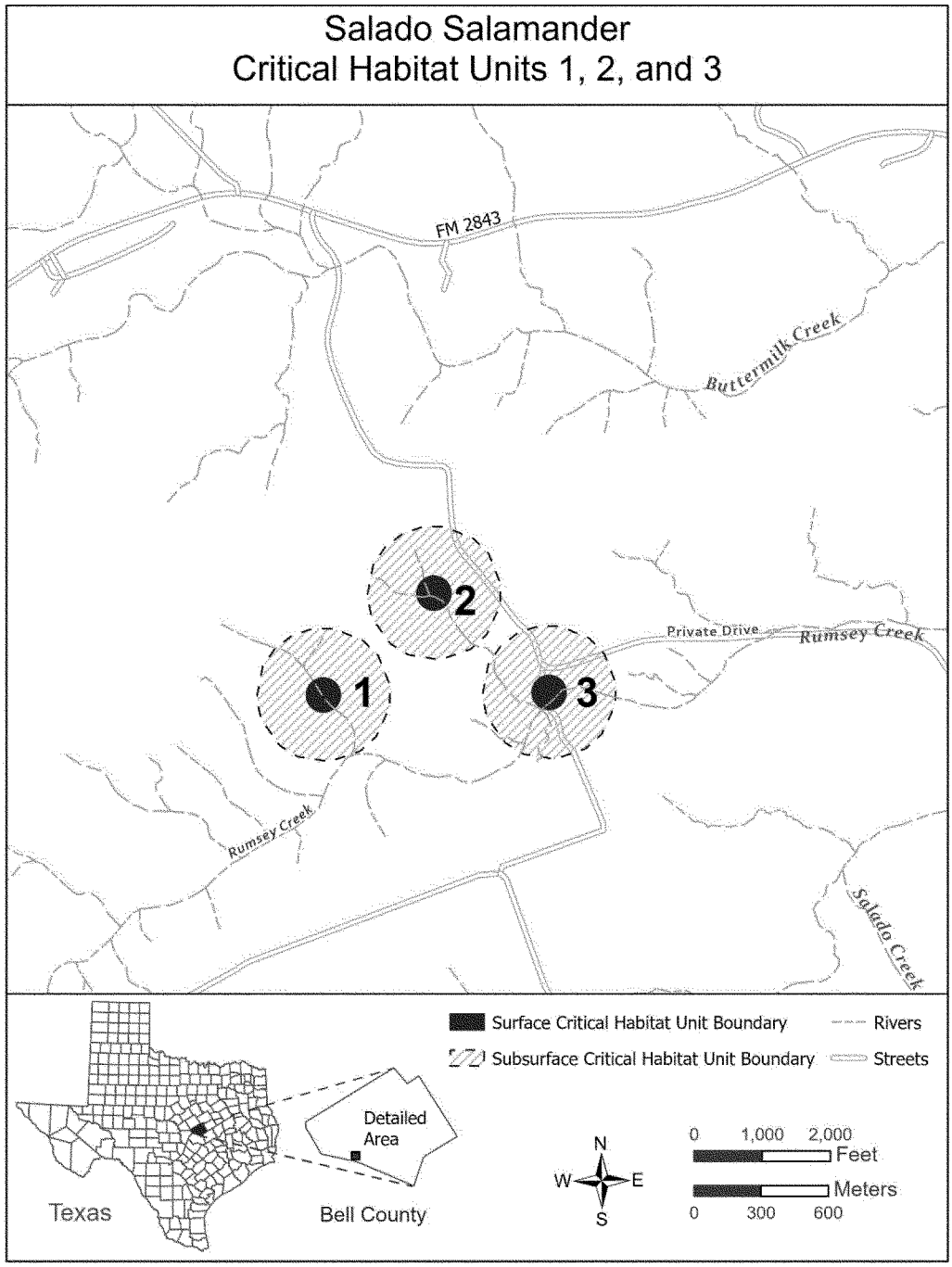
(4) *Critical habitat map units.* Data layers defining map units were created using a geographic information system (GIS), which included species locations, roads, property boundaries, 2011 aerial photography, and U.S. Geological Survey 7.5′ quadrangles. Points were placed on the GIS. We delineated critical habitat unit boundaries by starting with the cave or spring point locations that are occupied by the salamanders. From these cave or springs points, we delineated a 984-ft (300-m) buffer to create the polygons that capture the extent to which we believe the salamander populations exist through underground conduits. The polygons were then simplified to reduce the number of vertices, but still retain the overall shape and extent. Subsequently, polygons that were within 98 ft (30 m) of each other were merged together. Each new merged polygon was then revised to remove extraneous divots or protrusions that resulted from the merge process. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *http://www.fws.gov/southwest/es/AustinTexas/,* at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2020–0048, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Index map follows:

BILLING CODE 4333–15–P



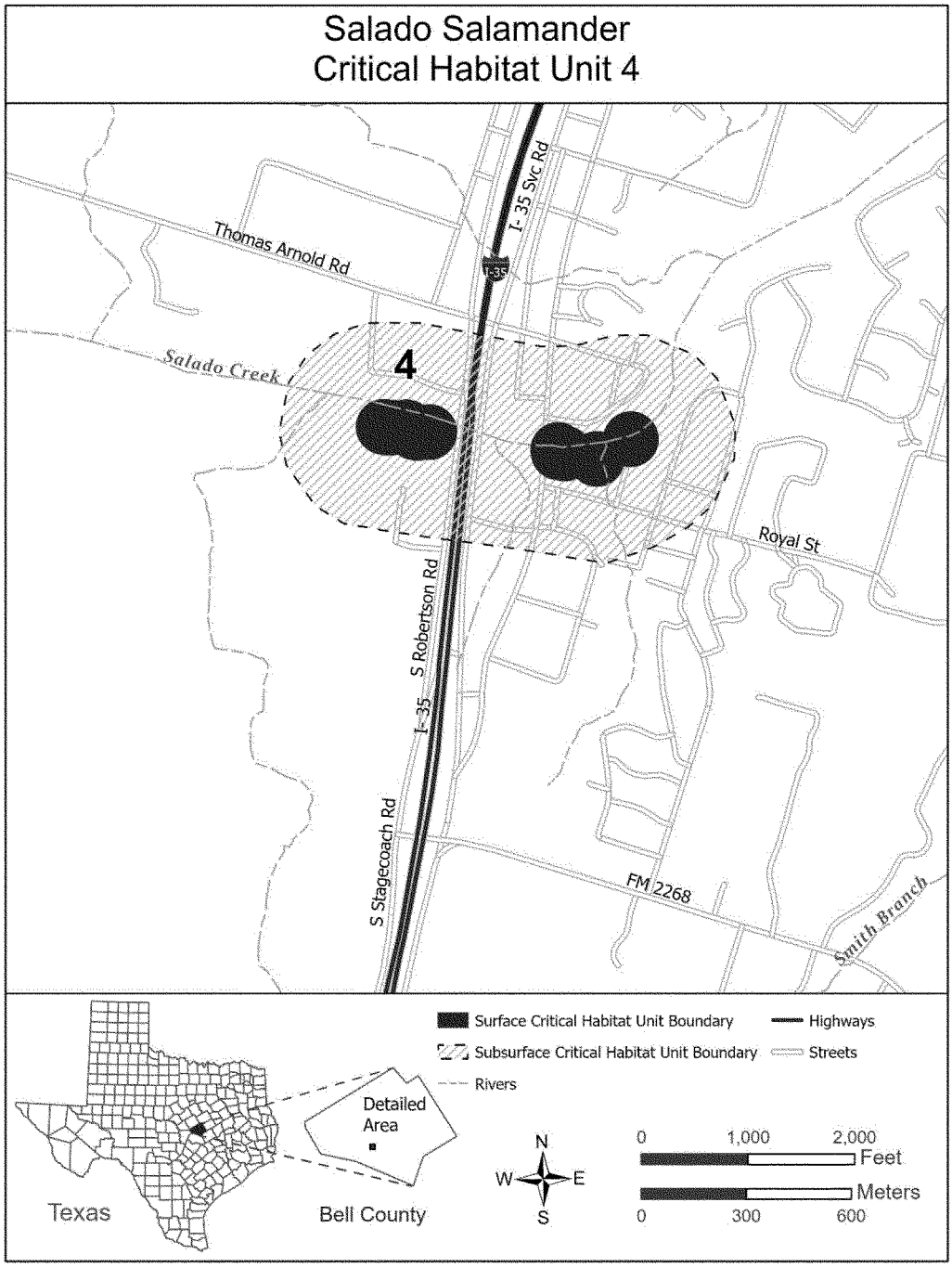

(6) Unit 1: Hog Hollow Spring Unit, Williamson County, Texas. Map of Units 1, 2, and 3 follows:



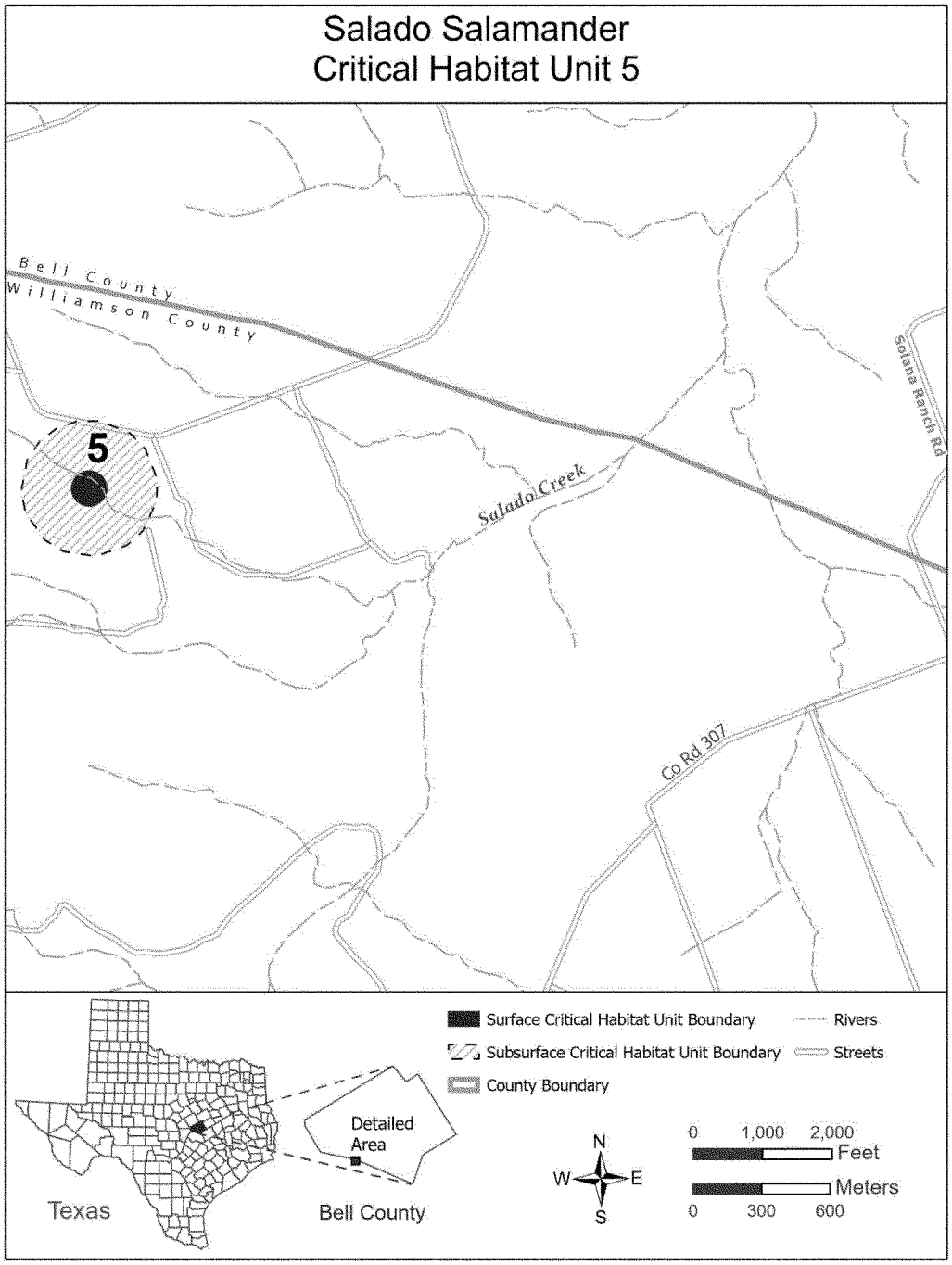

(7) Unit 2: Solana Spring Unit. Map of Unit 2 is provided at paragraph (6) of this entry.

(8) Unit 3: Cistern Spring Unit. Map of Unit 3 is provided at paragraph (6) of this entry.

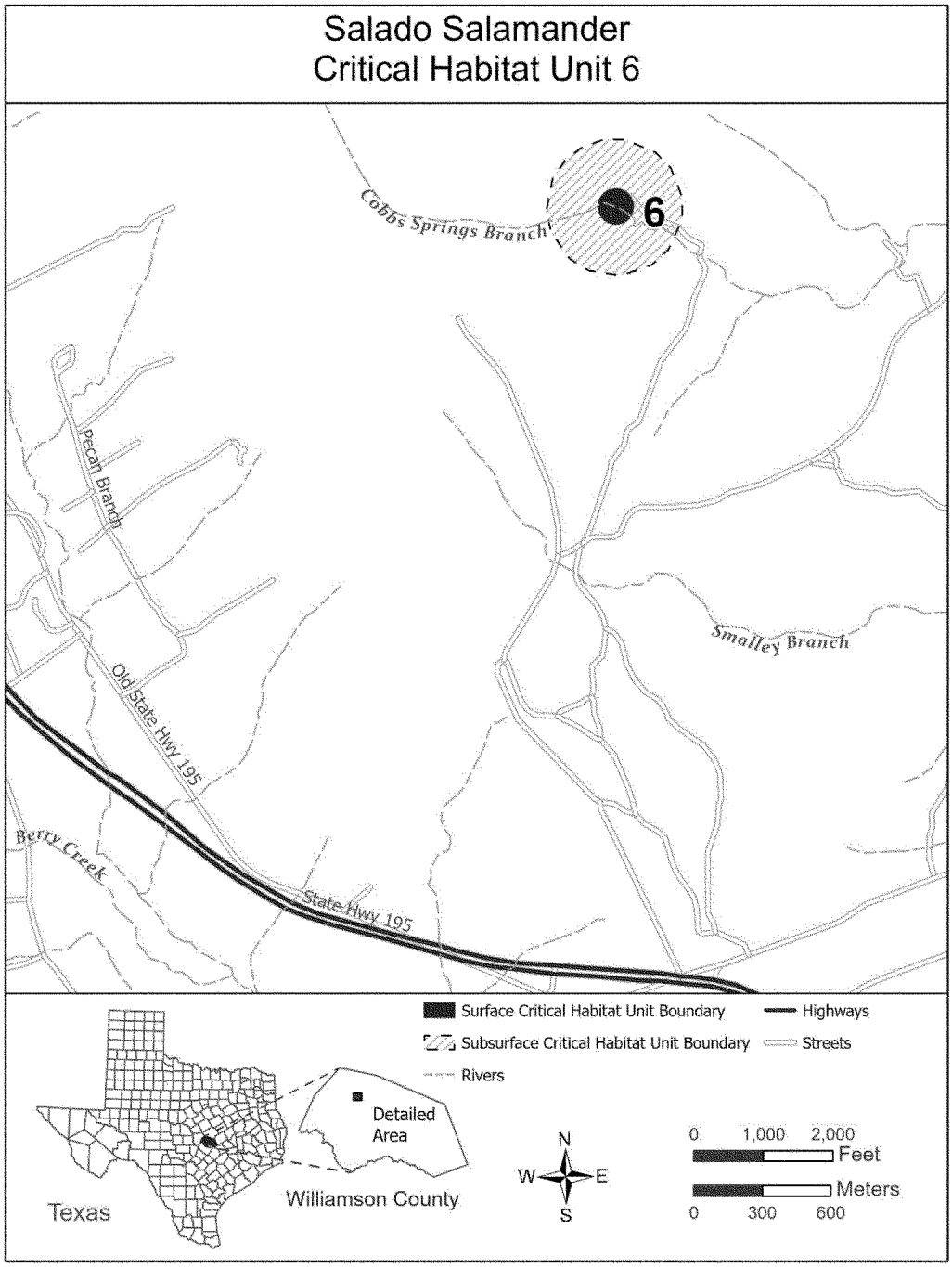
(9) Unit 4: IH–35 Unit. Map follows:



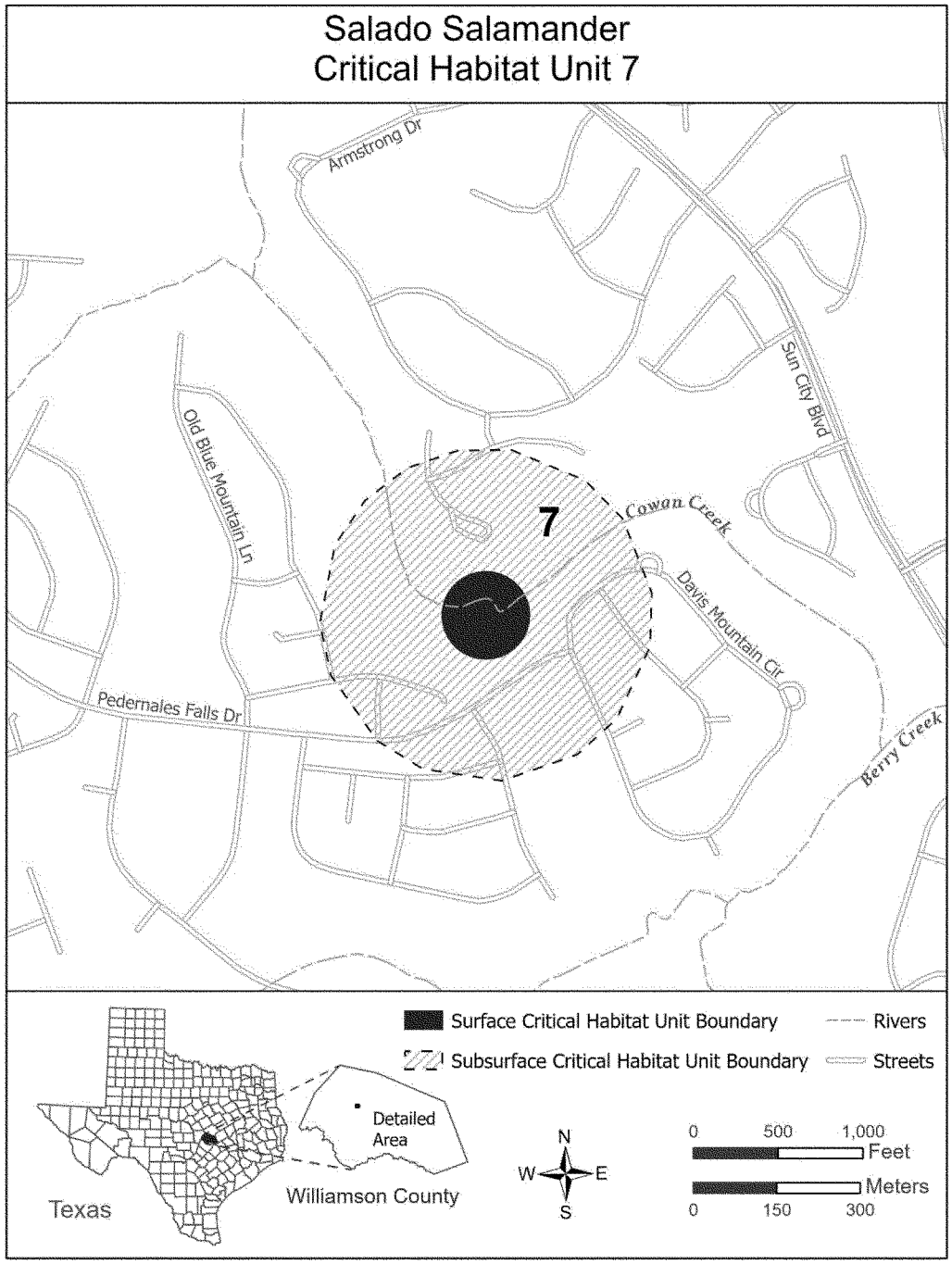

(10) Unit 5: King's Garden Main Spring Unit. Map follows:



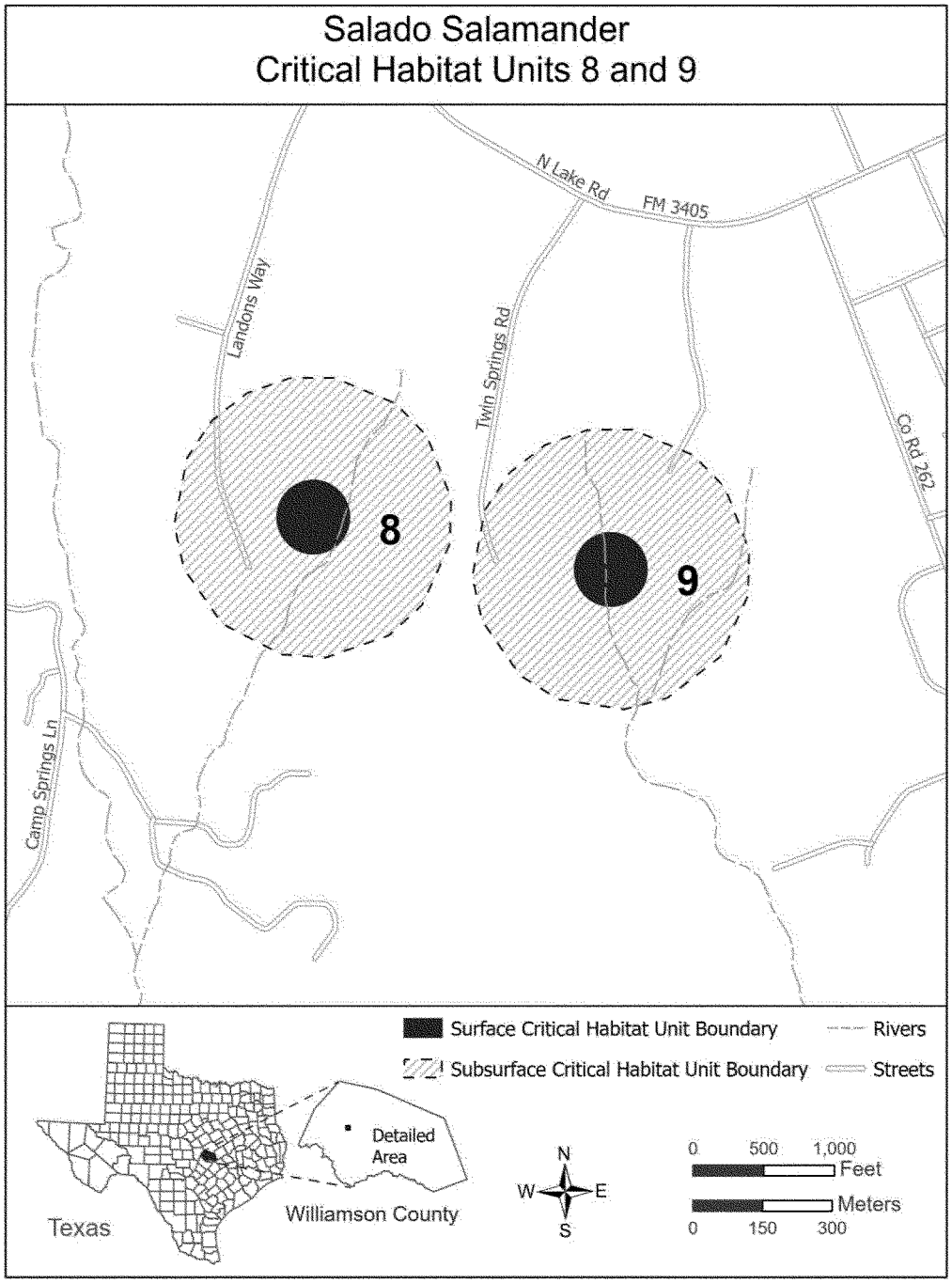

(11) Unit 6: Cobbs Spring Unit. Map follows:




(12) Unit 7: Cowan Creek Spring Unit.
Map follows:

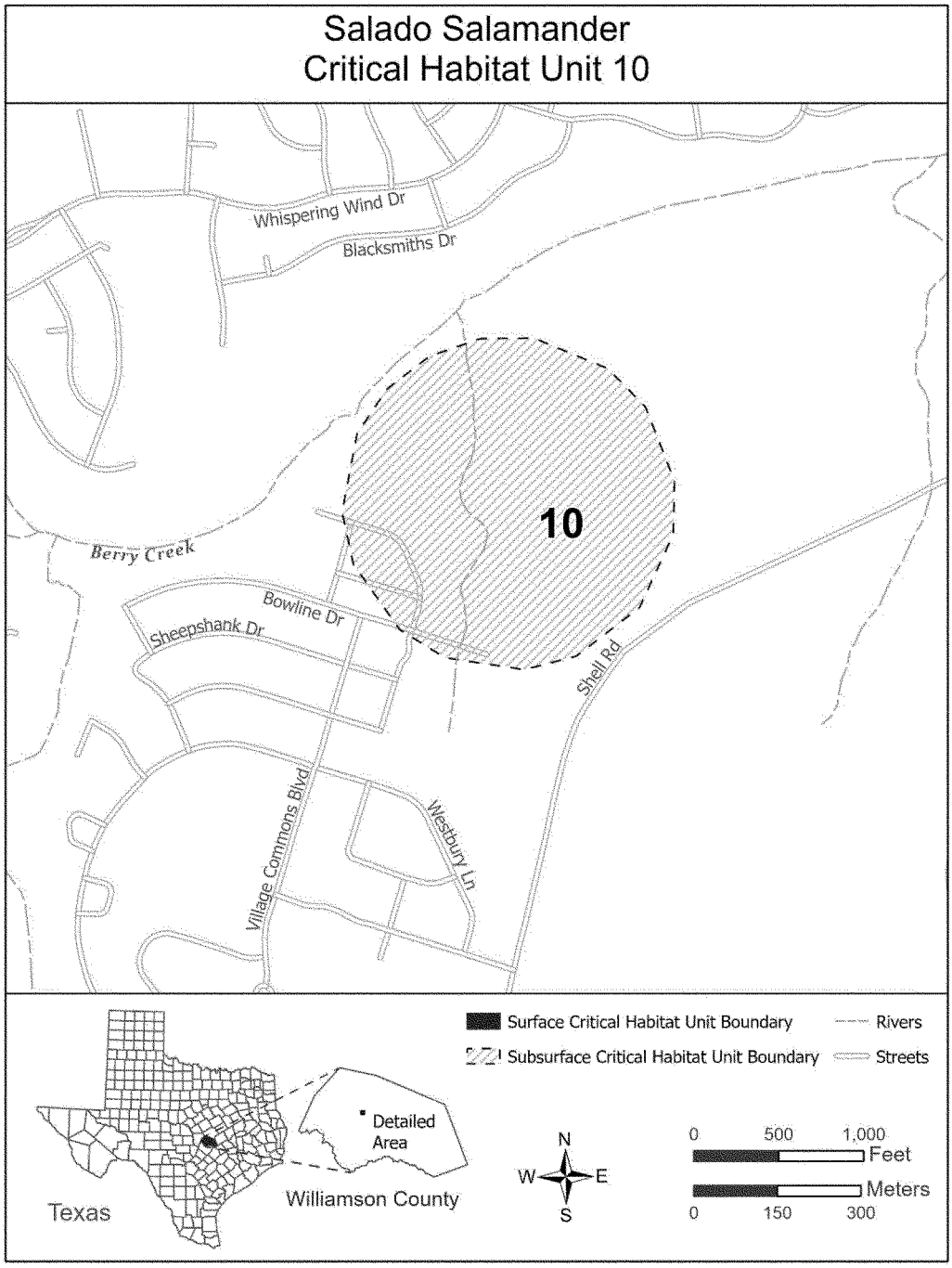



(13) Unit 8: Walnut Spring Unit. Map of Units 8 and 9 follows:




(14) Unit 9: Twin Springs Unit. Map of Unit 9 is provided at paragraph (12) of this entry.

(15) Unit 10: Bat Well Cave Unit. Map follows:




* * * * *

**Aurelia Skipwith,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2020–17921 Filed 9–14–20; 8:45 am]

BILLING CODE 4333–15–C

# FEDERAL REGISTER

Vol. 85 Tuesday,

No. 179 September 15, 2020


Part VI

## Federal Reserve System

12 CFR Part 261

Rules Regarding Availability of Information; Final Rule

**FEDERAL RESERVE SYSTEM**

**12 CFR Part 261**

**[Docket No. R–1665; RIN 7100 AF–51]**

## Rules Regarding Availability of Information

**AGENCY:** Board of Governors of the Federal Reserve System (''Board'').

**ACTION:** Final rule.

**SUMMARY:** The Board is issuing a final rule revising its rules regarding availability of information. The revisions clarify and update the Board's regulations implementing the Freedom of Information Act and the rules governing the disclosure of confidential supervisory information and other nonpublic information of the Board.

**DATES:** This final rule is effective on October 15, 2020.

**FOR FURTHER INFORMATION CONTACT:** Alye S. Foster, Assistant General Counsel, (202) 452–5289; Mary Bigloo, Senior Counsel, (202) 475–6361, or Misty M. Kheterpal, Senior Counsel, (202) 452–2597, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On June 17, 2019, the Board published a notice of proposed rulemaking [1] (''proposal'') in the **Federal Register** revising its rules regarding availability of information (the ''Board's Rules'') found at 12 CFR part 261, with a 60-day public comment period ending on August 16, 2019. The Board's Rules set forth the procedures for requesting access to documents that are records of the Board under the Freedom of Information Act (''FOIA'') as well as the rules governing the disclosure of the Board's confidential supervisory information and other nonpublic information. The Board received 15 comment letters including from supervised financial institutions, industry trade associations, bar associations, law firms, and individuals. While commenters were generally supportive of the proposed changes to improve the efficiency of the Board's Rules, some commenters had concerns regarding particular provisions and suggested further clarifications and revisions. With the exception of a few comments that focused on the FOIA provisions, particularly, the sections referencing the ''competitive harm'' test under Exemption 4 and addressing confidential treatment requests, most of the comments addressed the rules governing disclosure of confidential supervisory information. Of particular concern to a number of commenters was the scope of the term ''confidential supervisory information'' and the provisions concerning the sharing of confidential supervisory information by supervised financial institutions with staff, outside legal counsel, auditors, service providers, the Federal and State banking agencies and the Bureau of Consumer Financial Protection (''CFPB''). We have made a number of changes to the proposal to address these and other comments we received.

*Harmonization With Other Agencies' Regulations*

A few commenters recommended that the Federal banking agencies issue identical or harmonized rules governing confidential supervisory information and, in particular, sought harmonization in how confidential supervisory information is defined and to whom supervised financial institutions may disclose confidential supervisory information. The commenters noted that their banking organizations are regulated by multiple regulators including the Board and uniformity of the regulators' separate confidential supervisory information rules would be beneficial. In response to the comments, the Board has explored areas where it would be appropriate to harmonize the final rule with the rules of the other Federal banking agencies and the CFPB. A key opportunity for harmonization we noted is the standard for sharing within and by the organization. In the final rule, we adopted the Office of the Comptroller of the Currency's (''OCC'') standard to permit supervised financial institutions to disclose confidential supervisory information with their directors, officers, and employees ''when necessary or appropriate for business purposes,'' and included a similar standard permitting disclosures to the supervised financial institution's outside legal counsel and auditors when the disclosures are ''necessary or appropriate in connection with the provision of legal or auditing services.'' Consistent with the OCC's rules, we also removed the proposed provision that conditioned disclosures to legal counsel and auditors on their executing specific written agreements with respect to their use of confidential supervisory information. Additionally, consistent with the OCC's and the CFPB's rules, we eliminated the requirement that supervised financial institutions obtain prior Federal Reserve approval to disclose confidential supervisory information to their other service providers, such as consultants, contractors, and contingent workers. Opportunities to harmonize the Board's definition of confidential supervisory information with the corresponding definitions of the other agencies were more limited as those definitions did not contain sufficient particularity to meet the Board's needs.

*Comments Concerning Additional Categories of Disclosure*

A few commenters requested that the Board's final rule authorize additional categories of disclosure which were not addressed in the Board's proposal. A few commenters proposed that the Board establish procedures for supervised financial institutions subject to horizontal reviews to disclose confidential supervisory information amongst each other. The commenters argued that providing firms the opportunity to disclose confidential supervisory information relating to the horizontal reviews would facilitate the enhancement of firms' practices and allow them to better meet supervisory expectations. The Board did not adopt these recommendations. These recommendations pose significant concerns with respect to the protection of the confidentiality of the information, which may include market-sensitive information that could be misused by competitor firms. In addition, while the Federal Reserve looks at a similar business line or control function across firms in a horizontal examination, the supervisory assessment and feedback reflects a consideration of the firm's practices in light of the firm's risk profile and activities. Thus, supervisory feedback provided to one firm may not be appropriate or relevant for another firm. Permitting firms to disclose this confidential supervisory information to other firms would present the risk that the feedback would be inappropriately interpreted and applied.

One commenter suggested that the Board publish general observations arising from examinations and other supervisory activities, including anonymized supervisory feedback regarding horizontal reviews. The commenter argued that publishing this information in an anonymized manner would offer institutions the opportunity to strengthen their compliance programs. Consistent with commenters' suggestions, the Federal Reserve is committed to ensuring transparency regarding its supervisory process. The Federal Reserve issues supervisory guidance to outline supervisory expectations or priorities and to articulate its general views regarding

[1] 84 FR 27976 (June 17, 2019).

appropriate practices for a given subject area, including compliance. In addition, the Board publishes its semi-annual Supervision and Regulation Report to provide transparency regarding Federal Reserve supervisory programs and approaches. This report includes supervisory themes and findings drawn from Federal Reserve examinations, including horizontal reviews.

Other commenters recommended that the Board's Rules address the disclosure of confidential supervisory information under applicable securities laws. One commenter in particular recommended permitting disclosure of confidential supervisory information without the prior authorization of the Board when a supervised financial institution determines disclosure is required under securities laws. The Board also received comments recommending the Board's Rules address disclosure of confidential supervisory information in the context of merger and acquisition transactions. One commenter stated that prohibiting access to confidential supervisory information in the M&A context runs counter to bank regulatory policies and objectives and frustrates the ability of acquiring institutions to understand and make plans to address potential compliance, operational, or other weaknesses of target institutions. The commenter recommended that the Board issue parameters for sharing confidential supervisory information in the M&A context in order to meet the dual objectives of safeguarding confidential supervisory information from improper disclosure and promoting thorough due diligence and thoughtful integration planning in connection with a merger or acquisition. The Board did not adopt either recommendation. The proposal did not address disclosures in the M&A context or pursuant to securities laws and guidance establishing parameters for such disclosures requires additional consideration and should be addressed on a consistent basis across the Federal and State banking agencies and the CFPB.

**Section-by-Section Analysis of Comments**

*§ 261.1 Authority, Purpose, and Scope*

We received one comment on § 261.1. The commenter suggested the inclusion of a statement of the rules' objectives, the public policy goals that the rules are designed to achieve, and the potential harm, if any, they seek to prevent. We considered the request and, after reviewing the Board's Rules, including the parameters set out for the disclosure of confidential supervisory information, we determined a broad statement is not necessary. We did, however, modify § 261.1(a) to note that the Board's Rules establish mechanisms to carry out the Board's responsibilities relating to the disclosure, production, or withholding of information ''to facilitate the Board's interactions with financial institutions and the public.'' Additionally, in the section's reference to the Board's authorities, the proposal inadvertently omitted a reference to the Freedom of Information Act. Accordingly, we modified § 261.1 to include a reference to the ''Freedom of Information Act, 5 U.S.C. 552.''

*§ 261.2 Definitions*

The Board received one comment concerning the term ''nonpublic information'' and several comments concerning the definition of ''confidential supervisory information.'' One commenter voiced concern with the Board replacing the term ''exempt information'' with ''nonpublic information.'' The commenter argued that the change minimizes the protections given to confidential supervisory information and particularly expressed a concern that courts will not afford confidential supervisory information sufficient protection if it is deemed ''confidential'' rather than ''exempt.''[2] The Board replaced the term ''exempt information'' with ''nonpublic information'' as the term is used throughout the Board's Rules and thus applies not only to the processing of FOIA requests under subpart B but also to requests for the disclosure of confidential supervisory information and confidential information under subpart C. The replacement of the term ''exempt information'' with ''nonpublic information'' effects no change to the confidentiality afforded to confidential supervisory information as that information remains exempt under Exemption 8 of the FOIA. Indeed, in assessing the confidentiality of a document, a court looks to the document's contents rather than its designation as ''exempt'' or ''nonpublic.'' We note further that to the extent the commenter is concerned with the protection of confidential supervisory information that the Board authorizes for use in private litigation, the Board generally authorizes such use on the condition that the parties enter into a protective order preserving the confidentiality of the information, including by requiring any Board information filed in the case to be filed under seal. The Board's final rule retains the term ''nonpublic information.''

Several commenters also commented on the proposed revisions to the definition of ''confidential supervisory information.'' Commenters specifically focused on the scope of the term as it regards documents prepared by or for a financial institution for its own business purposes. Commenters were concerned that any document prepared by or for the supervised financial institution for its own business purposes and in its possession would be confidential supervisory information irrespective of its contents provided that the document is also ''*created or obtained* in furtherance of the Board's supervisory, investigatory, or enforcement activities'' (emphasis added). We agree that the proposed definition of confidential supervisory information was not sufficiently clear with respect to documents prepared by or for a supervised financial institution for its own business purposes and that are in the institution's possession. The definition is not intended to encompass internal business documents merely because in the Federal Reserve's possession such documents are confidential supervisory information. To address the concerns with the definition of confidential supervisory information, we revised the definition by reorganizing paragraph (b)(1) into three separate sentences with clarifying revisions and also by making some clarifying edits to paragraph (b)(2).

The first sentence of paragraph (b)(1) provides that: ''*Confidential supervisory information* means nonpublic information that is exempt from disclosure pursuant to 5 U.S.C. 552(b)(8) and includes information that is or was created or obtained in furtherance of the Board's supervisory, investigatory, or enforcement activities, including activities conducted by a Federal Reserve Bank (Reserve Bank) under delegated authority, relating to any supervised financial institution, and any information derived from or related to such information.'' In this first sentence, we retained the proposed language with the exception of edits to the portion of the proposal stating that confidential supervisory information includes ''any information derived from, related to, or contained in such documents;'' because ''such'' was intended to refer to confidential supervisory information generally rather than particular documents, the final rule replaces

[2] While the commenter was concerned with the level of protection that is afforded ''confidential'' documents, the Board's definition replaced the term ''exempt information'' with ''nonpublic information'' We assume the commenter interprets the ''nonpublic'' term as synonymous with ''confidential.''

''documents'' with ''information'' and deletes ''contained in.'' Accordingly, the final rule provides that confidential supervisory information includes ''any information derived from or related to such information.''

We also received a few comments on particular phrasing contained in the first sentence of paragraph (b)(1). One commenter contended that the term ''related to'' is vague and potentially overly broad. We decline to delete or modify the ''related to'' wording as it has always been part of the Board's definition of confidential supervisory information and, to date, we are not aware of any issues in practice with the breadth of the language. Another commenter raised concerns with the phrase ''in furtherance of'' in the provision stating that confidential supervisory information includes ''information that is or was created or obtained in furtherance of the Board's supervisory, investigatory, or enforcement activities.'' The commenter suggested that the Board clarify the meaning of ''in furtherance of'' as the language may be construed to include ''business as usual'' documents created by a supervised financial institution in response to a supervisory finding that do not refer to Federal Reserve findings or supervisory communications. The Board declines to incorporate the requested clarification; given the variety of possible ''business as usual'' documents, questions about whether particular documents constitute or contain confidential supervisory information are best handled on a case-by-case basis between the institution and its Federal Reserve supervisors.

The second sentence of paragraph (b)(1) provides: ''Examples of confidential supervisory information include, without limitation, reports of examination, inspection, and visitation; confidential operating and condition reports; supervisory assessments; investigative requests for documents or other information; and supervisory correspondence or other supervisory communications.'' In this sentence, we clarified that the kinds of supervisory documents referenced in the proposed language are ''[e]xamples of confidential supervisory information.''

The third sentence of paragraph (b)(1) provides: ''Additionally, any portion of a document in the possession of any person, entity, agency or authority, including a supervised financial institution that contains or would reveal confidential supervisory information is confidential supervisory information.'' In this third sentence, we modified the phrase in the proposed rule referring to ''portions of internal documents of a supervised financial institution that contain, refer to, or would reveal confidential supervisory information,'' which was too narrowly focused on documents in the possession of supervised financial institutions. Because confidential supervisory information may exist in the documents of other third parties, we modified the phrase to state that confidential supervisory information includes ''any portion of a document in the possession of any person, entity, agency or authority, including a supervised financial institution that contains or would reveal confidential supervisory information.'' Additionally, one commenter argued that ''refer to'' is vague and overly broad and that the ''contains or would reveal'' language is sufficiently broad. We agree that the ''refer to'' phrase is unnecessary and covered by the ''contains or would reveal'' language. Accordingly, we have deleted ''refer to'' in paragraph (b)(1).

We also edited paragraph (b)(2) to specify that documents prepared by or for a supervised financial institution for its own business purposes that are in its possession and do not include confidential supervisory information do not constitute confidential supervisory information ''even though copies of such documents in the Board's or Reserve Bank's possession constitute confidential supervisory information.''

Another commenter argued that supervised financial institutions should be able to make their own judgment about the disclosure and use of information material to the institution's business, operations, and condition, and that the Board's restriction on disclosure of confidential supervisory information interferes with the free flow of information upon which businesses and markets operate. The commenter offered an alternative view of what constitutes confidential supervisory information and suggested limiting confidential supervisory information to information the Board believes would not be appropriately evaluated or understood by the public if disclosed and that the Board has clearly designated as confidential supervisory information. The commenter asserted such a revision would appropriately put the burden on the Board to evaluate the impact of possible disclosure of the information, while permitting supervised financial institutions to meet their disclosure obligations to third parties. The Board does not agree with the proposed standard, which is inconsistent with Exemption 8 of the FOIA and the key purpose of the bank examination privilege which is to preserve candor in communications between the agency and supervised financial institutions. In addition, the proposed standard would be very difficult to implement given that there is no objective measure for determining what supervisory information would be appropriately evaluated or understood by the public.

We did not receive any other comments regarding the proposal's other revisions to § 261.2 and the final rule adopts those revisions as proposed with the exception of a change to the definition of ''records of the Board.'' As noted in the proposal, the Board's revision to the definition of ''records of the Board'' was made in order to conform to Board practice and eliminate any ambiguity regarding the scope of the Board's records as they pertain to Reserve Banks. The Board has determined that further clarification of the scope of the term ''records of the Board'' is appropriate for these reasons. Thus, the Board's final rule revises the definition to state that Board records include records created or obtained by Reserve Bank officers, directors, employees, or contractors that either ''constitute[] confidential supervisory information'' or are ''created or obtained in the performance of Board functions delegated to the Reserve Bank pursuant to 12 U.S.C. 248(k).''

*§ 261.3 Custodian of Records; Certification; Service; Alternative Authority*

We did not receive any comments on proposed § 261.3 and the final rule adopts the section as proposed.

*§ 261.4 Prohibition Against Disclosure*

We did not receive any comments on § 261.4 and the final rule adopts the section as proposed.

*§ 261.10 Published Information*

The Board received no comments on § 261.10. In reviewing the section, however, we noted an outdated reference to the inspection and copying of hard copy materials in paragraph (c)(2). Consistent with the FOIA Improvement Act of 2016, we replaced ''inspection and copying at Reserve Banks'' with ''inspection in electronic format.''

*§ 261.11 Records Available to the Public Upon Request*

The Board did not receive comments on § 261.11 and the final rule adopts the section as proposed, with one minor edit at the second sentence of paragraph (b)(3) to delete the article ''the'' before ''fees'' for readability.

*§ 261.12 Processing Requests*

The Board did not receive comments on § 261.12 and the final rule adopts the section as proposed.

*§ 261.13 Responses to Requests*

The Board received no comments on § 261.13. The Board is adopting the proposed section as final with one clarifying revision to § 261.13(a). Consistent with the Department of Justice's *Template for Agency FOIA Regulations,* which supplements its *Guidance for Agency FOIA Regulations* (''DOJ guidance''),[3] the final rule provides that when the Board receives a perfected request, it will conduct a reasonable search of Board records ''in its possession'' on the date the Board's search begins.

*§ 261.14 Appeals*

The Board did not receive any comments on § 261.14. The final rule adopts the section as proposed with one minor edit to paragraph (c)(2). Current § 261.13(i)(2) and proposed § 261.14(c)(2) provide that ''[a]n initial request for records may not be combined in the same letter with an appeal.'' To provide further clarity and consistency, the Board's final rule replaces ''[a]n initial request for records'' with ''[a] request for records under § 261.11.''

*§ 261.15 Exemptions From Disclosure*

The Board received one comment regarding § 261.15(b)(3), which provides that ''[e]xcept where disclosure is expressly prohibited by statute, regulation, or order, the Board may release records that are exempt from mandatory disclosure whenever the Board or designated Board members, the Secretary, or the General Counsel determines that such disclosure would be in the public interest.'' The commenter recommended that the Board revise § 261.15(b)(3) to provide that the Board will release records that are exempt from mandatory disclosure only where the failure to disclose such records would be manifestly contrary to the public interest. The commenter argued that the suggested added qualifier will avoid undermining the judicial integrity of the bank examination privilege by highlighting that the Federal Reserve recognizes that disclosure of confidential supervisory information is not to be taken lightly and should meet a robust public interest standard. In response to the comment, the Board added language to § 261.15(b)(3) to clarify that confidential supervisory information will only be released as set forth in subpart C. The Board, however, does not agree with the commenter's additional suggestion that § 261.20(c) of subpart C be revised to provide that the Board will exercise its discretion to release confidential supervisory information only where the failure to do so would be manifestly contrary to the public interest. The suggestion conflicts with the Board's legal authority as the Board may disclose confidential supervisory information to ''any . . . person that the Board determines to be proper.'' 12 U.S.C. 326. Accordingly, § 261.20(c) appropriately reflects the Board's broad statutory authority to make discretionary releases of confidential supervisory information.

In addition to the clarification stating that discretionary releases of confidential supervisory information will only be made as set forth in subpart C, the Board has made a minor addition to § 261.15(b)(3) to reiterate that the Board will ''provide predisclosure notice to submitters of confidential information in accordance with § 261.18(b)(1).''

The Board did not receive any other comments on § 261.15 and the final rule adopts the remainder of the section as proposed.

*§ 261.16 Fee Schedules; Waiver of Fees*

The Board did not receive any comments on § 261.16 and the final rule adopts the section as proposed, with a few minor edits. At paragraph (g)(1), the Board has removed ''federal'' from the proposal's reference to ''the operation or activities of the federal government'' and has edited ''operation'' to ''operations'' in the plural for consistency with the FOIA and the DOJ guidance. Additionally, for clarity and consistency with the DOJ guidance, at paragraph (h)(3)(i), the Board inserted ''unusual circumstances'' so the subsection now reads ''[p]rovided timely notice of unusual circumstances to the requester in accordance with the FOIA.'' The final rule also replaces the references to ''actual costs'' in the fee schedule with ''direct costs.'' Finally, while the proposal included the costs for ''[c]omputer search, including computer search time, output, operator's salary'' for commercial requesters, it failed to specify that these costs also apply to ''all other requesters.'' We have corrected this minor omission and the fee schedule now states that the computer search costs apply to ''all other requesters.''

*§ 261.17 Request for Confidential Treatment*

The Board received a few comments relating to § 261.17. One commenter noted that the Board's requirement for a submitter of confidential information ''to identify the specific information for which confidential treatment is requested and include an affirmative statement that such information is not available publicly'' imposes a burden in situations where confidential and non-confidential information is interwoven and there is no immediate need to make any information public. The commenter asserted that the requirement could be read to impose an obligation on a supervised financial institution to submit a public version of a document each time the institution seeks confidential treatment under FOIA, similar to the application context where banking organizations submit to the Board both public and nonpublic versions of applications. The commenter therefore recommended that the Board maintain its existing requirement that submitters of information solely ''state in reasonable detail the facts supporting the request and its legal justification.'' The Board does not view the requirement to include an affirmative statement that the information is not publicly available as burdensome as the requirement is a reasonable means of ensuring that submitters of information make requests for confidential treatment only with respect to information that is truly confidential and not in the public domain. For further consistency with the DOJ guidance, however, the Board's final rule replaces the requirement to ''identify the specific information'' with a requirement that submitters of information ''use good faith efforts to designate by appropriate markings any portion of the submission for which confidential treatment is requested.'' The Board believes this change will eliminate any implication that the submitter needs to do a line-by-line review for confidential information or submit a public version of a document each time the submitter seeks confidential treatment. Another commenter requested the final rule make clear that when a submission consists entirely of information that is subject to withholding under Exemption 4, the entire document is entitled to confidential treatment. The Board does not deem this change necessary as the submitter is free to request confidential treatment of the whole document.

The Board also received comments expressing concern over the 10-year expiration period for designations of

[3] U.S. Department of Justice, Office of Information Policy, *Template for Agency FOIA Regulations, https://www.justice.gov/oip/template-agency-foia-regulations* (last updated Feb. 22, 2017).

confidential commercial or financial information pursuant to § 261.15(a)(4). One commenter asked that the Board instead maintain confidential treatment of supervisory documents in accordance with the Board's record retention policy. Although the commenter noted that the DOJ guidance, which also provides for a 10-year expiration period on confidential treatment requests under Exemption 4, preceded the Supreme Court's decision in *Food Marketing Institute* v. *Argus Leader Media,* 139 S. Ct. 2356 (2019), the commenter did not elaborate on how that decision bears on the standard 10-year expiration period. The Board will retain the 10-year expiration period with respect to requests for confidential treatment under § 261.15(a)(4) as that is the period provided for in the DOJ guidance. Additionally, the Board does not believe its record retention policies, which govern the management, scheduling, and disposition of Board records, are an appropriate standard to address the confidentiality of information contained in those Board records.

Another commenter argued that any expiration period is inappropriate in light of the ongoing and frequent submission by supervised financial institutions of highly sensitive, nonpublic information. The commenter further argued that the provision allowing submitters of information to renew their requests for confidentiality prior to the 10-year expiration date will not mitigate the risk to financial institutions given the unlikelihood that institutions will retain personnel who are adequately familiar with the sensitive information that was the subject of a request for confidential treatment submitted years earlier. The Board notes, however, that the fact that the 10-year period has not expired is not dispositive of whether information that a submitter has designated confidential in reliance upon § 261.15(a)(4) will be withheld. Indeed, at the time of any FOIA request for the information, the Board must make a determination regarding whether the information is subject to withholding under Exemption 4 even if the 10-year period has not expired. Information that may have been confidential at the time submitted may lose its confidentiality at a later time, whether as a result of the submitter's public release of the information or other factors. In any event, under § 261.18(b)(1), when information has been designated in good faith as protected from disclosure under either Exemption 4 or 6, the Board will provide written notice to submitters if their designated confidential information becomes the subject of a FOIA request and the Board determines that it may be required to disclose the information. In response, however, to the comments expressing concerns regarding the requirement that submitters of information who wish their information to be treated confidentially beyond the initial 10-year period renew their requests for confidential treatment, the Board's final rule removes the renewal requirement. The final rule instead incorporates language from the DOJ guidance to provide that a request for confidential treatment will expire 10 years after the date of submission unless the submitter requests and provides justification for a longer designation period. This revision will permit a submitter to request a longer designation period at the time of the initial submission.

In response to comments and for the reasons described below in connection with § 261.18, the Board's final rule removes the second sentence of proposed § 261.17(b), which referenced the ''competitive harm'' test under Exemption 4 of the FOIA. The Board did not receive any comments on other provisions of § 261.17.

*§ 261.18 Process for Addressing a Submitter's Request for Confidential Treatment*

Three commenters asked that the Board remove all references to ''competitive harm'' in the regulation in light of the Supreme Court's decision in *Food Marketing Institute* v. *Argus Leader Media,* 139 S. Ct. 2356 (2019), which was issued after the Board's proposed rule. In *Argus Leader,* the Supreme Court rejected the longstanding ''competitive harm'' test used to determine whether information is confidential under Exemption 4. Commenters further asked that the Board provide explicit assurances of privacy with respect to commercially sensitive information provided to the Board. In light of *Argus Leader,* the Board has removed all references in the rule to the ''competitive harm'' test. Because, however, the Supreme Court did not reach the question of whether an assurance of confidentiality by the government is a necessary condition for information to be treated confidentially under Exemption 4, the Board is not adopting the recommendation to incorporate an explicit assurance of privacy. Additionally, following *Argus Leader,* DOJ issued guidance on Exemption 4 (''DOJ Exemption 4 guidance'') which provides that an assurance of confidentiality by the government ''can be either explicit or implicit.''[4] DOJ also prepared a step-by-step guide for Exemption 4 analysis which provides that submitters of confidential information may rely on ''express or implied'' assurances of confidentiality when submitting commercial or financial information to an agency.[5] To ensure consistent analysis with DOJ Exemption 4 guidance, the Board plans to use the DOJ's step-by-step guide when analyzing the application of Exemption 4. The Board did not receive any other comments concerning proposed § 261.18 and the final rule otherwise adopts the section as proposed.

*§ 261.20 General*

The Board received a few comments on § 261.20. Commenters objected to the prohibition at § 261.20(a) which applies to both use and disclosure of confidential supervisory information for an unauthorized purpose. Commenters argued that the prohibition on unauthorized use introduces ambiguity and will increase the potential of inadvertent violations including violations by officers, directors, and employees who may use confidential supervisory information over a long period of time for varying business purposes. One commenter asserted that the prohibition on unauthorized disclosure sufficiently protects the Board's interests. The Board does not agree that the prohibition on use for an unauthorized purpose is ambiguous or exposes directors, officers, and employees of supervised financial institutions to the risk that they will run afoul of the prohibition. The Board's final rule allows supervised financial institutions to disclose confidential supervisory information to their directors, officers, and employees when ''necessary or appropriate for business purposes.'' Accordingly, the use of confidential supervisory information by directors, officers, and employees for a necessary or appropriate business purpose consistent with the final rule, in the Board's view, constitutes use for an authorized purpose. Moreover, the Board believes the prohibition against use for unauthorized purposes is

[4] U.S. Department of Justice, Office of Information Policy, *Exemption 4 After the Supreme Court's Ruling in Food Marketing Institute* v. *Argus Leader Media, https://www.justice.gov/oip/* exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media (last updated Oct. 4, 2019).

[5] U.S. Department of Justice, Office of Information Policy, *Step-by-Step Guide for Determining if Commercial or Financial Information Obtained From a Person is Confidential Under Exemption 4 of the FOIA, https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential* (last updated Oct. 7, 2019).

necessary to proscribe impermissible uses such as use of the Board's confidential information for personal gain.

Another commenter also expressed concern that the Board should not deem conduct in violation of the rule's prohibition on unauthorized use and disclosure of confidential supervisory information as within the purview of 18 U.S.C. 641, which imposes Federal criminal liability on whoever ''embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof.'' The commenter suggested that the threat of criminal sanctions for improper sharing of confidential supervisory information creates a chilling effect on employees of supervised financial institutions that inhibits beneficial information sharing internally and with third-party advisors. The Board does not believe that the prospect of criminal penalties under section 641 will inhibit disclosures authorized under the Board's Rules, which have been revised to allow internal disclosures ''when necessary or appropriate for business purposes.'' In addition, the Board's Rules permit disclosures to outside legal counsel and auditors ''when necessary or appropriate'' in connection with the provision of legal or auditing services and to service providers when the ''disclosure is deemed necessary'' to the service providers' provision of services. Moreover, unauthorized disclosures that lack criminal intent, such as those made inadvertently, would not be subject to prosecution under section 641. Where the requisite criminal intent to steal or knowingly convert the information may be present, criminal prosecution may be appropriate. *See, e.g., United States* v. *Blaszczak,* 947 F.3d 19, 39 (2d Cir. 2019); *United States* v. *Fowler,* 932 F.2d 306, 309–10 (4th Cir. 1991); *United States* v. *Girard,* 601 F.2d 69, 70–71 (2d Cir. 1979). In those instances, the Board cooperates with law enforcement agencies in their investigations of potential violations of the statute. The commenter further suggested that the prospect of criminal sanctions may put supervised financial institutions in the position of having to choose between complying with congressional subpoenas and refusing to comply in order to avoid the threat of criminal sanctions for disclosing confidential supervisory information if the Board does not consent to the disclosure. The Board's Rules, however, do not sanction supervised financial institutions' non-compliance with congressional or other legally enforceable demands. Rather, the Board's Rules set forth a process for an institution to obtain permission to disclose confidential supervisory information in response to subpoenas or other legally enforceable demands including from congressional committees.

As discussed above, one commenter suggested the Board revise § 261.20(c) to provide that the Board will exercise its discretion to release confidential supervisory information only where the failure to do so would be manifestly contrary to the public interest. Because the Board has authority to disclose confidential supervisory information to ''any . . . person that the Board determines to be proper,'' 12 U.S.C. 326, it would not be appropriate to constrain the Board's authority as proposed by the commenter. Accordingly, the Board did not adopt the recommended change. The Board did not receive any further comments to § 261.20.

*§ 261.21 Confidential Supervisory Information Made Available to Supervised Financial Institutions*

Disclosures to Directors, Officers, and Employees

The Board received several comments on its proposed revisions to § 261.21(b), addressing disclosures to and by supervised financial institutions. While many commenters were supportive of expanding the scope of authorized disclosures to the affiliates of supervised financial institutions under paragraph (b)(1), they disagreed with the proposal's qualification conditioning disclosure to the directors, officers, and employees of supervised financial institutions and their affiliates on their ''need for the information in the performance of official duties.'' Commenters argued that there could be ambiguity regarding the meaning of ''need'' and what qualifies as an individual's ''official duties,'' and that these ambiguities increase the risk of inconsistent application of the Board's Rules and potentially subject firms' internal disclosures to the Board's second-guessing. As an alternative, three commenters suggested that the Board adopt the OCC's language and permit disclosures that are ''necessary or appropriate for business purposes.'' The Board agrees. Accordingly, the final rule permits supervised financial institutions to disclose confidential supervisory information to their directors, officers, and employees and to the directors, officers, and employees of their affiliates ''when necessary or appropriate for business purposes.'' Additionally, one commenter questioned whether the limitation on sharing confidential supervisory information applies only to disclosures made to the directors, officers, or employees of affiliates. The final rule addresses this concern and makes clear that the ''necessary or appropriate for business purposes'' standard applies to all directors, officers, and employees, including at the supervised financial institution and its affiliates.

A few commenters suggested that the final rule should treat contingent workers and independent contractors as employees rather than as service providers for purposes of access to confidential supervisory information in light of the ''business as usual'' roles these individuals fulfill. The Board declines to make this change. Instead, to address the concerns, we streamlined the process for access by all service providers including contingent workers and independent contractors. The final rule does not require the Federal Reserve's prior approval of disclosures to contingent workers or independent contractors. Where necessary for the provision of the services, the supervised financial institution may provide the contingent worker or independent contractor access to confidential supervisory information if the individual is under a written contract with the supervised financial institution that includes the confidentiality agreements specified in the rule.

Disclosures to the FDIC, OCC, CFPB, and State Financial Supervisory Agencies

The Board also received a number of comments on § 261.21(b)(2), which proposed to permit supervised financial institutions to disclose confidential supervisory information directly to the Federal Deposit Insurance Corporation (''FDIC''), the OCC, the CFPB, and the State financial supervisory agency that supervises the institution, so long as the institution's central point of contact at the Reserve Bank or equivalent supervisory team leader (''CPC'') concurred that the receiving agency had a legitimate supervisory or regulatory interest in the information. Commenters suggested the final rule be revised to eliminate the prior approval requirement for these disclosures arguing that the requirement is administratively burdensome. Commenters in particular noted that supervised financial institutions routinely receive requests from their banking regulators for certain internally-prepared materials, such as board and committee meeting minutes and

materials, that reference the confidential supervisory information of another banking regulator. Commenters alternatively proposed that, at most, the rule should require supervised financial institutions to provide CPCs notice and an opportunity to object to the disclosure of confidential supervisory information to their other banking regulators.

The Board declines to remove the requirement that supervised financial institutions obtain Federal Reserve approval of disclosures of confidential supervisory information to the FDIC, the OCC, the CFPB, and State banking agencies. Because the regulators have different scopes of authority, Federal Reserve review of proposed disclosures is necessary to ensure that the information provided is relevant to the agency's supervisory responsibilities. The Board further notes that the banking regulators and the CFPB have no parallel provision in their respective rules that allows supervised entities to disclose nonpublic information of the agencies to the Board.

The Board, however, has decided that further revisions to paragraph (b)(2) are warranted both to limit the types of requests that may be approved under the paragraph and to clarify to whom requests should be directed. As the provision is intended to enable the expeditious sharing of supervised financial institutions' internally-prepared documents, such as board and committee meeting minutes and materials, with the FDIC, the OCC, the CFPB, and State banking agencies, the Board revised paragraph (b)(2) to apply only to requests to release ''confidential supervisory information . . . contained in documents prepared by or for the institution for its own business purposes.'' As one commenter stated, the supervised financial institutions should not be required to play a middleperson role between the Board and the other regulators. The Board agrees and recognizes that to the extent other documents, including but not limited to, examination reports or supervisory correspondence, are provided to other agencies, it is the responsibility of the Federal Reserve, not the supervised financial institution, to provide that information. The final rule's limitation on the scope of permitted requests under paragraph (b)(2) balances the institution's need for a streamlined process to respond to supervisory requests for internally-prepared documents containing confidential supervisory information, while recognizing that the institution should not act as an intermediary between the Board and the other agencies for the provision of other confidential supervisory information. Accordingly, all other requests to disclose confidential supervisory information to the FDIC, the OCC, the CFPB, State banking agency or other agencies are to be directed to the Board's General Counsel.

In addition, the final rule clarifies to whom requests are submitted under paragraph (b)(2) in recognition that the appropriate individual to approve requests may not always be the ''CPC'' or ''equivalent supervisory team leader.'' To that end, the final rule replaces the term ''CPC'' with ''Reserve Bank Point of Contact'' or ''Reserve Bank POC'' and defines that term to include not only the CPC or equivalent supervisory team leader but also any ''other designated Reserve Bank employee.'' Additionally, the final rule omits as redundant the reference in paragraph (b)(2) of the proposal to a supervised financial institution that is ''lawfully in possession of confidential supervisory information about that institution pursuant to this section.''

Some commenters were concerned that the CPCs (now Reserve Bank POCs) would not be able to grant blanket approval for recurring disclosures. Reserve Bank POCs will, when consistent with internal supervisory procedures, have latitude to approve requests to disclose confidential supervisory information contained in specified categories of internally-prepared business documents with the FDIC, the OCC, the CFPB, and State banking agencies on a recurring basis.

The Board received one comment stating that the Board should include clear procedures for supervised financial institutions to appeal a CPC's decision denying a request to disclose confidential supervisory information. The Board does not agree that the regulation needs to incorporate such specific procedures. The Board's Rules do not preclude a supervised financial institution that disagrees with a Reserve Bank POC's determination from requesting reconsideration. Additionally, the supervised financial institution whose request is denied under § 261.21(b)(2) may advise the Federal or State banking agency to submit a request for the Board's information directly to the Reserve Bank POC.

Section 261.21(b)(2) also provides, consistent with proposed § 261.21(b)(5), that the Reserve Bank POC's action under § 261.21(b)(2) may require concurrence of other Federal Reserve staff in accordance with internal supervisory procedures. Commenters expressed concerns that without common standards such as what circumstances or topics will require further Federal Reserve consultation, CPCs would provide different, inconsistent, and potentially arbitrary responses, and the process would create unnecessary delays that would undermine any efficiencies that might have resulted from the CPC approval process. While the Board believes that consultation within the Federal Reserve as part of the Reserve Bank POC approval process will lead to more consistent responses and improved efficiencies over time, the likelihood of achieving these goals is further increased given that requests under paragraph (b)(2) are now limited to requests to disclose confidential supervisory information contained in documents prepared by or for the supervised financial institution for its own business purposes. The provision acknowledging that concurrence of other Federal Reserve staff may be necessary reflects that confidential supervisory information is the Board's information and that in certain circumstances it will be appropriate for Board staff to review the specific proposed disclosures, for example, to ensure consistency in approach.

Two commenters requested that the final rule clarify that supervised financial institutions are authorized to disclose confidential supervisory information to State insurance regulators in accordance with the procedures set forth at § 261.21(b)(2). Another commenter argued that State financial supervisory agencies often appoint third-party firms, experts, or consultants to conduct or assist in examinations of supervised financial institutions, and that § 261.21(b)(2) should be revised to provide for disclosures to such third parties appointed by the State financial supervisory agency. Three commenters further proposed that the Board's final rule include procedures for supervised financial institutions to disclose confidential supervisory information to foreign bank supervisors. We decline to incorporate these changes into the final rule. Section 261.21(b)(2) is intended to facilitate the disclosure of confidential supervisory information to the primary banking agencies and the CFPB—the regulators with whom the Board interacts most closely in its day-to-day supervisory activities. All other disclosures are best handled on an individual basis under §§ 261.22(c) or 261.23(c) so that the Board may conduct an appropriate review to ensure that the information that is proposed to be shared is needed in connection with the

agency's supervisory and other statutory responsibilities.

Disclosures to Legal Counsel and Auditors

The Board also received comments regarding the disclosure of confidential supervisory information to outside legal counsel and auditors under § 261.21(b)(3). Commenters remarked favorably on the elimination of the requirement that legal counsel and auditors view confidential supervisory information only on the premises of the supervised financial institution. Commenters, however, raised concerns with the proposal's requirement that legal counsel and auditors enter into specific written agreements in which they agree to certain requirements concerning their handling and use of confidential supervisory information. Many commenters questioned the need for the agreements given that legal counsel and auditors are already bound by professional ethical and confidentiality obligations with one commenter suggesting that the requirement would conflict with such obligations as well as with applicable laws and regulations. The same commenter further noted that the requirement to return or destroy the confidential supervisory information or to otherwise make electronic copies inaccessible at the conclusion of the legal counsel's or auditor's engagement would be burdensome and possibly impractical. Commenters recommended that the final rule eliminate the requirement that legal counsel and auditors enter into specific written agreements and permit supervised financial institutions to disclose confidential supervisory information to these third parties ''when necessary or appropriate for business purposes.'' We agree. Accordingly, the final rule authorizes supervised financial institutions to disclose confidential supervisory information to their legal counsel and auditors ''[w]hen necessary or appropriate in connection with the provision of legal or auditing services to the supervised financial institution'' without the need for a written agreement addressing the use and handling of confidential supervisory information.

Some commenters also requested that the Board clarify that litigation vendors and similar service providers providing services to legal counsel are authorized to access confidential supervisory information to the extent necessary in their performance of services for the financial institution. We agree with this addition. The final rule provides that the supervised financial institution may also disclose confidential supervisory information to service providers of its legal counsel or auditors if the service provider is under a written agreement with the legal counsel or auditor in which the service provider agrees to treat the Board's information in accordance with § 261.20(a) and that it will not use the information for any purpose other than as necessary to provide services to the supervised financial institution. The final rule also clarifies that the reference to service providers—both under paragraphs (b)(3) and (b)(4)—includes independent contractors, in addition to consultants, contingent workers, and technology providers. One commenter additionally suggested that the final rule be revised to permit legal counsel and auditors to disclose confidential supervisory information to their affiliates in the performance of legal and auditing services for the financial institution. We view adoption of this suggestion as unnecessary given that the need for these types of disclosures do not appear to be common and thus can be handled on a case-by-case basis.

Disclosures to Other Service Providers

The Board also received a number of comments on § 261.21(b)(4) regarding the disclosure of confidential supervisory information by supervised financial institutions to their other service providers, including consultants and independent contractors. While commenters appreciated that the proposal would improve efficiency by allowing firms to submit their requests to their Reserve Bank CPCs rather than the General Counsel, commenters urged the Board to eliminate any prior approval requirement and to adopt a rule similar to the OCC's which permits national banks to disclose nonpublic OCC information to their consultants subject to certain written confidentiality agreements. Commenters cited the inefficiencies and burdens associated with a prior approval requirement and the critical role consultants play in assisting firms in meeting supervisory and regulatory requirements. One commenter suggested that the Board require supervised financial institutions to maintain a log of confidential supervisory information disclosures to service providers that may be subject to examiner review in lieu of prior approval. The Board agrees with the comments and has removed the requirement to obtain CPC approval to disclose confidential supervisory information to service providers. Under the final rule, a supervised financial institution is authorized to disclose confidential supervisory information to a service provider if the service provider is under a written contract to provide services to the institution, the disclosure of confidential supervisory information is deemed necessary to the provision of the services, and the service provider has a written agreement with the institution that includes the written agreements set forth at § 261.21(b)(4)(i)(A)–(B).

The Board is also adopting the suggestion that it require supervised financial institutions to maintain a log of confidential supervisory information disclosures to service providers that is subject to examiner review. The final rule requires supervised financial institutions to maintain a written account of their disclosures to service providers under § 261.21(b)(4)(ii) and to provide the Board or Reserve Bank a copy of the written account upon request. The written account should allow the supervised financial institution to identify the actual confidential supervisory information that was disclosed to the service provider. The written account is intended to protect the confidentiality of the Board's privileged information in the hands of a wide array of service providers and also to ensure accountability and compliance with the rule and the parameters for appropriately disclosing confidential supervisory information under § 261.21(b)(4). The firm is expected to have reasonable assurance of such accountability and compliance through maintenance of the written account and more broadly through the policies, procedures, and controls that apply to the disclosure of confidential supervisory information.

*§ 261.22 Nonpublic Information Made Available by the Board to Governmental Agencies and Entities Exercising Governmental Authority*

The Board received three comments regarding § 261.22. One commenter recommended that the Board revise § 261.22(a), which addresses disclosures by the Federal Reserve to Federal and State financial supervisory agencies, and § 261.22(b), which addresses disclosures to certain governmental officials in furtherance of specific statutory responsibilities, to provide that the Federal Reserve will disclose confidential supervisory information and other nonpublic information under those sections only when disclosure would be appropriate in light of the general factors that govern the General Counsel's decision to disclose confidential supervisory information to other governmental agencies under § 261.22(c). Under § 261.22(c), other

Federal, State, and local agencies and other entities exercising governmental authority may file written requests with the Board for access to confidential supervisory information and other nonpublic information. Section 261.22(c)(2) provides that the General Counsel may approve such requests if ''[t]he information is needed in connection with a formal investigation or other official duties of the requesting agency or entity;'' ''[s]atisfactory assurances of confidentiality have been given;'' and ''[d]isclosure is consistent with the supervisory and regulatory responsibilities and policies of the Board.'' The Board does not agree that the rule should be revised to provide that the Federal Reserve will disclose confidential supervisory information and other nonpublic information under paragraphs (a) and (b) only when disclosure would be appropriate under the factors set forth under paragraph (c)(2). The specific delegations authorizing the disclosure of confidential supervisory information to the FDIC, the OCC, the CFPB, and State financial supervisory agencies and the disclosure of confidential supervisory information to particular governmental officials in furtherance of specific statutory responsibilities are codified at § 261.22(a) and (b) based on the Board's determination that the authorized disclosures satisfy the considerations set forth at § 261.22(c)(2)(ii)–(iv). Indeed, the delegations at paragraphs (a) and (b) were established because the Board determined that the named agencies and officials in those sections require confidential supervisory information in connection with their official duties on a recurring basis and that given the close coordination between the agencies authorizing disclosures on a case-by-case basis does not further the Board's supervisory and regulatory responsibilities. Furthermore, all disclosures under § 261.22, including those made under paragraphs (a) and (b), are subject to the confidentiality restrictions set forth in the Board's Rules.

Another commenter recommended that the Board add State insurance regulatory authorities to the regulators included at § 261.22(a). The Board declines to make this change. Section 261.22(a) is intended to delegate information sharing at the staff level in order to facilitate the disclosure of confidential supervisory information to the primary banking regulators and the CFPB—the regulators with whom the Board interacts most closely in its day-to-day supervisory activities. Disclosures to the other functional regulators, including State insurance supervisors, are better addressed by the General Counsel on a case-by-case basis under § 261.22(c) or in accordance with written memoranda of understanding between the agencies.

The same commenter stated that the Board should confirm that the Federal Reserve will not, absent an enforceable subpoena or court order, transfer materials covered by 12 U.S.C. 1828(x) to other government agencies or third parties, and that the Federal Reserve will notify supervised financial institutions of any such subpoena or court order to the extent legally permissible. The commenter also suggested that the final rule should provide a mechanism for an institution to challenge the Federal Reserve's transfer of such material. The Board, however, only transfers attorney-client, work product, or other privileged materials in accordance with applicable law including 12 U.S.C. 1821(t) and 1828(x). The law does not require prior notice to the supervised financial institution of a request including an enforceable subpoena or court order for privileged materials. Additionally, such notice would not be appropriate as it may reveal confidential information about an agency's pending actions involving the supervised financial institution and, in some cases, such as grand jury subpoenas, would also not be permitted. The Board is cognizant of the privilege concerns and thus encourages institutions to clearly mark their attorney-client, work product, or other materials as privileged. Accordingly, the Board declines to make the proposed changes.

*§ 261.23 Other Disclosure of Confidential Supervisory Information*

The Board received three comments on § 261.23. One commenter supported the Board's revisions to § 261.23(b)(2)(iii) requiring requesters ''to provide a narrow and specific description of the confidential supervisory information the requester seeks to access or to disclose in the litigation'' and to provide ''the reason why the information sought, or equivalent information adequate to the needs of the case, cannot by obtained from any other source,'' but argued that supervised financial institutions should have the opportunity to provide input on third-party requests to use confidential supervisory information in litigation. The commenter asserted that the Board should grant supervised financial institutions the opportunity to provide input on such requests because financial institutions are best suited to address the intent of the requester. The commenter also contended that there is a potential for the development of mistrust between financial institutions and the Board if institutions are not afforded an opportunity to provide input on the disclosure of confidential supervisory information. The Board does not agree that any change to the final rule is warranted. The Board's Rules set forth stringent standards for the disclosure of confidential supervisory information that recognize the sensitivity of the information and disfavor the granting of a request absent substantial need. Moreover, the Board may, on a case-by-case basis, seek the input of supervised financial institutions if it would be of assistance in resolving specific requests for access to confidential supervisory information. In many cases, the institution is a party to the litigation and may provide input.

Another commenter requested that the Board clarify that third parties who are authorized to access confidential supervisory information for litigation purposes are prohibited from further disclosing the information. The Board does not believe this clarification is necessary as the Board's Rules state that confidential supervisory information remains the property of the Board and that no person to whom the information is made available may use the information for an unauthorized purpose or disclose the information without the prior written permission of the General Counsel. In addition, the Board's authorization letters approving the use of confidential supervisory information for litigation purposes also emphasize the restriction on further disclosures and generally require that the parties obtain a protective order acceptable to the Board.

Lastly, one commenter stated that the Board should affirm that it will not produce to litigants materials that are covered by 12 U.S.C. 1828(x) and that the Board should otherwise notify supervised financial institutions so that they may assert privilege or other grounds for withholding the information if the Board believes that there is a question as to whether § 1828(x) applies. The Board does not believe such a clarification to § 261.23 is warranted because these requests are rare and, when they arise, the Board's Rules provide sufficient flexibility to address them. Under the Board's Rules, the litigant must show that ''the information sought, or equivalent information adequate to the needs of the case, cannot be obtained from any other source.'' Because the litigant can seek the firm's privileged material directly from the firm through existing discovery processes, the Board would not have

reason to grant the litigant's request. In the rare instance that the disclosure of privileged materials were necessary, those requests would generally be handled in consultation with the firm as the Board would ask the firm to confirm that a court has ordered or the firm has authorized production of the firm's privileged information. The Board did not receive any other comments regarding § 261.23 and the final rule adopts the section as proposed.

*§ 261.24 Subpoenas, Orders Compelling Production, and Other Process*

The Board did not receive any comments on proposed § 261.24 and the final rule adopts the section as proposed.

**III. Administrative Law Matters**

*Regulatory Flexibility Act*

In accordance with the Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* the Board published an initial regulatory flexibility analysis with the proposal. The Board did not receive any comments on its initial regulatory flexibility analysis. The RFA requires a Federal agency to prepare a final regulatory flexibility analysis unless the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Based on its analysis, and for the reasons stated below, the Board certifies that the final rule will not have a significant economic impact on a substantial number of small entities.[6]

Under regulations issued by the Small Business Administration, a small entity includes a bank, bank holding company, or savings and loan holding company with assets of $600 million or less and trust companies with annual receipts of $41.5 million or less.[7] As of March 2020, there were approximately 2,925 small bank holding companies, 132 small savings and loan holding companies, and 472 small State member banks. As of March 2020, the Board does not supervise any small trust companies.

As stated in the initial regulatory flexibility analysis, the requirements set forth in the rule with respect to requests for Board records under the FOIA and requests to access and disclose confidential supervisory information apply equally to all persons and to all entities regardless of their size. The rule, which in part introduces organizational changes to clarify the Board's FOIA regulation, does not impose economic effects on FOIA requesters, including any FOIA requesters that would be small entities. Notably, consistent with the FOIA, the Board's fees for processing FOIA requests are limited to reasonable standard charges, and the processing fees have not been increased by the final rule. Similarly, far from imposing any economic costs on supervised financial institutions, the Board's clarifications to the rules governing access to and disclosure of the Board's confidential supervisory information ease certain outdated restrictions that hamper supervised financial institutions in their ability to further disclose confidential supervisory information of the Board within their organizations as well as with their outside legal counsel, auditors, and other service providers. The final rule imposes minimal reporting, recordkeeping, or other compliance requirements, including the reporting requirements under §§ 261.22(c), 261.23(b) and (c), and 261.24(a)(1); the recordkeeping requirement under § 261.21(b)(4)(ii); and the disclosure requirements under § 261.24(a)(2) and (a)(3). As noted in the discussion of the Paperwork Reduction Act below, the Board has estimated the reporting, recordkeeping, and disclosure requirements would impose an annual burden of approximately 134 hours on all respondents. For these reasons, the Board certifies that the final rule will not have a significant economic impact on a substantial of number of small entities.

*Paperwork Reduction Act*

The Paperwork Reduction Act (44 U.S.C. 3501–3521) (''PRA'') states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (''OMB'') control number. 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, as well as the authority to temporarily approve a new collection of information without providing opportunity for public comment if the Board determines that a change in an existing collection must be instituted quickly and that public participation in the approval process would defeat the purpose of the collection or substantially interfere with the Board's ability to perform its statutory obligation.

This final rule contains collections of information subject to the PRA, including certain reporting and disclosure requirements in subpart C that have not previously been cleared by the Board under the PRA. In order to accurately account for these requirements pursuant to the PRA, the Board has temporarily approved new collections of information titled Information Collections Associated with the Rules Regarding Availability of Information (FR 4035; OMB No. 7100–NEW).

The Board's delegated authority requires that the Board, after temporarily approving a collection, solicit public comment to extend the information collection for a period not to exceed three years. Therefore, the Board is inviting comment to extend the FR 4035 information collections for three years.

The Board invites public comment on the FR 4035 information collections, which are being reviewed under authority delegated by the OMB under the PRA. Comments must be submitted on or before November 16, 2020. Comments are invited on the following:

a. Whether the collections of information are 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 information collections, 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 collections 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 collections.

Final Approval Under OMB Delegated Authority of the Temporary Implementation of, and Solicitation of Comment To Extend for Three Years, the Following Information Collection

*Collection title:* Information Collections Associated with the Rules Regarding Availability of Information.

*Agency form number:* FR 4035.

*OMB control number:* 7100–NEW.

*Effective Date:* September 15, 2020

*Frequency:* Event generated.

*Respondents:*

[6] 5 U.S.C. 605(b).

[7] *See* 13 CFR 121.201; 84 FR 34261 (July 18, 2019).

§ 261.21(b)(4) Supervised financial institutions
§ 261.22(c) State, local, and foreign agencies and entities exercising governmental authority
§ 261.23(b) Any person
§ 261.23(c) Any person
§ 261.24(a) Any person

*Estimated number of respondents:*

§ 261.21(b)(4) 60
§ 261.22(c) 20
§ 261.23(b) 15
§ 261.23(c) 30
§ 261.24(a) 3

*Estimated average hours per response:*

§ 261.21(b)(4) 0.25
§ 261.22(c) 0.5
§ 261.23(b) 1
§ 261.23(c) 1
§ 261.24(a)(1) 1
§ 261.24(a)(2) 1
§ 261.24(a)(3) 1

*Estimated annual burden hours:*

§ 261.21(b)(4) 60
§ 261.22(c) 20
§ 261.23(b) 15
§ 261.23(c) 30
§ 261.24(a)(1) 3
§ 261.24(a)(2) 3
§ 261.24(a)(3) 3

*General description of information collection:*

Subpart C provides for certain reporting, recordkeeping, and disclosure requirements under the PRA. As discussed in further detail below, the subpart contains reporting requirements to enable third parties to request the Board's authorization to access, use, or further disclose confidential supervisory information or other nonpublic information of the Board, and to ensure that the Board is informed when any subpoena or other legally enforceable demand requires production of the Board's confidential supervisory information or other nonpublic information in the form of documents or testimony. Additionally, the subpart contains one recordkeeping requirement related to the provision that allows supervised financial institutions to disclose the Board's confidential supervisory information to service providers if the disclosure is deemed necessary to the service provider's provision of services. It also contains two disclosure requirements when individuals are served with a subpoena, order, or other judicial or administrative process requiring the production of the Board's confidential supervisory information or other nonpublic information in the form of documents or testimony.[8]

*Reporting:* Pursuant to § 261.22(c), State, local, and foreign agencies and other entities exercising governmental authority may file written requests to the General Counsel for access to the Board's confidential supervisory information and other nonpublic information.[9] Such written requests must include the information specified at § 261.22(c)(1)(i)–(v). Pursuant to § 261.23(b), any person that seeks to access, use or disclose, or require another person to disclose the Board's confidential supervisory information in connection with litigation before a court, board, commission, agency, or arbitration must file a written request with the General Counsel. Such a request must include the information specified in § 261.23(b)(2). Additionally, pursuant to § 261.23(c), any other person seeking to access, use, or disclose the Board's confidential supervisory information for any other purpose shall file a written request with the General Counsel. Such a request must describe the purpose for which access, use, or disclosure is sought and the requester must provide other information as requested by the General Counsel. Finally, pursuant to § 261.24(a)(1), any person who is served with a subpoena, order, or other judicial or administrative process requiring the production of the Board's confidential supervisory information or other nonpublic information or requiring the person's testimony regarding such Board information in any proceeding is required to promptly inform the General Counsel of the service and all relevant facts, including the documents, information or testimony demanded, and any facts relevant to the Board in determining whether the Board material requested should be made available.

The information provided in written requests made pursuant to the § 261.22(c) enables the General Counsel to determine, pursuant to § 261.22(c)(2), whether ''[t]he information is needed in connection with a formal investigation or other official duties of the requesting agency or entity;'' whether ''[s]atisfactory assurances of confidentiality have been given;'' and whether ''[d]isclosure is consistent with the supervisory and regulatory responsibilities and policies of the Board.'' The information provided in written requests pursuant to § 261.23)(b) and (c) allows the Board to determine, pursuant to § 261.23(d), whether the ''[t]he person seeking access, or the person to whom access would be provided, has shown a substantial need to access [the Board's] confidential supervisory information that outweighs the need to maintain confidentiality'' and whether ''[a]pproval is consistent with the supervisory and regulatory responsibilities and policies of the Board.'' Finally, the information provided pursuant to § 261.24(a) allows the Board to determine whether the Board's confidential supervisory information or other nonpublic information should be disclosed in response to a subpoena or other legally enforceable demand.

*Recordkeeping:* Pursuant to § 261.21(b)(4)(ii), a Board-supervised financial institution must maintain a written account of the disclosures of the Board's confidential supervisory information that the supervised financial institution makes to service providers under that section and provide the Board or Reserve Bank with a copy of the written account upon request. The Board has decided to implement this recordkeeping requirement in light of its decision to eliminate the longstanding requirement that supervised financial institutions request the Board's authorization to disclose the Board's confidential supervisory information to service providers. As explained above, the Board received public comments requesting that the Board eliminate the prior approval requirement for service providers, citing the inefficiencies and burdens associated with requesting and waiting for Federal Reserve approval before being able to disclose the Board's confidential supervisory information to service providers, such as consultants and contingent workers. While supervised financial institutions will no longer be required to request approval from the Board to disclose the Board's confidential supervisory information to their service providers, the new recordkeeping requirement is necessary to maintain accountability and supervisory oversight with respect to disclosures of the Board's privileged information to a wide array of third-party service providers.

*Disclosure:* In addition to the reporting requirement described under

[8] Subpart C of the final rule generally prohibits supervised financial institutions from disclosing the Board's confidential supervisory information without prior approval. However, § 261.21(b) of the final rule provides that such institutions may ''disclose'' confidential supervisory information, under certain circumstances, to various persons, without prior approval. This provision does not grant positive authority to disclose the Board's information or impose a separate ''requirement'' under the PRA to disclose such information. Instead, it defines the scope of the general prohibition against disclosing confidential supervisory information without prior approval.

[9] Such a request may also be made by a Federal agency. However, a Federal agency is not considered a ''person'' under the PRA. Therefore, the FR 4035 information clearance for § 261.22(c) encompasses only requests by persons other than Federal agencies.

§ 261.24(a)(1), § 261.24 also imposes two related disclosure requirements on persons who are served with a subpoena, order, or other judicial or administrative process requiring the production of the Board's confidential supervisory information or other nonpublic information in the form of documents or testimony. Under § 261.24(a)(2) and (a)(3), the person is required to inform the entity that issued the process and, at the appropriate time, the relevant court or tribunal of the substance of the Board's Rules and, in particular, of the obligation to follow the request procedures in § 261.23(b). These disclosure requirements help to ensure that the Board's confidential information is not disclosed in proceedings other than as authorized by the General Counsel.

*Current actions:*

The Board has temporarily implemented the collections of information contained within subpart C pursuant to its authority to approve temporarily a collection of information without providing opportunity for public comment. The Board has determined that these collections of information must be instituted quickly and that public participation in the approval process would defeat the purpose of the collections and substantially interfere with the Board's ability to carry out its statutory obligations. In particular, the Board has determined that because the reporting and disclosure requirements are existing requirements that facilitate the Board's processing of requests to access and use the Board's confidential supervisory information, the Board's ability to perform its statutory responsibilities relating to the disclosure, production, or withholding of the Board's information would be diminished if the Board were unable to enforce the collections of information contained within subpart C due to possible noncompliance with the PRA. The Board also invites comment to extend the FR 4035 information collections for three years.

*Plain Language*

Section 722 of the Gramm-Leach-Bliley Act requires each Federal banking agency to use plain language in all rules published after January 1, 2000. In light of this requirement, the Board believes this final rule is presented in a simple and straightforward manner and is consistent with this ''plain language'' directive.

**List of Subjects in 12 CFR Part 261**

Administrative practice and procedure, Confidential business information, Freedom of information, Reporting and recordkeeping requirements.

**Authority and Issuance**

■ For the reasons stated in the preamble, the Board of Governors of the Federal Reserve System revises 12 CFR part 261 to read as follows:

## PART 261—RULES REGARDING AVAILABILITY OF INFORMATION

### Subpart A—General

Sec.
261.1 Authority, purpose, and scope.
261.2 Definitions.
261.3 Custodian of records; certification; service; alternative authority.
261.4 Prohibition against disclosure.

### Subpart B—Published Information and Records Available to Public; Procedures for Requests

261.10 Published information.
261.11 Records available to the public upon request.
261.12 Processing requests.
261.13 Responses to requests.
261.14 Appeals.
261.15 Exemptions from disclosure.
261.16 Fee schedules; waiver of fees.
261.17 Request for confidential treatment.
261.18 Process for addressing a submitter's request for confidential treatment.

### Subpart C—Nonpublic Information Made Available to Supervised Financial Institutions, Governmental Agencies, and Others in Certain Circumstances

261.20 General.
261.21 Confidential supervisory information made available to supervised financial institutions.
261.22 Nonpublic information made available by the Board to governmental agencies and entities exercising governmental authority.
261.23 Other disclosure of confidential supervisory information.
261.24 Subpoenas, orders compelling production, and other process.

**Authority:** 5 U.S.C. 552; 12 U.S.C. 248(i) and (k), 321 *et seq.,* 611 *et seq.,* 1442, 1467a, 1817(a)(2)(A), 1817(a)(8), 1818(u) and (v), 1821(o), 1821(t), 1830, 1844, 1951 *et seq.,* 2601, 2801 *et seq.,* 2901 *et seq.,* 3101 *et seq.,* 3401 *et seq.;* 15 U.S.C. 77uuu(b), 78q(c)(3); 29 U.S.C. 1204; 31 U.S.C. 5301 *et seq.;* 42 U.S.C. 3601; 44 U.S.C. 3510.

## Subpart A—General

### § 261.1 Authority, purpose, and scope.

(a) *Authority and purpose.* This part establishes mechanisms for carrying out the Board's statutory responsibilities relating to the disclosure, production, or withholding of information to facilitate the Board's interaction with financial institutions and the public. In this regard, the Board has determined that the Board or its delegees may disclose nonpublic information of the Board, in accordance with the procedures set forth in this part, whenever it is necessary or appropriate to do so in the exercise of any of the Board's authorities, including but not limited to authority granted to the Board in the Freedom of Information Act, 5 U.S.C. 552, Federal Reserve Act, 12 U.S.C. 221 *et seq.,* the Bank Holding Company Act, 12 U.S.C. 1841 *et seq.,* the Home Owners' Loan Act, 12 U.S.C. 1461 *et seq.,* and the International Banking Act, 12 U.S.C. 3101 *et seq.* The Board has determined that all such disclosures made in accordance with the rules and procedures specified in this part are authorized by law, and are, as applicable, disclosures to proper persons pursuant to 12 U.S.C. 326. This part also sets forth the categories of information made available to the public, the procedures for obtaining information and records, the procedures for limited release of nonpublic information, and the procedures for protecting confidential business information.

(b) *Scope.* (1) This subpart A contains general provisions and definitions of terms used in this part.

(2) Subpart B implements the Freedom of Information Act (FOIA) (5 U.S.C. 552).

(3) Subpart C sets forth:

(i) The kinds of nonpublic information made available to supervised financial institutions, governmental agencies, and others in certain circumstances;

(ii) The procedures for disclosure; and

(iii) The procedures with respect to subpoenas, orders compelling production, and other process.

### § 261.2 Definitions.

For purposes of this part:

(a) *Affiliate* has the meaning given it in 12 CFR 225.2(a).

(b)(1) *Confidential supervisory information* means nonpublic information that is exempt from disclosure pursuant to 5 U.S.C. 552(b)(8) and includes information that is or was created or obtained in furtherance of the Board's supervisory, investigatory, or enforcement activities, including activities conducted by a Federal Reserve Bank (Reserve Bank) under delegated authority, relating to any supervised financial institution, and any information derived from or related to such information. Examples of confidential supervisory information include, without limitation, reports of examination, inspection, and visitation; confidential operating and condition reports; supervisory assessments; investigative requests for documents or other information; and supervisory correspondence or other supervisory

communications. Additionally, any portion of a document in the possession of any person, entity, agency or authority, including a supervised financial institution, that contains or would reveal confidential supervisory information is confidential supervisory information.

(2) *Confidential supervisory information* does not include:

(i) Documents prepared by or for a supervised financial institution for its own business purposes that are in its own possession and that do not include confidential supervisory information as defined in paragraph (b)(1) of this section, even though copies of such documents in the Board's or Reserve Bank's possession constitute confidential supervisory information; or

(ii) Final orders, amendments, or modifications of final orders, or other actions or documents that are specifically required to be published or made available to the public pursuant to 12 U.S.C. 1818(u), the Community Reinvestment Act, or other applicable law.

(c) *Nonpublic information* means information that has not been publicly disclosed by the Board and that is:

(1) Confidential supervisory information, or

(2) Exempt from disclosure under § 261.15(a).

(d)(1) *Records of the Board* or *Board records* means all recorded information, regardless of form or characteristics, that is created or obtained by the Board and is under the Board's control. A record is created or obtained by the Board if it is created or obtained by:

(i) Any Board member or any officer, employee, or contractor of the Board in the conduct of the Board's official duties, or

(ii) Any officer, director, employee, or contractor of any Reserve Bank and either constitutes confidential supervisory information as defined in paragraph (b)(1) of this section or is created or obtained in the performance of Board functions delegated to the Reserve Bank pursuant to 12 U.S.C. 248(k).

(2) *Records of the Board* do not include:

(i) Personal files or notes of Board members, employees, or contractors; extra copies of documents and library and museum materials kept solely for reference or exhibition purposes; or unaltered publications otherwise available to the public in Board publications, libraries, or established distribution systems;

(ii) Records located at Reserve Banks other than those records identified in paragraph (d)(1) of this section; or

(iii) Records that belong to or are otherwise under the control of another entity or agency despite the Board's possession.

(e)(1) *Search* means a reasonable search of such records of the Board as seem likely in the particular circumstances to contain information of the kind requested.

(2) As part of the Board's search for responsive records, the Board is not obligated to conduct any research, create any document, or modify an electronic program or automated information system.

(f) *Supervised financial institution* includes any institution that is supervised by the Board, including a bank; a bank holding company, intermediate holding company, or savings and loan holding company (including their non-depository subsidiaries); an Edge Act or agreement corporation; a U.S. branch or agency of a foreign bank; any company designated for Board supervision by the Financial Stability Oversight Council; or any other entity or service subject to examination by the Board.

(g) *Working day* means any day except Saturday, Sunday, or a legal Federal holiday.

### § 261.3 Custodian of records; certification; service; alternative authority.

(a) *Custodian of records.* The Secretary of the Board (Secretary) is the official custodian of all records of the Board.

(b) *Certification of record.* The Secretary may certify the authenticity of any Board record, or any copy of such record, for any purpose, and for or before any duly constituted Federal or State court, tribunal, or agency.

(c) *Service of subpoenas or other process.* Subpoenas or other judicial or administrative process demanding access to any Board records or making any claim against the Board or against Board members or staff in their official capacity shall be addressed to and served upon the Secretary of the Board at the Board's office at 20th Street and Constitution Avenue NW, Washington, DC 20551. The Board does not accept service of process on behalf of any employee in respect of purely private legal disputes.

(d) *Alternative authority.* Any action or determination required or permitted by this part to be done by the Board, the Secretary, the General Counsel, the Director of any Division, or any Reserve Bank, may be done by any employee who has been duly authorized or designated for this purpose by the Board, the Secretary, the General Counsel, the appropriate Director, or the appropriate Reserve Bank, respectively.

### § 261.4 Prohibition against disclosure.

Except as provided in this part or as otherwise authorized, no officer, employee, or agent of the Board or any Reserve Bank shall disclose or permit the disclosure of any nonpublic information of the Board to any person other than Board or Reserve Bank officers, employees, or agents properly entitled to such information for the performance of official duties.

## Subpart B—Published Information and Records Available to Public; Procedures for Requests

### § 261.10 Published information.

(a) **Federal Register**. The Board publishes in the **Federal Register** for the guidance of the public:

(1) Descriptions of the Board's central and field organization;

(2) Statements of the general course and method by which the Board's functions are channeled and determined, including the nature and requirements of procedures;

(3) Rules of procedure, descriptions of forms available and the place where they may be obtained, and instructions on the scope and contents of all papers, reports, and examinations;

(4) Substantive rules, interpretations of general applicability, and statements of general policy;

(5) Every amendment, revision, or repeal of the foregoing in paragraphs (a)(1) through (4) of this section; and

(6) Other notices as required by law.

(b) *Publications.* The Board maintains a list of publications on its website (at *www.federalreserve.gov/publications*). Most publications issued by the Board, including available back issues, may be downloaded from the website; some may be obtained through an order form located on the website (at *www.federalreserve.gov/files/orderform.pdf*) or by contacting Board Printing & Fulfillment, Federal Reserve Board, Washington, DC 20551. Subscription or other charges may apply for some publications.

(c) *Publicly available information*—(1) *Electronic reading room.* The Board makes the following records available in its electronic reading room, *http://www.federalreserve.gov/foia/readingrooms.htm#rr1.*

(i) Final opinions, including concurring and dissenting opinions, as well as final orders and written agreements, made in the adjudication of cases;

(ii) Statements of policy and interpretations adopted by the Board

that are not published in the **Federal Register**;

(iii) Administrative staff manuals and instructions to staff that affect the public;

(iv) Copies of all records, regardless of form or format—

(A) That have been released to any person under § 261.11; and

(B)(*1*) That because of the nature of their subject matter, the Board has determined have become or are likely to become the subject of subsequent requests for substantially the same records; or

(*2*) That have been requested three or more times;

(v) A general index of the records referred to in paragraph (c)(1)(iv) of this section; and

(vi) The public section of Community Reinvestment Act examination reports.

(2) *Inspection in electronic format at Reserve Banks.* The Board may determine that certain classes of publicly available filings shall be made available for inspection in electronic format only at the Reserve Bank where those records are filed.

(3) *Privacy protection.* The Board may delete identifying details from any public record to prevent a clearly unwarranted invasion of personal privacy.

**§ 261.11 Records available to the public upon request.**

(a) *Procedures for requesting records.* (1) Requesters are encouraged to submit requests electronically by filling out the required information at *https://www.federalreserve.gov/secure/forms/efoiaform.aspx.* Alternatively, requests may be submitted in writing to the Office of the Secretary, Board of Governors of the Federal Reserve System, Attn: FOIA Requests, 20th Street and Constitution Avenue NW, Washington, DC 20551; or sent by facsimile to the Office of the Secretary, (202) 872–7565. Clearly mark the request FREEDOM OF INFORMATION ACT REQUEST.

(2) A request may not be combined with any other request or with any matter presented to the Board such as a protest on a pending application or a comment on a public rulemaking. It may, however, be combined with a request for records under the Privacy Act pursuant to 12 CFR 261a.5(a) or a request for discretionary release of confidential supervisory information pursuant to § 261.23.

(b) *Contents of request.* A request must include:

(1) The requester's name, address, daytime telephone number, and an email address if available.

(2) A description of the records that enables the Board's staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the Board's operations. Whenever possible, the request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record.

(3) A statement agreeing to pay the applicable fees. If the information requested is not intended for a commercial use (as defined in § 261.16(d)(1)) and the requester seeks a reduction or waiver of fees because he or she is either a representative of the news media, an educational institution, or a noncommercial scientific institution, the requester should include the information called for in § 261.16(g)(2).

(c) *Perfected and defective requests.* (1) The Board will consider the request to be perfected on the date the Office of the Secretary receives a request that contains all of the information required by paragraphs (b)(1) through (3) of this section.

(2) The Board need not accept or process a request that does not reasonably describe the records requested or that does not otherwise comply with the requirements of this section.

(3) The Board may return a defective request, specifying the deficiency. The requester may submit a corrected request, which will be treated as a new request.

**§ 261.12 Processing requests.**

(a) *Receipt of requests.* Upon receipt of any request that satisfies the requirements set forth in § 261.11, the Office of the Secretary shall assign the request to the appropriate processing schedule, pursuant to paragraph (b) of this section. The date of receipt for any request, including one that is addressed incorrectly or that is referred to the Board by another agency or by a Reserve Bank, is the date the Office of the Secretary actually receives the request.

(b) *Multitrack processing.* (1) The Board provides different levels of processing for categories of requests under this section.

(i) Requests for records that are readily identifiable by the Office of the Secretary and that have already been cleared for public release or can easily be cleared for public release may qualify for simple processing.

(ii) All other requests shall be handled under normal processing procedures, unless expedited processing has been granted pursuant to paragraph (c) of this section.

(2) The Office of the Secretary will make the determination whether a request qualifies for simple processing. A requester may contact the Office of the Secretary to learn whether a particular request has been assigned to simple processing. If the request has not qualified for simple processing, the requester may limit the scope of the request in order to qualify for simple processing by contacting the Office of the Secretary in writing, by letter or email, or by telephone.

(c) *Expedited processing.* (1) A request for expedited processing may be made at any time. A request for expedited processing must be clearly labeled ''Expedited Processing Requested.'' The Board will process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information.

(2) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (c)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about Federal Government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an ''urgency to inform'' the public on the topic. As a matter of administrative discretion, the Board may waive the formal certification requirement.

(3) Within 10 calendar days of receipt of a request for expedited processing, the Board will notify the requester of its decision on the request. A denial of expedited processing may be appealed to the Board in accordance with § 261.14. The Board will respond to the appeal within 10 working days of receipt of the appeal.

(d) *Priority of responses.* The Office of the Secretary will normally process requests in the order they are received in the separate processing tracks, except when expedited processing is granted in which case the request will be processed as soon as practicable.

(e) *Time limits.* The time for response to requests shall be 20 working days from when a request is perfected. Exceptions to the 20-day time limit are only as follows:

(1) In the case of expedited treatment under paragraph (c) of this section, the Board shall give the expedited request priority over non-expedited requests and shall process the expedited request as soon as practicable.

(2) Where the running of such time is suspended for a requester to address fee requirements pursuant to § 261.16(c)(1) or (2).

(3) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B), the Board may—

(i) Extend the 20-day time limit for a period of time not to exceed 10 working days, where the Board has provided written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; and

(ii) Extend the 20-day time limit for a period of more than 10 working days where the Board has provided the requester with an opportunity to modify the scope of the FOIA request so that it can be processed within that time frame or with an opportunity to arrange an alternative time frame for processing the original request or a modified request, and has notified the requester that the Board's FOIA Public Liaison is available to assist the requester for this purpose and in the resolution of any disputes between the requester and the Board and of the requester's right to seek dispute resolution services from the Office of Government Information Services.

**§ 261.13 Responses to Requests.**

(a) When the Board receives a perfected request, it will conduct a reasonable search of Board records in its possession on the date the Board's search begins and will review any responsive information it locates.

(b) If a request covers documents that were created by, obtained from, or classified by another agency, the Board may refer the request for such documents to that agency for a response and inform the requester promptly of the referral.

(c) In responding to a request, the Board will withhold information under this section only if—

(1) The Board reasonably foresees that disclosure would harm an interest protected by an exemption described in § 261.15(a); or

(2) Disclosure is prohibited by law.

(d) The Board will take reasonable steps necessary to segregate and release nonexempt information.

(e) The Board will notify the requester of:

(1) The Board's determination of the request;

(2) The reasons for the determination;

(3) An estimate of the amount of information withheld, if any. An estimate is not required if the amount of information is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(4) The right of the requester to seek assistance from the Board's FOIA Public Liaison; and

(5) When an adverse determination is made, the Board will advise the requester in writing of that determination and will further advise the requester of:

(i) The right of the requester to appeal any adverse determination within 90 calendar days after the date of the determination as specified in § 261.14;

(ii) The right of the requester to seek dispute resolution services from the Board's FOIA Public Liaison or the Office of Government Information Services; and

(iii) The name and title or position of the person responsible for the adverse determination.

(f) Adverse determinations, or denials of requests, include decisions that the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited treatment.

(g) The Board will normally send responsive, nonexempt documents to the requester by email but may use other means as arranged between the Board and the requester or as determined by the Board. The Board will attempt to provide records in the format requested by the requester.

**§ 261.14 Appeals.**

(a) *Appeal of adverse determination.* If the Board makes an adverse determination as defined in § 261.13(f), the requester may file a written appeal with the Board, as follows:

(1) The appeal should prominently display the phrase FREEDOM OF INFORMATION ACT APPEAL on the first page, and should be sent directly to *FOIA-Appeals@frb.gov* or, if sent by mail, addressed to the Office of the Secretary, Board of Governors of the Federal Reserve System, Attn: FOIA Appeals, 20th Street & Constitution Avenue NW, Washington, DC 20551; or sent by facsimile to the Office of the Secretary, (202) 872–7565. If the requester is appealing the denial of expedited treatment, the appeal should clearly be labeled ''Appeal for Expedited Processing.''

(2) A request for records under § 261.11 may not be combined in the same letter with an appeal.

(3) To be considered timely, an appeal must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the adverse determination.

(b) Except as provided in § 261.12(c)(3), the Board shall make a determination regarding any appeal within 20 working days of actual receipt of the appeal by the Office of the Secretary. If an adverse determination is upheld on appeal, in whole or in part, the determination letter shall notify the appealing party of the right to seek judicial review and of the availability of dispute resolution services from the Office of Government Information Services as a nonexclusive alternative to litigation.

(c) The Board may reconsider an adverse determination, including one on appeal, if intervening circumstances or additional facts not known at the time of the adverse determination come to the attention of the Board.

**§ 261.15 Exemptions from disclosure.**

(a) *Types of records exempt from disclosure.* Pursuant to 5 U.S.C. 552(b), the following records of the Board are exempt from disclosure under this part:

(1) Any information that is specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and is in fact properly classified pursuant to the executive order.

(2) Any information related solely to the internal personnel rules and practices of the Board.

(3) Any information specifically exempted from disclosure by statute to the extent required by 5 U.S.C. 552(b)(3).

(4) Any matter that is a trade secret or that constitutes commercial or financial

information obtained from a person and that is privileged or confidential.

(5) Inter- or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the Board, provided that the deliberative process privilege shall not apply to records that were created 25 years or more before the date on which the records were requested.

(6) Any information contained in personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Any records or information compiled for law enforcement purposes, to the extent permitted under 5 U.S.C. 552(b)(7).

(8) Any matter that is contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, including a State financial institution supervisory agency.

(b) *Release of nonpublic information.* (1) The Board may make any nonpublic information furnished in connection with an application for Board approval of a transaction available to the public in response to a request in accordance with § 261.11, and may, without prior notice and to the extent it deems necessary, comment on such information in any opinion or statement issued to the public in connection with a Board action to which such information pertains.

(2) The fact that the Board has determined to release particular nonpublic information does not waive the Board's ability to withhold similar nonpublic information in response to the same or a different request.

(3) Except where disclosure is expressly prohibited by statute, regulation, or order, the Board may release records that are exempt from mandatory disclosure whenever the Board or designated Board members, the Secretary, or the General Counsel determines that such disclosure would be in the public interest. The Board will provide predisclosure notice to submitters of confidential information in accordance with § 261.18(b)(1). Confidential supervisory information may only be released as set forth in subpart C.

(c) *Delayed release.* Except as required by law, publication in the **Federal Register** or availability to the public of certain information may be delayed if immediate disclosure would likely:

(1) Interfere with accomplishing the objectives of the Board in the discharge of its statutory functions;

(2) Interfere with the orderly conduct of the foreign affairs of the United States;

(3) Permit speculators or others to gain unfair profits or other unfair advantages by speculative trading in securities or otherwise;

(4) Result in unnecessary or unwarranted disturbances in the securities markets;

(5) Interfere with the orderly execution of the objectives or policies of other government agencies; or

(6) Impair the ability to negotiate any contract or otherwise harm the commercial or financial interest of the United States, the Board, any Reserve Bank, or any department or agency of the United States.

**§ 261.16 Fee schedules; waiver of fees.**

(a) *Fee schedules.* Consistent with the limitations set forth in 5 U.S.C. 552(a)(4)(A)(viii), the fees applicable to a request for records pursuant to § 261.11 are set forth in table 1 to this section. These fees cover only the full allowable direct costs of search, duplication, and review. No fees will be charged where the average cost of collecting the fee (calculated at $5.00) exceeds the amount of the fee.

(b) *For purposes of computing fees.* (1) Search time includes all time spent looking for material that is responsive to a request, including line-by-line identification of material within documents. Such activity is distinct from ''review'' of material to determine whether the material is exempt from disclosure.

(2) Direct costs mean those expenditures that the Board actually incurs in searching for, reviewing, and duplicating records in response to a request made under § 261.11, as shown in table 1 to this section.

(3) Duplication refers to the process of making a copy, in any format, of a document.

(4) Review refers to the process of examining documents that have been located as being potentially responsive to a request for records to determine whether any portion of a document is exempt from disclosure. It includes doing all that is necessary to prepare the documents for release, including the redaction of exempt information. It does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(c) *Payment procedures.* The Board may assume that a person requesting records pursuant to § 261.11 will pay the applicable fees, unless the request includes a limitation on fees to be paid or seeks a waiver or reduction of fees pursuant to paragraph (g) of this section.

(1) *Advance notification of fees.* If the estimated charges are likely to exceed the amount authorized by the requester, the Office of the Secretary shall notify the requester of the estimated amount. Upon receipt of such notice, the requester may confer with the Office of the Secretary to reformulate the request to lower the costs or may authorize a higher amount. The time period for responding to requests under § 261.12(e) and the processing of the request will be suspended until the requester agrees in writing to pay the applicable fees.

(2) *Advance payment.* The Board may require advance payment of any fee estimated to exceed $250. The Board may also require full payment in advance where a requester has previously failed to pay a fee in a timely fashion. The time period for responding to a request under § 261.12(e) and the processing of the request will be suspended until the Office of the Secretary receives the required payment.

(3) *Late charges.* The Board may assess interest charges when fee payment is not made within 30 days of the date on which the billing was sent. Interest is at the rate prescribed in 31 U.S.C. 3717 and accrues from the date of the billing.

(d) *Categories of uses.* The fees assessed depend upon the intended use for the records requested. In determining which category is appropriate, the Board will look to the intended use set forth in the request for records. Where a requester's description of the use is insufficient to make a determination, the Board may seek additional clarification before categorizing the request.

(1) A *commercial use requester* is one who requests records for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.

(2) *Representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience, including organizations that disseminate solely on the internet. The term ''news'' means information that is about current events or that would be of current interest to the public. A non-affiliated journalist who demonstrates a solid basis for expecting publication through a news media

entity, such as a publishing contract or past publication record, will be considered as a representative of the news media.

(3) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. The Board may seek verification from the requester that the request is in furtherance of scholarly research.

(4) *Noncommercial scientific institution* is an institution that is not operated on a ''commercial'' basis, as defined in paragraph (d)(1) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

(5) *Fees table.* Please refer to table 1 to this section to determine what fees apply for different categories of users.

(e) *Nonproductive search.* Fees for search and review may be charged even if no responsive documents are located or if the request is denied.

(f) *Aggregated requests.* A requester may not file multiple requests at the same time, solely in order to avoid payment of fees. If the Board reasonably believes that a requester is separating a single request into a series of requests for the purpose of evading the assessment of fees, the Board may aggregate any such requests and charge accordingly. It is considered reasonable for the Board to presume that multiple requests of this type made within a 30-day period have been made to avoid fees.

(g) *Waiver or reduction of fees.* A request for a waiver or reduction of the fees, and the justification for the waiver, shall be included with the request for records to which it pertains. If a waiver is requested and the requester has not indicated in writing an agreement to pay the applicable fees if the waiver request is denied, the time for response to the request for documents, as set forth in § 261.12(e), shall not begin until either a waiver has been granted or, if the waiver is denied, until the requester has agreed to pay the applicable fees.

(1) The Board will grant a waiver or reduction of fees where it is determined both that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and that the disclosure of information is not primarily in the commercial interest of the requester. In making this determination, the Board will consider the following factors:

(i) Whether the subject of the records would shed light on identifiable operations or activities of the government with a connection that is direct and clear, not remote or attenuated; and

(ii) Whether disclosure of the information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. The Board will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. A commercial interest includes any commercial, trade, profit, or litigation interest.

(2) A request for a waiver or reduction of fees must include:

(i) A clear statement of the requester's interest in the documents;

(ii) The use proposed for the documents and whether the requester will derive income or other benefit for such use;

(iii) A statement of how the public will benefit from such use and from the Board's release of the documents;

(iv) A description of the method by which the information will be disseminated to the public; and

(v) If specialized use of the information is contemplated, a statement of the requester's qualifications that are relevant to that use.

(3) The requester has the burden to present evidence or information in support of a request for a waiver or reduction of fees.

(4) The Board will notify the requester of its determination on the request for a waiver or reduction of fees. The requester may appeal a denial in accordance with § 261.14(a).

(5) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver must be granted for those records.

(6) A request for a waiver or reduction of fees should be made when the request for records is first submitted to the Board and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

(h) *Restrictions on charging fees.* (1) If the Board fails to comply with the FOIA's time limits in which to respond to a request, the Board may not charge search fees, or, in the instances of requests from requesters described in paragraphs (d)(2) through (4) of this section, may not charge duplication fees, except as permitted under paragraphs (h)(2) through (4) of this section.

(2) If the Board determines that unusual circumstances exist, as described in 5 U.S.C. 552(a)(6)(B), and has provided timely written notice to the requester and subsequently responds within the additional 10 working days as provided in § 261.12(e)(3), the Board may charge search fees, or, in the case of requesters described in paragraphs (d)(2) through (4) of this section, may charge duplication fees.

(3) If the Board determines that unusual circumstances exist, as described in 5 U.S.C. 552(a)(6)(B), and more than 5,000 pages are necessary to respond to the request, then the Board may charge search fees, or, in the case of requesters described in paragraphs (d)(2) through (4) of this section, may charge duplication fees, if the Board has:

(i) Provided timely written notice of unusual circumstances to the requester in accordance with the FOIA; and

(ii) Discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(4) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply

with the time limits shall be excused for the length of time provided by the court order.

(i) *Employee requests.* In connection with any request by an employee, former employee, or applicant for employment, for records for use in prosecuting a grievance or complaint of discrimination against the Board, fees shall be waived where the total charges (including charges for information provided under the Privacy Act of 1974 (5 U.S.C. 552a)) are $50 or less; but the Board may waive fees in excess of that amount.

(j) *Special services.* The Board may agree to provide, and set fees to recover the costs of, special services not covered by the FOIA, such as certifying records or information and sending records by special methods such as express mail or overnight delivery.

TABLE 1 TO § 261.16—FEES

| Type of requester | Search costs per hour | Review costs per hour | Duplication costs |
|---|---|---|---|
| Commercial | Clerical/Technical staff—$20<br>Professional/Supervisory staff—$40.<br>Manager/Senior professional staff—$65.<br>Computer search, including computer search time, output, operator's salary—Direct Costs. | Clerical/Technical staff—$20<br>Professional/Supervisory staff—$40.<br>Manager/Senior professional staff—$65. | Photocopy per standard page—.10.<br>Other types of duplication—Direct Costs. |
| Educational; or Non-commercial scientific; or News media. | Costs waived | Costs waived | First 100 pages *free,* then: Photocopy per standard page—.10.<br>Other types of duplication—Direct Costs. |
| All other requesters | First 2 hours *free,* then: Clerical/Technical staff—$20.<br>Professional/Supervisory staff—$40.<br>Manager/Senior professional staff—$65.<br>Computer search, including computer search time, output, operator's salary—Direct Costs. | Costs waived | First 100 pages *free,* then: Photocopy per standard page—.10.<br>Other types of duplication—Direct Costs. |

**§ 261.17 Request for confidential treatment.**

(a) *Submission of request.* Any submitter of information to the Board who desires that such information be withheld pursuant to § 261.15(a)(4) or (6) shall file a request for confidential treatment with the Board (or in the case of documents filed with a Reserve Bank, with that Reserve Bank) at the time the information is submitted or within 10 working days thereafter.

(b) *Form of request.* Each request for confidential treatment shall state in reasonable detail the facts supporting the request, provide the legal justification, use good faith efforts to designate by appropriate markings any portion of the submission for which confidential treatment is requested, and include an affirmative statement that such information is not available publicly. A submitter's request for confidentiality in reliance upon § 261.15(a)(4) generally expires 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *Designation and separation of confidential material.* All information considered confidential by a submitter shall be clearly designated *CONFIDENTIAL* in the submission and separated from information for which confidential treatment is not requested. Failure to segregate confidential information from other material may result in release of the unsegregated material to the public without notice to the submitter.

(d) *Exceptions.* This section does not apply to:

(1) Data items collected on forms that are approved pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and deemed confidential by the Board. Any such data items deemed confidential by the Board shall so indicate on the face of the form or in its instructions. The data may, however, be disclosed in aggregate form in such a manner that individual company data is not disclosed or derivable.

(2) Any comments submitted by a member of the public on applications and regulatory proposals being considered by the Board, unless the Board determines that confidential treatment is warranted.

(3) A determination by the Board to comment upon information submitted to the Board in any opinion or statement issued to the public as described in § 261.15(b)(1).

(e) *Special procedures.* The Board may establish special procedures for particular documents, filings, or types of information by express provisions in this part or by instructions on particular forms that are approved by the Board. These special procedures shall take precedence over this section.

**§ 261.18 Process for addressing a submitter's request for confidential treatment.**

(a) *Resolving requests for confidential treatment.* In general, a request by a submitter for confidential treatment of any information shall be considered in connection with a request for access to that information. At its discretion, the Board may act on a request for confidentiality prior to any request for access to the documents.

(b) *Notice to the submitter.* (1) When the Board receives a FOIA request for information for which a submitter has requested confidential treatment, the Board shall promptly provide written notice of the request to the submitter if the Board determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under 5 U.S.C. 552(b)(4) or (b)(6); and

(ii) The Board has reason to believe that the requested information may be

protected from disclosure, but has not yet determined whether the information may be protected from disclosure.

(2) Where a submitter has not requested confidential treatment but the Board reasonably believes the requested information may be protected from disclosure under 5 U.S.C. 552(b)(4) or (b)(6), the Board may notify a submitter of the receipt of a request for access to that information and provide the submitter an opportunity to respond.

(3) The notice given to the submitter shall:

(i) Describe the information that has been requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the Board may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications; and

(ii) Give the submitter a reasonable opportunity, not to exceed 10 working days from the date of notice, to submit written objections to disclosure of the information.

(c) *Exceptions to notice to submitter.* Notice to the submitter need not be given if:

(1) The Board determines that the information is exempt under the FOIA and, therefore, will not be disclosed;

(2) The requested information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute (other than 5 U.S.C. 552) or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The submitter's claim of confidentiality appears obviously frivolous or has already been denied by the Board. In such case, the Board shall give the submitter written notice of the determination to disclose the information at least five working days prior to disclosure.

(d) *Notice to requester.* The requester shall be notified whenever:

(1) The submitter is provided with notice and an opportunity to object to disclosure under paragraph (b) of this section;

(2) The submitter is notified of the Board's intention to disclose the requested information; or

(3) The submitter files a lawsuit to prevent the disclosure of information.

(e) *Written objections by submitter.* (1) Upon receipt of the notice referenced in paragraph (b) of this section, a submitter that has any objections to disclosure should provide a detailed written statement that specifies all grounds for withholding the particular information under any exemption identified in § 261.15(a). A submitter relying on § 261.15(a)(4) as the basis for nondisclosure must explain why the information constitutes a trade secret or commercial or financial information that is confidential and must explain the consequences of disclosure of the information.

(2) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The Board is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart, including a written request for confidential treatment, may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The Board's determination to disclose any information for which confidential treatment has been requested shall be communicated to the submitter immediately. If the Board determines to disclose the information and the submitter has objected to such disclosure pursuant to paragraph (e) of this section, the Board shall provide the submitter with the reasons for disclosure and shall delay disclosure for 10 working days from the date of the determination.

(g) *Notice of lawsuit.* The Board shall promptly notify any submitter of information covered by this section of the filing of any legal action against the Board to compel disclosure of such information.

## Subpart C—Nonpublic Information Made Available to Supervised Financial Institutions, Governmental Agencies, and Others in Certain Circumstances

### § 261.20 General.

(a) All confidential supervisory information and other nonpublic information, including but not limited to information made available under this subpart, remains the property of the Board, and except as otherwise provided in this regulation, no person, entity, agency, or authority to whom the information is made available or who otherwise possesses the information, including any officer, director, employee, or agent thereof, may use any such information for an unauthorized purpose or disclose any such information without the prior written permission of the General Counsel.

(b) The disclosure of confidential supervisory information or other nonpublic information in accordance with this subpart shall not constitute a waiver by the Board of any applicable privileges.

(c) Nothing in this subpart shall be construed to limit or restrict the authority of the Board to impose any additional conditions or limitations on the use and disclosure of confidential supervisory information or other nonpublic information. Further, nothing in this subpart shall be construed to limit or restrict the authority of the Board to make discretionary disclosures of confidential supervisory information or other nonpublic information in addition to the disclosures expressly provided for in this subpart.

### § 261.21 Confidential supervisory information made available to supervised financial institutions.

(a) *Disclosure of confidential supervisory information to supervised financial institutions.* The Board or the appropriate Reserve Bank may disclose confidential supervisory information concerning a supervised financial institution to that supervised financial institution.

(b) *Disclosure of confidential supervisory information by supervised financial institutions*—(1) *General.* Any supervised financial institution lawfully in possession of confidential supervisory information pursuant to this section may when necessary or appropriate for business purposes disclose such information to its directors, officers, or employees, and to the directors, officers, or employees of its affiliates.

(2) *Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Bureau of Consumer Financial Protection, and State financial supervisory agencies.* Any supervised financial institution may, with the concurrence of the institution's central point of contact at the Reserve Bank, equivalent supervisory team leader, or other designated Reserve Bank employee (hereinafter, ''Reserve Bank Point of Contact'' or ''Reserve Bank POC''), disclose confidential supervisory information about the institution that is contained in documents prepared by or for the institution for its own business purposes to the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Bureau of Consumer Financial Protection, and the State financial supervisory agency that supervises that institution when the Reserve Bank POC determines that the receiving agency has a legitimate supervisory or regulatory interest in the information. A Reserve Bank POC's

action under this paragraph may require concurrence of other Federal Reserve staff in accordance with internal supervisory procedures. Requests to disclose any other confidential supervisory information to these or other agencies should be directed to the General Counsel under § 261.22(c) or § 261.23(c).

(3) *Legal counsel and auditors.* When necessary or appropriate in connection with the provision of legal or auditing services to the supervised financial institution, the supervised financial institution may disclose confidential supervisory information to its legal counsel or auditors. The supervised financial institution may also disclose confidential supervisory information to service providers (such as consultants, contractors, contingent workers, and technology providers) of its legal counsel or auditors if the service provider is under a written agreement with the legal counsel or auditor in which the service provider agrees that:

(i) It will treat the confidential supervisory information in accordance with § 261.20(a); and

(ii) It will not use the confidential supervisory information for any purpose other than as necessary to provide the services to the supervised financial institution.

(4) *Other service providers.* (i) A supervised financial institution may disclose confidential supervisory information to other service providers engaged by the supervised financial institution if the service provider is under a written contract to provide services to the institution, the disclosure of the confidential supervisory information is deemed necessary to the service provider's provision of services, and the service provider has a written agreement with the institution in which the service provider has agreed that:

(A) It will treat the confidential supervisory information in accordance with § 261.20(a); and

(B) It will not use the confidential supervisory information for any purpose other than as provided under its contract to provide services to the supervised financial institution.

(ii) A supervised financial institution shall maintain a written account of the disclosures of confidential supervisory information that the supervised financial institution makes to service providers under this section and provide the Board or Reserve Bank with a copy of such written account upon the Board's or Reserve Bank's request.

**§ 261.22 Nonpublic information made available by the Board to governmental agencies and entities exercising governmental authority.**

(a) *Disclosure to Federal and State financial institution supervisory agencies.* The Director of the Division of Supervision and Regulation, the Director of the Division of Consumer and Community Affairs, the General Counsel, or the appropriate Reserve Bank may, for legitimate supervisory or regulatory purposes and with or without a request, disclose confidential supervisory information and other nonpublic information to the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Bureau of Consumer Financial Protection, and a State financial institution supervisory agency.

(b) *Disclosures pursuant to the Equal Credit Opportunity Act, the Fair Housing Act, and the Employee Retirement Income Security Act.* The Director of the Division of Supervision and Regulation, the Director of the Division of Consumer and Community Affairs, or the General Counsel may disclose confidential supervisory information and other nonpublic information concerning a supervised financial institution to:

(1) The Attorney General or to the Secretary of the Department of Housing and Urban Development related to the enforcement of the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) or the Fair Housing Act (42 U.S.C. 3601 *et seq.*); and

(2) The Secretary of the Department of Labor and the Secretary of the Department the Treasury in accordance with section 3004(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1204(b)).

(c) *Disclosure to other governmental agencies and entities exercising governmental authority.* Except as provided in paragraph (d) or (e) of this section, other Federal, State, and local agencies, including law enforcement agencies, and other entities exercising governmental authority, may file written requests with the Board for access to confidential supervisory information and other nonpublic information under this section, including information in the form of testimony and interviews from current or former Federal Reserve System staff. Properly accredited foreign law enforcement agencies and other foreign government agencies may also file written requests with the Board in accordance with this paragraph, except that provision of confidential supervisory information to foreign bank regulatory or supervisory authorities is governed by 12 CFR 211.27.

(1) *Contents of request.* To obtain access to confidential supervisory information or other nonpublic information under this section, including information in the possession of a person other than the Board, the requester shall address a letter request to the Board's General Counsel, specifying:

(i) The particular information, kinds of information, and where possible, the particular documents to which access is sought;

(ii) The reasons why such information cannot be obtained from the supervised financial institution in question or another source rather than from the Board;

(iii) A statement of the law enforcement purpose or other statutory purpose for which the information shall be used;

(iv) A commitment that the information requested shall not be disclosed to any person outside the requesting agency or entity without the written permission of the General Counsel; and

(v) If the document or information requested includes customer account information subject to the Right to Financial Privacy Act, as amended (12 U.S.C. 3401 *et seq.*), any Federal agency request must include a statement that such customer account information need not be provided, or a statement as to why the Act does not apply to the request, or a certification that the requesting Federal agency has complied with the requirements of the Act.

(2) *Action on request.* The General Counsel may approve the request upon determining that:

(i) The request complies with this section;

(ii) The information is needed in connection with a formal investigation or other official duties of the requesting agency or entity;

(iii) Satisfactory assurances of confidentiality have been given; and

(iv) Disclosure is consistent with the supervisory and regulatory responsibilities and policies of the Board.

(d) *Federal and State grand jury, criminal trial, and government administrative subpoenas.* The General Counsel shall review and may approve the disclosure of nonpublic information pursuant to Federal and State grand jury, criminal trial, and government administrative subpoenas.

(e) *Conditions or limitations; written agreements.* The General Counsel may impose any conditions or limitations on disclosure that the General Counsel determines to be necessary to effect the purposes of this regulation, including

the protection of the confidentiality of the Board's information, or to ensure compliance with applicable laws or regulations. In addition, Board or Reserve Bank staff may make disclosures pursuant to any written agreement entered into by the Board when authorized by the express terms of such agreement or by the General Counsel.

**§ 261.23 Other disclosure of confidential supervisory information.**

(a) *Board policy.* (1) It is the Board's policy regarding confidential supervisory information that such information is confidential and privileged. Accordingly, the Board does not normally disclose confidential supervisory information to the public or authorize third parties in possession of confidential supervisory information to further use or disclose the information. When considering a request to access, use, or to disclose confidential supervisory information under this section, the Board will not authorize access, use, or disclosure unless the requesting person is able to show a substantial need to access, use, or disclose such information that outweighs the need to maintain confidentiality.

(2) Notwithstanding any other provision of this part, the Board will not authorize access to or disclosure of any suspicious activity report (SAR), or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this part, ''official duties'' shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for disclosure of nonpublic information or a request for use in a private legal proceeding, including a request pursuant to this section.

(b) *Requests in connection with litigation.* Except as provided in §§ 261.21 and 261.22:

(1) In connection with any proposed use of confidential supervisory information in litigation before a court, board, commission, agency, or arbitration, any person who—

(i) Seeks access to confidential supervisory information from the Board or a Reserve Bank (including the testimony of present or former Board or Reserve Bank employees on matters involving confidential supervisory information, whether by deposition or otherwise),

(ii) Seeks to use confidential supervisory information in its possession or to disclose such information to another party, or

(iii) Seeks to require a person to disclose confidential supervisory information to a party, shall file a written request with the General Counsel.

(2) The request shall include:

(i) The judicial or administrative action, including the case number and court or adjudicative body and a copy of the complaint or other pleading setting forth the assertions in the case;

(ii) A description of any prior judicial or other decisions or pending motions in the case that may bear on the asserted relevance of the requested information;

(iii) A narrow and specific description of the confidential supervisory information the requester seeks to access or to disclose for use in the litigation including, whenever possible, the specific documents the requester seeks to access or disclose;

(iv) The relevance of the confidential supervisory information to the issues or matters raised by the litigation;

(v) The reason why the information sought, or equivalent information adequate to the needs of the case, cannot be obtained from any other source; and

(vi) A commitment to obtain a protective order acceptable to the Board from the judicial or administrative tribunal hearing the action preserving the confidentiality of any information that is provided.

(3) In the case of requests covered by paragraph (b)(1)(ii) of this section, the Board may require the party to whom disclosure would ultimately be made to substantiate its need for the information prior to acting on any request.

(c) *All other requests.* Any other person seeking to access, use, or disclose confidential supervisory information for any other purpose shall file a written request with the General Counsel. A request under this paragraph (c) shall describe the purpose for which access, use, or disclosure is sought and the requester shall provide other information as requested by the General Counsel.

(d) *Action on request*—(1) *Determination of approval.* The General Counsel may approve a request made under this section provided that he or she determines that:

(i) The person seeking access, or the person to whom access would be provided, has shown a substantial need to access confidential supervisory information that outweighs the need to maintain confidentiality; and

(ii) Approval is consistent with the supervisory and regulatory responsibilities and policies of the Board.

(2) *Conditions or limitations.* The General Counsel may, in approving a request, impose such conditions or limitations on use of any information disclosed as is deemed necessary to protect the confidentiality of the Board's information.

(e) *Exhaustion of administrative remedies for discovery purposes in civil, criminal, or administrative action.* Action on a request under this section by the General Counsel is necessary in order to exhaust administrative remedies for discovery purposes in any civil, criminal, or administrative proceeding. A request made pursuant to § 261.11 of this regulation does not exhaust administrative remedies for discovery purposes. Therefore, it is not necessary to file a request pursuant to § 261.11 to exhaust administrative remedies under this section.

**§ 261.24 Subpoenas, orders compelling production, and other process.**

(a) *Advice by person served.* Any person (including any officer, employee, or agent of the Board or any Reserve Bank) who is served with a subpoena, order, or other judicial or administrative process requiring the production of confidential supervisory information or other nonpublic information of the Board or requiring the person's testimony regarding such Board information in any proceeding, shall:

(1) Promptly inform the Board's General Counsel of the service and all relevant facts, including the documents, information or testimony demanded, and any facts relevant to the Board in determining whether the material requested should be made available;

(2) Inform the entity issuing the process of the substance of these rules and, in particular, of the obligation to follow the request procedures in § 261.23(b); and

(3) At the appropriate time inform the court or tribunal that issued the process of the substance of these rules.

(b) *Appearance by person served.* Unless authorized by the Board or as ordered by a Federal court in a judicial proceeding in which the Board has had the opportunity to appear and oppose discovery, any person who is required to respond to a subpoena or other legal process concerning Board confidential supervisory information or other nonpublic Board information shall attend at the time and place required and respectfully decline to disclose or to give any testimony with respect to the information, basing such refusal upon the provisions of this regulation. If the court or other body orders the

disclosure of the information or the giving of testimony, the person having the information shall continue to decline to disclose the information and shall promptly report the facts to the Board for such action as the Board may deem appropriate.

(c) *Civil requests for production.* A litigant or non-party who is served with a civil request for production of documents calling for production of confidential supervisory information should proceed under § 261.23 rather than this section.

By order of the Board of Governors of the Federal Reserve System, August 21, 2020.

**Ann E. Misback,**

*Secretary of the Board.*

[FR Doc. 2020–18806 Filed 9–14–20; 8:45 am]

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Part VII

## Department of Defense

Department of the Army

32 CFR Part 553

Army Cemeteries; Proposed Rule

**DEPARTMENT OF DEFENSE**

**Department of the Army**

**32 CFR Part 553**

**[Docket No. USA–2019–HQ–0032]**

**RIN 0702–AB08**

## Army Cemeteries

**AGENCY:** Department of the Army, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of the Army proposes to amend this regulation in order to revise eligibility criteria for interment (in ground) and inurnment (above ground) at Arlington National Cemetery. This rule does not affect veterans' burial benefits or eligibility at Department of Veterans Affairs' national cemeteries.

**DATES:** Consideration will be given to all comments received by November 16, 2020.

**ADDRESSES:** You may submit comments, identified by 32 CFR part 553, Docket No. USA–2019–HQ–0032 and/or by Regulatory Information Number (RIN) 0702–AB08, or by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

*Instructions:* All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Ms. Renea Yates, Arlington National Cemetery, *usarmy.pentagon.hqda-anc-osa.mbx.anc-revised-eligibility@mail.mil* or 1–877–907–8585.

**SUPPLEMENTARY INFORMATION:**

### Background

Arlington National Cemetery represents the American people for past, present and future generations by laying to rest those few who have served our nation with dignity and honor, while immersing guests in the cemetery's living history. However, without this action, Arlington National Cemetery would run out of space for new burials by the year 2041 (or the year 2055 with construction of Southern Expansion in the vicinity of the Air Force Memorial), even for those Killed in Action (KIA) and Medal of Honor recipients. Changes to eligibility at Arlington National Cemetery will preserve this national symbol and shrine as an active burial ground for current and future generations of military service members.

The Department of the Army amended 32 CFR part 553 and published rules pertaining to the development, operation, maintenance, and administration of Army National Military Cemeteries on September 26, 2016 (80 FR 65875), and August 29, 2019 (84 FR 45406). The rule published on August 29, 2019, also incorporated Army post cemeteries for the first time.

The Department of the Army is proposing these amendments in response to Section 598 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232 which requires the Secretary of the Army to prescribe revised criteria for internment at Arlington National Cemetery that preserve Arlington National Cemetery as an active burial ground well into the future. These amendments revise eligibility criteria for interment (in ground) and inurnment (above ground) at Arlington National Cemetery.

The Army also considered additional physical expansion of Arlington National Cemetery to include adjacent land in developing this regulation. While costly, the Army determined additional land would not extend the active life of the cemetery sufficiently given the intent of Section 598 of Public Law 115–232.

### Legal Authority for This Program

The legal basis for this rulemaking can be found in section 7722 of Title 10, U.S. Code: ''The Secretary of the Army, with the approval of the Secretary of Defense, shall determine eligibility for interment or inurnment'' at Arlington National Cemetery and the U.S. Soldiers' and Airmen's Home National Cemetery. Additional legal authority is also found in section 7721 of Title 10, U.S. Code which directs the Secretary of the Army to operate, manage, administer, oversee, and fund the cemeteries covered by this regulation.

Finally, section 598 of Public Law 115–232 (John S. McCain National Defense Authorization Act for Fiscal Year 2019) states ''The Secretary of the Army, in consultation with the Secretary of Defense, shall prescribe revised criteria for interment at Arlington National Cemetery that preserve Arlington National Cemetery as an active burial ground 'well into the future' [defined as 150 years] . . . the Secretary of the Army shall establish the criteria . . . not later than September 30, 2019.''

### Changes Proposed in This Rulemaking

Currently, one percent of the veteran population is laid to rest at Arlington National Cemetery, utilizing 3,691 new graves in Fiscal Year 2019. Current eligibility is summarized at *https://www.arlingtoncemetery.mil/Portals/0/Docs/Eligibilty-Fact-Sheet-20170701.pdf.* Changes to eligibility at Arlington National Cemetery will preserve this national symbol and shrine as an active burial ground for current and future generations of military service members. This rule does not affect veterans' burial benefits or eligibility at Department of Veterans Affairs' national cemeteries.

With the proposed criteria, approximately 700 new interments (in ground) of eligible service members, veterans, and family members will be conducted annually at Arlington National Cemetery. Most veterans no longer eligible for in-ground interment at Arlington National Cemetery will remain eligible for above-ground inurnment. Without other eligibility, the largest affected groups with this proposed revisions are veterans retired from the U.S. Armed Forces and entitled to receive military retired pay, and service members eligible to retire from the U.S. Armed Forces and entitled to receive military retired pay on the date of their death. Annually, approximately 1,900 of these personnel entitled to receive retired pay will remain eligible for above-ground inurnment.

Service members who die on active duty, but neither as the result of armed conflict service nor from preparations or operations related to combat, both defined in § 553.1, are no longer eligible for in-ground interment or above-ground inurnment at Arlington National Cemetery. Based on recent trends, approximately 43 service members annually fit this description and were interred or inurned at Arlington National Cemetery.

With the proposed criteria, approximately 1,950 new inurnments (above ground) of eligible service members, veterans, and family members will be conducted annually at Arlington National Cemetery. Without other eligibility, veterans and service members who served on active duty (other than active duty for training) for no less than 24 months and performed armed conflict service, as defined in § 553.1, remain eligible for above-

ground inurnment at Arlington National Cemetery.

Veterans and service members no longer eligible for in-ground interment or above-ground inurnment at Arlington National Cemetery have multiple options.

(a) Nationwide. The Department of Veterans Affairs' National Cemetery Administration operates, maintains, and funds veterans' cemeteries across the country. Their strategic goal is to provide reasonable access (within 75 miles of a veteran's residence) to a burial option in a VA national cemetery or VA-funded state or tribal veterans' cemetery to reach 95 percent of eligible veterans living in the United States. This vast cemetery network continues to expand in order to serve veterans and their families throughout the country.

(b) Washington, DC metropolitan area. Veterans and their families who live in the Washington, DC metropolitan area have multiple options for burial at their time of need, including nearby Quantico National Cemetery, which provides ample burial opportunities for those veterans that are no longer eligible at Arlington National Cemetery.

This rule amends multiple sections of 32 CFR 553, including the following.

a. Section 553.1 is amended to add definitions for *armed conflict service, preparations or operations related to combat, positions of significant governmental responsibility,* and other important terms as they relate to Army cemeteries. These definitions were added to assist in revising eligibility criteria in §§ 553.12 and 553.13.

b. Section 553.9 is amended to set aside 1,000 gravesites at Arlington National Cemetery for current and future Medal of Honor recipients, as directed by the Secretary of the Army.

c. Section 553.10 is amended to add the date of July 27, 1953, the date the Armistice was signed ending combat activities in Korea, it established a start date for the requirement for service members who die on active duty to provide a statement of honorable service from the first General Courts-Martial Convening Authority.

d. Section 553.12 is amended to revise eligibility criteria for interment (in ground) at Arlington National Cemetery to meet the intent of section 598 of Public Law 115–232. The major change to this section is that military retirees without other eligibility are no longer eligible for interment (in ground), but remain eligible for inurnment (above ground).

e. Section 553.13 is amended to revise eligibility criteria for inurnment (above ground) at Arlington National Cemetery to meet the intent of section 598 of Public Law 115–232. The major change to this section is that veterans and service members who neither served on active duty (other than active duty for training) for 24 months nor performed armed conflict service, as defined in § 553.1, are no longer for inurnment (above ground). Additionally, eligibility is maintained for those veterans who served during any armed conflict prior to July 27, 1953, and their service ended honorably.

f. Sections 553.20 and 553.47 are amended to strengthen prohibitions related to capital crimes such as murder and Tier III sex offenses.

g. Section 553.28 is amended to prohibit the construction and installation of private markers in Army National Military Cemeteries unless approved prior to December 1, 2017. Private markers have been prohibited in new sections of the cemetery since 1947. Now that previously authorized sections are full, this change provides continuity and consistency with established policy for Army National Military Cemeteries and Department of Veterans Affairs' national cemeteries.

h. Section 553.50 is added to include procedures for requesting disinterment or disinurnment of remains at Army post cemeteries.

i. Section 553.51 is added to prohibit the construction and installation of private markers in Army post cemeteries unless approved by the Executive Director prior to October 1, 2020. This addition provides continuity and consistency with established policy for Army National Military Cemeteries and Department of Veterans Affairs' national cemeteries.

**B. Regulatory Flexibility Act**

The Army has determined that the Regulatory Flexibility Act does not apply because the rule does not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

**C. Unfunded Mandates Reform Act**

The Army has determined that the Unfunded Mandates Reform Act does not apply because the rule does not include a mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or the private sector, of $100 million or more.

**D. National Environmental Policy Act**

Neither an environmental analysis nor an environmental impact statement under the National Environmental Policy Act is required.

**E. Paperwork Reduction Act**

The Army has determined that this rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, as the Army does not require a form. The Army collects, reviews, and maintains existing documents provided by families as specified in §§ 553.10, 553.22, and 553.25, which have not changed. Department of Veterans Affairs Form 40–1330 (Claim for Standard Government Headstone or Marker) already has an OMB control number assigned OMB Control Number 2900–0222.

**F. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)**

The Army has determined that E.O. 12630 does not apply because the rule does not impair private property rights.

**G. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order.

**H. Executive Order 13045 (Protection of Children From Environmental Health Risk and Safety Risks)**

The Army has determined that according to the criteria defined in Executive Order 13045, the requirements of that Order do not apply to this rule.

**I. Executive Order 13132 (Federalism)**

The Army has determined that, according to the criteria defined in Executive Order 13132, the requirements of that Order do not apply to this rule because the rule will not have a substantial effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

**J. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)**

This proposed rule is not expected to be an E.O. 13771 action because this rule is expected to be related to agency management, personnel, or organization.

**K. Congressional Review Act**

This proposed rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

**List of Subjects in 32 CFR part 553**

Armed Forces, Eligibility, Military personnel, Monuments and memorials, Reserve components, Service members, Veterans.

For the reasons stated in the preamble, the Department of the Army proposes to revise 32 CFR part 553 to read as follows:

## PART 553—ARMY CEMETERIES

### Subpart A—Army National Military Cemeteries

Sec.
553.1 Definitions.
553.2 Purpose.
553.3 Statutory authorities.
553.4 Scope and applicability.
553.5 Maintaining order.
553.6 Standards for managing Army National Military Cemeteries.
553.7 Arlington Memorial Amphitheater.
553.8 Permission to install utilities.
553.9 Assignment of gravesites or niches.
553.10 Proof of eligibility.
553.11 General rules governing eligibility for interment, inurnment, and memorialization at Arlington National Cemetery.
553.12 Eligibility for interment in Arlington National Cemetery.
553.13 Eligibility for inurnment in Arlington National Cemetery Columbarium.
553.14 Eligibility for interment of cremated remains in the Arlington National Cemetery Unmarked Area.
553.15 Eligibility for group burial in Arlington National Cemetery.
553.16 Eligibility for memorialization in an Arlington National Cemetery memorial area.
553.17 Arlington National Cemetery interment/inurnment agreement.
553.18 Eligibility for burial in U.S. Soldiers' and Airmen's Home National Cemetery.
553.19 Ineligibility for interment, inurnment, or memorialization in an Army National Military Cemetery.
553.20 Prohibition of interment, inurnment, or memorialization in an Army National Military Cemetery of persons who have committed certain crimes.
553.21 Findings concerning the commission of certain crimes where a person has not been convicted due to death or flight to avoid prosecution.
553.22 Exceptions to policies for interment, inurnment, or memorialization at Arlington National Cemetery.
553.23 Placement of cremated remains at Army National Military Cemeteries.
553.24 Subsequently recovered remains.
553.25 Disinterment and disinurnment of remains.
553.26 Design of Government-furnished headstones, niche covers, and memorial markers.
553.27 Inscriptions on Government-furnished headstones, niche covers, and memorial markers.
553.28 Private headstones and markers.
553.29 Permission to construct or amend private headstones and markers.
553.30 Inscriptions on private headstones and markers.
553.31 Memorial and commemorative monuments (other than private headstones or markers).
553.32 Conduct of memorial services and ceremonies.
553.33 Visitors rules for Army National Military Cemeteries.
553.34 Soliciting and vending.
553.35 Media.

### Subpart B—Army Post Cemeteries

553.36 Definitions.
553.37 Purpose.
553.38 Statutory authorities.
553.39 Scope and applicability.
553.40 Assignment of gravesites or niches.
553.41 Proof of eligibility.
553.42 General rules governing eligibility for interment or inurnment in Army Post Cemeteries.
553.43 Eligibility for interment and inurnment in Army Post Cemeteries.
553.44 Eligibility for interment and inurnment in the West Point Post Cemetery.
553.45 Eligibility for interment in U.S. Disciplinary Barracks Cemetery at Fort Leavenworth.
553.46 Ineligibility for interment, inurnment, or memorialization in an Army Post Cemetery.
553.47 Prohibition of interment, inurnment, or memorialization in an Army Post Cemetery of persons who have committed certain crimes.
553.48 Findings concerning the commission of certain crimes where a person has not been convicted due to death or flight to avoid prosecution.
553.49 Exceptions to policies for interment or inurnment at Army Post Cemeteries.
553.50 Disinterment and disinurnment of remains.
553.51 Private headstones and markers.

**Authority:** 10 U.S.C. 985, 1128, 1481, 1482, 3013, 7721–7726; 24 U.S.C. 295a, 412; 38 U.S.C. 2402 note, 2409–2411, 2413; 40 U.S.C. 9102; Pub. L. 93–43, 87 Stat. 75; and Pub. L. 115–232, Sec. 598.

### Subpart A—Army National Military Cemeteries

#### § 553.1 Definitions.

As used in this subpart, the following terms have these meanings:

*Active duty.* Full-time duty in the active military service of the United States.

(1) This includes:

(i) Active Reserve component duty performed pursuant to title 10, United States Code.

(ii) Service as a cadet or midshipman currently on the rolls at the U.S. Military, U.S. Naval, U.S. Air Force, or U.S. Coast Guard Academies.

(iii) Active duty for operational support.

(iv) Persons whose service has been determined to be active duty service pursuant to section 401 of the GI Bill Improvement Act of 1977 (Pub. L. 95–202; 38 U.S.C. 106 note) as of May 20, 2016 and whose remains were not already formally interred or inurned as of May 20, 2016 or who died on or after May 20, 2016.

(2) This does not include:

(i) Full-time National Guard duty performed under title 32, United States Code.

(ii) Active duty for training, initial entry training, annual training duty, or inactive-duty training for members of the Reserve components.

*Active duty designee.* A person whose service has been determined to be active duty service pursuant to section 401 of the GI Bill Improvement Act of 1977, as amended by Public Law 114–158 of May 20, 2016.

*Active duty for operational support (formerly active duty for special work).* A tour of active duty for Reserve personnel authorized from military or Reserve personnel appropriations for work on Active component or Reserve component programs. The purpose of active duty for operational support is to provide the necessary skilled manpower assets to support existing or emerging requirements and may include training.

*Active duty for training.* A category of active duty used to provide structured individual and/or unit training, including on-the-job training, or educational courses to Reserve component members. Included in the active duty for training category are annual training, initial active duty for training, or any other training duty.

*Annual training.* The minimum period of active duty for training that Reserve members must perform each year to satisfy the training requirements associated with their Reserve component assignment.

*Armed conflict service.* Service in a hostile fire area during a period of armed conflict. Such service must be evidenced by receipt of: Combat pay, imminent danger or hostile fire pay, or the receipt of a qualifying medal. Examples of qualifying medals include,

but are not limited to, the Korean Service Medal, Vietnam Service Medal, Southwest Asia Service Medal, Armed Forces Expeditionary Medal, Navy and Marine Expeditionary Medal, Kosovo Campaign Medal, Afghanistan Campaign Medal, Iraq Campaign Medal, Global War on Terrorism Expeditionary Medal, and Inherent Resolve Campaign Medal.

*Armed Forces.* The U.S. Army, Navy, Marine Corps, Coast Guard, Air Force, Space Force and their Reserve components.

*Army National Military Cemeteries.* Arlington National Cemetery and the U.S. Soldiers' and Airmen's Home National Cemetery.

*Child, minor child, permanently dependent child, unmarried adult child*—(1) *Child.* (i) Natural child of a primarily eligible person, born in wedlock;

(ii) Natural child of a female primarily eligible person, born out of wedlock;

(iii) Natural child of a male primarily eligible person, who was born out of wedlock and:

(A) Has been acknowledged in a writing signed by the male primarily eligible person;

(B) Has been judicially determined to be the male primarily eligible person's child;

(C) Whom the male primarily eligible person has been judicially ordered to support; or

(D) Has been otherwise proved, by evidence satisfactory to the Executive Director, to be the child of the male primarily eligible person;

(iv) Adopted child of a primarily eligible person; or

(v) Stepchild who was part of the primarily eligible person's household at the time of death of the individual who is to be interred or inurned.

(2) *Minor child.* A child of the primarily eligible person who:

(i) Is unmarried;

(ii) Has no dependents; and

(iii) Is under the age of twenty-one years, or is under the age of twenty-three years and is taking a full-time course of instruction at an educational institution that the U.S. Department of Education acknowledges as an accredited educational institution.

(3) *Permanently dependent child.* A child of the primarily eligible person who:

(i) Is unmarried;

(ii) Has no dependents; and

(iii) Is permanently and fully dependent on one or both of the child's parents because of a physical or mental disability incurred before attaining the age of twenty-one years or before the age of twenty-three years while taking a full-time course of instruction at an educational institution that the U.S. Department of Education acknowledges as an accredited educational institution.

(4) *Unmarried adult child.* A child of the primarily eligible person who:

(i) Is unmarried;

(ii) Has no dependents; and

(iii) Has attained the age of twenty-one years.

*Close relative.* The spouse, parents, adult brothers and sisters, adult natural children, adult stepchildren, and adult adopted children of a decedent.

*Commemorative monuments.* Monuments or other structures or landscape features that serve to honor events in history, units of the Armed Forces, individuals, or groups of individuals that served in the Armed Forces, and that do not contain human remains or mark the location of remains in close proximity. The term does not include memorial markers erected pursuant to § 553.16.

*Derivatively eligible person.* Any person who is entitled to interment or inurnment solely based on his or her relationship to a primarily eligible person, as set forth in §§ 553.12(b) and 553.13(b), respectively.

*Disinterment.* The permanent removal of interred human remains from a particular gravesite.

*Disinurnment.* The permanent removal of remains from a particular niche.

*Executive Director.* The person statutorily charged with exercising authority, direction, and control over all aspects of Army National Military Cemeteries, and the person charged by the Secretary of the Army to serve as the functional proponent for policies and procedures pertaining to the administration, operation, and maintenance of all military cemeteries under the jurisdiction of the Army.

*Formal interment or inurnment.* Interment or inurnment of identified human remains in a cemetery, crypt mausoleum, columbarium or similar formal location. Formal interment or inurnment includes interment or inurnment in private cemeteries or private burial locations at the direction of the person authorized to direct disposition or the primary next of kin. Formal interment or inurnment does not include temporary battlefield interments or inurnments, or interment or inurnment while the person was detained by or in the custody of a government other than the United States.

*Former prisoner of war.* A person who is eligible for or has been awarded the Prisoner of War Medal.

*Former spouse.* See *spouse.*

*Government.* The U.S. government and its agencies and instrumentalities.

*Group burial.* (1) Interment in one gravesite of one or more service members on active duty killed in the same incident or location where:

(i) The remains cannot be individually identified; or

(ii) The person authorized to direct disposition of subsequently identified remains has authorized their interment with the other service members.

(2) Group remains may contain incidental remains of civilians and foreign nationals.

*Human remains.* The deceased human body or portions of the body, including but not limited to: Amputated limbs and individual bones. Human remains do not include portions of the human body that are naturally and/or intentionally shed or expelled by the body during the lifetime of a human. Examples of those items excluded from this definition include, but are not limited to, the following when removed, cut, or expelled prior to death: Hair, teeth, skin cells, sperm, eggs, blood, and stem cells.

*Inactive-duty training.* (1) Duty prescribed for members of the Reserve components by the Secretary concerned under 37 U.S.C. 206 or any other provision of law.

(2) Special additional duties authorized for members of the Reserve components by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

(3) In the case of a member of the Army National Guard or Air National Guard of any State, duty (other than full-time duty) under 32 U.S.C. 316, 502, 503, 504, or 505 or the prior corresponding provisions of law.

(4) This term does not include:

(i) Work or study performed in connection with correspondence courses,

(ii) Attendance at an educational institution in an inactive status, or

(iii) Duty performed as a temporary member of the Coast Guard Reserve.

*Interment.* The ground burial of casketed or cremated human remains.

*Inurnment.* The placement of cremated human remains in a niche.

*Killed in Action.* A service member, as defined in this section, whose death occurred as a direct result of action against a force hostile to the United States.

*Media.* Individuals and agencies that print, broadcast, or gather and transmit news, and their reporters, photographers, and employees.

*Memorial marker.* A headstone used to memorialize a service member or veteran whose remains are unavailable for reasons listed in § 553.16.

*Memorial service or ceremony.* Any activity intended to honor the memory of a person or persons interred, inurned, or memorialized in the Army National Military Cemeteries. This term includes private memorial services, public memorial services, public wreath laying ceremonies, and official ceremonies.

*Minor child.* See *child.*

*Murder.* Pursuant to any Federal or State law, the causing the death of another human being when:

(1) It is committed purposely or knowingly; or

(2) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviant sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

*Niche.* An aboveground space constructed specifically for the placement of cremated human remains.

*Official ceremony.* A memorial service or ceremony approved by the Executive Director in which the primary participants are representatives of the Government, a State government, a foreign government, or an international organization authorized by the U.S. Department of State to participate in an official capacity.

*Parent.* A natural parent, a stepparent, a parent by adoption, or a person who for a period of not less than one year stood *in loco parentis,* or was granted legal custody by a court decree or statutory provision.

*Permanently dependent child.* See *child.*

*Person authorized to direct disposition.* The person primarily entitled to direct disposition of human remains and who elects to exercise that entitlement. Determination of such entitlement shall be made in accordance with applicable law and regulations.

*Personal representative.* A person who has legal authority to act on behalf of another through applicable law, order, and regulation.

*Positions of significant governmental responsibility.* Persons permanently (*i.e.,* not acting in the position, or performing the duties of that position) holding or who formerly permanently (*i.e.,* not acting in the position, or performing the duties of that position) held the following positions in the government of the United States of America: Elected Members of Congress, Chief Justice and Associate Justices of the Supreme Court, Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security, Director of Office of Management and Budget, Director of National Intelligence, Director of the Central Intelligence Agency, Assistant to the President for National Security Affairs, Administrator of the Environmental Protection Agency, Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, Chairman of the Joint Chiefs of Staff and Senior Enlisted Advisor, Chief of Staff of the Army and Senior Enlisted Advisor, Chief of Naval Operations and Senior Enlisted Advisor, Commandant of the Marine Corps and Senior Enlisted Advisor, Chief of Staff of the Air Force and Senior Enlisted Advisor, Chief of Space Operations and Senior Enlisted Advisor, Chief of the National Guard Bureau and Senior Enlisted Advisor, Commandant of the Coast Guard and Senior Enlisted Advisor, and Combatant Commanders and their Senior Enlisted Advisors.

*Preparations or operations related to combat.* Military operations, individual or collective training for battle-related tasks, or transportation to or from such operations or training in a vehicle, vessel or aircraft whose primary purpose is combat or direct support of combat. Examples include, but are not limited to, military parachuting, convoy operations, live-fire operations, at-sea operations or flight operations. Activities excluded from this category include, but are not limited to, personally conducted physical training (*i.e.,* not organized unit physical training), disease or illness, or operator or passenger in a private or commercially owned vehicle not under contract to the United States Government, and suicide on or off duty.

*Primarily eligible person.* Any person who is entitled to interment or inurnment based on his or her service as specified in §§ 553.12(a) and 553.13(a), respectively.

*Primary next of kin.* (1) In the absence of a valid written document from the decedent identifying the primary next of kin, the order of precedence for designating a decedent's primary next of kin is as follows:

(i) Spouse, even if a minor;

(ii) Children, age 18 years and over (if under 18 years of age, their surviving parent or legal guardian shall exercise the rights of the minor);

(iii) Parents;

(iv) Siblings, to include half-blood and those acquired through adoption, age 18 years and over;

(v) Grandparents; and

(vi) Other next of kin, in order of relationship to the decedent as determined by the laws of the decedent's state of domicile.

(2) Absent a court order or written document from the deceased, the precedence of next of kin with equal relationships to the decedent is governed by seniority (age), older having higher priority than younger. Equal relationship situations include those involving divorced parents of the decedent, children of the decedent, and siblings of the decedent.

*Private headstones or markers.* A headstone or individual memorial marker provided at private expense, in lieu of a headstone or individual memorial marker furnished by the Government.

*Private memorial service.* A memorial service or ceremony conducted at the decedent's gravesite, memorial headstone, or niche.

*Public memorial service.* A ceremony conducted by members of the public at a historic site in an Army National Military Cemetery.

*Public wreath-laying ceremony.* A ceremony in which members of the public, assisted by the Tomb Guards, present a wreath or similar memento at the Tomb of the Unknown Soldier.

*Reserve component.* See definition in 10 U.S.C. 101.

*Senior Enlisted Advisor.* A service member in the grade of E–9 who is nominatively selected and permanently appointed (*i.e.,* is not holding the position in an acting or temporary status) to serve as the senior advisor to an officer in the Armed Forces in the grade of O–10.

*Spouse, former spouse, subsequently remarried spouse*—(1) *Spouse.* A person who is legally married to another person.

(2) *Former spouse.* A person who was legally married to another person at one time, but was not legally married to that person at the time of one of their deaths.

(3) *Subsequently remarried spouse.* A derivatively eligible spouse who was married to the primarily eligible person at the time of the primarily eligible person's death and who subsequently remarried another person.

*Subsequently recovered remains.* Additional remains belonging to the

decedent that are recovered or identified after the decedent's interment or inurnment.

*Subsequently remarried spouse.* See *spouse.*

*Unmarried adult child.* See *child.*

*Veteran.* A person who served in the U.S. Armed Forces and who was discharged or released under honorable conditions (general discharge under honorable conditions is not sufficient to meet this definition).

**§ 553.2 Purpose.**

This subpart specifies the authorities and assigns the responsibilities for the development, operation, maintenance, and administration of the Army National Military Cemeteries.

**§ 553.3 Statutory authorities.**

(a) *Historical.* Act of July 17, 1862, Sec. 18, 12 Stat. 594, 596; Act of February 22, 1867, Ch. 61, 14 Stat. 399; and the National Cemeteries Act of 1973, Public Law 93–43, 87 Stat. 75 (1973). The National Cemeteries Act established the National Cemetery System, which primarily consists of national cemeteries transferred from the management authority of the Department of the Army to the (now) Department of Veterans Affairs. Section 6(a) of the Act exempted Arlington National Cemetery and the Soldiers' and Airmen's Home National Cemetery from transfer to the National Cemetery System, leaving them under the management authority of the Secretary of the Army.

(b) *Current.* Pursuant to 10 U.S.C. 7721(a), the Secretary of the Army shall develop, operate, manage, oversee, and fund the Army National Military Cemeteries. Section 10 U.S.C. 7721(c) provides that the Army National Military Cemeteries are under the jurisdiction of Headquarters, Department of the Army, and 10 U.S.C. 7721(d) provides that the Secretary of the Army shall prescribe such regulations and policies as may be necessary to administer the Army National Military Cemeteries. The responsibilities of Headquarters, Department of the Army with regard to the Army National Military Cemeteries are enumerated in 10 U.S.C. 7721–7726 and Army General Orders 2014–74, 2014–75, 2020–01, and 2020–02.

**§ 553.4 Scope and applicability.**

(a) *Scope.* The development, maintenance, administration, and operation of the Army National Military Cemeteries are governed by this subpart, Army Regulation 290–5, and Department of the Army Pamphlet 290–5. The development, maintenance, administration, and operation of Army post cemeteries are not covered by this subpart.

(b) *Applicability.* This subpart is applicable to all persons on, engaging in business with, or seeking access to or benefits from the Army National Military Cemeteries, unless otherwise specified.

**§ 553.5 Maintaining order.**

The Executive Director may order the removal from, and bar the re-entry onto, Army National Military Cemeteries of any person who acts in violation of any law or regulation, including but not limited to demonstrations and disturbances as outlined in 38 U.S.C. 2413, and in this subpart. This authority may not be re-delegated.

**§ 553.6 Standards for managing Army National Military Cemeteries.**

(a) The Executive Director is responsible for establishing and maintaining cemetery layout plans, including plans setting forth sections with gravesites, memorial areas with markers, columbaria with niches, and landscape planting plans.

(b) New sections or areas may be opened and prepared for interments or for installing memorial markers only with the approval of the Executive Director.

**§ 553.7 Arlington Memorial Amphitheater.**

(a) In accordance with 24 U.S.C. 295a:

(1) No memorial may be erected and no remains may be entombed in the Arlington Memorial Amphitheater unless specifically authorized by Congress; and

(2) The character, design, or location of any memorial authorized by Congress for placement in the Amphitheater is subject to the approval of the Secretary of Defense.

(b) The Secretary of Defense will seek the advice of the Commission of Fine Arts in such matters, in accordance with 40 U.S.C. 9102.

(c) Tributes offered for those interred in the Tomb of the Unknown Soldier for placement in the Arlington Memorial Amphitheater display room are not memorials for purposes of this section.

**§ 553.8 Permission to install utilities.**

(a) The installation of utilities in Army National Military Cemeteries, including but not limited to, telephone and fiber optic lines, electric lines, natural gas lines, water pipes, storm drains, and sanitary sewers, must be authorized by the Executive Director.

(b) Requests for licenses, permits, or easements to install water, gas, or sewer lines, or other utilities or equipment on or across an Army National Military Cemetery or an approach road in which the Government has a right-of-way, fee simple title, or other interest, must be sent to the Executive Director, who will process the request in accordance with Army policy. Requests must include a complete description of the type of license, permit, or easement desired and a map showing the location of the project.

**§ 553.9 Assignment of gravesites or niches.**

(a) All eligible persons will be assigned gravesites or niches without discrimination as to race, color, sex, religion, age, or national origin and without preference to military grade or rank.

(b) The Army National Military Cemeteries will enforce a one-gravesite-per-family policy. Once the initial interment or inurnment is made in a gravesite or niche, each additional interment or inurnment of eligible persons must be made in the same gravesite or niche, except as noted in paragraph (f) of this section. This includes multiple primarily eligible persons if they are married to each other.

(c) In accordance with 38 U.S.C. 2410A(a)(2) the Secretary of the Army may waive the prohibition in paragraph (b) of this section as the Secretary of the Army deems appropriate.

(d) A gravesite reservation will be honored if it meets the following requirements, unless cancelled by the Executive Director:

(1) The gravesite was properly reserved by law before January 1, 1962; and

(2) An eligible person was interred in the reserved gravesite prior to January 1, 2017.

(e) The Executive Director may cancel a gravesite reservation:

(1) Upon determination that a derivatively eligible spouse has remarried;

(2) Upon determination that the reservee's remains have been buried elsewhere or otherwise disposed of;

(3) Upon determination that the reservee desires to or will be interred in the same gravesite with the predeceased, and doing so is feasible; or

(4) Upon determination that the reservee would be 120 years of age and there is no record of correspondence with the reservee within the last two decades.

(f) In cases of reservations meeting the requirements of 38 U.S.C. 2410A note, where more than one gravesite was reserved (on the basis of the veteran's eligibility at the time the reservation was made) and no interment has yet

been made in any of the sites, the one-gravesite-per-family policy will be enforced, unless waived by the Executive Director. Gravesite reservations will be honored only if the decedents meet the eligibility criteria for interment in Arlington National Cemetery that are in effect at the time of need, and the reserved gravesite is available.

(g) Where a primarily eligible person has been or will be interred as part of a group burial or has been or will be memorialized in a memorial area at Arlington National Cemetery, the Executive Director will assign a gravesite or niche for interment or inurnment of a derivatively eligible person.

(h) Gravesites or niches shall not be reserved or assigned prior to the time of need.

(i) The selection of gravesites and niches is the responsibility of the Executive Director. The selection of specific gravesites or niches by the family or other representatives of the deceased is prohibited.

(j) The Executive Director shall set aside 1,000 gravesites at Arlington National Cemetery to be used for the interment of Medal of Honor recipients who meet the criteria of § 553.12 or are granted an exception to policy pursuant to § 553.22. Derivatively eligible persons, as defined in § 553.1, of the Medal of Honor recipient may be interred in the same grave as the recipient. These gravesites shall not be located in a singular defined area within the cemetery. These gravesites shall be disbursed throughout the cemetery at the direction of the Executive Director.

**§ 553.10 Proof of eligibility.**

(a) The personal representative or primary next of kin is responsible for providing appropriate documentation to verify the decedent's eligibility for interment or inurnment.

(b) The personal representative or primary next of kin must certify in writing that the decedent is not prohibited from interment, inurnment, or memorialization under § 553.20 because he or she has committed or been convicted of a Federal or State capital crime or is a convicted Tier III sex offender as defined in 38 U.S.C. 2411.

(c) For service members who die on active duty after July 27, 1953, a statement of honorable service is required from the first General Courts-Martial Convening Authority in the service member's chain of command. If the certificate of honorable service cannot be granted, the service member is ineligible for interment, inurnment, and memorialization pursuant to § 553.19(h).

(d) When applicable, the following documents are required:

(1) Death certificate;

(2) Proof of eligibility as required by paragraphs (e) through (g) of this section;

(3) Any additional documentation to establish the decedent's eligibility (*e.g.,* marriage certificate, birth certificate, waivers, statements that the decedent had no children);

(4) Burial agreement;

(5) Notarized statement that the remains are unavailable for the reasons set forth in § 553.16; and

(6) A certificate of cremation or notarized statement attesting to the authenticity of the cremated human remains and that 100% of the cremated remains received from the crematorium are present. The Executive Director may, however, allow a portion of the cremated remains to be removed by the crematorium for the sole purpose of producing commemorative items.

(7) Any other document as required by the Executive Director.

(e) The following documents may be used to establish the eligibility of a primarily eligible person:

(1) DD Form 214, Certificate of Release or Discharge from Active Duty;

(2) WD AGO 53 or 53–55, Enlisted Record and Report of Separation Honorable Discharge;

(3) WD AGO 53–98, Military Record and Report of Separation Certificate of Service;

(4) NAVPERS–553, Notice of Separation from U.S. Naval Service;

(5) NAVMC 70–PD, Honorable Discharge, U.S. Marine Corps;

(6) DD Form 1300, Report of Casualty (required in the case of death of an active duty service member); or

(7) NGB Form 22, National Guard Report of Separation and Record of Service (must indicate a minimum of 20 years total service for pay).

(f) In addition to the documents otherwise required by this section, a request for interment or inurnment of a subsequently remarried spouse must be accompanied by:

(1) A notarized statement from the new spouse of the subsequently remarried spouse agreeing to the interment or inurnment and relinquishing any claim for interment or inurnment in the same gravesite or niche.

(2) Notarized statement(s) from all of the children, age 18 years and over, from the prior marriage agreeing to the interment or inurnment of their parents in the same gravesite or niche.

(g) In addition to the documents otherwise required by this section, a request for interment or inurnment of a permanently dependent child must be accompanied by:

(1) A notarized statement as to the marital status and degree of dependency of the decedent from an individual with direct knowledge; and

(2) A physician's statement regarding the nature and duration of the physical or mental disability; and

(3) A statement from someone with direct knowledge demonstrating the following factors:

(i) The deceased lived most of his or her adult life with one or both parents, who are otherwise eligible for interment;

(ii) The decedent's children and siblings age 18 years and over, or other family members, other than the eligible parent, waive any derivative claim to be interred at Arlington National Cemetery, in accordance with the Arlington National Cemetery Burial Agreement.

(h) Veterans or primary next of kin of deceased veterans may obtain copies of their military records by writing to the National Personnel Records Center, Attention: Military Personnel Records, 1 Archives Drive, St. Louis, Missouri 63132–1002 or using their website. All others may request a record by completing and submitting Standard Form 180.

(i) The burden of proving eligibility lies with the party who requests the burial. The Executive Director will determine whether the submitted evidence is sufficient to support a finding of eligibility.

**§ 553.11 General rules governing eligibility for interment, inurnment, and memorialization at Arlington National Cemetery.**

(a) Only those persons who are not formally interred or inurned as of the date of publication of this rule and who meet the criteria of § 553.12 or are granted an exception to policy pursuant to § 553.22 may be interred in Arlington National Cemetery. Only those persons who are not formally interred or inurned as of the date of publication of this rule and who meet the criteria of § 553.13 or are granted an exception to policy pursuant to § 553.22 may be inurned in Arlington National Cemetery. Only those persons who meet the criteria of § 553.14 may be interred in the Arlington National Cemetery Unmarked Area. Only those persons who meet the criteria of § 553.15 may be interred in an Arlington National Cemetery group burial. Only those persons who meet the criteria of § 553.16 may be memorialized in Arlington National Cemetery.

(b) Derivative eligibility for interment or inurnment may be established only

through a decedent's connection to a primarily eligible person and not to another derivatively eligible person.

(c) No veteran is eligible for interment, inurnment, or memorialization in Arlington National Cemetery unless the veteran's last period of active duty ended with an honorable discharge. A general discharge under honorable conditions is not sufficient for interment, inurnment or memorialization in Arlington National Cemetery.

(d) For purposes of determining whether a service member has received an honorable discharge, final determinations regarding discharges made in accordance with procedures established by chapter 79 of title 10, United States Code, will be considered authoritative.

(e) The Secretary of the Army has the authority to act on requests for exceptions to the provisions of the interment, inurnment, and memorialization eligibility policies contained in this subpart. The Secretary of the Army may delegate this authority in writing to the Executive Director on such terms deemed appropriate.

(f) Individuals who do not qualify as a primarily eligible person or a derivatively eligible person, but who are granted an exception to policy to be interred or inurned pursuant to § 553.22 in a new gravesite or niche, will be treated as a primarily eligible person for purposes of this subpart.

(g) Notwithstanding any other section in this subpart, memorialization with an individual memorial marker, interment, or inurnment in Army National Military Cemeteries is prohibited if there is a gravesite, niche, or individual memorial marker for the decedent in any other Government-operated cemetery or the Government has provided an individual grave marker, individual memorial marker or niche cover for placement in a private cemetery.

**§ 553.12 Eligibility for interment in Arlington National Cemetery.**

Only those who qualify as a primarily eligible person or a derivatively eligible person are eligible for interment in Arlington National Cemetery, unless otherwise prohibited as provided for in §§ 553.19 and 553.20, provided that the last period of active duty of the service member or veteran ended with an honorable discharge.

(a) *Primarily eligible persons.* The following are primarily eligible persons for purposes of interment:

(1) Any service member who is killed in action, as defined in § 553.1, while serving in the U.S. Armed Forces, if the General Courts-Martial Convening Authority grants a certificate of honorable service.

(2) Any service member whose death results from preparations or operations related to combat, as defined in § 553.1, if the General Courts-Martial Convening Authority grants a certificate of honorable service and confirms the circumstances of death.

(3) Any service member or veteran who has performed armed conflict service, as defined in § 553.1, whose last period of active duty ended with an honorable discharge or the General Courts-Martial Convening Authority grants a certificate of honorable service, and is awarded one of the following decorations:

(i) Medal of Honor;

(ii) Distinguished Service Cross, Navy Cross, Air Force Cross, Coast Guard Cross;

(iii) Department of Defense Distinguished Service Medal, Army Distinguished Service Medal, Navy Distinguished Service Medal, Air Force Distinguished Service Medal, Coast Guard Distinguished Service Medal;

(iv) Silver Star; or

(v) Purple Heart.

(4) Any person who served in the position of President or Vice President of the United States.

(5) Any service member or veteran who served on active duty, performed armed conflict service, as defined in § 553.1, and served in a position of significant governmental responsibility, as defined in § 553.1.

(6) Any former prisoner of war who, while a prisoner of war, served honorably in the active military service and who died on or after November 30, 1993.

(b) *Derivatively eligible persons.* The following individuals are derivatively eligible persons for purposes of interment who may be interred if space is available in the gravesite of the primarily eligible person:

(1) The spouse of a primarily eligible person who is or will be interred in Arlington National Cemetery. A former spouse of a primarily eligible person is not eligible for interment in Arlington National Cemetery under this section.

(2) The spouse of an active duty service member or an eligible veteran, who was:

(i) Lost or buried at sea, temporarily interred overseas due to action by the Government, or officially determined to be missing in action;

(ii) Buried in a U.S. military cemetery maintained by the American Battle Monuments Commission; or

(iii) Interred in Arlington National Cemetery as part of a group burial (the derivatively eligible spouse may not be buried in the group burial gravesite).

(3) A subsequently remarried spouse if the remarriage is terminated by divorce, annulment or the death of the subsequently remarried spouse's subsequent spouse.

(4) The parents of a minor child or a permanently dependent adult child, whose remains were interred in Arlington National Cemetery based on the eligibility of a parent at the time of the child's death, unless eligibility of the non-service connected parent is lost through divorce from the primarily eligible parent.

(5) A minor child or permanently dependent child of a primarily eligible person who is or will be interred in Arlington National Cemetery.

(6) An honorably discharged veteran who does not qualify as a primarily eligible person, if the veteran will be buried in the same gravesite as an already interred primarily eligible person who is a close relative, where the interment meets the following conditions:

(i) The veteran is without minor or unmarried adult dependent children;

(ii) The veteran will not occupy space reserved for the spouse, a minor child, or a permanently dependent adult child;

(iii) All other close relatives of the primarily eligible person concur with the interment of the veteran with the primarily eligible person by signing a notarized statement;

(iv) The veteran's spouse waives any entitlement to interment in Arlington National Cemetery, where such entitlement might be based on the veteran's interment in Arlington National Cemetery. The Executive Director may set aside the spouse's waiver, provided space is available in the same gravesite, and all close relatives of the primarily eligible person concur; and

(v) Any cost of moving, re-casketing, or re-vaulting the remains will be paid from private funds.

**§ 553.13 Eligibility for inurnment in Arlington National Cemetery Columbarium.**

The following persons are eligible for inurnment in the Arlington National Cemetery Columbarium, unless otherwise prohibited as provided for in §§ 553.19 and 553.20, provided that the last period of active duty of the service member or veteran ended with an honorable discharge.

(a) *Primarily eligible persons.* The following are primarily eligible persons for purposes of inurnment:

(1) Any person eligible for interment in Arlington National Cemetery, as provided for in § 553.12(a).

(2) Any veteran retired from the U.S. Armed Forces, and entitled to receive

military retired pay on the date of their death.

(3) Any service member eligible to retire from the U.S. Armed Forces, and entitled to receive military retired pay on the date of their death.

(4) Any service member or veteran who served on active duty (other than active duty for training) for no less than 24 months and performed armed conflict service.

(5) Any veteran who:

(i) Received an honorable discharge from the Armed Forces prior to October 1, 1949, and

(ii) Who was discharged for a permanent physical disability, and

(iii) Who served on active duty (other than active duty for training), and

(iv) Who would have been eligible for military medical retirement (as authorized under 10 U.S.C. 1201) had this statute been in effect on the date of separation.

(6) Any service member or veteran who served on active duty (other than active duty for training) and served in a position of significant governmental responsibility, as defined in § 553.1.

(7) Any citizen of the United States who, during any armed conflict prior to July 27, 1953, in which the United States has been or may hereafter be engaged, served in the armed forces of any government allied with the United States during that armed conflict, whose last service ended honorably, as determined by the Executive Director, by death or otherwise, and who was a citizen of the United States at the time of entry into that service and at the time of death.

(8) Any commissioned officer of the United States Coast and Geodetic Survey who died during or subsequent to the service specified in the following categories and whose last service terminated honorably:

(i) Assignment to areas of immediate military hazard prior to September 3, 1945; or

(ii) Served in the Philippine Islands on December 7, 1941.

(9) Any commissioned officer of the United States Public Health Service:

(i) Who performed active service prior to July 29, 1945;

(ii) Such active service was in time of war; and

(iii) The officer was detailed for duty with the U.S. Armed Forces.

(10) Any Active Duty Designee as defined in § 553.1.

(b) *Derivatively eligible persons.* Those connected to an individual described in paragraph (a) of this section through a relationship described in § 553.12(b). Such individuals may be inurned if space is available in the primarily eligible person's niche.

**§ 553.14 Eligibility for interment of cremated remains in the Arlington National Cemetery Unmarked Area.**

(a) The cremated remains of any person eligible for interment in Arlington National Cemetery as described in § 553.12 may be interred in the designated Arlington National Cemetery Unmarked Area.

(b) Cremated remains must be interred in a biodegradable container or placed directly into the ground without a container. Cremated remains are not authorized to be scattered at this site or at any location within Arlington National Cemetery.

(c) There will be no headstone or marker for any person choosing this method of interment. The Executive Director will maintain a permanent register.

(d) Consistent with the one-gravesite-per-family policy, once a person is interred in the Unmarked Area, any derivatively eligible persons and spouses must be interred in this manner. This includes spouses who are also primarily eligible persons. No additional gravesite, niche, or memorial marker in a memorial area will be authorized.

**§ 553.15 Eligibility for group burial in Arlington National Cemetery.**

(a) The Executive Director may authorize a group burial in Arlington National Cemetery whenever several people, at least one of whom is an active duty service member, die during a military-related activity and not all remains can be individually identified.

(b) Before authorizing a group burial that includes both United States and foreign decedents, the Executive Director will notify the Department of State and request that the Department of State notify the appropriate foreign embassy.

**§ 553.16 Eligibility for memorialization in an Arlington National Cemetery memorial area.**

(a) With the authority granted by 38 U.S.C. 2409, a memorial marker may be placed in an Arlington National Cemetery memorial area to honor the memory of service members or veterans, who are eligible for interment under § 553.12(a) and:

(1) Who are missing in action;

(2) Whose remains have not been recovered or identified;

(3) Whose remains were buried at sea, whether by the member's or veteran's own choice or otherwise;

(4) Whose remains were donated to science; or

(5) Whose remains were cremated and the cremated remains were scattered without interment or inurnment of any portion of those remains.

(b) When the remains of a primarily eligible person are unavailable for one of the reasons listed in paragraph (a) of this section, and a derivatively eligible person who predeceased the primarily eligible person is already interred or inurned in Arlington National Cemetery, the primarily eligible person may be memorialized only on the existing headstone or niche cover, or on a replacement headstone or niche cover ordered with a new inscription. Consistent with the one-gravesite-per-family policy, a separate marker in a memorial area is not authorized.

(c) When a memorial marker for a primarily eligible person is already in place in a memorial area, and a derivatively eligible person is subsequently interred or inurned in Arlington National Cemetery, an inscription memorializing the primarily eligible person will be placed on the new headstone or niche cover. Consistent with the one-gravesite-per-family policy, the memorial marker will then be removed from the memorial area.

**§ 553.17 Arlington National Cemetery interment/inurnment agreement.**

(a) A derivatively eligible person who predeceases the primarily eligible person may be interred or inurned in Arlington National Cemetery only if the primarily eligible person agrees in writing to be interred in the same gravesite or inurned in the same niche at his or her time of need and that his or her estate shall pay for all expenses related to disinterment or disinurnment of the predeceased person from Arlington National Cemetery if the primarily eligible person is not interred or inurned as agreed.

(b) If the primarily eligible person becomes ineligible for interment or inurnment in Arlington National Cemetery or the personal representative or primary next of kin decides that the primarily eligible person will be interred or inurned elsewhere, the remains of any predeceased person may be removed from Arlington National Cemetery at no cost to the Government.

**§ 553.18 Eligibility for burial in U.S. Soldiers' and Airmen's Home National Cemetery.**

Only the residents of the Armed Forces Retirement Home are eligible for interment in the U.S. Soldiers' and Airmen's Home National Cemetery. Resident eligibility criteria for the Armed Forces Retirement Home is provided for at 24 U.S.C. 412.

**§ 553.19 Ineligibility for interment, inurnment, or memorialization in an Army National Military Cemetery.**

The following persons are not eligible for interment, inurnment, or memorialization in an Army National Military Cemetery:

(a) A father, mother, brother, sister, or in-law solely on the basis of his or her relationship to a primarily eligible person, even though the individual is:

(1) Dependent on the primarily eligible person for support; or

(2) A member of the primarily eligible person's household.

(b) A person whose last period of service was not characterized with an honorable discharge (*e.g.,* they received a separation or discharge under general but honorable conditions, other than honorable conditions, a bad conduct discharge, a dishonorable discharge, or a dismissal), regardless of whether the person:

(1) Received any other veterans' benefits; or

(2) Was treated at a Department of Veterans Affairs hospital or died in such a hospital.

(c) A person who has volunteered for service with the U.S. Armed Forces, but has not yet entered on active duty.

(d) A former spouse whose marriage to the primarily eligible person ended in divorce.

(e) A spouse who predeceases the primarily eligible person and is interred or inurned in a location other than Arlington National Cemetery, and the primarily eligible person remarries.

(f) A divorced spouse of a primarily eligible person.

(g) Otherwise derivatively eligible persons, such as a spouse or minor child, if the primarily eligible person was not or will not be interred or inurned at Arlington National Cemetery.

(h) A service member who dies while on active duty, if the first General Courts-Martial Convening Authority in the service member's chain of command determines that there is clear and convincing evidence that the service member engaged in conduct that would have resulted in a separation or discharge not characterized as an honorable discharge (*e.g.,* a separation or discharge under general but honorable conditions, other than honorable conditions, a bad conduct discharge, a dishonorable discharge, or a dismissal) being imposed, but for the death of the service member.

(i) Animal remains that are unintentionally commingled with human remains due to a natural disaster, unforeseen accident, act of war or terrorism, violent explosion, or similar incident, and such remains cannot be separated from the remains of an eligible person, then the remains may be interred or inurned with the eligible person, but the identity of the animal remains shall not be inscribed or identified on a niche, marker, headstone, or otherwise.

**§ 553.20 Prohibition of interment, inurnment, or memorialization in an Army National Military Cemetery of persons who have committed certain crimes.**

(a) *Prohibition.* Notwithstanding §§ 553.12 through 553.16, 553.18, and 553.22, the interment, inurnment, or memorialization in an Army National Military Cemetery of any of the following persons is prohibited:

(1) Any person identified in writing to the Executive Director by the Attorney General of the United States, prior to his or her interment, inurnment, or memorialization, as a person who has been convicted of a Federal capital crime, as defined in 38 U.S.C. 2411, and whose conviction is final (other than a person whose sentence was commuted by the President).

(2) Any person identified in writing to the Executive Director by an appropriate State official, prior to his or her interment, inurnment, or memorialization, as a person who has been convicted of a State capital crime, as defined in 38 U.S.C. 2411, and whose conviction is final (other than a person whose sentence was commuted by the Governor of the State).

(3) Any person identified in writing to the Executive Director by the Attorney General of the United States or by an appropriate State official, prior to his or her interment, inurnment, or memorialization, as a person who has been convicted of murder, as defined in § 553.1, and whose conviction is final (other than a person whose sentence was commuted by the President or the Governor of a State, as the case may be).

(4) Any person identified in writing to the Executive Director by the Attorney General of the United States or by an appropriate State official, prior to his or her interment, inurnment, or memorialization, as a person who has been convicted of a Federal capital crime or a State capital crime, as defined in 38 U.S.C. 2411, or other criminal offense causing the person to be a Tier III sex offender for purposes of the Sex Offender Registration and Notification Act, who for such crime is sentenced to a minimum of life imprisonment and whose conviction is final (other than a person whose sentence was commuted by the President or the Governor of a State, or the appropriate commutation authority as dictated by the law in the jurisdiction where the conviction was finalized, as the case may be).

(5) Any person found under procedures specified in § 553.21 to have committed any crime identified in § 553.20(a)(1) through (4), but who has not been convicted of such crime by reason of such person not being available for trial due to death or flight to avoid prosecution. Notice from officials is not required for this prohibition to apply.

(b) *Notice.* The Executive Director is designated as the Secretary of the Army's representative authorized to receive from the appropriate Federal or State officials notification of conviction of capital crimes referred to in this section.

(c) *Confirmation of person's eligibility.* (1) If notice has not been received, but the Executive Director has reason to believe that the person may have been convicted of a Federal capital crime or a State capital crime, as defined in 38 U.S.C. 2411, the Executive Director shall seek written confirmation from:

(i) The Attorney General of the United States, with respect to a suspected Federal capital crime; or

(ii) An appropriate State official, with respect to a suspected State capital crime.

(2) The Executive Director will defer the decision on whether to inter, inurn, or memorialize a decedent until a written response is received.

**§ 553.21 Findings concerning the commission of certain crimes where a person has not been convicted due to death or flight to avoid prosecution.**

(a) *Preliminary inquiry.* If the Executive Director has reason to believe that a decedent may have committed a Federal capital crime or a State capital crime, as defined in 38 U.S.C. 2411, but has not been convicted of such crime by reason of such person not being available for trial due to death or flight to avoid prosecution, the Executive Director shall submit the issue to the General Counsel of the Department of the Army. The General Counsel of the Department of the Army shall initiate a preliminary inquiry seeking information from Federal, State, or local law enforcement officials, or other sources of potentially relevant information.

(b) *Decision after preliminary inquiry.* If, after conducting the preliminary inquiry described in paragraph (a) of this section, the General Counsel of the Department of the Army determines that credible evidence exists suggesting the decedent may have committed a Federal capital crime or State capital crime, as defined in 38 U.S.C. 2411, then further

proceedings under this section are warranted to determine whether the decedent committed such crime. Consequently the General Counsel of the Department of the Army shall present the personal representative with a written notification of such preliminary determination and a dated, written notice of the personal representative's procedural options.

(c) *Notice and procedural options.* The notice of procedural options shall indicate that, within fifteen days, the personal representative may:

(1) Request a hearing;

(2) Withdraw the request for interment, inurnment, or memorialization; or

(3) Do nothing, in which case the request for interment, inurnment, or memorialization will be considered to have been withdrawn.

(d) *Time computation.* The fifteen-day time period begins on the calendar day immediately following the earlier of the day the notice of procedural options is delivered in person to the personal representative or is sent by U.S. registered mail or, if available, by electronic means to the personal representative. It ends at midnight on the fifteenth day. The period includes weekends and holidays.

(e) *Hearing.* The purpose of the hearing is to allow the personal representative to present additional information regarding whether the decedent committed a Federal capital crime or a State capital crime, as defined in 38 U.S.C. 2411. In lieu of making a personal appearance at the hearing, the personal representative may submit relevant documents for consideration.

(1) If a hearing is requested, the General Counsel of the Department of the Army shall conduct the hearing.

(2) The hearing shall be conducted in an informal manner.

(3) The rules of evidence shall not apply.

(4) The personal representative and witnesses may appear, at no expense to the Government, and subject to the discretion of the General Counsel of the Department of the Army, they may testify. All testimony shall be under oath and a person who possesses the legal authority to administer oaths shall administer the oath.

(5) The General Counsel of the Department of the Army shall consider all relevant information obtained.

(6) The hearing shall be appropriately recorded. Upon request, a copy of the record shall be provided to the personal representative.

(f) *Final determination.* After considering the opinion of the General Counsel of the Department of the Army, and any additional information submitted by the personal representative, the Secretary of the Army shall determine the decedent's eligibility for interment, inurnment, or memorialization. This determination is final and not appealable.

(1) The determination shall be based on evidence that supports or undermines a conclusion that the decedent's actions satisfied the elements of the crime as established by the law of the jurisdiction in which the decedent would have been prosecuted.

(2) If an affirmative defense is offered by the decedent's personal representative, a determination as to whether the defense was met shall be made according to the law of the jurisdiction in which the decedent would have been prosecuted.

(3) Mitigating evidence shall not be considered.

(4) The opinion of the local, State, or Federal prosecutor as to whether he or she would have brought charges against the decedent had the decedent been available is relevant but not binding and shall be given no more weight than other facts presented.

(g) *Notice of decision.* The Executive Director shall provide written notification of the Secretary's decision to the personal representative.

**§ 553.22 Exceptions to policies for interment, inurnment, or memorialization at Arlington National Cemetery.**

(a) As a national military cemetery, eligibility standards for interment, inurnment, or memorialization are based on honorable military service. Exceptions to the eligibility standards for new graves are rarely granted. When granted, exceptions are for those persons who have made significant contributions that directly and substantially benefited the U.S. military. Exceptions to the interment or inurnment eligibility policies shall be decided by the Secretary of the Army.

(b) Requests for an exception to the interment or inurnment eligibility policies shall be considered only after the individual's death.

(c) Requests for an exception to the interment or inurnment eligibility policies shall be submitted to the Executive Director and shall include any documents required by the Executive Director.

(d) The primary next of kin is responsible for providing and certifying the authenticity of all documents and swearing to the accuracy of the accounting provided to support the request for exception to the interment or inurnment eligibility policies.

(e) Disapproved requests will be reconsidered only when the personal representative or next of kin submits new and substantive information not previously considered by the Secretary of the Army. Requests for reconsideration shall be submitted directly to the Executive Director. The Executive Director will deny requests for reconsideration not supported by new and substantive information after review and advice from the General Counsel of the Department of the Army. The Executive Director shall notify the personal representative or next of kin of the decision of the reconsideration.

(f) The decision by the Secretary of the Army or the Executive Director, as the case may be, is final and not appealable.

(g) Under no circumstances, will exceptions to policies be considered or granted for those individuals prohibited from interment or inurnment by virtue of § 553.20 or § 553.21.

**§ 553.23 Placement of cremated remains at Army National Military Cemeteries.**

All cremated remains shall be interred or inurned. The scattering of cremated remains and the burial of symbolic containers are prohibited in Army National Military Cemeteries.

**§ 553.24 Subsequently recovered remains.**

Subsequently recovered identified remains of a decedent shall be reunited in one gravesite or urn, or as part of a group burial, in either an Army National Military Cemetery or other cemetery. Subsequently recovered identified remains may also be interred in the Arlington National Cemetery Tomb of Remembrance. Unidentified remains (which may or may not be commingled) may also be interred in the Arlington National Cemetery Tomb of Remembrance.

**§ 553.25 Disinterment and disinurnment of remains.**

(a) Interments and inurnments in Army National Military Cemeteries are considered permanent.

(b) Requests for the permanent (*i.e.,* the remains will not be immediately returned to the same gravesite or niche) disinterment or disinurnment of individually interred or inurned remains are considered requests for exceptions to this policy, and must be addressed to the Executive Director for decision. The request must include:

(1) A full statement of the reasons for the disinterment or disinurnment of the remains from the personal representative or primary next of kin who directed the original interment or inurnment if still living, or if not, the

current personal representative or primary next of kin;

(2) A notarized statement from each living close relative of the decedent that he or she does not object to the proposed disinterment or disinurnment;

(3) A notarized statement by a person who has personal knowledge of the decedent's relatives stating that the persons giving statements comprise all of the decedent's living close relatives; and

(4) An appropriate funding source for the disinterment or disinurnment, as disinterments and disinurnments of individually interred or inurned remains must be accomplished without expense to the Government, unless done in accordance with paragraph (c) of this section.

(c) Disinterments performed at the direction of the Secretary of Defense for the purpose of the identification of remains shall be done in compliance with, and as directed by, Department of Defense regulation and policy.

(d) The Executive Director shall carry out disinterments and disinurnments directed by a court of competent jurisdiction upon presentation of a lawful, original court order and after consulting with the General Counsel of the Department of the Army.

(e) Disinterment or disinurnment is not permitted for the sole purpose of splitting remains or keeping a portion of the remains in a location other than Arlington National Cemetery.

(f) Disinterment of previously designated group remains for the sole purpose of individually segregating the group remains is not permitted unless the requirements of paragraph (d) of this section are met.

**§ 553.26 Design of Government-furnished headstones, niche covers, and memorial markers.**

(a) Headstones and memorial markers shall be white marble in an upright slab design. Flat-type granite markers may be used, at the Executive Director's discretion, when the terrain or other obstruction precludes use of an upright marble headstone or memorial marker.

(b) Niche covers shall be white marble.

(c) The Executive Director shall approve the design of headstones and memorial markers erected for group burials, consistent with the policies of the Secretary of Veterans Affairs.

**§ 553.27 Inscriptions on Government-furnished headstones, niche covers, and memorial markers.**

(a) Inscriptions on Government-furnished headstones, niche covers, and memorial markers will be made according to the policies and specifications of the Secretary of the Army, consistent with the policies of the Secretary of Veterans Affairs.

(b) No grades, titles, or ranks other than military grades granted pursuant to title 10, United States Code, will be engraved on Government-furnished headstones, niche covers, and memorial markers. Honorary grades, titles, or ranks granted by States, governors, and others shall not be inscribed on headstones, niche covers, or memorial markers.

(c) Memorial markers must include the words ''In Memory of'' preceding the inscription.

(d) The words ''In Memory of'' shall not precede the inscription of a decedent whose remains are interred or inurned.

**§ 553.28 Private headstones and markers.**

(a) Construction and installation of private headstones and markers, in lieu of Government-furnished headstones, are prohibited in Army National Military Cemeteries unless approved prior to December 1, 2017. Repair or replacement of private headstones and markers that were approved prior to December 1, 2017, and are in sections of Army National Military Cemeteries in which private memorials and markers were authorized as of January 1, 1947, must be of simple design, dignified, and appropriate for a military cemetery as determined by the Executive Director.

(b) The design and inscription of a private headstone or marker must be approved by the Executive Director prior to its construction and placement. All private headstones and markers will conform to the dimensions and profiles specified by the Executive Director and will be inscribed with the location of the gravesite.

(c) Inscription or modification to a private headstone or marker previously placed or approved for placement is conditional upon the primary next of kin agreeing in writing to maintain it in a manner acceptable to the Government. Should the headstone or marker become unserviceable at any time and the primary next of kin fail to repair or replace it, or if the marker is not updated to reflect all persons buried in that gravesite within 6 months of the most recent burial, the Executive Director reserves the right to remove and dispose of the headstone or marker and replace it with a standard, Government-furnished headstone or marker.

(d) The construction of a headstone or marker to span two gravesites will be permitted only in those sections in which headstones and markers are presently spanning two gravesites and only with the express understanding that in the event both gravesites are not utilized for burials, the headstone or marker will be relocated to the center of the occupied gravesite, if possible. Such relocation must be accomplished at no expense to the Government. The Executive Director reserves the right to remove and dispose of the headstone or marker and to mark the gravesite with a Government-furnished headstone or marker if the personal representative or primary next of kin fails to relocate the headstone or marker as requested by the Executive Director.

(e) Arrangements must be made with an appropriate commercial firm to ensure that additional inscriptions will be promptly inscribed following each succeeding interment in the gravesite. Foot markers must be authorized by the Executive Director and may only be authorized when there is no available space for an inscription on the front or rear of a private headstone.

(f) Except as may be authorized for marking group burials, ledger monuments of freestanding cross design, narrow shafts, and mausoleums are prohibited.

**§ 553.29 Permission to construct or amend private headstones and markers.**

(a) Headstone firms must receive permission from the Executive Director to construct a private headstone or marker or to add an inscription to an existing headstone or marker in an Army National Military Cemetery.

(b) Requests for permission must be submitted to the Executive Director and must include:

(1) Written consent from the personal representative or primary next of kin;

(2) Contact information for both the personal representative or primary next of kin and the headstone firm; and

(3) A scale drawing (no less than 1:12) showing all dimensions, or a reproduction showing detailed specifications of design and proposed construction material, finishing, carving, lettering, exact inscription to appear on the headstone or marker, and a trademark or copyright designation.

(c) The Army does not endorse headstone firms, but grants permission for the construction of headstones or markers in individual cases.

(d) When using sandblast equipment to add an inscription to an existing headstone or marker, headstone firms shall restore the surrounding grounds in a timely manner as determined by the Executive Director to the condition of the grounds before work began and at no expense to the Government.

**§ 553.30 Inscriptions on private headstones and markers.**

An appropriate inscription for the decedent will be placed on the headstone or marker in accordance with the dimensions of the stone and arranged in such a manner as to enhance the appearance of the stone. Additional inscriptions may be inscribed following each succeeding interment in the gravesite. All inscriptions will be in accordance with policies established by the Executive Director.

**§ 553.31 Memorial and commemorative monuments (other than private headstones or markers).**

The placement of memorials or commemorative monuments in Arlington National Cemetery will be carried out in accordance with 38 U.S.C. 2409(b).

**§ 553.32 Conduct of memorial services and ceremonies.**

(a) The Executive Director shall ensure the sanctity of public and private memorial and ceremonial events.

(b) All memorial services and ceremonies within Army National Military Cemeteries, other than official ceremonies, shall be purely memorial in purpose and may be dedicated only to:

(1) The memory of all those interred, inurned, or memorialized in Army National Military Cemeteries;

(2) The memory of all those who died in the military service of the United States while serving during a particular conflict or while serving in a particular military unit or units; or

(3) The memory of the individual or individuals to be interred, inurned, or memorialized at the particular site at which the service or ceremony is held.

(c) Memorial services and ceremonies at Army National Military Cemeteries will not include partisan political activities.

(d) Private memorial services may be closed to the media and public as determined by the decedent's primary next of kin.

(e) Public memorial services and public wreath-laying ceremonies shall be open to all members of the public to observe.

**§ 553.33 Visitors rules for Army National Military Cemeteries.**

(a) *Visiting hours.* Visiting hours shall be established by the Executive Director and posted in conspicuous places. No visitor is permitted to enter or remain in an Army National Military Cemetery outside the established visiting hours.

(b) *Destruction or removal of property.* No person shall destroy, damage, mutilate, alter, or remove any monument, gravestone, niche cover, structure, tree, shrub, plant, or other property located within an Army National Military Cemetery, without the prior approval of the Executive Director.

(c) *Conduct within Army National Military Cemeteries.* Army National Military Cemeteries are national shrines to the honored dead of the U.S. Armed Forces, and certain acts and activities, which may be appropriate elsewhere, are not appropriate in Army National Military Cemeteries. All visitors, including persons attending or taking part in memorial services and ceremonies, shall observe proper standards of decorum and decency while in an Army National Military Cemetery. Specifically, no person shall:

(1) Conduct any memorial service or ceremony within an Army National Military Cemetery without the prior approval of the Executive Director.

(2) Engage in demonstrations prohibited by 38 U.S.C. 2413.

(3) Engage in any orations, speeches, or similar conduct to assembled groups of people, unless such actions are part of a memorial service or ceremony authorized by the Executive Director.

(4) Display any placards, banners, flags, or similar devices within an Army National Military Cemetery, unless first approved by the Executive Director for use in an authorized memorial service or ceremony. This rule does not apply to clothing worn by visitors.

(5) Distribute any handbill, pamphlet, leaflet, or other written or printed matter within an Army National Military Cemetery, except a program approved by the Executive Director to be provided to attendees of an authorized memorial service or ceremony.

(6) Bring a dog, cat, or other animal (other than a service animal or military working dog) within an Army National Military Cemetery. This prohibition does not apply to persons living in quarters located on the grounds of the Army National Military Cemeteries.

(7) Use the cemetery grounds for recreational activities (*e.g.,* physical exercise, running, jogging, sports, or picnics).

(8) Ride a bicycle or similar vehicle or conveyance in an Army National Military Cemetery, except with a proper pass issued by the Executive Director to visit a gravesite or niche. An individual visiting a relative's gravesite or niche may be issued a temporary pass by the Executive Director to proceed directly to and from the gravesite or niche on a bicycle or similar vehicle or conveyance.

(9) Operate a musical instrument, a loudspeaker, or an audio device without a headset within an Army National Military Cemetery.

(10) Drive any motor vehicle within an Army National Military Cemetery in excess of the posted speed limit.

(11) Park any motor vehicle in any area of an Army National Military Cemetery designated as a no-parking area.

(12) Leave any vehicle in the Arlington National Cemetery Visitors' Center parking area or Soldiers' and Airmen's Home National Cemetery visitors' parking area more than thirty minutes outside of established visiting hours or anywhere else in an Army National Military Cemetery outside of established visiting hours.

(13) Consume or serve alcoholic beverages without prior written permission from the Executive Director.

(14) Possess firearms without prior written permission from the Executive Director. This prohibition does not apply to law enforcement and military personnel in the performance of their official duties. In accordance with locally established policy, military and law enforcement personnel may be required to obtain advance permission from the Executive Director prior to possessing firearms on the property of an Army National Military Cemetery.

(15) Deposit or throw litter or trash on the grounds of an Army National Military Cemetery.

(16) Engage in any disrespectful or disorderly conduct within an Army National Military Cemetery.

(d) *Vehicular traffic.* All visitors, including persons attending or taking part in memorial services and ceremonies, will observe the following rules concerning motor vehicle traffic within Arlington National Cemetery:

(1) Visitors arriving by car and not entitled to a vehicle pass pursuant to paragraph (d)(2) of this section are required to park their vehicles in the Visitors' Center parking area or at a location outside of the cemetery.

(2) Only the following categories of vehicles may be permitted access to Arlington National Cemetery roadways and issued a permanent or temporary pass from the Executive Director:

(i) Official Government vehicles being used on official Government business.

(ii) Vehicles carrying persons on official Cemetery business.

(iii) Vehicles forming part of an authorized funeral procession and authorized to be part of that procession.

(iv) Vehicles carrying persons visiting the Arlington National Cemetery gravesites, niches, or memorial areas of relatives or loved ones interred, inurned, or memorialized within Arlington National Cemetery.

(v) Arlington National Cemetery and National Park Service maintenance vehicles.

(vi) Vehicles of contractors who are authorized to perform work within Arlington National Cemetery.

(vii) Concessionaire tour buses authorized by the Executive Director to operate in Arlington National Cemetery.

(viii) Vehicles of employees of the Army National Military Cemeteries as authorized by the Executive Director.

**§ 553.34 Soliciting and vending.**

The display or distribution of commercial advertising to or solicitation of business from the public is strictly prohibited within an Army National Military Cemetery, except as authorized by the Executive Director.

**§ 553.35 Media.**

All officials and staff of the media are subject to the Visitors Rules enumerated in § 553.33 and shall comply with the Department of the Army's media policy.

## Subpart B—Army Post Cemeteries

**§ 553.36 Definitions.**

As used in this subpart, the following terms have these meanings:

*Active duty.* Full-time duty in the active military service of the United States.

(1) This includes:

(i) Active Reserve component duty performed pursuant to title 10, United States Code.

(ii) Service as a cadet or midshipman currently on the rolls at the U.S. Military, U.S. Naval, U.S. Air Force, or U.S. Coast Guard Academies.

(iii) Active duty for operational support.

(2) This does not include:

(i) Full-time National Guard duty performed under title 32, United States Code.

(ii) Active duty for training, initial entry training, annual training duty, or inactive-duty training for members of the Reserve components.

*Active duty for operational support (formerly active duty for special work).* A tour of active duty for Reserve personnel authorized from military or Reserve personnel appropriations for work on Active component or Reserve component programs. The purpose of active duty for operational support is to provide the necessary skilled manpower assets to support existing or emerging requirements and may include training.

*Active duty for training.* A category of active duty used to provide structured individual and/or unit training, including on-the-job training, or educational courses to Reserve component members. Included in the active duty for training category are annual training, initial active duty for training, or any other training duty.

*Annual training.* The minimum period of active duty for training that Reserve members must perform each year to satisfy the training requirements associated with their Reserve component assignment.

*Armed Forces.* The U.S. Army, Navy, Marine Corps, Coast Guard, Air Force, Space Force and their Reserve components.

*Army Post Cemeteries.* Cemeteries operated by the Department of the Army on active Army installations, on Army reserve complexes, and on former Army installations or inactive posts whose purpose is to inter or inurn eligible members of the Armed Forces, Veterans, and their eligible family members. Army National Military Cemeteries are not included in post cemeteries. The West Point Cemetery is considered an Army Post Cemetery, but has separate eligibility standards due to its unique stature. In addition to the Army Post Cemeteries, there are four Native American cemeteries on Fort Sill and five World War II Enemy Prisoner of War cemeteries on four Army installations. Finally, there is the U.S. Army Disciplinary Barracks Cemetery at Fort Leavenworth used for interring the unclaimed remains of those who die while incarcerated by the United States Military. Unlike the other Army cemeteries which honor the Nation's veterans, this cemetery has unique eligibility standards due to the characterization of service of those criminally incarcerated.

*Cemetery Responsible Official.* An appointed official who serves as the primary point of contact and responsible official for all matters relating to the operation maintenance and administration of an Army cemetery. The appointee must be a U.S. Federal Government employee, DA civilian, or military member and appointed on orders by the appropriate garrison commander or comparable official.

*Child, minor child, permanently dependent child, unmarried adult child*—(1) *Child.* (i) Natural child of a primarily eligible person, born in wedlock;

(ii) Natural child of a female primarily eligible person, born out of wedlock;

(iii) Natural child of a male primarily eligible person, who was born out of wedlock and:

(A) Has been acknowledged in writing signed by the male primarily eligible person;

(B) Has been judicially determined to be the male primarily eligible person's child;

(C) Whom the male primarily eligible person has been judicially ordered to support; or

(D) Has been otherwise proven, by evidence satisfactory to the Executive Director, to be the child of the male primarily eligible person;

(iv) Adopted child of a primarily eligible person; or

(v) Stepchild who was part of the primarily eligible person's household at the time of death of the individual who is to be interred or inurned.

(2) *Minor child.* A child of the primarily eligible person who:

(i) Is unmarried;

(ii) Has no dependents; and

(iii) Is under the age of twenty-one years, or is under the age of twenty-three years and is taking a full-time course of instruction at an educational institution that the U.S. Department of Education acknowledges as an accredited educational institution.

(3) *Permanently dependent child.* A child of the primarily eligible person who:

(i) Is unmarried;

(ii) Has no dependents; and

(iii) Is permanently and fully dependent on one or both of the child's parents because of a physical or mental disability incurred before attaining the age of twenty-one years or before the age of twenty-three years while taking a full-time course of instruction at an educational institution that the U.S. Department of Education acknowledges as an accredited educational institution.

(4) *Unmarried adult child.* A child of the primarily eligible person who:

(i) Is unmarried;

(ii) Has no dependents; and

(iii) Has attained the age of twenty-one years.

*Close relative.* The spouse, parents, adult brothers and sisters, adult natural children, adult stepchildren, and adult adopted children of a decedent.

*Derivatively eligible person.* Any person who is entitled to interment or inurnment solely based on his or her relationship to a primarily eligible person, as set forth in §§ 553.43 through 553.45.

*Disinterment.* The removal of interred human remains from a particular gravesite.

*Disinurnment.* The removal of remains from a particular niche.

*Executive Director.* The person statutorily charged with exercising authority, direction, and control over all aspects of Army National Military Cemeteries, and the person charged by the Secretary of the Army to serve as the

functional proponent for policies and procedures pertaining to the administration, operation, and maintenance of all military cemeteries under the jurisdiction of the Army.

*Former prisoner of war.* A person who is eligible for or has been awarded the Prisoner of War Medal.

*Former spouse.* See *spouse.*

*Government.* The U.S. Government and its agencies and instrumentalities.

*Group burial.* (1) Interment in one gravesite of one or more service members on active duty killed in the same incident or location where:

(i) The remains cannot be individually identified; or

(ii) The person authorized to direct disposition of subsequently identified remains has authorized their interment with the other service members.

(2) Group remains may contain incidental remains of civilians and foreign nationals.

*Inactive-duty training.* (1) Duty prescribed for members of the Reserve components by the Secretary concerned under 37 U.S.C. 206 or any other provision of law.

(2) Special additional duties authorized for members of the Reserve components by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

(3) In the case of a member of the Army National Guard or Air National Guard of any State, duty (other than full-time duty) under 32 U.S.C. 316, 502, 503, 504, or 505 or the prior corresponding provisions of law.

(4) This term does not include:

(i) Work or study performed in connection with correspondence courses;

(ii) Attendance at an educational institution in an inactive status; or

(iii) Duty performed as a temporary member of the Coast Guard Reserve.

*Interment.* The ground burial of casketed or cremated human remains.

*Inurnment.* The placement of cremated human remains in a niche.

*Media.* Individuals and agencies that print, broadcast, or gather and transmit news, and their reporters, photographers, and employees.

*Minor child.* See *child.*

*Murder.* Pursuant to any Federal or State law, the causing the death of another human being when:

(1) It is committed purposely or knowingly; or

(2) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape.

*Niche.* An above ground space constructed specifically for the placement of cremated human remains.

*Parent.* A natural parent, a stepparent, a parent by adoption, or a person who for a period of not less than one year stood *in loco parentis,* or was granted legal custody by a court decree or statutory provision.

*Permanently dependent child.* See *child.*

*Person authorized to direct disposition.* The person primarily entitled to direct disposition of human remains and who elects to exercise that entitlement. Determination of such entitlement shall be made in accordance with applicable law and regulations.

*Personal representative.* A person who has legal authority to act on behalf of another through applicable law, order, and regulation.

*Primarily eligible person.* Any person who is entitled to interment or inurnment based on his or her service as specified in §§ 553.43 through 553.45.

*Primary next of kin.* (1) In the absence of a valid written document from the decedent identifying the primary next of kin, the order of precedence for designating a decedent's primary next of kin is as follows:

(i) Spouse, even if a minor;

(ii) Children, age 18 years and over (if under 18 years of age, their surviving parent or legal guardian shall exercise the rights of the minor);

(iii) Parents;

(iv) Siblings, to include half-blood and those acquired through adoption, age 18 years and over;

(v) Grandparents; and

(vi) Other next of kin, in order of relationship to the decedent as determined by the laws of the decedent's state of domicile.

(2) Absent a court order or written document from the deceased, the precedence of next of kin with equal relationships to the decedent is governed by seniority (age), older having higher priority than younger. Equal relationship situations include those involving divorced parents of the decedent, children of the decedent, and siblings of the decedent.

*Private headstones or markers.* A headstone or individual memorial marker provided at private expense, in lieu of a headstone or individual memorial marker furnished by the Government.

*Private memorial service.* A memorial service or ceremony conducted at the decedent's gravesite, memorial headstone, or niche.

*Public memorial service.* A ceremony conducted by members of the public at a historic site in an Army cemetery.

*Reserve component.* See definition in 10 U.S.C. 101.

*Spouse, former spouse, subsequently remarried spouse*—(1) *Spouse.* A person who is legally married to another person.

(2) *Former spouse.* A person who was legally married to another person at one time but was not legally married to that person at the time of one of their deaths.

(3) *Subsequently remarried spouse.* A derivatively eligible spouse who was married to the primarily eligible person at the time of the primarily eligible person's death and who subsequently remarried another person.

*Subsequently recovered remains.* Additional remains belonging to the decedent that are recovered or identified after the decedent's interment or inurnment.

*Subsequently remarried spouse.* See *spouse.*

*Subversive activity.* Actions constituting subversive activity are those defined in applicable provisions of Federal law.

*Unmarried adult child.* See *child.*

*Veteran.* A person who served in the U.S. Armed Forces and who was discharged or released under honorable conditions (general discharge under honorable conditions is not sufficient to meet this definition).

### § 553.37 Purpose.

This subpart specifies the eligibility for interment and inurnment in the Post Cemeteries and the U.S. Disciplinary Barracks Cemetery at Fort Leavenworth.

### § 553.38 Statutory authorities.

The statutory authorities for this subpart are Public Law 93–43 87 Stat. 75, 10 U.S.C. 985, 1481, 1482, 3013, and 38 U.S.C. 2411.

### § 553.39 Scope and applicability.

(a) *Scope.* The development, maintenance, administration, and operation of the Army Post Cemeteries are governed by this subpart, Army Regulation 290–5, and Department of the Army Pamphlet 290–5. The development, maintenance, administration, and operation of Army National Military Cemeteries are not covered by this subpart.

(b) *Applicability.* This subpart is applicable to all persons seeking

interment or inurnment in Army Post Cemeteries.

**§ 553.40 Assignment of gravesites or niches.**

(a) All eligible persons will be assigned gravesites or niches without discrimination as to race, color, sex, religion, age, or national origin and without preference to military grade or rank.

(b) Army cemeteries will enforce a one-gravesite-per-family policy. Once the initial interment or inurnment is made in a gravesite or niche, each additional interment or inurnment of eligible persons must be made in the same gravesite or niche, except as noted in paragraph (e) of this section. This includes multiple primarily eligible persons if they are married to each other.

(c) A gravesite reservation will be honored if the gravesite was properly reserved before May 1, 1975.

(d) The commander or Cemetery Responsible Official responsible for an Army cemetery may cancel a gravesite reservation:

(1) Upon determination that a derivatively eligible spouse has remarried;

(2) Upon determination that the remains of the person having the gravesite reservation have been buried elsewhere or otherwise disposed of;

(3) Upon determination that the person having the gravesite reservation desires to or will be interred in the same gravesite with the predeceased, and doing so is feasible; or

(4) Upon determination that the person having the gravesite reservation would be 120 years of age and there is no record of correspondence with the person having the gravesite reservation within the last two decades.

(e) In cases of reservations where more than one gravesite was reserved (on the basis of the veteran's eligibility at the time the reservation was made), the gravesite reservations will be honored only if the decedents continue to meet the eligibility criteria for interment in Army Post Cemeteries that are in effect at the time of need, and the reserved gravesite is available.

(f) Gravesites or niches shall not be reserved or assigned prior to the time of need.

(g) The selection of gravesites and niches is the responsibility of the Cemetery Responsible Official. The selection of specific gravesites or niches by the family or other representatives of the deceased is prohibited.

**§ 553.41 Proof of eligibility.**

(a) The personal representative or primary next of kin is responsible for providing appropriate documentation to verify the decedent's eligibility for interment or inurnment.

(b) The personal representative or primary next of kin must certify in writing that the decedent is not prohibited from interment, inurnment, or memorialization under § 553.47 because he or she has not committed or been convicted of a Federal or State capital crime or is a convicted Tier III sex offender as defined in 38 U.S.C. 2411.

(c) For service members who die on active duty, a statement of honorable service is required from the first General Court-Martial Convening Authority in the service member's chain of command. If the certificate of honorable service cannot be granted, the service member is ineligible for interment, inurnment, and memorialization pursuant to § 553.46(i).

(d) When applicable, the following documents are required:

(1) Death certificate;

(2) Proof of eligibility as required by paragraphs (e) through (g) of this section;

(3) Any additional documentation to establish the decedent's eligibility (*e.g.,* marriage certificate, birth certificate, waivers, statements that the decedent had no children);

(4) Burial agreement;

(5) Notarized statement that the remains are unavailable for the reasons set forth in § 553.16;

(6) A certificate of cremation or notarized statement attesting to the authenticity of the cremated human remains and that 100% of the cremated remains received from the crematorium are present. The Cemetery Responsible Official may, however, allow a portion of the cremated remains to be removed by the crematorium for the sole purpose of producing commemorative items.

(e) The following documents may be used to establish the eligibility of a primarily eligible person:

(1) DD Form 214, Certificate of Release or Discharge from Active Duty;

(2) WD AGO 53 or 53–55, Enlisted Record and Report of Separation Honorable Discharge;

(3) WD AGO 53–98, Military Record and Report of Separation Certificate of Service;

(4) NAVPERS–553, Notice of Separation from U.S. Naval Service;

(5) NAVMC 70–PD, Honorable Discharge, U.S. Marine Corps;

(6) DD Form 1300, Report of Casualty (required in the case of death of an active duty service member); or

(7) NGB Form 22, National Guard Report of Separation and Record of Service (must indicate a minimum of 20 years total service for pay).

(f) In addition to the documents otherwise required by this section, a request for interment or inurnment of a subsequently remarried spouse must be accompanied by:

(1) A notarized statement from the new spouse of the subsequently remarried spouse agreeing to the interment or inurnment and relinquishing any claim for interment or inurnment in the same gravesite or niche.

(2) Notarized statement(s) from all of the children, age 18 years and over, from the prior marriage agreeing to the interment or inurnment of their parents in the same gravesite or niche.

(g) In addition to the documents otherwise required by this section, a request for interment or inurnment of a permanently dependent child must be accompanied by:

(1) A notarized statement as to the marital status and degree of dependency of the decedent from an individual with direct knowledge; and

(2) A physician's statement regarding the nature and duration of the physical or mental disability; and

(3) A statement from someone with direct knowledge demonstrating the following factors:

(i) The deceased lived most of his or her adult life with one or both parents who is otherwise eligible for interment; and

(ii) The decedent's children and siblings age 18 years and over, or other family members, other than the eligible parent, waive any derivative claim to be interred at the Army Post Cemetery in question.

(h) Veterans or primary next of kin of deceased veterans may obtain copies of their military records by writing to the National Personnel Records Center, Attention: Military Personnel Records, 1 Archives Drive, St. Louis, Missouri 63138–1002 or using their website. All others may request a record by completing and submitting Standard Form 180.

(i) The burden of proving eligibility lies with the party who requests the burial. Commanders of these cemeteries or their Cemetery Responsible Officials will determine whether the submitted evidence is sufficient to support a finding of eligibility.

**§ 553.42 General rules governing eligibility for interment or inurnment in Army Post Cemeteries.**

(a) Only those persons who meet the criteria of § 553.43 of this subpart or are granted an exception to policy pursuant to § 553.49 of this subpart may be interred in the Army Post Cemeteries. Only those persons who meet the

criteria of § 553.44 of this subpart or are granted an exception to policy pursuant to § 553.49 of this subpart may be interred or inurned in the West Point Post Cemetery. Only those persons who meet the criteria of § 553.45 may be interred in the U.S. Disciplinary Barracks Cemetery.

(b) Derivative eligibility for interment or inurnment may be established only through a decedent's connection to a primarily eligible person and not to another derivatively eligible person.

(c) No veteran is eligible for interment, inurnment, or memorialization in an Army Post Cemetery (except for the U.S. Disciplinary Barracks Cemetery) unless the veteran's last period of active duty ended with an honorable discharge. A general discharge under honorable conditions is not sufficient for interment, inurnment, or memorialization in an Army Post Cemetery.

(d) For purposes of determining whether a service member has received an honorable discharge, final determinations regarding discharges made in accordance with procedures established by chapter 79 of title 10, United States Code, will be considered authoritative.

(e) The Executive Director has the authority to act on requests for exceptions to the provisions of the interment, inurnment, and memorialization eligibility policies contained in this subpart. The Executive Director may delegate this authority in writing on such terms deemed appropriate.

(f) Individuals who do not qualify as a primarily eligible person or a derivatively eligible person, but who are granted an exception to policy to be interred or inurned pursuant to § 553.49 of this subpart in a new gravesite or niche, will be treated as a primarily eligible person for purposes of this subpart.

(g) Notwithstanding any other section in this subpart, memorialization with an individual memorial marker, interment, or inurnment in an Army Post Cemetery is prohibited if there is a gravesite, niche, or individual memorial marker for the decedent in any other Government-operated cemetery or the Government has provided an individual grave marker, individual memorial marker or niche cover for placement in a private cemetery.

**§ 553.43 Eligibility for interment and inurnment in Army Post Cemeteries.**

Only those who qualify as a primarily eligible person or a derivatively eligible person are eligible for interment and inurnment in Army Post Cemeteries (except for the West Point Post Cemetery), unless otherwise prohibited as provided for in §§ 553.46 through 553.48 of this subpart, provided that the last period of active duty of the service member or veteran ended with an honorable discharge.

(a) *Primarily eligible persons.* The following are primarily eligible persons for purposes of interment:

(1) Any service member who dies on active duty in the U.S. Armed Forces (except those service members serving on active duty for training only), if the General Courts-Martial Convening Authority grants a certificate of honorable service.

(2) Any veteran retired from a Reserve component who served a period of active duty (other than for training), is carried on the official retired list, and is entitled to receive military retired pay.

(3) Any veteran retired from active military service and entitled to receive military retired pay.

(b) *Derivatively eligible persons.* The following individuals are derivatively eligible persons for purposes of interment who may be interred if space is available in the gravesite of the primarily eligible person:

(1) The spouse of a primarily eligible person who is or will be interred in an Army Post Cemetery in the same grave as the spouse. A former spouse of a primarily eligible person is not eligible for interment in an Army Post Cemetery under this section.

(2) A subsequently remarried spouse if the remarriage is terminated by divorce, annulment or the death of the subsequently remarried spouse's subsequent spouse.

(3) The spouse of an active duty service member or an eligible veteran, who was:

(i) Lost or buried at sea, temporarily interred overseas due to action by the Government, or officially determined to be missing in action;

(ii) Buried in a U.S. military cemetery maintained by the American Battle Monuments Commission; or

(iii) Interred in Arlington National Cemetery as part of a group burial (the derivatively eligible spouse may not be buried in the group burial gravesite) and the active duty service member does not have a separate individual interment or inurnment location.

(4) A minor child or permanently dependent adult child of a primarily eligible person who is or will be interred in an Army Post Cemetery.

(5) The parents of a minor child or a permanently dependent adult child, whose remains were interred in an Army Post Cemetery based on the eligibility of a parent at the time of the child's death, unless eligibility of the non-service connected parent is lost through divorce from the primarily eligible parent.

**§ 553.44 Eligibility for interment and inurnment in the West Point Post Cemetery.**

The following persons are eligible for interment and inurnment in the West Point Post Cemetery, unless otherwise prohibited as provided for in §§ 553.46 through 553.48, provided that the last period of active duty of the service member or veteran ended with an honorable discharge or characterization of honorable service for active duty deaths.

(a) *Primarily eligible persons for interment or inurnment.* The following are primarily eligible persons for purposes of interment or inurnment:

(1) A graduate of the United States Military Academy, provided the individual was a U.S. citizen, both as a cadet and at the time of death, and whose military service fulfilled one of the following criteria.

(i) The graduate's service in the Armed Forces of the United States, if any, terminated honorably.

(ii) The graduate's service in wartime in the Armed Forces of a nation that was allied with the United States during the war, if the service terminated honorably.

(2) Members of the Armed Forces of the United States, including United States Military Academy cadets, who were on active duty at the United States Military Academy at time of death and their derivatively eligible person dependents who may have died while the service member was on active duty at the United States Military Academy.

(3) Members of the Armed Forces of the United States whose last permanent active duty station was the United States Military Academy at time of retirement.

(4) Members of the Armed Forces of the United States whose last permanent active duty station was the United States Military Academy prior to retirement for physical disability, in accordance with 10 U.S.C. 1201. However, personnel (not otherwise eligible) who are transferred to the Medical Holding Detachment, Keller Army Hospital, for medical boarding or medical disability retirement are not, regardless of length of time, eligible for interment or inurnment in the West Point Post Cemetery or Columbarium.

(5) Officers appointed as Professors, United States Military Academy.

(b) *Derivatively eligible persons.* Derivatively eligible persons are those connected to an individual described in paragraph (a) of this section through a

relationship described in § 553.43(b). Such individuals may be interred or inurned if space is available in the primarily eligible person's gravesite or niche.

(c) *Temporary restrictions.* The Secretary of the Army may, in special circumstances, impose temporary restrictions on the eligibility standards for the West Point Post Cemetery. If temporary restrictions are imposed, they will be reviewed annually to ensure the special circumstances remain valid for retaining the temporary restrictions.

**§ 553.45 Eligibility for interment in U.S. Disciplinary Barracks Cemetery at Fort Leavenworth.**

(a) Military prisoners who die while in Military custody and are not claimed by the person authorized to direct disposition of remains or other persons legally authorized to dispose of remains are permitted to be interred in the U.S. Disciplinary Barracks Cemetery. The Executive Director will make all decisions for interment in the U.S. Disciplinary Barracks Cemetery.

(b) Other persons approved by the Executive Director.

**§ 553.46 Ineligibility for interment, inurnment, or memorialization in an Army Post Cemetery.**

The following persons are not eligible for interment, inurnment, or memorialization in an Army Post Cemetery:

(a) A father, mother, brother, sister, or in-law solely because of his or her relationship to a primarily eligible person, even though the individual is:

(1) Dependent on the primarily eligible person for support; or

(2) A member of the primarily eligible person's household.

(b) Except for the U.S. Disciplinary Barracks Cemetery in § 553.45, a person whose last period of service was not characterized as an honorable discharge (*e.g.,* a separation or discharge under general but honorable conditions, other than honorable conditions, a bad conduct discharge, a dishonorable discharge, or a dismissal), regardless of whether the person:

(1) Received any other veterans' benefits; or

(2) Was treated at a Department of Veterans Affairs hospital or died in such a hospital.

(c) A person who has volunteered for service with the U.S. Armed Forces, but has not yet entered on active duty.

(d) A former spouse whose marriage to the primarily eligible person ended in divorce.

(e) A spouse who predeceases the primarily eligible person and is interred or inurned in a location other than an Army Cemetery and the primarily eligible person remarries.

(f) A divorced spouse of a primarily eligible person, or the service-connected parent when the divorced spouse has a child interred or inurned in an Army cemetery under the child's derivative eligibility.

(g) Otherwise derivatively eligible persons, such as a spouse or minor child, if the primarily eligible person was not or will not be interred or inurned at an Army Cemetery.

(h) A person convicted in a Federal court or by a court-martial of any offense involving subversive activity or an offense described in 18 U.S.C. 1751 (except for military prisoners at the U.S. Disciplinary Barracks Cemetery).

(i) A service member who dies while on active duty, if the first General Courts-Martial Convening Authority in the service member's chain of command determines that there is clear and convincing evidence that the service member engaged in conduct that would have resulted in a separation or discharge not characterized as an honorable discharge (*e.g.,* a separation or discharge under general but honorable conditions, other than honorable conditions, a bad conduct discharge, a dishonorable discharge, or a dismissal) being imposed, but for the death of the service member.

(j) If animal remains are unintentionally commingled with human remains due to a natural disaster, unforeseen accident, act of war or terrorism, violent explosion, or similar incident, and such remains cannot be separated from the remains of an eligible person, then the remains may be interred or inurned with the eligible person, but the identity of the animal remains shall not be inscribed or identified on a niche, marker, headstone, or otherwise.

**§ 553.47 Prohibition of interment, inurnment, or memorialization in an Army Post Cemetery of persons who have committed certain crimes.**

(a) *Prohibition.* Notwithstanding §§ 553.43 through 553.45, and pursuant to 10 U.S.C. 985 and 38 U.S.C. 2411, the interment, inurnment, or memorialization in an Army cemetery of any of the following persons is prohibited:

(1) Any person identified in writing to the Executive Director by the Attorney General of the United States, prior to his or her interment, inurnment, or memorialization, as a person who has been convicted of a Federal capital crime and whose conviction is final (other than a person whose sentence was commuted by the President).

(2) Any person identified in writing to the Executive Director by an appropriate State official, prior to his or her interment, inurnment, or memorialization, as a person who has been convicted of a State capital crime and whose conviction is final (other than a person whose sentence was commuted by the Governor of the State).

(3) Any person identified in writing to the Executive Director by the Attorney General of the United States or by an appropriate State official, prior to his or her interment, inurnment, or memorialization, as a person who has been convicted of murder, as defined in as defined in 38 U.S.C. 2411, and whose conviction is final (other than a person whose sentence was commuted by the President or the Governor of a State, as the case may be).

(4) Any person identified in writing to the Executive Director by the Attorney General of the United States, or by an appropriate State official, prior to his or her interment, inurnment, or memorialization, as a person who has been convicted of a Federal or State capital crime, as defined in 38 U.S.C. 2411, or other crime causing the person to be a Tier III sex offender for purposes of the Sex Offender Registration and Notification Act, who for such crime is sentenced to a minimum of life imprisonment and whose conviction is final (other than a person whose sentence was commuted by the President or the Governor of a State, or the appropriate commutation authority as dictated by the law in the jurisdiction where the conviction was finalized, as the case may be).

(5) Any person found under procedures specified in § 553.48 to have committed any crime identified in § 553.47(a)(1) through (4), but who has not been convicted of such crime by reason of such person not being available for trial due to death or flight to avoid prosecution. Notice from Federal or State officials is not required for this prohibition to apply.

(b) *Notice.* The Executive Director is designated as the Secretary of the Army's representative authorized to receive from the appropriate Federal or State officials notification of conviction of capital crimes referred to in this section.

(c) *Confirmation of person's eligibility.* (1) If notice has not been received, but the Executive Director has reason to believe that the person may have been convicted of a Federal capital crime or a State capital crime, the Executive Director shall seek written confirmation from:

(i) The Attorney General of the United States, with respect to a suspected Federal capital crime; or

(ii) An appropriate State official, with respect to a suspected State capital crime.

(2) The Executive Director will defer the decision on whether to inter, inurn, or memorialize a decedent until a written response is received.

(d) *Due diligence.* Army Commanders who have cemeteries for which they are responsible will make every effort to determine if the decedent is ineligible in accordance with 10 U.S.C. 985 and 38 U.S.C. 2411. For those determined ineligible due to the provisions of these sections, commanders will submit their determinations in writing to the Executive Director for validation.

**§ 553.48 Findings concerning the commission of certain crimes where a person has not been convicted due to death or flight to avoid prosecution.**

(a) *Preliminary inquiry.* If the Executive Director has reason to believe that a decedent may have committed a Federal capital crime or a State capital crime, as defined in 38 U.S.C. 2411, but has not been convicted of such crime by reason of such person not being available for trial due to death or flight to avoid prosecution, the Executive Director shall submit the issue to the General Counsel of the Department of the Army. The General Counsel of the Department of the Army shall initiate a preliminary inquiry seeking information from Federal, State, or local law enforcement officials, or other sources of potentially relevant information.

(b) *Decision after preliminary inquiry.* If, after conducting the preliminary inquiry described in paragraph (a) of this section, the General Counsel of the Department of the Army determines that credible evidence exists suggesting the decedent may have committed a Federal capital crime or State capital crime, as defined in 38 U.S.C. 2411, then further proceedings under this section are warranted to determine whether the decedent committed such crime. Consequently, the General Counsel of the Department of the Army shall present the personal representative with a written notification of such preliminary determination and a dated, written notice of the personal representative's procedural options.

(c) *Notice and procedural options.* The notice of procedural options shall indicate that, within fifteen days, the personal representative may:

(1) Request a hearing;

(2) Withdraw the request for interment, inurnment, or memorialization; or

(3) Do nothing, in which case the request for interment, inurnment, or memorialization will be considered to have been withdrawn.

(d) *Time computation.* The fifteen-day time period begins on the calendar day immediately following the earlier of the day the notice of procedural options is delivered in person to the personal representative or is sent by U.S. registered mail or, if available, by electronic means to the personal representative. It ends at midnight on the fifteenth day. The period includes weekends and holidays.

(e) *Hearing.* The purpose of the hearing is to allow the personal representative to present additional information regarding whether the decedent committed a Federal capital crime or a State capital crime, as defined in 38 U.S.C. 2411. In lieu of making a personal appearance at the hearing, the personal representative may submit relevant documents for consideration.

(1) If a hearing is requested, the General Counsel of the Department of the Army shall conduct the hearing.

(2) The hearing shall be conducted in an informal manner.

(3) The rules of evidence shall not apply.

(4) The personal representative and witnesses may appear, at no expense to the Government, and subject to the discretion of the General Counsel of the Department of the Army, they may testify. All testimony shall be under oath and a person who possesses the legal authority to administer oaths shall administer the oath.

(5) The General Counsel of the Department of the Army shall consider all relevant information obtained.

(6) The hearing shall be appropriately recorded. Upon request, a copy of the record shall be provided to the personal representative.

(f) *Final determination.* After considering the opinion of the General Counsel of the Department of the Army, and any additional information submitted by the personal representative, the Secretary of the Army shall determine the decedent's eligibility for interment, inurnment, or memorialization. This determination is final and not appealable.

(1) The determination shall be based on evidence that supports or undermines a conclusion that the decedent's actions satisfied the elements of the crime as established by the law of the jurisdiction in which the decedent would have been prosecuted.

(2) If an affirmative defense is offered by the decedent's personal representative, a determination as to whether the defense was met shall be made according to the law of the jurisdiction in which the decedent would have been prosecuted.

(3) Mitigating evidence shall not be considered.

(4) The opinion of the local, State, or Federal prosecutor as to whether he or she would have brought charges against the decedent had the decedent been available is relevant but not binding and shall be given no more weight than other facts presented.

(g) *Notice of decision.* The Executive Director shall provide written notification of the Secretary's decision to the personal representative.

**§ 553.49 Exceptions to policies for interment or inurnment at Army Post Cemeteries.**

(a) Requests for exceptions to policy for interment or inurnment at Army post cemeteries, to include the West Point Post Cemetery, will be made to the Executive Director.

(b) Eligibility standards for interment and inurnment are based on honorable military service, except at the U.S. Disciplinary Barracks Cemetery. Exceptions to the eligibility standards are rarely granted. When granted, exceptions are for those persons who have made significant contributions that directly and substantially benefited the U.S. military.

(c) Requests for an exception to the interment or inurnment eligibility policies shall be considered only after the individual's death.

(d) Procedures for submitting requests for exceptions to policy for interment and inurnment will be established by the Executive Director.

(e) The decision by the Executive Director is final and not appealable.

**§ 553.50 Disinterment and disinurnment of remains.**

(a) Interments and inurnments in Army post cemeteries are considered permanent.

(b) Requests for the permanent (*i.e.,* the remains will not be immediately returned to the same gravesite or niche) disinterment or disinurnment of individually interred or inurned remains are considered requests for exceptions to this policy, and must be addressed to the Executive Director for decision. The request must include:

(1) A full statement of the reasons for the disinterment or disinurnment of the remains from the personal representative or primary next of kin who directed the original interment or inurnment if still living, or if not, the current personal representative or primary next of kin;

(2) A notarized statement from each living close relative of the decedent that he or she does not object to the proposed disinterment or disinurnment;

(3) A notarized statement by a person who has personal knowledge of the decedent's relatives stating that the persons giving statements comprise all of the decedent's living close relatives; and

(4) An appropriate funding source for the disinterment or disinurnment, as disinterments and disinurnments of individually interred or inurned remains must be accomplished without expense to the Government, unless done in accordance with paragraph (c) of this section.

(c) Disinterments performed at the direction of the Secretary of Defense for the purpose of the identification of remains shall be done in compliance with, and as directed by, Department of Defense regulation and policy.

(d) The Executive Director shall carry out disinterments and disinurnments directed by a court of competent jurisdiction upon presentation of a lawful, original court order and after consulting with the General Counsel of the Department of the Army.

(e) Disinterment or disinurnment is not permitted for the sole purpose of splitting remains or keeping a portion of the remains in a location other than in the cemetery where the disinterment or disinurnment occurred.

(f) Disinterment of previously designated group remains for the sole purpose of individually segregating the group remains is not permitted unless the requirements of paragraph (c) of this section are met.

**§ 553.51 Private headstones and markers.**

Construction and installation of private headstones and markers, in lieu of Government-furnished headstones and markers, are prohibited in Army post cemeteries unless approved by the Executive Director prior to October 1, 2020. Repair or replacement of private headstones and markers that were approved prior to October 1, 2020, must be consistent with the requirements of §§ 553.28(b) through (f), 553.29, and 553.30, and the repair or replacement must be approved in advance by the Executive Director.

**Brenda S. Bowen,**

*Army Federal Register Liaison Officer.*

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# FEDERAL REGISTER

Vol. 85 Tuesday,

No. 179 September 15, 2020


Part VIII

## The President

Proclamation 10070—National Days of Prayer and Remembrance, 2020

Federal Register
Vol. 85, No. 179
Tuesday, September 15, 2020

# Presidential Documents

**Title 3—**

## The President

**Proclamation 10070 of September 3, 2020**

## National Days of Prayer and Remembrance, 2020

**By the President of the United States of America**

**A Proclamation**

During these National Days of Prayer and Remembrance, we pay tribute to the nearly 3,000 precious lives lost on September 11, 2001. We solemnly honor them and pray that those who bear the burdens of unimaginable loss find comfort in knowing that God is close to the brokenhearted and that He provides abiding peace.

The memories of that fateful morning still touch American hearts and remind us of our Nation's reliance on Almighty God. When cowardly terrorists attacked our homeland, we witnessed the unthinkable as each successive plane struck the very heart of our Nation. As the Twin Towers fell and the Pentagon was hit, the peace and calm in the lives of innocent families were shattered. Our Nation watched in shock as courageous first responders faced great peril to save the lives of their fellow Americans. Onboard United Flight 93, a group of heroic individuals braced themselves to stop hijackers from hitting our Nation's Capital. Passenger Todd Beamer told Lisa Jefferson, a call center supervisor in Chicago who stayed on the phone with him until the end, that he would ''go out on faith'' and asked her to recite the Lord's Prayer with him over the phone, beginning: ''Our Father, who art in heaven.''

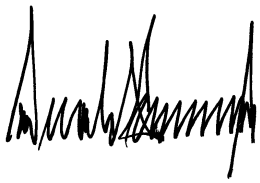
Despite immeasurable loss, we were not defeated. Our Nation's darkest hour was pierced by candlelight, our anguish was met with prayer, and our grief was met with unity. Like so many times before in our country's history, we sought peace and strength through faith.

Today, at Ground Zero in New York City, the ''Survivor Tree'' stands as an enduring symbol of our faith and national restoration. As it blooms with the seasons and reminds us of its triumph over destruction, we remember the words of John 1:5: ''The light shines in the darkness, and the darkness has not overcome it.'' In the nearly two decades that have passed since this tragedy, our Nation has grown stronger and more resilient. As one country, we honor all of the mothers, fathers, sons, and daughters who perished on that day. They are forever remembered.

On these National Days of Prayer and Remembrance, we pray for the families of all those who were lost and honor the courageous heroes who came through for our Nation when we needed them most. Together, as one Nation under God, we renew our vow to never forget. We cherish each other as fellow Americans and look proudly to our flag—an unwavering reminder of freedom's triumph over fear. And, above all, we thank God for the strength and courage He has provided us, and take heart that our beloved departed now rest in His loving embrace.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim Friday, September 4, through Sunday, September 6, 2020, as National Days of Prayer and Remembrance. I call upon the people of the United States to observe these National Days of Prayer and Remembrance with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this third day of September, 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.



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