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Office of the Comptroller of the Currency

12 CFR Part 3

[Docket No. OCC–2020–0009]

RIN 1557–AE81

FEDERAL RESERVE SYSTEM

12 CFR Parts 217 and 252

[Regulations Q and YY; Docket Nos. R–1703, 1706; RIN 7100–AF77, 7100–AF80]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 324

RIN 3064–AF40

Regulatory Capital Rule and Total Loss-Absorbing Capacity Rule: Eligible Retained Income

AGENCY: Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), and Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The OCC, Board, and FDIC (together, the agencies) are adopting as final the revisions to the definition of eligible retained income made under the interim final rule published in the **Federal Register** on March 20, 2020, for all depository institutions, bank holding companies, and savings and loan holding companies subject to the agencies' capital rule. The final rule revises the definition of eligible retained income to make more gradual any automatic limitations on capital distributions that could apply under the agencies' capital rule. Separately, in this final rule, the Board also is adopting as final the definition of eligible retained income made under the interim final rule published in the **Federal Register** on March 26, 2020, for purposes of the Board's total loss-absorbing capacity (TLAC) rule. The final rule adopts these interim final rules with no changes.

DATES: The final rule is effective January 1, 2021.

FOR FURTHER INFORMATION CONTACT:

OCC: Benjamin Pegg, Risk Expert, Capital and Regulatory Policy, (202) 649–6370; or Kevin Korzeniewski, Counsel, or Marta Stewart-Bates, Senior Attorney, Chief Counsel's Office, (202) 649–5490, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

Board: Anna Lee Hewko, Associate Director, (202) 530–6360, Constance Horsley, Deputy Associate Director, (202) 452–5239, Matthew McQueeney, Senior Financial Institution Policy Analyst II, (202) 452–2942, or Eusebius Luk, Senior Financial Institution Policy Analyst I, (202) 452–2874, Division of Supervision and Regulation; Benjamin McDonough, Assistant General Counsel, (202) 452–2036, Mark Buresh, Senior Counsel, (202) 452–5270, Asad Kudiya, Senior Counsel, (202) 475–6358, or Mary Watkins, Senior Attorney, (202) 452–3722, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263–4869.

FDIC: Bobby R. Bean, Associate Director, *bbean@fdic.gov;* Benedetto Bosco, Chief, Capital Policy Section, *bbosco@fdic.gov;* Michael Maloney, Senior Policy Analyst, *mmaloney@fdic.gov; regulatorycapital@fdic.gov;* Capital Markets Branch, Division of Risk Management Supervision, (202) 898–6888; or Michael Phillips, Counsel, *mphillips@fdic.gov;* Catherine Wood, Counsel, *cawood@fdic.gov;* Supervision and Legislation Branch, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (800) 925–4618.

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I. Introduction

In light of recent disruptions in economic conditions caused by the coronavirus disease 2019 (COVID–19) and current strains in U.S. financial markets, the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), and Federal Deposit Insurance Corporation (FDIC) (together, the agencies) published an interim final rule in the **Federal Register** on March 20, 2020 (capital interim final rule) [1] that revised the definition of eligible retained income for all depository institutions, bank holding companies, and savings and loan holding companies (together, banking organizations) subject to the agencies' capital rule (capital rule). Separately, the Board published an interim final rule in the **Federal Register** on March 26, 2020 (TLAC interim final rule) [2] that revised the definition of eligible retained income for the largest and most systemically important U.S. bank holding companies (collectively, U.S. GSIBs) and the U.S. operations of the largest and most systemically important foreign banking organizations (collectively, covered intermediate holding companies (IHCs) and together with U.S. GSIBs, TLAC covered companies), which are subject to the Board's total loss-absorbing capacity (TLAC) rule. These revisions help strengthen the ability of banking organizations and TLAC covered companies to continue lending and conducting other financial intermediation activities during stress periods by making distribution limitations more gradual, as intended by the agencies.

In this final rule, the agencies are adopting as final and without change

[1] *See* 85 FR 15909 (March 20, 2020).

[2] *See* 85 FR 17003 (March 26, 2020).

the revisions to the definition of eligible retained income made under the capital interim final rule and TLAC interim final rule, as detailed further below.

II. Background

A. Capital Rule

Under the capital rule, a banking organization [3] must maintain minimum risk-based capital and leverage ratios.[4] In addition, a banking organization under the capital rule must maintain a buffer of regulatory capital above its applicable minimum risk-based capital and leverage ratio requirements, as applicable, to avoid restrictions on capital distributions—including in the form of dividends and share buybacks and certain discretionary bonus payments (collectively, capital distributions).[5]

Banking organizations under the capital rule are generally subject to a fixed capital conservation buffer requirement, composed solely of common equity tier 1 capital, of greater than 2.5 percent of risk-weighted assets. On March 4, 2020, the Board adopted a final rule that simplified the Board's regulatory capital framework for large bank holding companies and U.S. intermediate holding companies of foreign banking organizations with the introduction of a stress capital buffer requirement (SCB final rule).[6] Under the SCB final rule, a covered holding company will receive a new stress capital buffer requirement on an annual basis, which replaces the static greater than 2.5 percent capital conservation buffer requirement.[7] Moreover, banking organizations subject to Category I, II, and III standards also are subject to a countercyclical capital buffer requirement [8] and a minimum supplementary leverage ratio of 3 percent. U.S. GSIBs are subject to the GSIB surcharge, an additional capital buffer requirement based on a measure of their systemic risk. Further, U.S. GSIBs are subject to enhanced supplementary leverage ratio standards, and must hold an additional leverage capital buffer of tier 1 capital to avoid limitations on capital distributions. The insured depository institution subsidiaries of U.S. GSIBs must maintain a similarly higher supplementary leverage ratio to be considered well capitalized under the agencies' respective prompt corrective action frameworks.[9]

The agencies established the capital buffer requirements to encourage better capital conservation by banking organizations and to enhance the resilience of the banking system during stress periods.[10] In particular, the agencies intended for the capital buffer requirements to limit gradually the ability of banking organizations to distribute capital if their capital ratios fall below certain levels, thereby strengthening the ability of banking organizations to continue lending and conducting other financial intermediation activities during stress periods.

Under the capital rule, if a banking organization's capital ratios fall within its applicable minimum-plus-buffer requirements, the maximum amount of capital distributions it can make is a function of its eligible retained income.[11] All of the buffer requirements in the capital rule use the same definition of eligible retained income and the same definition of eligible retained income applies to depository institutions and holding companies. Prior to the issuance of the capital interim final rule, the capital rule generally defined eligible retained income as four quarters of net income, net of distributions and associated tax effects not already reflected in net income.[12]

B. TLAC Rule

In December 2016, the Board issued a final rule (TLAC rule) to require U.S. GSIBs and covered IHCs to maintain a minimum TLAC amount, consisting of minimum amounts of long-term debt (LTD) and tier 1 capital.[13] In addition, the TLAC rule prescribed buffer requirements above the minimum TLAC amount which a TLAC covered company must maintain to avoid restrictions on capital distributions.

The TLAC rule applies to U.S. GSIBs and covered IHCs because the failure or material financial distress of these companies has the greatest potential to disrupt U.S. financial stability.[14] The requirements in the TLAC rule build on, and serve as a complement to, the regulatory capital requirements in the Board's capital rule (Board capital rule).[15] As with the Board capital rule, the TLAC buffer requirements were established to encourage better capital conservation by TLAC covered companies and to enhance the resilience of the banking system during stress periods.[16] In particular, the Board intended for the TLAC buffer requirements to limit gradually the ability of TLAC covered companies to make capital distributions under certain circumstances, thereby strengthening the ability of TLAC covered companies to continue lending and conducting other financial intermediation activities during stress periods.

A TLAC covered company with a TLAC level that falls below the applicable minimum-plus-buffer requirements faces limitations on

[3] Banking organizations subject to the agencies' capital rule include national banks, state member banks, state nonmember banks, savings associations, and top-tier bank holding companies and savings and loan holding companies domiciled in the United States not subject to the Board's Small Bank Holding Company and Savings and Loan Holding Company Policy Statement (12 CFR part 225, Appendix C), but exclude certain savings and loan holding companies that are substantially engaged in insurance underwriting or commercial activities or that are estate trusts and bank holding companies and savings and loan holding companies that are employee stock ownership plans.

[4] 12 CFR 3.10 (OCC); 12 CFR 217.10 (Board); and 12 CFR 324.10 (FDIC). An additional minimum supplementary leverage ratio of 3 percent applies to banking organizations subject to Category I, II, and III standards.

[5] *See* 12 CFR 3.11 (OCC); 12 CFR 217.11 (Board); and 12 CFR 324.11 (FDIC).

[6] Amendments to the Regulatory Capital, Capital Plan, and Stress Test Rules, March 4, 2020, available at *https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200304a2.pdf.* The SCB final rule applies to bank holding companies and U.S. intermediate holding companies of foreign banking organizations subject to the capital plan rule (covered holding company). 12 CFR 225.8.

[7] A covered holding company's first stress capital buffer requirement, as determined under the SCB final rule, will be effective October 1, 2020. *See* 12 CFR 225.8.

[8] Currently, the countercyclical capital buffer is set at 0 percent.

[9] *See* 12 CFR 6.4(b)(1)(i) (OCC); 12 CFR 208.43(b)(1)(i) (Board); 12 CFR 324.403(b)(1)(ii) (FDIC).

[10] *See* 78 FR 62018, 62034 (October 11, 2013).

[11] A banking organization in or below the bottom quartile of its capital conservation buffer requirement may not make any capital distributions without prior approval from the OCC, Board, or FDIC, as applicable.

[12] For purposes of the stress capital buffer, the definition of eligible retained income used to determine restrictions on capital distributions by an applicable banking organization depended on the covered holding company's capital buffer amount compared to its stress capital buffer requirement.

[13] 82 FR 8266 (January 27, 2017); 12 CFR part 252, subparts G and P.

[14] *See* 12 CFR 252.60; 12 CFR 252.160.

[15] While the Board capital rule's requirements are intended to ensure that a banking organization has sufficient capital to remain a going concern, the objective of the TLAC rule is to reduce the financial stability impact of the failure of a TLAC covered company by requiring sufficient loss- absorbing capacity on both a going-concern and a gone-concern basis. A TLAC covered company's regulatory capital, and especially its equity capital, is likely to be significantly or completely depleted in the events leading to its bankruptcy or resolution. Thus, if a TLAC covered company is to re-emerge from resolution with sufficient capital to successfully operate as a going concern, the firm must have a source of capital. The TLAC rule therefore requires TLAC covered companies to maintain a minimum amount of LTD that can absorb losses and serve as a source of capital in resolution.

[16] 78 FR 62018, 62034 (October 11, 2013).

capital distributions, in a manner designed to parallel the restrictions on capital distributions under the Board capital rule. In particular, the maximum amount of capital distributions that a TLAC covered company can make is limited as a percentage of its eligible retained income, as defined in the TLAC rule.

Prior to the issuance of TLAC interim final rule, the TLAC rule used the same definition of eligible retained income for purposes of the TLAC buffer as the definition used under the Board capital rule prior to the adoption of the capital interim final rule.

III. Overview of the Interim Final Rules and Public Comments

The spread of COVID–19 has disrupted economic activity in the United States, causing significant volatility in U.S. financial markets. The magnitude and persistence of COVID–19's overall effect on the economy remain uncertain. In light of these developments, banking organizations may experience a sudden and unanticipated decline in capital ratios.

A. Capital Interim Final Rule

In March 2020, the agencies issued the capital interim final rule, which revised the definition of eligible retained income to the greater of (1) a banking organization's net income for the four preceding calendar quarters, net of any distributions and associated tax effects not already reflected in net income, and (2) the average of a banking organization's net income over the preceding four quarters.[17] This revision reduces the likelihood that a banking organization is suddenly subject to abrupt and restrictive distribution limitations in a scenario where its ratios fall within its applicable minimum-plus-buffer requirements.

The capital interim final rule's changes to the definition of eligible retained income allow banking organizations to more freely use their capital and leverage buffers and supports banking organizations' lending activity and other financial intermediation activities to avoid compounding negative impacts on the financial markets.

The revised definition of eligible retained income under the capital interim final rule applies to all of a banking organization's buffer requirements, including the fixed greater than 2.5 percent capital conservation buffer and, if applicable, the countercyclical capital buffer, as well as, for global systemically important bank holding companies, the GSIB surcharge, and enhanced supplementary leverage ratio buffer. Once the stress capital buffer requirements for covered holding companies under the SCB final rule apply, the revised definition would also apply to all parts of a covered holding company's buffer requirements. The agencies believe that having one definition of eligible retained income for all banking organizations under the capital rule simplifies the regulatory capital framework and ensures fairness across banking organizations of all sizes.

In addition, the revised definition of eligible retained income under the capital interim final rule assists in the ability of S-corporation banking organizations to provide dividends to shareholders in order to meet their pass-through tax liabilities. S-corporation banking organizations do not pay federal income taxes. Instead, income and losses of an S-corporation are attributed to shareholders, potentially increasing their personal tax liability when the S-corporation has income and potentially reducing their personal tax liability when the S-corporation has losses. In a situation where the S-corporation has income but does not pay dividends, its shareholders are responsible for meeting their increased personal tax liability using their own resources. When an otherwise adequately capitalized S-corporation banking organization is restricted from making dividends because one or more of its capital ratios breach its buffer requirements, a situation can arise in which the banking organization's dividends to its shareholders would be insufficient to pay their share of taxes on the banking organization's income.[18]

The agencies encourage banking organizations to make prudent decisions regarding capital distributions.[19] The capital interim final rule was intended to strengthen the incentives for a banking organization to use its buffers in a prudent manner in adverse conditions and continue to serve as a financial intermediary and source of credit to the economy. The capital interim final rule does not make changes to any other requirement that may limit capital distributions.[20] For instance, under the prompt corrective action requirements, an insured depository institution that becomes less than adequately capitalized would be subject to dividend restrictions.[21]

B. TLAC Interim Final Rule

The COVID–19 stress period has presented analogous concerns under the TLAC rule to those described above around buffer use and continued financial intermediation. That is, in light of developments in connection with COVID–19, TLAC covered companies rule may experience a sudden and unanticipated decline in TLAC and, prior to the issuance of the TLAC interim final rule, the Board was similarly concerned that the mechanics around buffer requirements set forth in the TLAC rule did not reflect the intended gradual manner in which capital distribution restrictions applied. A modest reduction in TLAC could result in sudden and severe limitations on capital distributions, undermining a TLAC covered company's ability to use its TLAC buffer and creating a strong incentive to limit lending and other financial intermediation activities, thereby deterring the company from continued lending to creditworthy businesses and households during a stress period.

In March 2020, the Board issued the TLAC interim final rule so that the definition of eligible retained income under the TLAC rule paralleled the definition of the term under the Board capital rule. Specifically, the TLAC interim final rule revises the definition of eligible retained income under the TLAC rule to mean the greater of (1) a TLAC covered company's net income for the four preceding calendar quarters, net of any distributions and associated tax effects not already reflected in net income, and (2) the average of a TLAC covered company's net income over the preceding four quarters. The Board adopted this modified definition with the intent to support TLAC covered companies' lending activity and other financial intermediation activities and avoid compounding impacts on the financial markets. The revised definition applies with respect to all TLAC buffer requirements under the TLAC rule.[22]

[17] The capital interim final rule also applies to the U.S. intermediate holding companies of foreign banking organizations required to be established or designated under 12 CFR 252.153.

[18] FDIC, FIL–40–2014 (July 21, 2014).

[19] *See* Interagency Statement on the Use of Capital and Liquidity Buffers (March 17, 2020), *available at: https://www.occ.gov/news-issuances/news-releases/2020/nr-ia-2020-34a.pdf.*

[20] *See, e.g.,* 12 U.S.C. 56 and 60 (OCC); 12 CFR 5.46, 5.55, and 5.64 (OCC); 12 CFR 208.5 and 12 CFR 225.4(b) (Board); 12 U.S.C. 1828(i) and 12 CFR 303.241 (FDIC).

[21] *See* 12 CFR 6.6 (OCC); 12 CFR 208.40 (Board); 12 CFR 324.405 (FDIC).

[22] Under the TLAC rule, a U.S. GSIB is subject to the external TLAC risk-weighted buffer, which sits above the minimum risk-based TLAC requirement, and the external TLAC leverage buffer, which sits above the minimum total-leverage exposure-based TLAC requirement. 12 CFR 252.63(c). Similarly, a covered IHC is subject to covered IHC TLAC buffer,

Continued

C. Public Comments

The agencies received five public comment letters on the capital interim final rule, and the Board received two public comments on the TLAC interim final rule.

Comments on the Capital Interim Final Rule

Some commenters on the capital interim final rule supported the change to the definition of eligible retained income in the capital rule, indicating that flexibility provided by the change will help banking organizations continue to lend through the COVID–19 crisis. One commenter indicated that the capital interim final rule would assist community banking organizations organized as S-corporations to meet tax obligations and still raise capital as needed. Another commenter was supportive of the capital interim final rule's application of a consistent definition of eligible retained income across banking organizations of all sizes and suggested that the new definition will add consistency to the capital rule while balancing the need for banking organizations to lend to borrowers affected by COVID–19 and still maintain general safety and soundness.

Other commenters opposed the change to the definition of eligible retained income in the capital interim final rule and advocated that the agencies be more prescriptive in compelling banking organizations to take actions to conserve capital or continue lending, such as prohibiting capital distributions while the COVID–19 crisis continues.[23] One commenter was supportive of the capital interim final rule, but asserted that the revised definition of eligible retained income should only be used by a banking organization if the capital distributions enhance the financial institution's ability to contribute to economic recovery of both the stock market and main street businesses. The commenter suggested that capital distributions should have requirements and restrictions associated with them, such as limits on executive bonuses or payouts and limits on share repurchases, and should not be permitted in certain situations.

The agencies note that the capital buffer requirements do restrict capital distributions. As described above, if a banking organization's capital or leverage ratios fall within its applicable minimum-plus-buffer requirements, the maximum amount of capital distributions it can make is limited as a percentage of its eligible retained income, as defined in the capital rule. Accordingly, the capital buffer requirements compel banking organizations to increasingly constrain distributions as their regulatory capital ratios approach their applicable minimums. For instance, a banking organization in or below the bottom quartile of its buffer requirement may not make any capital distributions without prior approval from its primary Federal regulator.

The revised definition of eligible retained income under the final rule facilitates banking organizations' use of their buffers as intended by ensuring that the limits on capital distributions apply gradually. The revised definition reduces the incentive for banking organizations to limit their lending and other financial intermediation activities in order to avoid facing abrupt limitations on capital distributions.

Comments on the TLAC Interim Final Rule

The comment letters addressing the TLAC interim final rule generally opposed the Board's change to the definition of eligible retained income and advocated for additional restrictions on capital distributions. These comments closely aligned with similar comments received in connection with the capital interim final rule.

A commenter to the TLAC interim final rule suggested that TLAC covered companies that utilize U.S. Treasury or Federal Reserve lending facilities should not be able to apply the revised definition of eligible retained income since it would potentially allow for greater distributions while simultaneously taking advantage of government support. Additionally, this commenter suggested that TLAC covered companies should be subject to minimum requirements for lending and limits on executive bonuses and share repurchases in order to ensure capital distributions enhance their ability to contribute to the economic recovery.

Another commenter to the TLAC interim final rule indicated that, given the uncertainties surrounding COVID–19 and potential economic effects, TLAC covered companies should be taking actions to conserve capital. This commenter asserted that the TLAC interim final rule may pose risks to safety and soundness because capital distributed will not be available to absorb future losses of unknown severity. Further, the commenter expressed doubt that the TLAC interim final rule would achieve the Board's intent of promoting lending to the economy. The commenter concluded that the best way to promote lending would be for the Board to prohibit capital distributions by TLAC covered companies for the duration of the crisis. In addition, the commenter requested that the Board delay implementation of the revised definition of eligible retained income until after the crisis has passed.

The revised definition of eligible retained income under the TLAC interim final rule facilitates TLAC covered companies' use of their buffers as intended by ensuring that the limits on capital distributions apply gradually. The revised definition reduces the incentive for TLAC covered companies to limit their lending and other financial intermediation activities in order to avoid facing abrupt limitations on capital distributions.

IV. Summary of the Final Rule

For the reasons discussed above, the final rule adopts the definition of eligible retained income unchanged from the capital interim final rule, and the TLAC interim final rule. Accordingly, under the final rule, eligible retained income for purposes of the agencies' capital rule and the Board's TLAC rule is defined as the greater of (1) a banking organization's or TLAC covered company's net income (as applicable) for the four preceding calendar quarters, net of any distributions and associated tax effects not already reflected in net income, and (2) the average of a banking organization's or TLAC covered company's net income (as applicable) over the preceding four quarters.

V. Impact Assessment

In ordinary economic circumstances, many banking organizations will distribute a significant portion of their net income and retain the rest to support growth. As banking organizations enter stress periods, the restrictions in the capital rule and TLAC rule, as applicable, limit distributions and help to preserve capital and support lending. However, if the limits to distributions are too restrictive, banking organizations can face a sharp increase in their distribution limitations when their applicable ratios fall to certain levels. This may create an incentive for banking organizations to reduce lending or take other actions to avoid using their buffers. The revised definition of eligible net income in the final rule

which sits above the minimum risk-based TLAC requirement. 12 CFR 252.165(d).

[23] The Board received a number of comments that were not specifically responsive to the proposals. In particular, commenters suggested that the Board take actions outside of the scope of the Board capital rule. These comments are not within the scope of this rulemaking and therefore are not discussed in this **SUPPLEMENTARY INFORMATION**.

allows banking organizations to more gradually reduce distributions as they enter stress and provides banking organizations with stronger incentives to continue to lend in a stressed scenario. On the other hand, by enabling banking organizations to gradually decrease capital distributions in stress (rather than mandating a sharp decrease) the rule could incrementally reduce the banking organization's loss-absorption capacity in stress.

The definition of eligible retained income affects the distributions of banking organizations operating within their applicable minimum-plus-buffer requirements. It does not have an impact on minimum capital or TLAC requirements, *per se.* As such, the revised definition of eligible retained income in the final rule is not likely to have any noticeable effect on the minimum capital requirements of banking organizations or the TLAC or LTD requirements applicable to covered companies. However, the final rule could impact actual capital levels given the additional flexibility of meeting buffers during times of stress.

VI. Administrative Law Matters

A. Congressional Review Act

For purposes of Congressional Review Act, the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a ''major'' rule.[24] If a rule is deemed a ''major rule'' by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[25]

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) 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.[26]

As required by the Congressional Review Act, the agencies will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

[24] 5 U.S.C. 801 *et seq.*

[25] 5 U.S.C. 801(a)(3).

[26] 5 U.S.C. 804(2).

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (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 OMB control number. In connection with the capital interim final rule, the agencies made revisions to their current information collections for the Consolidated Reports of Condition and Income (Call Reports) (FFIEC 031, FFIEC 041, and FFIEC 051). The OMB control numbers for the agencies are: OCC OMB No. 1557–0081; Board OMB No. 7100–0036; and FDIC OMB No. 3064–0052. OMB has approved these revisions and the agencies are seeking comment in a separate **Federal Register** notice.[27] There is no change, however, to the Call Reports or their related instructions in connection with this final rule.

Also, in connection with the capital interim final rule, the Board temporarily revised the Consolidated Financial Statements for Holding Companies (FR Y–9; OMB No. 7100–0128) to reflect the changes made in the capital interim final rule, and invited comment on a proposal to extend that collection of information for three years, with revision. No comments were received regarding this proposal under the PRA. The Board has now extended the FR Y–9 reports for three years, with revision, as proposed, to align the reporting instructions with this final rule. The Board has reviewed the revisions to the FR Y–9C pursuant to authority delegated by the OMB and will submit information collection burden estimates to OMB to finalize the revisions. All of the updates to the FR Y–9C noted in the interim final rule should be minimal and result in zero estimated net change in hourly burden.

(1) *Report title:* Financial Statements for Holding Companies.

Agency form number: FR Y–9C, FR Y–9LP, FR Y–9SP, FR Y–9ES, and FR Y–9CS.

OMB control number: 7100–0128.

Effective Date: Currently effective.

Frequency: Quarterly, semiannually, and annually.

Respondents: Bank holding companies, savings and loan holding companies,[28] securities holding companies, and U.S. intermediate holding companies (collectively, HCs).

Estimated number of respondents:

FR Y–9C (non-advanced approaches (AA) HCs community bank leverage ratio (CBLR)) with less than $5 billion in total assets—71,

FR Y–9C (non AA HCs CBLR) with $5 billion or more in total assets—35,

FR Y–9C (non AA HCs non-CBLR) with less than $5 billion in total assets—84,

FR Y–9C (non AA HCs non-CBLR) with $5 billion or more in total assets—154,

FR Y–9C (AA HCs)—19,

FR Y–9LP—434,

FR Y–9SP—3,960,

FR Y–9ES—83,

FR Y–9CS—236.

Estimated average hours per response:

Reporting

FR Y–9C (non AA HCs CBLR) with less than $5 billion in total assets—29.17,

FR Y–9C (non AA HCs CBLR) with $5 billion or more in total assets—35.14,

FR Y–9C (non AA HCs non-CBLR) with less than $5 billion in total assets—41.01,

FR Y–9C (non AA HCs non-CBLR) with $5 billion or more in total assets—46.98,

FR Y–9C (AA HCs)—48.80,

FR Y–9LP—5.27,

FR Y–9SP—5.40,

FR Y–9ES—0.50,

FR Y–9CS—0.50.

Recordkeeping

FR Y–9C (non-advanced approaches HCs with less than $5 billion in total assets), FR Y–9C (non-advanced approaches HCs with $5 billion or more in total assets), FR Y–9C (advanced approaches HCs), and FR Y–9LP: 1.00 hour; FR Y–9SP, FR Y–9ES, and FR Y–9CS: 0.50 hours.

Estimated annual burden hours:

Reporting

FR Y–9C (non AA HCs CBLR) with less than $5 billion in total assets—8,284,

FR Y–9C (non AA HCs CBLR) with $5 billion or more in total assets—4,920,

FR Y–9C (non AA HCs non-CBLR) with less than $5 billion in total assets—13,779,

FR Y–9C (non AA HCs non-CBLR) with $5 billion or more in total assets—28,940,

FR Y–9C (AA HCs)—3,709,

FR Y–9LP—9,149,

FR Y–9SP—42,768,

[27] *See* 85 FR 44361 (July 22, 2020).

[28] A savings and loans holding company (SLHC) must file one or more of the FR Y–9 series of reports unless it is: (1) A unitary SLHC with primarily commercial assets that meets the requirements of section 10(c)(9)(c) of the Home Owners' Loan Act, for which thrifts make up less than 5 percent of its consolidated assets; or (2) a SLHC that primarily holds insurance-related assets and does not otherwise submit financial reports with the SEC pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934.

FR Y–9ES—42,
FR Y–9CS—472.

Recordkeeping

FR Y–9C—1,452,
FR Y–9LP—1,736,
FR Y–9SP—3,960,
FR Y–9ES—42,
FR Y–9CS—472.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities. The RFA requires an agency to prepare a final regulatory flexibility analysis when it promulgates a final rule after being required to publish a general notice of proposed rulemaking. As discussed previously, the agencies have decided to adopt, without changes, revisions to the definition of eligible retain income made under the capital interim final rule and the TLAC interim final rule. There was no general notice of proposed rulemaking associated with this final rule. Accordingly, the agencies have concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply to the promulgation of this final rule.

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[29] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with the principle of safety and soundness and the public interest, any administrative burdens that such regulations would place on IDIs, including small IDIs, and customers of IDIs, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[30] The agencies considered the administrative burdens and benefits of the final rule in determining its effective date and administrative compliance requirements. As such, the final rule will be effective on January 1, 2021.

E. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act[31] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies have sought to present the final rule in a simple and straightforward manner and did not receive any comments on the use of plain language.

F. OCC Unfunded Mandates Reform Act of 1995

As a general matter, the Unfunded Mandates Act of 1995 (UMRA), 2 U.S.C. 1531 *et seq.,* requires the preparation of a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. However, the UMRA does not apply to final rules for which a general notice of proposed rulemaking was not published. See 2 U.S.C. 1532(a). Therefore, because the OCC has not published a general notice of proposed rulemaking in connection with this revision, the OCC has not prepared an economic analysis of the rule under the UMRA.

Authority and Issuance

■ For the reasons set forth in the preamble, the interim final rules that were published at 85 FR 15909 on March 20, 2020, and 85 FR 17003 on March 26, 2020, are adopted as final rules by the OCC, Board, and FDIC without change.

Brian P. Brooks,

Acting Comptroller of the Currency

By order of the Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on or about August 21, 2020.

James P. Sheesley,

Acting Assistant Executive Secretary.

[FR Doc. 2020–19829 Filed 10–7–20; 8:45 am]

BILLING CODE 4810–33–P, 6210–01–P; 6714–01–P

[29] 12 U.S.C. 4802(a).

[30] 12 U.S.C. 4802.

[31] 12 U.S.C. 4809.

FARM CREDIT ADMINISTRATION

12 CFR Part 620

RIN 3052–AD37

District Financial Reporting

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA, we, or our) is amending our regulations governing how a Farm Credit bank presents information on its related associations when preparing annual bank financial statements on a stand-alone basis. The final rule provides two presentation options when disclosing related association financial information in an annual bank report: By footnote or attached in a supplement.

DATES: This regulation will be effective 30 days after publication in the **Federal Register** during which either or both Houses of Congress are in session. We will publish notification of the effective date in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Technical information: Joi Neal, Senior Accountant, Office of Regulatory Policy, (703) 883–4223, TTY (703) 883–4056.

Legal information: Laura McFarland, Senior Counsel, Office of General Counsel, (703) 883–4020, TTY (703) 883–4056.

SUPPLEMENTARY INFORMATION:

I. Objective

The objective of the final rule is to improve shareholder access to district financial information by providing an additional method of presenting financial information on a bank's related associations to those banks preparing annual financial statements on a stand-alone basis.

II. Background

The Farm Credit Act of 1971 (Act), as amended,[1] authorizes the FCA to issue regulations implementing the Act's provisions. Our regulations are intended to ensure the safe and sound operation of Farm Credit System (System) institutions and to govern the disclosure of financial information to shareholders of, and investors in, the System. Congress explained in section 514 of the Farm Credit Banks and Associations Safety and Soundness Act of 1992[2] that disclosures of financial information, among other disclosures, provide System shareholders with information

[1] Public Law 92–181, 85 Stat. 583 (1971), 12. U.S.C. 2001, *et seq.*

[2] Public Law 102–552, 106 Stat. 4131 (1992).

necessary to better manage their institution and make informed decisions regarding its operations.

We issued a proposed rule on December 12, 2019, asking for comments on proposed changes to 12 CFR 620.2.[3] Specifically, we proposed allowing Farm Credit banks to use a supplement for disclosure of combined districtwide (bank and related association) financial information in lieu of a footnote when issuing stand-alone annual financial statements. As proposed, the supplement would be considered part of the bank's annual report and therefore be distributed at the same time as the annual report, and covered by its accuracy, distribution, and internal control requirements. The comment period for the proposed rule closed on March 9, 2020.

III. Comments and Our Responses

We received two comment letters on our proposed changes to § 620.2(g)(2). One letter came from CoBank, ACB (CoBank), a System institution, and one letter came from the American Bankers Association (ABA). Both letters supported FCA's objective for the rulemaking but asked for changes to what was proposed. We discuss these comments to our proposed rule and our responses below. However, after consideration of all the comments, we are making no changes and final all provisions as proposed.

A. Treatment of Supplement as Part of the Annual Report

We proposed requiring the inclusion of the combined districtwide financial information via a supplement to be considered part of the annual report. CoBank expressed support for the flexibility of using either a supplement or footnote for discussion of districtwide financial information within the bank's annual report. However, CoBank requested removal of the proposed requirement that the supplement be considered part of the annual bank stand-alone report, asking that the supplement be a separate report. CoBank gave several reasons for the request and we address each of the reasons given by CoBank later in this preamble, but generally respond here by explaining that the supplement was proposed as an alternative presentation format to using a footnote as provided under our existing regulations. In keeping with this existing regulatory requirement, we proposed keeping the combined districtwide financial information as an essential part of the annual report itself, whether presented as a footnote or supplement.

We explained in the preamble to the proposed rule that use of a supplement instead of a footnote was not creating a new report, but merely giving the alternative presentation method requested by the four Farm Credit banks.[4] Because by its nature a footnote is indelibly part of a report, we proposed concurrent distribution when presentation of districtwide information is done through a supplement to ensure it received the same treatment as if presented in a footnote. Meaning, whether a supplement or footnote, the contents would be part of the annual report, distributed with the annual report pursuant to 12 CFR 620.4, and therefore included in the annual report signature, certification, and internal controls requirements of 12 CFR 620.3. Additionally, we believe that shareholders need both the bank-only financial information and combined districtwide financial information at the same time to foster a better understanding of the bank and its district operations. All the financial information—bank-only and combined districtwide financial information—needs to be available at the same time to accomplish that goal.

1. Comingling Districtwide Data With Bank Only Information

CoBank commented that it believes the inclusion of the supplement as part of the bank's annual report renders the bank's disclosures misleading to its investors because the bank has lending activities beyond the associations. CoBank has the unique status of being the only System institution possessing Title III authorities, resulting in Title III voting stockholders that are not System associations—these stockholders are called ''cooperative association stockholders'' (CA stockholders). CoBank explained that, because the districtwide disclosures exclude its Title III lending activities, an investor might interpret the different disclosure treatment as being required due to accounting or financial reasons. CoBank also claimed its CA shareholders could mistakenly conclude there are multi-tiered classes of common stockholders due both to the heightened prominence of the district financial information resulting from use of a supplement over a footnote and the equity interests of this group of stockholders not being reflected in the districtwide information.

We disagree with CoBank's stated concern. A clearly presented supplement or footnote would label the information in a manner to avoid an investor or shareholder misreading the data. Although CoBank has both System association shareholders and CA stockholders, the districtwide financial information presented in a supplement or footnote further supports the bank's discussion of the components of its operations. Throughout its annual report, CoBank discusses the distinctions between its association shareholders and CA stockholders. The disclosure of districtwide financial information continues the bank's efforts to clarify its operations to its association shareholders and CA stockholders by reducing confusion on its district operations. In addition, both the footnote and the supplement specify the scope of the financial information presented, which avoids confusion with CoBank's lending activities with CA stockholder entities.

2. Delay in Receipt of Districtwide Information

CoBank objected to distributing the supplement concurrently with the annual report because receipt of the districtwide information may be delayed, making the entire annual report late. CoBank stated that any delay in issuing the annual report could adversely affect CoBank's credibility in the capital markets, which in turn could imperil access to third-party capital resources. CoBank added that it envisioned sending both items together except when there was a delay in obtaining the districtwide data.

As the funding bank for its associations, we believe CoBank can minimize the potential for financial reporting delays and other issues at its related associations. By using its ongoing monitoring and other supervisory activities, each bank can identify and assess the impact of potential delays and other issues on the preparation of annual reports and take proactive steps to minimize the potential consequences should a delay or other issue occur. Further, effective internal controls over financial reporting at a bank and its related associations reduces the likelihood of delays. We encourage the banks to proactively utilize measures that improve its districtwide financial reporting processes, while decreasing any issuance risks. Separately, investors from the capital markets, just like System shareholders, must obtain timely, reliable financial information to make informed investment decisions when purchasing System securities. We

[3] 85 FR 647.

[4] Refer to the proposed rule at section II, ''Background'' (85 FR 647, January 7, 2020).

do not believe that separately issuing bank-only and combined districtwide financial information accomplishes that goal. By concurrently issuing combined districtwide information with the bank's annual report, the investors receive a timely and complete view of the bank's operations and obligations in order to price System securities accordingly.

3. Different Accounting Treatment

We proposed clarifying that the current § 620.2(g)(2) option for banks to issue the related associations' financial information on an unaudited basis extends to all the financial information provided for the related associations, whether in a footnote or supplement. We also proposed language to specify that all information provided through use of either a footnote or a supplement would be considered part of the bank's annual report and therefore included in the distribution, signature, certification, and internal control assessments of the annual report. CoBank questioned treating the supplement as part of the annual report's financial certification when separate auditing protocols are applied to the bank only financial information. CoBank explained that it appeared inappropriate to include unaudited districtwide financial information within the report when the bank-only financial information is audited. CoBank added that it had no disagreement with the districtwide information being unaudited, only with treating it as part of the annual report.

We disagree with CoBank's comment that the bank's annual reports, which contain both audited and unaudited information, is contradictory or misleading. The rule does not change the current regulatory provision that the combined bank and association financial information may be unaudited, nor does it change the requirement for the bank to disclose the basis of presentation for the districtwide financial information. Additionally, the bank-only component of the annual report also contains both audited and unaudited financial information. For example, management's discussion and analysis is a required unaudited element, whereas a bank's financial statements are an audited element of the annual report. We also remark that Generally Acceptable Accounting Principles allow the inclusion of both audited and unaudited information in an annual report. As a result, we believe our rule provides consistent application of accounting and reporting standards across all elements of a bank's annual report. Also, we believe inclusion of districtwide financial information within the annual report, as either a footnote or supplement, bolsters the disclosure purpose of the annual report.

B. Additional Disclosures

In the preamble to the proposed rule we listed our expectations regarding the contents of the districtwide information provided as part of a bank's annual report. The ABA expressed strong support for increasing districtwide disclosures and asked that the recommended information listed in the preamble to the proposed rule be required and issued in a tabular format to permit more extensive comparison of association financial results within the bank's district. The preamble did not discuss or propose the recommended information as regulatory text and thus we do not feel that it would be appropriate to now add these recommendations as new requirements for the final rule. We do not believe that a prescriptive approach regarding the contents of the districtwide information provided as part of a bank's annual report is appropriate. Rather, while some general uniformity is appropriate, FCA recognizes that districtwide financial disclosures may vary among the banks. We also reiterate our expectations that district financial information at a minimum, include:

- The nature of business relationships between System entities within the bank's district;
- Summary of District financial information for the preceding three years;
- Summary of district loan portfolio, discussing concentration risks and significant changes in credit quality, nonperforming assets, past due loans, loan loss allowance and reserves, and loan aging analysis within the district as compared to previous years.
- A description of combined association investments;
- Districtwide capital levels and regulatory ratios;
- Summary of key districtwide income statement line items and profitability measures; and
- A description of any qualified and nonqualified districtwide defined pension plan(s), including each plan's current funding status, accrued benefit obligation and projected benefit obligation, and key actuarial assumptions.

We believe an annual report, with the above list of items, will provide the most meaningful transparency on the financial condition of each Farm Credit District.

The ABA also asked that the rule require increased discussion within the annual report of supervisory and enforcement actions. FCA existing regulation § 620.5(c) currently requires the disclosure of enforcement actions as part of an annual report. We proposed no changes to this rule provision so are not making any changes in response to the comment.

IV. Regulatory Flexibility Act and Major Rule Conclusion

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), FCA hereby certifies that this final rule would not have a significant economic impact on a substantial number of small entities. Each of the banks in the System, considered together with its related associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not ''small entities'' as defined in the Regulatory Flexibility Act.

Under the provisions of the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Management and Budget's Office of Information and Regulatory Affairs has determined that this final rule is not a ''major rule,'' as the term is defined at 5 U.S.C. 804(2).

List of Subjects in 12 CFR Part 620

Accounting, Agriculture, Banks, Banking, Reporting and recordkeeping requirements, Rural areas.

For the reasons stated in the preamble, part 620 of chapter VI, title 12 of the Code of Federal Regulations are amended as follows:

PART 620—DISCLOSURE TO SHAREHOLDERS

■ 1. The authority citation for part 620 continues to read as follows:

Authority: Secs. 4.3, 4.3A, 4.19, 5.9, 5.17, 5.19 of the Farm Credit Act (12 U.S.C. 2154, 2154a, 2207, 2243, 2252, 2254); sec. 424 of Pub. L. 100–233, 101 Stat. 1568; sec. 514 of Pub. L. 102–552, 106 Stat. 4102.

Subpart A—General

■ 2. Amend § 620.2 by revising paragraph (g) to read as follows:

§ 620.2 Preparing and filing reports.

* * * * *

(g) Each Farm Credit institution shall present its reports in accordance with generally accepted accounting principles and in a manner that provides the most meaningful disclosure to shareholders.

(1) Any Farm Credit institution that presents its annual and quarterly financial statements on a combined or consolidated basis shall also include in the report the statement of condition and statement of income of the

institution on a stand-alone basis. The stand-alone statements may be in summary form and shall disclose the basis of presentation if different from accounting policies of the combined or consolidated statements.

(2) Any Farm Credit bank that prepares its annual financial statements on a stand-alone basis must also provide financial information on its related associations as part of its annual report. The information on the related associations must be presented on a combined basis with the bank's financial information and, at a minimum, include both a condensed statement of condition and a statement of income. The combined bank and association financial information may either be in the footnotes of the bank's annual report or located in a supplement to the report. All combined information provided through either a footnote or a supplement will be considered part of the bank's annual report, subject to the same annual report preparation, distribution, and accuracy requirements of part 620.

(i) The combined bank and association financial information may be unaudited but must disclose the basis of presentation if different from accounting policies used for the bank-only financial statements.

(ii) If the combined bank and association financial information is presented in the form of a supplement, the supplement must be referenced within the bank's annual report and accompany the annual report when distributed.

Dated: September 9, 2020.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2020–20264 Filed 10–7–20; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0856; Product Identifier 2019–SW–071–AD; Amendment 39–21270; AD 2020–20–14]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Helicopters Model SA–365N, SA–365N1, AS–365N2, AS 365 N3, EC 155B, EC155B1, AS350B3, AS355F, AS355F1, AS355F2, AS355N, AS355NP, EC130B4, and EC130T2 helicopters. This AD requires inspecting the main rotor (M/R) servo actuators, and depending on the inspection results, replacing the affected part, applying a slippage mark, and reporting information. This AD was prompted by an incident of a sudden, strong nose-up attitude followed by intensive vibrations and increased loads on the flight controls during a cruise flight. The actions of this AD are intended to address an unsafe condition on these products.

DATES: This AD becomes effective October 23, 2020.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of October 23, 2020.

The FAA must receive comments on this AD by November 23, 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–2020–0856; 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 AD, the European Union Aviation Safety Agency (EASA) AD, any service information that is incorporated by reference, 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 final rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* 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. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0856.

FOR FURTHER INFORMATION CONTACT: Matthew L. Thompson, Aerospace Engineer, DSCO Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5251; email *matthew.l.thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and the FAA did not provide you with notice and an opportunity to provide your comments prior to it becoming effective. However, 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 AD, 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 them 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 rulemaking during the comment period. The FAA will consider all the comments received and may conduct additional rulemaking based on those comments.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this final rule 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 final rule, 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 final rule. Submissions containing CBI should be sent to Matthew L. Thompson, Aerospace Engineer, DSCO Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5251; email *matthew.l.thompson@faa.gov.* Any comments that the FAA receives which are not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD No. 2019–0184, dated July 29, 2019, to correct an unsafe condition for Airbus Helicopters (AH), formerly Eurocopter, Eurocopter France, Aerospatiale, Sud Aviation, Model SA 365 N, SA 365 N1, AS 365 N2, AS 365 N3, EC155 B and EC155 B1 helicopters, AS 350 B3 helicopters if equipped with dual hydraulic system (OP 3346 or OP 3082), EC 130 B4 and EC 130 T2 helicopters, and AS355 F, AS355 F1, AS355 F2, AS355 N and AS355 NP helicopters. EASA advises that a Model AS 365 N3 helicopter experienced a sudden, strong nose-up attitude followed by intense vibrations and increased loads on the flight controls during a cruise flight. Following an emergency landing, the post-flight visual inspection of the front left-hand M/R servo actuator showed that the threaded-shouldered bushing holding the lower end-fitting was uncoupled from the actuator body. EASA further advises that other helicopter models are affected due design similarity of the installed M/R servo actuators. EASA also advises that this condition, if not detected and corrected, could lead to loss of control of the helicopter.

Accordingly, the EASA AD requires a one-time inspection of each M/R servo actuator for correct installation and, depending on the findings, replacing the affected part or applying a slippage mark. The EASA AD also requires inspecting the slippage mark for misalignment and, depending on the findings replacing the affected part. EASA considers its AD an interim action and states that further AD action may follow.

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 issuing this AD after evaluating all of the information provided by EASA and determining the unsafe condition exists and is likely to exist or develop on other helicopters of the same type designs.

Related Service Information Under 1 CFR Part 51

The FAA reviewed one document that co-publishes eight Airbus Helicopters Emergency Alert Service Bulletin (EASB) identification numbers: No. 67.00.17 for Model AS365 N, N1, N2, and N3 helicopters and non FAA-type certificated military Model AS365 F, Fs, Fi, K, and K2 helicopters; No. 67.00.10 for non FAA-type certificated military Model AS565 MA, MB, MBe, SA, SB, and UB helicopters; No. 67.11 for non FAA-type certificated military Model SA366 GA helicopters; No. 67A016 for Model EC155 B and B1 helicopters; No. 67.00.77 for Model AS350 B3 helicopters; No. 67.00.48 for Model AS355 F, F1, F2, N, and NP helicopters; No. 67.00.33 for non FAA-type certificated military Model AS555 AF, AN, AP, SN, UF, and UN helicopters; and No. 67A021 for Model EC130 B4 and T2 helicopters, each Revision 0 and dated July 25, 2019. EASB Nos. 67.00.17, 67A016, 67.00.77, 67.00.48, and 67A021 are incorporated by reference in this AD. EASB Nos. 67.00.10, 67.11, and 67.00.33 are not incorporated by reference in this AD.

This service information specifies procedures for inspecting the links between the lower ball end fitting and the M/R actuator rods. This service information also specifies procedures for applying a slippage mark (red mark) and inspecting the slippage mark.

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.

AD Requirements

This AD requires, within 30 hours time-in-service (TIS), with any sealing compound on the lower ball end fitting link removed, inspecting each M/R servo actuator for correct installation by inspecting the link between the lower ball end fitting and the actuator rod for visible threads and play between the actuator rod and the punched lockwasher, inspecting for protrusion of the threaded shouldered bushing from the punched lockwasher, and inspecting the alignment between the punching of the punched lockwasher and the stud of the lower ball end fitting. Depending on the inspection results, this AD requires replacing the M/R servo actuator and reporting the inspection results to Airbus Helicopters if there is any visible thread or play between the actuator rod and the punched lockwasher, protrusion of the threaded shouldered bushing, or misalignment between the punching of the punched lockwasher and the stud of the lower ball end fitting. This AD also requires applying a slippage mark from the actuator rod (excluding the chamfered part of the rod) to the nut, including the punched lockwasher and the lockwasher.

Differences Between This AD and the EASA AD

The EASA AD is applicable to affected M/R servo actuators that were supplied by Airbus Helicopters before August 12, 2019, whereas this AD applies to affected M/R servo actuators that were manufactured before July 25, 2019 or with an unknown date of manufacture, instead. The EASA AD requires the one-time inspection within 55 flight hours, whereas this AD requires the one-time inspection within 30 hours TIS instead. The EASA AD requires a longer-term inspection of the slippage mark for misalignment for affected M/R servo actuators regardless of when they were originally supplied, whereas this AD does not. The FAA plans to publish a notice of proposed rulemaking to give the public an opportunity to comment on this longer-term requirement.

Interim Action

The FAA considers this AD to be an interim action. If final action is later identified, the FAA might consider further rulemaking then.

Regulatory Flexibility Act

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

Costs of Compliance

The FAA estimates that this AD affects 1,270 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates that operators may incur the following costs in order to comply with this AD.

Inspecting the M/R servo actuators takes about one work-hour for an estimated cost of $85 per helicopter and

$107,950 for the U.S. fleet. Applying a slippage mark takes a minimal amount of time at a nominal cost.

If required, reporting information takes about 1 hour for an estimated cost of $85.

Replacing an M/R actuator takes about 2 work-hours and parts cost up to $53,315 for an estimated cost of up to $53,485 per replacement.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour 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. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

FAA's Justification and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (5 U.S.C.) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to the rulemaking.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because the required corrective action must be completed within 30 hours TIS, a time period of up to one month based on the average flight-hour utilization rate of these helicopters. Therefore, the FAA finds good cause that notice and opportunity for prior public comment are impracticable. In addition, for the reason(s) stated above, the FAA finds that good cause exists for making this amendment effective in less than 30 days.

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

For the reasons discussed, I certify that this AD:

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

2. Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–20–14 Airbus Helicopters: Amendment 39–21270; Docket No. FAA–2020–0856; Product Identifier 2019–SW–071–AD.

(a) Applicability

This AD applies to the following Airbus Helicopters model helicopters, certificated in any category:

(1) Model SA–365N, SA–365N1, AS–365N2, AS 365 N3, EC 155B, and EC155B1 helicopters with a main rotor (M/R) servo actuator part number (P/N) 704A44831074 (manufacturer part number (MP/N) SC8031), P/N 704A44831117 (MP/N SC8031–1), P/N 704A44831144 (MP/N SC8031–2), P/N 704A44831106 (MP/N SC8031A), P/N 704A44831097 (MP/N SC8032), P/N 704A44831118 (MP/N SC8032–1), P/N 704A44831145 (MP/N SC8032–2), P/N 704A44831127 (MP/N SC8033–1), P/N 704A44831146 (MP/N SC8033–2), P/N 704A44831128 (MP/N SC8034–1), P/N 704A44831147 (MP/N SC8034–2), P/N 704A44831149 (MP/N SC8037), or P/N 704A44831155 (MP/N SC8037–1) manufactured before July 25, 2019 or with an unknown date of manufacture, installed.

(2) Model AS350B3, AS355F, AS355F1, AS355F2, AS355N, AS355NP, EC130B4, and EC130T2 helicopters with an M/R servo actuator P/N 704A44831102 (MP/N SC8042) or P/N 704A44831103 (MP/N SC8043) manufactured before July 25, 2019 or with an unknown date of manufacture, installed.

(b) Unsafe Condition

This AD defines the unsafe condition as an uncoupled M/R servo actuator rod. This condition could result in excessive vibrations, increased loads on the flight controls, failure of the M/R servo actuator, and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective October 23, 2020.

(d) 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.

(e) Required Actions

(1) Within 30 hours time-in-service, with any sealing compound on the lower ball end fitting link removed, determine if each M/R servo actuator is correctly installed by:

(i) Inspecting the link between the lower ball end fitting (f) and the actuator rod (a) for visible threads and play between the actuator rod (a) and the punched lockwasher (b) as depicted in Figures 1 and 2 of Airbus Helicopters Emergency Alert Service Bulletin (EASB) Nos. 67.00.17, 67A016, 67.00.77, 67.00.48, or 67A021, each Revision 0 and dated July 25, 2019 (EASB 67.00.17, 67A016, 67.00.77, 67.00.48, or 67A021), as applicable to your helicopter. If there is a visible thread

or play, before further flight, replace the M/R servo actuator.

(ii) Inspecting for protrusion of the threaded shouldered bushing (c) from the punched lockwasher (b) as depicted in Figure 3 of EASB 67.00.17, 67A016, 67.00.77, 67.00.48, or 67A021, as applicable to your helicopter. If there is a protrusion, before further flight, replace the M/R servo actuator.

(iii) Inspecting the alignment between the punching of the punched lockwasher (b) and the stud of the lower ball end fitting (f) as depicted in Figure 4 of EASB 67.00.17, 67A016, 67.00.77, 67.00.48, or 67A021, as applicable to your helicopter. If there is misalignment, before further flight, replace the M/R servo actuator.

(2) After accomplishing paragraph (e)(1) of this AD, before further flight, apply a slippage mark from the actuator rod (a) (excluding the chamfered part of the rod) to the nut (e), including the punched lockwasher (b) and the lockwasher (d) as depicted in Figure 5 of EASB 67.00.17, 67A016, 67.00.77, 67.00.48, or 67A021, as applicable to your helicopter.

(3) If any parts were required to be replaced as a result of the inspections required by paragraph (e)(1) of this AD, within 10 days after completing the inspection, report the information in Appendix 1 to this AD by email to *support.technical-hydraulics.ah@airbus.com.*

(4) For Model SA–365N, SA–365N1, AS–365N2, AS 365 N3, EC 155B, and EC155B1 helicopters, as of the effective date of this AD, do not install an M/R servo actuator identified in paragraph (a)(1) of this AD on any helicopter, unless the actions required by paragraphs (e)(1) and (2) of this AD have been accomplished.

(5) For Model AS350B3, AS355F, AS355F1, AS355F2, AS355N, AS355NP, EC130B4, and EC130T2 helicopters, as of the effective date of this AD, do not install an M/R servo actuator identified in paragraph (a)(2) of this AD on any helicopter, unless the actions required by paragraphs (e)(1) and (2) of this AD have been accomplished.

(f) Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour 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. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

(g) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Rotorcraft Standards Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Matthew L. Thompson, Aerospace Engineer, DSCO Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5251; 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

(1) Airbus Helicopters EASB Nos. 67.00.10, 67.11, and 67.00.33, each Revision 0 and dated July 25, 2019, which are not incorporated by reference, contain additional information about the subject of this AD. For service information identified in this AD, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* You may view a copy of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

(2) The subject of this AD is addressed in European Union Aviation Safety Agency (EASA) AD No. 2019–0184, dated July 29, 2019. You may view the EASA AD on the internet at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2020–0856.

(i) Subject

Joint Aircraft Service Component (JASC) Code: 6730, Rotorcraft Servo System.

(j) Material Incorporated by Reference

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

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

(i) Airbus Helicopters Emergency Alert Service Bulletin (EASB) No. 67.00.17, Revision 0, dated July 25, 2019.

(ii) Airbus Helicopters EASB No. 67A016, Revision 0, dated July 25, 2019.

(iii) Airbus Helicopters EASB No. 67.00.77, Revision 0, dated July 25, 2019.

(iv) Airbus Helicopters EASB No. 67.00.48, Revision 0, dated July 25, 2019.

(v) Airbus Helicopters EASB No. 67A021, Revision 0, dated July 25, 2019.

Note 1 to paragraph (j)(2): Airbus Helicopters EASB Nos. 67.00.17, 67A016, 67.00.77, 67.00.48, and 67A021, each Revision 0 and dated July 25, 2019 are co-published as one document along with Airbus Helicopters EASB Nos. 67.00.10, 67.11, and 67.00.33, each Revision 0 and dated July 25, 2019, which are not incorporated by reference in this AD.

(3) For service information identified in this AD, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110.

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

Appendix 1 to AD 2020–20–14

Report the following information by email to *support.technical-hydraulics.ah@airbus.com.* (Airbus Helicopters Emergency Alert Service Bulletin Nos. 67.00.17, 67A016, 67.00.77, 67.00.48, and 67A021, each Revision 0 and dated July 25, 2019.)

(1) Date of Inspection:

(2) Helicopter Model and Serial Number:

(3) Total hours time-in-service (TIS) on the aircraft:

(4) Date of manufacture of the main rotor (M/R) servo actuator:

(5) Total hours TIS on M/R servo actuator:

(6) Total hours TIS since last service of the M/R servo actuator and description of service:

(7) Describe in detail any information and findings and, if possible, provide photos.

Issued on September 24, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–22259 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0343; Product Identifier 2019–NM–206–AD; Amendment 39–21272; AD 2020–20–16]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2018–17–05, which applied to all Airbus SAS

Model A350–941 and –1041 airplanes. AD 2018–17–05 required a check of the insulation resistance of the direct drive solenoid valve (DDSOV) of each affected electro-hydrostatic actuator (EHA) and applicable corrective actions. Since the FAA issued AD 2018–17–05, it was determined that certain EHA part numbers can be modified and re-identified as specified in a European Union Aviation Safety Agency (EASA) AD, which could inadvertently remove certain part numbers from the applicability in other EHA-related ADs including AD 2018–17–05. This AD was prompted by reports of EHA units that were returned to the manufacturer with degraded insulation resistance in the DDSOV; investigation results revealed that moisture ingress, due to incorrect sealing application, had caused this degradation. This AD was also prompted by a report of a technical issue detected on EHAs installed on inboard ailerons and elevators, causing potential erroneous monitoring of those actuators. This AD requires a check of the insulation resistance of the DDSOV of each affected EHA and applicable corrective actions, and modification or replacement of certain EHAs; as specified in two EASA ADs, which are incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 12, 2020.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of November 12, 2020.

ADDRESSES: 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–2020–0343.

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–2020–0343; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kathleen Arrigotti, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; *Kathleen.Arrigotti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019–0301, dated December 12, 2019 (''EASA 2019–0301''); and EASA AD 2020–0027R1, dated February 21, 2020 (''EASA AD 2020–0027R1''); (these ADs are also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI'') to correct an unsafe condition for all Airbus SAS Model A350–941 and –1041 airplanes. EASA AD 2020–0027R1 supersedes EASA AD 2018–0141, dated July 3, 2018 (which corresponds to FAA AD 2018–17–05, Amendment 39–19359 (83 FR 40438, August 15, 2018) (''AD 2018–17–05'')).

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2018–17–05. The NPRM published in the **Federal Register** on May 1, 2020 (85 FR 25345).

AD 2018–17–05 applied to all Airbus SAS Model A350–941 and –1041 airplanes and addressed degraded insulation resistance in the DDSOV, due to incorrect sealing application, which could lead to the DDSOV being unable to command or maintain the EHA in active mode, possibly resulting in reduced control of the airplane. Since AD 2018–17–05 was issued, it has been determined that certain EHA part numbers can be modified and reidentified as described in EASA AD 2019–0301, which would inadvertently remove certain part numbers from the applicability in other EHA-related ADs. Therefore, EASA issued AD 2020–0027R1 to revise the definition of an affected EHA.

In addition to the determination that certain EHA part numbers might have been inadvertently removed from the actions required by AD 2018–17–05, the NPRM was prompted by reports of EHA units that were returned to the manufacturer with degraded insulation resistance in the DDSOV; investigation results revealed that moisture ingress, due to incorrect sealing application, had caused this degradation. The NPRM was also prompted by a report of a technical issue detected on EHAs installed on inboard ailerons and elevators, causing potential erroneous monitoring of those actuators. The NPRM proposed to require a check of the insulation resistance of the DDSOV of each affected EHA and applicable corrective actions, and modification or replacement of certain EHAs, as specified in EASA AD 2019–0301 and EASA AD 2020–0027R1.

The FAA is issuing this AD to address degraded insulation resistance, which could lead to the DDSOV being unable to command or maintain the EHA in active mode, and possibly result in reduced control of the airplane. The FAA is also issuing this AD to address the possibility of an in-flight loss of inboard aileron or elevator control, which, due to the resulting drag, would lead to increased fuel consumption, and when combined with one engine inoperative, could result in reduced control of the airplane. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The following presents the comments received on the NPRM and the FAA's response to each comment.

Support for the NPRM

The Air Line Pilots Association, International (ALPA) stated its support for the NPRM.

Request to Use Technical Adaptions for EASA AD 2019–0301

Delta Airlines (DAL) requested that the proposed AD include Airbus Technical Adaptations 80602190/058/2020 and 80602190/059/2020 approved by the EASA Design Organization Approval (DOA) (EASA.21J.031) as an approved method of compliance to correct the errors identified in certain service information specified in EASA AD 2019–0301. DAL also requested, or allow the accomplishment of maintenance procedure (MP) tasks A350–A–27–14–XX–0A003–345A–A in lieu of testing step 3.E.(b), option 1, as an alternative means of compliance with Airbus Service Bulletin A350–27–P034, Revision 01, dated April 8, 2020; and MP task A350–A–27–34–XX–08003–345A–A in lieu of testing step 3.E.(b), option 1, as an alternative means of compliance to Airbus Service Bulletin

A350–27–P036, Revision 01, dated April 8, 2020; for EASA AD 2019–0301.

The FAA partially agrees with the comment. As another method of compliance, the FAA has added paragraph (h)(7) to this AD to allow use of Airbus Technical Adaptations 80602190/058/2020 and 80602190/059/2020 approved by the EASA DOA (EASA.21J.031).

The FAA disagrees with allowing the use of the maintenance procedures tasks specified above because the tasks are not approved by Airbus and Airbus SAS's EASA DOA for use with the service information. However, under the provisions of paragraph (i)(1) of this AD, the FAA will consider requests for the use of certain service information if sufficient data are submitted to substantiate that the change would provide an acceptable level of safety. The FAA has not changed the AD in this regard.

Conclusion

The FAA reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this final rule with the change described previously and minor editorial changes. The FAA has determined that these minor changes:

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

The FAA also determined that these changes will not increase the economic burden on any operator or increase the scope of this final rule.

Related IBR Material Under 1 CFR Part 51

EASA AD 2019–0301 describes, among other actions, procedures for modifying or replacing affected EHAs. In addition, EASA AD 2020–0027R1 describes procedures for a check of the insulation resistance of the DDSOV of each affected EHA (installed on inboard ailerons, elevators, and rudder) and applicable corrective actions (replacing or reidentifying the affected EHA). 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.

Costs of Compliance

The FAA estimates that this AD affects 13 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS *

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 28 work-hours × $85 per hour = Up to $2,380	** $0	Up to $2,380	Up to $30,940

* Table does not include estimated costs for reporting.
** The FAA has received no definitive data on the parts cost for the modification or replacement specified in this AD.

The FAA estimates that it would take about 1 work-hour per product to comply with the reporting requirement in this AD. The average labor rate is $85 per hour. Based on these figures, the FAA estimates the cost of reporting the inspection results on U.S. operators to be $1,105, or $85 per product.

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on the results of any required actions. The FAA has no way of determining the number of aircraft that might need these on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 28 work-hours × $85 per hour = Up to $2,380	Up to $518,314	Up to $520,694

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this AD is 2120–0056. The paperwork cost associated with this AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

(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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2018–17–05, Amendment 39–19359 (83 FR 40438, August 15, 2018), and adding the following new AD:

2020–20–16 Airbus SAS: Amendment 39–21272; Docket No. FAA–2020–0343; Product Identifier 2019–NM–206–AD.

(a) Effective Date

This AD is effective November 12, 2020.

(b) Affected ADs

This AD replaces AD 2018–17–05, Amendment 39–19359 (83 FR 40438, August 15, 2018) (''AD 2018–17–05'').

(c) Applicability

This AD applies to all Airbus SAS Model A350–941 and –1041 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight controls.

(e) Reason

This AD was prompted by reports of electro-hydrostatic actuator (EHA) units that were returned to the manufacturer with degraded insulation resistance in the direct drive solenoid valve (DDSOV); investigation results revealed that moisture ingress, due to incorrect sealing application, had caused this degradation. This AD was also prompted by a report of a technical issue detected on EHAs installed on inboard ailerons and elevators, causing potential erroneous monitoring of those actuators. The FAA is issuing this AD to address degraded insulation resistance, which could lead to the DDSOV being unable to command or maintain the EHA in active mode, and possibly result in reduced control of the airplane. The FAA is also issuing this AD to address the possibility of an in-flight loss of inboard aileron or elevator control, which, due to the resulting drag, would lead to increased fuel consumption, and when combined with one engine inoperative, could result in reduced control of the airplane.

(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 2020–0027R1, dated February 21, 2020 (''EASA AD 2020–0027R1''); and EASA AD 2019–0301, dated December 12, 2019 (''EASA AD 2019–0301'').

(h) Exceptions and Clarifications to EASA AD 2019–0301 and EASA AD 2020–0027R1

(1) Where EASA AD 2019–0301 and EASA AD 2020–0027R1 refer to their effective dates, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2019–0301 and EASA AD 2020–0027R1 do not apply to this AD.

(3) Where EASA AD 2019–0301 requires the accomplishment of paragraphs (1) through (6), this AD requires only the accomplishment of paragraphs (5) and (6).

(4) Paragraph (6) of EASA AD 2020–0027R1 specifies to report insulation check results (*e.g.,* results of the detailed inspection of the insulation resistance) to Airbus within a certain compliance time. For this AD, report inspection results at the applicable time specified in paragraph (h)(4)(i) or (ii) of this AD.

(i) If the insulation check was done on or after the effective date of this AD: Submit the report within 30 days after the insulation check.

(ii) If the insulation check was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(5) EASA AD 2020–0027R1 includes a definition for ''affected EHA'' that specifies ''as listed by serial number in the applicable SB.'' All serial numbers listed in the ''applicable SB'' are included in the definition of ''affected EHA'' regardless of the associated part numbers that are also listed in the ''applicable SB.''

(6) For any service information referenced in EASA AD 2019–0301 that specifies to return parts to the manufacturer, that action is not required by this AD.

(7) Where any service information referenced in EASA AD 2019–0301 specifies rigging for testing, this AD allows rigging using Airbus Technical Adaptations 80602190/058/2020 and 80602190/059/2020 approved by the EASA Design Organization Approval (DOA) (EASA.21J.031).

(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) 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 Airbus SAS's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2020–0027R1 and paragraphs (5) and (6) of EASA AD 2019–0301 that contains RC procedures and tests: Except as required by paragraph (i)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(4) *Paperwork Reduction Act Burden Statement:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 1 hour 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. All responses to this collection of information are mandatory as required by this AD; the nature and extent of confidentiality to be provided, if any. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

(j) Related Information

For more information about this AD, contact Kathleen Arrigotti, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; *Kathleen.Arrigotti@faa.gov.*

(k) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on November 12, 2020.

(i) European Union Aviation Safety Agency (EASA) AD 2019–0301, dated December 12, 2019.

(ii) EASA AD 2020–0027R1, dated February 21, 2020.

(4) For EASA AD 2019–0301 and EASA AD 2020–0027R1, 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 these EASA ADs on the EASA website at *https://ad.easa.europa.eu.*

(5) 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–2020–0343.

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

Issued on September 25, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–22243 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0348; Product Identifier 2020–NM–054–AD; Amendment 39–21271; AD 2020–20–15]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus SAS Model A330–202, –203, –223, –223F, –243, –243F, –302, –303, –323, –343, and –941 airplanes; and Model A340–313, –541, and –642 airplanes. This AD was prompted by the results of laboratory tests on non-rechargeable lithium batteries installed in emergency locator transmitters (ELTs), which highlighted a lack of protection against currents of 28 volts DC or 115 volts AC that could lead to thermal runaway and a battery fire. This AD requires modifying a certain ELT by installing a diode between the ELT and the terminal block, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 12, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 12, 2020.

ADDRESSES: 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–2020–0348.

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–2020–0348; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229; email *vladimir.ulyanov@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0083, dated April 3, 2020 (''EASA AD 2020–0083'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus SAS Model A330–202, –203, –223, –223F, –243, –243F, –302, –303, –323, –343, and –941 airplanes; and Model A340–313, –541, and –642 airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus SAS Model A330–202, –203, –223, –223F, –243, –243F, –302, –303, –323, –343, and –941 airplanes; and Model A340–313, –541, and –642 airplanes. The NPRM published in the **Federal Register** on May 6, 2020 (85 FR 26896). The NPRM was prompted by the results of laboratory tests on non-rechargeable lithium batteries installed in ELTs, which highlighted a lack of protection against currents of 28 volts DC or 115 volts AC that could lead to thermal runaway and a battery fire. The NPRM proposed to require modifying a certain ELT by installing a diode between the ELT and the terminal block, as specified in EASA AD 2020–0083.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Allow Any Color and Width of Tape

Delta Air Lines (DAL) requested that operators be allowed to use any color and width of reinforced silicon tape, instead of part number (P/N) ASNA51072503, to protect the wiring in the area where the diode is secured to the harness. The commenter explained that P/N ASNA51072503 is specified in Airbus Service Bulletin A330–25–3733 (''Airbus Service Bulletin A330–25–3733''), and is for the 1-inch orange reinforced silicon tape under the ASNA5107 standard (which is an aerospace industry standard for a silicone rubber tape). The commenter requested approval to use any color and width of reinforced silicon tape meeting

the specifications of the broader ASNA5107 standard. The commenter explained that the specified reinforced silicon tape has a shelf-life, and it would be beneficial to operators if they were given the flexibility to use any color and width of reinforced silicon tape if the reinforced silicon tape is needed to be replaced during maintenance.

The FAA does not agree with the commenter's request. The commenter did not provide sufficient justification for the use of any color and width of reinforced silicon tape meeting the specifications of the broader ASNA5107 standard. The FAA is not aware of the airworthiness quality of other reinforced silicon tapes under specification ASNA5107. Furthermore, all self-adhesive tapes under the ASNA5107 standard, and their alternatives, have limited shelf lives. The reinforced silicon tape having P/N ASNA51072503 is included in the parts kit specified in Airbus Service Bulletin A330–25–3733 and will be delivered to operators. Airbus, as the Design Approval Holder (DAH), may authorize using alternate materials, which may be included in revised Airbus service information. Operators may, however, request alternative methods of compliance to use reinforced silicone tape other than P/N ASNA51072503 by following the procedures specified in paragraph (i)(1) of this AD and demonstrating how this alternative addresses the unsafe condition. The FAA has not revised this AD in regard to this issue.

Request To Allow an Alternative Continuity Check

In addition, DAL requested and provided an option to replace Step 3.C.(h) specified in Airbus Service Bulletin A330–25–3733. The commenter explained that Step 3.C.(h) in Airbus Service Bulletin A330–25–3733 requires a continuity test of the modified wiring and provides no specific steps for this test other than referencing Electrical Standard Practices Manual (ESPM) section 20–52–21. The commenter noted that although this ESPM section does provide basic continuity procedures, it fails to provide a procedure for a wire with a diode installed.

The FAA disagrees with the commenter's request. The FAA has determined that the procedures described in ESPM section 20–52–21 provide an adequate method for performing a continuity test using a standard multimeter. When placing the multimeter probes in the correct position, the operator is instructed to refer to the wiring schematic within Airbus Service Bulletin A330–25–3733, which provides the necessary procedures for a wire with a diode installed. In addition, anode/cathode polarization is depicted on the diode's housing. Furthermore, Airbus Service Bulletin A330–25–3733 specifies that after the wiring modification is done, a built-in test equipment (BITE) test of the ELT should be performed. The BITE test is also adequate to reveal an incorrectly installed diode.

In addition, the commenter did not provide justification regarding how its proposed procedure would maintain the airworthiness of the airplane. Operators may, however, request alternative methods of compliance to replace Step 3.C.(h) specified in Airbus Service Bulletin A330–25–3733 by using the procedures described in paragraph (i)(1) of this AD and demonstrating how this alternative addresses the unsafe condition. The FAA has not changed this AD regarding this issue.

Conclusion

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

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

Related IBR Material Under 1 CFR Part 51

EASA AD 2020–0083 describes procedures for modifying a certain ELT by installing a diode between the ELT and the terminal block. 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.

Costs of Compliance

The FAA estimates that this AD affects 12 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
3 work-hours × $85 per hour = $255	$460	$715	$8,580

According to the manufacturer, some or all of the costs of this 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

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

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

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

(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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–20–15 Airbus SAS: Amendment 39–21271; Docket No. FAA–2020–0348; Product Identifier 2020–NM–054–AD.

(a) Effective Date

This AD is effective November 12, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Airbus SAS airplanes specified in paragraphs (c)(1) through (7) of this AD, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2020–0083, dated April 3, 2020 (''EASA AD 2020–0083'').

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

(2) Model A330–223F and –243F airplanes.

(3) Model A330–302, –303, –323, and –343 airplanes.

(4) Model A330–941 airplanes.

(5) Model A340–313 airplanes.

(6) Model A340–541 airplanes.

(7) Model A340–642 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/Furnishings.

(e) Reason

This AD was prompted by the results of laboratory tests on non-rechargeable lithium batteries installed in emergency locator transmitters (ELTs), which highlighted a lack of protection against currents of 28 volts DC or 115 volts AC that could lead to thermal runaway and a battery fire. The FAA is issuing this AD to address local (temporary) fires in non-rechargeable lithium batteries installed in ELTs, which could result in damage to the airplane and injury to occupants.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2020–0083.

(h) Exceptions to EASA AD 2020–0083

(1) Where EASA AD 2020–0083 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0083 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) 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 Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2020–0083 that contains RC procedures and tests: Except as required by paragraph (i)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information

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

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0083, dated April 3, 2020.

(ii) [Reserved]

(3) For information about EASA AD 2020–0083, 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.*

(4) 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–2020–0348.

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

Issued on September 24, 2020.

Gaetano A. Sciortino,

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

[FR Doc. 2020–22235 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0410; Product Identifier 2019–SW–030–AD; Amendment 39–21274; AD 2020–21–01]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Helicopters Model AS–365N2, AS 365N3, EC 155B, EC155B1, and SA–365N1 helicopters. This AD requires modifying the main gearbox (MGB) tail rotor (T/R) drive flange installation.

This AD was prompted by several reported occurrences of loss of tightening torque of the Shur-Lok nut, which serves as a retainer of the T/R drive flange. The actions of this AD are intended to address an unsafe condition on these products.

DATES: This AD is effective November 12, 2020.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of November 12, 2020.

ADDRESSES: For service information identified in this final rule, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.* 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. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0410.

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–2020–0410; 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 AD, the European Union Aviation Safety Agency (EASA) AD, any service information that is incorporated by reference, any comments received, and other information. The street address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Matt Fuller, AD Program Manager, 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:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to Airbus Helicopters Model AS–365N2, AS 365N3, EC 155B, EC155B1, and SA–365N1 helicopters with modification 0763B64 installed, except those with modification 0763C81. The NPRM published in the **Federal Register** on April 23, 2020, (85 FR 22688). The NPRM proposed to require within 600 hours time-in-service, modifying the MGB T/R drive flange installation by removing the sliding flange from the flexible coupling and installing the sliding flange with aft output stop part number 365A32–7836–20 added, as per helicopter model and configuration. The NPRM also proposed to require removing from service certain washers, degreasing the bolt threads, applying a sealant between the interlay mating surfaces, and applying torque to the nuts. The proposed requirements were intended to prevent loosening and disengagement of the Shur-Lok nut threads, possibly resulting in reduction of T/R drive control, rear transmission vibrations, and subsequent loss of control of the helicopter.

The NPRM was prompted by EASA AD No. 2019–0046, dated March 11, 2019 (EASA AD 2019–0046), issued by EASA, which is the Technical Agent for the Member States of the European Union, to correct an unsafe condition for Airbus Helicopters (formerly Eurocopter, Eurocopter France, Aerospatiale) Model SA 365 N1, AS 365 N2, AS 365 N3, EC 155 B, and EC 155 B1 helicopters, all serial numbers, with modification 0763B64 installed, except those with 07 63C81 installed. EASA advises of reported occurrences of loss of tightening torque of the Shur-Lok nut, which serves as a retainer of the T/R drive flange of the MGB. EASA also advises of subsequent investigation that determined that these occurrences were the result of failure of the Shur-Lok nut locking function, which is normally ensured by two anti-rotation tabs engaged into two slots at the end of the MGB output shaft pinion. EASA states this condition could lead to the loosening and disengagement of the Shur-Lok nut threads, possibly resulting in reduction of T/R drive control, rear transmission vibrations, and subsequent loss of control of the helicopter.

To address this unsafe condition, EASA issued a series of ADs, initially with EASA AD No. 2014–0165, dated July 14, 2014 (EASA AD 2014–0165), which required a one-time inspection of the radial play inside the T/R drive flange and the condition of the Shur-Lok nut. Shortly after, EASA issued EASA AD No. 2014–0179, dated July 25, 2014 (EASA AD 2014–0179) to supersede EASA AD 2014–0165. EASA AD 2014–0179 retained the requirements of EASA AD 2014–0165 and expanded the applicability of helicopters affected by the unsafe condition. EASA later revised EASA AD 2014–0179 to Revision 1, dated July 29, 2014, to revise the applicability and specify updated related service information, and again to Revision 2, dated April 11, 2016 (EASA AD 2014–0179R2), to reduce the applicability and specify additional updated related service information. Since EASA issued EASA AD 2014–0179R2, another occurrence was reported that involved an on-ground loss of T/R synchronization, resulting from disengagement of the Shur-Lok nut. This additional occurrence prompted EASA to issue EASA AD 2019–0046 to require installation of modification 07 63C81, which consists of installing a rear output stop with 5 spigots on the T/R shaft flexible coupling. According to Airbus Helicopters, the 5 spigots will come into contact with the row of 5 bolt heads of the front T/R shaft if the T/R drive flange moves backwards. This contact limits backward displacement of the T/R drive flange and subsequently prevents T/R drive flange disengagement.

Comments

The FAA gave the public the opportunity to participate in developing this AD, but the FAA did not receive any comments on the NPRM.

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 issuing this AD after evaluating all information provided by EASA and determining the unsafe condition exists and is likely to exist or develop on other products of the same type designs and that air safety and the public interest require adopting the AD requirements as proposed.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Airbus Helicopters Alert Service Bulletin (ASB) No. AS365–63.00.19, for Model AS365N, N1, N2, and N3 helicopters and non FAA-type certificated military Model AS365F, Fi, Fs, K, and K2 helicopters; and Airbus Helicopters ASB No. EC155–63A013 for Model EC155B and B1 helicopters, both Revision 1 and dated January 31, 2019. This service information specifies procedures for modification 0763C81 to install a rear (aft) output stop between the T/R drive flange and T/R drive shaft.

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

Costs of Compliance

The FAA estimates that this AD affects 46 helicopters of U.S. Registry. The FAA estimates that operators may incur the following costs in order to comply with this AD. Labor costs are estimated at $85 per work-hour. Modifying the MGB T/R drive flange installation takes about 14 work-hours and parts cost about $2,704 for an estimated cost of $3,894 per helicopter and $179,124 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 helicopters identified in this rulemaking action.

Regulatory Findings

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

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

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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–21–01 Airbus Helicopters: Amendment 39–21274; Docket No. FAA–2020–0410; Product Identifier 2019–SW–030–AD.

(a) Applicability

This AD applies to Airbus Helicopters Model AS–365N2, AS 365N3, EC 155B, EC155B1, and SA–365N1 helicopters, certificated in any category, with modification 0763B64 installed, except those with modification 0763C81.

(b) Unsafe Condition

This AD defines the unsafe condition as loss of tightening torque of the Shur-Lok nut, which serves as a retainer of the tail rotor (T/R) drive flange of the main gearbox. This condition could result in loss of the Shur-Lok nut, possibly resulting in disengagement of the T/R drive flange, reduction of T/R drive control, rear transmission vibrations, and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective November 12, 2020.

(d) 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.

(e) Required Actions

Within 600 hours time-in-service:

(1) For Model AS–365N2, AS 365N3, and SA–365N1 helicopters:

(i) Without removing the tail drive shaft flange (a), remove the sliding flange (b) from the flexible coupling (c) as shown in Detail ''B'' of Figure 1, PRE MOD, of Airbus Helicopters Alert Service Bulletin (ASB) No. AS365–63.00.19, Revision 1, dated January 31, 2019 (ASB AS365–63.00.19); replace the 3 bolts (d) and remove from service the 3 washers (e).

(ii) Install the sliding flange (b) with aft output stop (1) part number (P/N) 365A32–7836–20 as shown in Detail ''B'' of Figure 1, POST MOD, of ASB AS365–63.00.19 and by following the Accomplishment Instructions, paragraph 3.B.2.b, of ASB AS365–63.00.19.

(2) For Model EC 155B and EC155B1 helicopters:

(i) Without removing the Shur-Lok nut (a), remove the sliding flange (b) from the flexible coupling (c) as shown in Detail ''B'' of Figure 1, PRE MOD, of Airbus Helicopters ASB No. EC155–63A013, Revision 1, dated January 31, 2019 (ASB EC155–63A013); replace the 3 bolts (d) and remove from service the 3 washers (e).

(ii) Install the sliding flange (b) with aft output stop (1) P/N 365A32–7836–20 as shown in Detail ''B'' of Figure 1, POST MOD, of ASB EC155–63A013 and by following the Accomplishment Instructions, paragraph 3.B.2.b, of ASB EC155–63A013.

Note 1 to paragraph (e)(2)(ii): ASB EC155–63A013 refers to the ''aft output stop'' as ''rear output stop.''

(f) 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, 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.

(g) Additional Information

The subject of this AD is addressed in European Union Aviation Safety Agency (EASA) AD No. 2019–0046, dated March 11, 2019. You may view the EASA AD on the internet at *https://www.regulations.gov* in Docket No. FAA 2020–0410.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6500, Tail Rotor Drive System.

(i) Material Incorporated by Reference

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

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

(i) Airbus Helicopters Alert Service Bulletin (ASB) No. AS365–63.00.19, Revision 1, dated January 31, 2019.

(ii) Airbus Helicopters ASB No. EC155–63A013, Revision 1, dated January 31, 2019.

(3) For service information identified in this AD, contact Airbus Helicopters, 2701 N Forum Drive, Grand Prairie, TX 75052; telephone 972–641–0000 or 800–232–0323; fax 972–641–3775; or at *https://www.airbus.com/helicopters/services/technical-support.html.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA,

email *fedreg.legal@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on September 29, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–22241 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0902; Project Identifier AD–2020–01174–E; Amendment 39–21273; AD 2020–20–17]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all General Electric Company GE90–110B1 and GE90–115B model turbofan engines. This AD was prompted by an in-service occurrence of loss of engine thrust control resulting in uncommanded high thrust. This AD prohibits dispatch of an airplane if certain status messages are displayed on the engine indicating and crew alerting system (EICAS) and if certain conditions are present per the manufacturer's service information. As a terminating action, this AD requires revision of the existing FAA-approved minimum equipment list (MEL) by incorporating into the MEL the dispatch restrictions listed in this AD. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective October 23, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of October 23, 2020.

The FAA must receive comments on this AD by November 23, 2020.

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

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

For service information identified in this final rule, contact General Electric Company, 1 Neumann Way, Cincinnati, OH 45215; phone: 513–552–3272; email: *aviation.fleetsupport@ge.com;* website: *www.ge.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0902.

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–2020–0902; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for the Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Stephen Elwin, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7236; fax: 781–238–7199; email: *stephen.l.elwin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA received a report from the manufacturer of an in-service loss of engine thrust control that occurred on October 27, 2019, resulting in uncommanded high thrust. Analysis by the manufacturer found accumulated thermal cycles of the MN4 integrated circuit in the full authority digital engine control (FADEC) through normal operation causes the solder ball joints to wear out and eventually fail over time. The failure was preceded by an inbound FADEC EICAS ''ENG EEC C1'' status message one flight before the in-service occurrence. This condition, if not addressed, could result in loss of engine thrust control and reduced control of the airplane. The FAA is issuing this AD to address the unsafe condition on these products.

FAA's Determination

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed GE GE90–100 Service Bulletin (SB) 73–0117, R01, dated August 5, 2020. The SB describes procedures for checking for an inbound FADEC EICAS ''ENG EEC C1'' status message and corresponding conditions. 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.

AD Requirements

This AD prohibits dispatch of the airplane if certain status messages are displayed on the EICAS and if certain conditions are present per the manufacturer's service information. As a terminating action, this AD requires, within 120 days of the effective date of this AD, revision of the existing FAA-approved MEL by incorporating into the MEL the dispatch restrictions listed in paragraph (g) of this AD.

Interim Action

The FAA considers this AD interim action. The manufacturer is still reviewing the unsafe condition and the FAA will consider further rulemaking.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C.) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without seeking comment prior to issuance. Further, Section 553(d) of the APA authorizes agencies to make rules effective in less than 30 days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies foregoing notice and comment prior to adoption of this rule. On October 27, 2019, a Boeing Company Model 777–300 airplane powered by GE GE90–115B model turbofan engines experienced an

unresponsive throttle for 11.5 minutes during descent into Abu Dhabi International Airport. The pilot regained throttle control of the engine while at an altitude over 15,000 feet, continued the descent to the airport, and landed without further incident. The investigation by the manufacturer discovered that cracking of the MN4 integrated circuit solder ball caused one of the FADEC channels to read an erroneous thrust lever resolver angle value which, once selected, caused an erroneously high thrust command. The manufacturer issued service information in August 2020 that provides procedures for status message checks of the FADEC required by this AD.

The FAA considers the failure of the MN4 integrated circuit in the FADEC an urgent safety issue, requiring immediate review of FADEC EICAS status messages and possible prohibition of departure of the airplane.

Accordingly, notice and opportunity for prior public comment are impracticable and contrary to public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2020–0902 and Project Identifier AD–2020–01174–E at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

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

Confidential Business Information

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

Regulatory Flexibility Act

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

Costs of Compliance

The FAA estimates that this AD affects 206 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise the existing MEL	1 work-hour × $85 per hour = $85	$0	$85	$17,510

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–20–17 General Electric Company: Amendment 39–21273; Docket No. FAA–2020–0902; Project Identifier AD–2020–01174–E.

(a) Effective Date

This AD is effective October 23, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all General Electric Company GE90–110B1 and GE90–115B model turbofan engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7600, Engine Controls.

(e) Unsafe Condition

This AD was prompted by an in-service occurrence of loss of engine thrust control resulting in uncommanded high thrust. The FAA is issuing this AD to prevent dispatch of the airplane when certain faults caused by degradation of the MN4 integrated circuit in the full authority digital engine control (FADEC) are displayed and certain FADEC conditions are present. The unsafe condition, if not addressed, could result in loss of engine thrust control and reduced control of the airplane.

(f) Compliance

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

(g) Required Actions

After the effective date of this AD, notwithstanding the provisions of the operator's minimum equipment list (MEL), dispatch of an airplane is prohibited if the engine indicating and crew alerting system (EICAS) displays the status message ''ENG EEC C1 L'' or ''ENG EEC C1 R'' and any condition is present that is listed in the Accomplishment Instructions, paragraphs 3.A.(2)(f), 3.A.3(a), or 3.A.(4) of GE GE90–100 Service Bulletin (SB) 73–0117 R01, dated August 5, 2020.

(h) Terminating Action

As terminating action for the requirements of paragraph (g) of this AD, within 120 days of the effective date of this AD, revise the existing FAA-approved MEL by incorporating into the MEL the dispatch restrictions listed in paragraph (g) of this AD as a required operation or maintenance procedure. Specific alternative MEL wording to accomplish the actions specified in paragraph (g) of this AD can be approved by the operator's principal operations or maintenance inspector.

(i) Alternative Methods of Compliance (AMOCs)

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

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

(j) Related Information

For more information about this AD, contact Stephen Elwin, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7236; fax: 781–238–7199; email: *stephen.l.elwin@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) General Electric Company (GE) GE90–100 Service Bulletin 73–0117 R01, dated August 5, 2020.

(ii) [Reserved]

(3) For GE service information identified in this AD, contact General Electric Company, 1 Neumann Way, Cincinnati, OH 45215; phone: 513–552–3272; email: *aviation.fleetsupport@ge.com;* website: *www.ge.com.*

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

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

Issued on September 25, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–22267 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–13–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4902

Privacy Act Regulation; Exemption for Insider Threat Program Records

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is adopting as final an interim final rule to amend PBGC's Privacy Act regulation to exempt a system of records that supports a program of insider threat detection and data loss prevention.

DATES: This final rule is effective October 8, 2020.

FOR FURTHER INFORMATION CONTACT: Melissa Rifkin (*rifkin.melissa@pbgc.gov*), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026; 202–229–6563; Shawn Hartley (*hartley.shawn@pbgc.gov*), Chief Privacy Officer, Office of the General Counsel, 202–229–6435. TTY users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–229–6435.

SUPPLEMENTARY INFORMATION:

Executive Summary

On July 9, 2019, PBGC published an interim final rule to amend PBGC's regulation on Disclosure and Amendment of Records Pertaining to Individuals under the Privacy Act (29 CFR part 4902) to exempt from disclosure information contained in a new system of records for PBGC's insider threat program.[1] The exemption was needed because records in this new system include investigatory material compiled for law enforcement purposes. PBGC is adopting the interim final rule as final with minor, technical amendments.

Authority for this rule is provided by section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA) and 5 U.S.C. 552a(k)(2).

Background

The Pension Benefit Guaranty Corporation (PBGC) administers the pension plan insurance programs under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). As a Federal agency, PBGC is subject to the Privacy Act of 1974, 5 U.S.C. 552a (Privacy Act), in its collection, maintenance, use, and dissemination of any personally identifiable information that it maintains in a ''system of records.'' A system of records is defined under the Privacy Act as ''a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.''[2]

On July 9, 2019, PBGC established a new system of records, ''PBGC–26,

[1] 84 FR 32618 (July 9, 2019).

[2] *See* 5 U.S.C. 552a(a)(5).

PBGC Insider Threat and Data Loss Prevention—PBGC'' [3]

Executive Order 13587, issued October 7, 2011, requires Federal agencies to establish an insider threat detection and prevention program to ensure the security of classified networks and the responsible sharing and safeguarding of classified information consistent with appropriate protections for privacy and civil liberties. While PBGC does not have any classified networks, it does maintain a significant amount of Controlled Unclassified Information (CUI) that, under law, it is required to safeguard from unauthorized access or disclosure. One method utilized by PBGC to ensure that only those with a need-to-know have access to CUI is a set of tools to minimize data loss, whether inadvertent or intentional. This system collects and maintains Personally Identifiable Information (PII) in the course of scanning traffic leaving PBGC's network and blocking traffic that violates PBGC's policies to safeguard PII.

This system covers ''PBGC insiders,'' who are individuals with access to PBGC resources, including facilities, information, equipment, networks, and systems. This includes Federal employees and contractors. Records from this system will be used on a need-to-know basis to manage insider threat matters; facilitate insider threat investigations and activities; identify threats to PBGC resources, including threats to PBGC's personnel, facilities, and information assets; track tips and referrals of potential insider threats to internal and external partners; meet other insider threat program requirements; and investigate/manage the unauthorized or attempted unauthorized disclosure of PII.

Exemption

Under section 552a(k) of the Privacy Act, PBGC may promulgate regulations exempting information contained in certain systems of records from specified sections of the Privacy Act including the section mandating disclosure of information to an individual who has requested it. Among other systems, PBGC may exempt a system that is ''investigatory material compiled for law enforcement purposes.'' [4] Under this provision, PBGC has exempted, in § 4209.11 of its Privacy Act regulation, records of the investigations conducted by its Inspector General and contained in a system of records entitled ''PBGC–17, Office of Inspector General Investigative File System—PBGC.''

The PBGC–26, PBGC Insider Threat and Data Loss Prevention—PBGC system contains: (1) Records derived from PBGC security investigations, (2) summaries or reports containing information about potential insider threats or the data loss prevention program, (3) information related to investigative or analytical efforts by PBGC insider threat program personnel, (4) reports about potential insider threats obtained through the management and operation of the PBGC insider threat program, and (5) reports about potential insider threats obtained from other Federal Government sources. The records contained in this new system include investigative material of actual, potential, or alleged criminal, civil, or administrative violations and law enforcement actions. These records are within the material permitted to be exempted under section 552a(k)(2) of the Privacy Act.

On July 9, 2019, at, PBGC published an interim rule adding a new § 4902.12 to its Privacy Act regulation.[5] This addition exempts PBGC–26, PBGC Insider Threat and Data Loss Prevention—PBGC, from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f). Exemption from these sections of the Privacy Act means that, with respect to records in the system, PBGC is not required to: (1) Disclose records to an individual upon request, (2) keep an accounting of individuals who request records, (3) maintain only records as necessary to accomplish an agency purpose, or (4) publish notice of certain revisions of the system of records.

PBGC provided the public 30 days in which to comment on the amendment made by the interim final rule and received comments from one commenter. PBGC considered the comments but is not modifying the regulation.

The commenter suggested that any data which is subject to breach or hacking should be made available to affected individuals and other interested persons, including the journalism community. Under 5 U.S.C. 552a(b), an agency is prohibited from disclosing any record contained in a system of records to any person unless it has obtained written consent from the subject of the record or the disclosure falls within one of the twelve exceptions articulated in that section. There is no exception that would permit PBGC to provide data that is subject to a ''breach or hacking'' to interested persons. Providing this information would be a violation of the Privacy Act.

The commenter suggested that the use of collected data must be strictly limited to necessary purposes, and broad collection of personal data, for investigations of insider threats, without access for review or correction of improper or unnecessary data should not be permitted. PBGC only collects the information it is authorized to collect and uses it for the purposes identified in its system of records notices. PBGC has listed the sources of records it anticipates collecting; however, to the extent that listing a source would potentially compromise a source of law enforcement information, PBGC has exempted this system of records under 5 U.S.C. 552a(e)(4)(I). Moreover, PBGC has exempted records maintained in this system of records from access to and amendment of records because providing access and amendment rights to such records could compromise or lead to the compromise of information that could warrant an invasion of another's privacy, reveal a sensitive investigative technique, potentially allow a suspect avoid detection or apprehension, or constitute potential danger to a confidential source or witness.

Finally, the commenter stated that an objective third party should be an option for review of data if requested by an affected individual or group, subject to reasonable confidentiality protections necessary to protect any legitimate law enforcement or investigatory purposes. Any disclosure of insider threat information, including disclosure to an ''objective third party,'' could substantially compromise an investigation of insider threat activities. For example, that information may identify the subject of the investigation or a witness who was promised confidentiality. PBGC does not know who the ''objective third party'' is or with whom the information might be shared. Further, there are no ''reasonable confidentiality protections'' that would prevent that information from getting into the wrong hands. Moreover, if the ''affected individual or group'' means those persons who were subjected to an unauthorized or attempted unauthorized disclosure of PII, providing that information to an ''objective third party'' may invade the privacy of ''the affected individual or group.'' Finally, disclosure may also compromise the investigation by revealing law enforcement techniques and procedures.

Accordingly, PBGC adopts the interim final rule as final with minor, technical amendments to remove the introductory

[3] 84 FR 32786 (July 9, 2019).

[4] *See* 5 U.S.C. 552a(k)(2).

[5] 84 FR 32618 (July 9, 2019).

text in § 4902.12(a) and redesignate the paragraphs.

Compliance With Rulemaking Guidelines

The interim final rule was exempt from the requirements of prior notice and comment and a 30-day delay in effective date because it is a rule of ''agency organization, procedure, or practice'' and is limited to ''agency organization, management, or personnel matters.'' *See* 5 U.S.C. 553(a), (b), (d). The exemption from provisions of the Privacy Act provided by the interim final rule affects only PBGC insiders described above. Nonetheless, PBGC provided an opportunity for post-promulgation comment. As this rule is the finalization of an interim final rule and is a rule of agency organization, procedure, or practice, further request for comment and a 30-day delay in effective date are not required. Because this rule is exempt from notice and public comment requirements under 5 U.S.C. 553(b), it is also exempt from the requirements of Executive Order 12866 and Executive Order 13771,[6] and the Regulatory Flexibility Act does not apply to this rule. *See* 5 U.S.C. 601(2), 603, 604.

List of Subjects in 29 CFR Part 4902

Privacy.

In consideration of the foregoing, the interim rule amending 29 CFR part 4902 which was published at 84 FR 32618 on July 9, 2019, is adopted as final with the following change:

PART 4902—DISCLOSURE AND AMENDMENT OF RECORDS PERTAINING TO INDIVIDUALS UNDER THE PRIVACY ACT

■ 1. The authority citation will continue to read as follows:

Authority: 5 U.S.C. 552a, 29 U.S.C. 1302(b)(3).

§ 4902.12 [Amended]

■ 2. In § 4902.12:

■ a. Remove the paragraph (a) subject heading; and

■ b. Redesignate paragraphs (a)(1) and (2) as paragraphs (a) and (b), respectively.

Issued in Washington, DC.

Gordon Hartogensis,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2020–19950 Filed 10–7–20; 8:45 am]

BILLING CODE 7709–02–P

[6] *See* section 3(d)(3) of Executive Order 12866 and section 4(b) of Executive Order 13771.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2020–0579]

Safety Zone, Brandon Road Lock and Dam to Lake Michigan Including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, and Calumet-Saganashkee Channel, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a segment of the Safety Zone; Brandon Road Lock and Dam to Lake Michigan including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, Calumet-Saganashkee Channel on all waters of the Chicago Sanitary and Ship Canal and South Branch of the Chicago River between mile marker 296 and mile marker 296.7 during specified times from September 25, 2020 through October 29, 2020. This action is necessary and intended to protect the safety of life and property on navigable waters prior to, during, and immediately after planned US Army Corps of Engineers work at the Electric Barrier. During the enforcement period listed below, entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan or a designated representative.

DATES: The regulations in 33 CFR 165.930 will be enforced from 7 a.m. through 11 a.m. and 1 p.m. through 5 p.m. daily without actual notice from October 8, 2020 through 5 p.m. on October 29, 2020. For purposes of enforcement, actual notice will be used 7 a.m. through 11 a.m. and 1 p.m. through 5 p.m. daily from September 25, 2020 through October 8, 2020.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email LT Tiziana Garner, Waterways Management Division, Marine Safety Unit Chicago, at 630–986–2155, email address *D09-DG-MSUChicago-Waterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce a segment of the Safety Zone; Brandon Road Lock and Dam to Lake Michigan including Des Plaines River, Chicago Sanitary and Ship Canal, Chicago River, Calumet-Saganashkee Channel on all waters of the Chicago Sanitary and Ship Canal and South Branch of the Chicago River between mile marker 296 and mile marker 296.7 during specified times from September 25, 2020 through October 29, 2020. This action is necessary and intended to protect the safety of life and property on navigable waters prior to, during, and immediately after planned US Army Corps of Engineers work at the Electric Barrier. During the enforcement period, entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan or a designated representative.

This notice of enforcement is issued under the authority of 33 CFR 165.930 and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide notification of this enforcement period via Broadcast Notice to Mariners, Local Notice to Mariners, distribution in leaflet form, and on-scene oral notice. Additionally, the Captain of the Port Lake Michigan may notify representatives from the maritime industry through telephonic and email notifications. If the Captain of the Port or a designated representative determines that the regulated area need not be enforced for the full duration stated in this notice, he or she may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area. The Captain of the Port Lake Michigan or a designated on-scene representative may be contacted via Channel 16 or at (414) 747–7182.

Dated: September 16, 2020.

Donald P. Montoro,

Captain, U.S. Coast Guard, Captain of the Port, Lake Michigan.

[FR Doc. 2020–20790 Filed 10–7–20; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R10–OAR–2020–0074; FRL–10011–40–Region 10]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; Oregon Department of Environmental Quality; Control of Emissions From Existing Municipal Solid Waste Landfills

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a state plan submitted by the

Oregon Department of Environmental Quality (ODEQ). This state plan submittal pertains to the regulation of nonmethane organic compounds from existing municipal solid waste (MSW) landfills. This state plan was submitted in response to the EPA's promulgation of Emissions Guidelines and Compliance Times for MSW landfills. This action is being taken under the Clean Air Act (CAA).

DATES: This plan will be effective on November 9, 2020. The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register as of November 9, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2020–0074. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Geoffrey Glass (he/him), at (206) 553–1847 or by email at *glass.geoffrey@epa.gov*.

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

Table of Contents

I. Proposed Action
II. Public Comments and EPA Responses
III. EPA Action
IV. Incorporation by Reference
V. Statutory and Executive Order Reviews

I. Proposed Action

On March 13, 2020 (85 FR 14621), the EPA proposed to approve a section 111(d) plan submitted by the ODEQ for existing municipal solid waste landfills. The submitted section 111(d) plan was in response to the August 29, 2016 promulgation of federal New Source Performance Standards and emission guidelines requirements for MSW landfills, 40 CFR part 60, subparts XXX and Cf, respectively (81 FR 59332 and 81 FR 59276). Included within the section 111(d) plan are regulations under the Oregon Administrative Rules at Chapter 340, Division 236 (OAR 340–236–0500) entitled ''Solid Waste Landfills: Emission Standards for Municipal Solid Waste Landfills,'' amended on July 19, 2019.

We proposed to approve this plan because we determined that it complies with the relevant CAA requirements. Our proposed action contains more information on the plan and our evaluation.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted. Therefore, the EPA is approving the plan submitted by the ODEQ.

IV. Incorporation by Reference

In accordance with the requirements of 1 CFR 51.5, the EPA is finalizing regulatory text that includes the incorporation by reference of OAR 340–236–0500 entitled ''Solid Waste Landfills: Emission Standards for Municipal Solid Waste Landfills'' amended on July 19, 2019, which is part of the CAA section 111(d) plan applicable to existing MSW landfills in the state of Oregon as discussed in section I of this preamble. These regulatory provisions in the section 111(d) plan establish emission standards and compliance times for the control of nonmethane organic compounds from certain existing MSW landfills located in Oregon that commenced construction, modification, or reconstruction on or before July 17, 2014. These provisions set forth requirements meeting criteria promulgated by the EPA at 40 CFR part 60, subpart Cf. The EPA has made, and will continue to make, the entire Oregon state plan, generally available through *www.regulations.gov,* Docket No. EPA–R10–OAR–2020–0074, and through the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). This incorporation by reference has been approved by the Office of the Federal Register and the plan is federally enforceable under the CAA as of the effective date of this final rulemaking.

V. Statutory and Executive Order Reviews

In reviewing state plan submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

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

In addition, this approval of the ODEQ plan submittal for existing MSW landfills does not apply in Indian Country. Therefore, the state plan does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General

of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 7, 2020. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 62

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

Dated: September 1, 2020.

Christopher Hladick,

Regional Administrator, Region 10.

For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR part 62 as follows:

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart MM—Oregon

■ 2. Revise § 62.9350(b)(5) to read as follows:

§ 62.9350 Identification of plan.

* * * * *

(b) * * *

(5) Control of emissions from existing municipal solid waste landfills was submitted by Oregon Department of Environmental Quality on August 2, 2019, amending a plan previously submitted on May 14, 1997 and approved by the EPA on June 26, 1998.

* * * * *

■ 3. Revise § 62.9510 to read as follows:

§ 62.9510 Identification of plan.

(a) The plan for the control of emissions from existing municipal solid waste landfills, submitted by the Oregon Department of Environmental Quality on May 14, 1997, to implement the emission guideline of 40 CFR part 60, subpart Cc, applies to all existing MSW landfill facilities in Oregon meeting the requirements as stated in their State regulations.

(b) The plan for the control of emissions from existing municipal solid waste landfills, submitted by the Oregon Department of Environmental Quality on August 2, 2019, to implement the emission guideline of 40 CFR part 60, subpart Cf, applies to all existing MSW landfill facilities in Oregon for which construction, reconstruction, or modification was commenced on or before July 17, 2014. The plan includes the regulatory provisions cited in paragraph (d)(2) of this section, which the EPA incorporates by reference.

(c) After November 9, 2020, the substantive requirements of the municipal solid waste landfills state plan are contained in paragraph (b) of this section and owners and operators of municipal solid waste landfills in Oregon must comply with the requirements in paragraph (b) of this section.

(d)(1) The material incorporated by reference in this section was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain copies from the EPA Docket Center—Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004 or U.S. EPA, Region 10 office by calling 206–553–1200. The telephone number for the Public Reading Room is (202) 566–1744. You may inspect the material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

(2) State of Oregon, Secretary of State, Oregon Administrative Rules, *https://secure.sos.state.or.us/oard/processLogin.action;*

(i) OAR 340–236–0500: Oregon Administrative Rules; Chapter 340, Oregon Department of Environmental Quality; Division 236, Emission Standards for Specific Industries; Rule 0500, Solid Waste Landfills: Emission Standards for Municipal Solid Waste Landfills, effective July 19, 2019.

(ii) [Reserved]

■ 4. Add § 62.9511 to read as follows:

§ 62.9511 Identification of sources.

The plan in § 62.9510(b) applies to all existing municipal solid waste landfills in the state of Oregon, excluding Indian Country, for which construction, reconstruction, or modification was commenced on or before July 17, 2014.

■ 5. Add § 62.9512 to read as follows:

§ 62.9512 Effective date.

The effective date of the plan submitted on August 2, 2019 by the Oregon Department of Environmental Quality for municipal solid waste landfills is November 9, 2020.

[FR Doc. 2020–19886 Filed 10–7–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 170

[EPA–HQ–OPP–2017–0543; FRL–10015–17]

RIN 2070–AK49

Notification of Submission to the Secretary of Agriculture; Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of submission to the Secretary of Agriculture.

SUMMARY: This document notifies the public as required by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that the EPA Administrator has forwarded to the Secretary of the United States Department of Agriculture (USDA) a draft regulatory document concerning ''Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements (RIN 2070–AK49).'' The draft regulatory document is not available to the public until after it has been signed and made available by EPA.

DATES: See Unit I. under **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2017–0543, is available at *http://www.regulations.gov.* That docket contains historical information and this **Federal Register** document; it does not contain the draft final rule.

Please note that due to the public health concerns related to COVID–19,

the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Carolyn Schroeder, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (703) 308–2961; email address: *OPP_NPRM_AgWorkerProtection@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What action is EPA taking?

FIFRA section 25(a)(2)(B) requires the EPA Administrator to provide the Secretary of USDA with a copy of any draft final rule at least 30 days before signing it in final form for publication in the **Federal Register**. The draft final rule is not available to the public until after it has been signed by EPA. If the Secretary of USDA comments in writing regarding the draft final rule within 15 days after receiving it, the EPA Administrator must include the comments of the Secretary of USDA, if requested by the Secretary of USDA, and the EPA Administrator's response to those comments with the final rule that publishes in the **Federal Register**. If the Secretary of USDA does not comment in writing within 15 days after receiving the draft final rule, the EPA Administrator may sign the final rule for publication in the **Federal Register** any time after the 15-day period.

II. Do any Statutory and Executive Order reviews apply to this notification?

No. This document is merely a notification of submission to the Secretary of USDA. As such, none of the regulatory assessment requirements apply to this document.

Dated: October 2, 2020.

Alexandra Dapolito Dunn,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2020–22280 Filed 10–7–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2020–0338; FRL–10013–94]

Kasugamycin; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for residues of kasugamycin in or on almonds. This action is in response to EPA's granting of an emergency exemption under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on almond trees. This regulation establishes maximum permissible levels for residues of kasugamycin in or on this commodity. The time-limited tolerances expire on December 31, 2023.

DATES: This regulation is effective October 8, 2020. Objections and requests for hearings must be received on or before December 7, 2020, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2020–0338, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under section 408(g) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2020–0338 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before December 7, 2020. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

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

by docket ID number EPA–HQ–OPP–2020–0338, by one of the following methods:

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

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

II. Background and Statutory Findings

EPA, on its own initiative, in accordance with FFDCA sections 408(e) and 408(l)(6), 21 U.S.C. 346a(e) and 346a(1)(6), is establishing time-limited tolerances for residues of kasugamycin, (3-O-[2-amino-4-[(carboxyimino-methyl)amino]-2,3,4,6-tetradeoxy-α-D-arabino-hexopyranosyl]-D-chiro-inositol), in or on Almond at 0.04 parts per million (ppm); and Almond, hulls at 0.4 ppm. These time-limited tolerances expire on December 31, 2023.

Section 408(l)(6) of FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under FIFRA section 18. Such tolerances can be established without providing notice or period for public comment. EPA does not intend for its actions on FIFRA section 18 related time-limited tolerances to set binding precedents for the application of FFDCA section 408 and the safety standard to other tolerances and exemptions. Section 408(e) of FFDCA allows EPA to establish a tolerance or an exemption from the requirement of a tolerance on its own initiative, *i.e.,* without having received any petition from an outside party.

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

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.'' EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

III. Emergency Exemption for Kasugamycin on Almond Trees

According to the California Department of Pesticide Regulation (CDPR), the California almond industry has been experiencing frequent frost events with concurrent wetness and temperatures below 0 °C in the last several years, specifically from 2013 to 2019. In recent seasons (2017, 2018, and 2019), early-spring cold spells have resulted in a high incidence of bacterial blast in almond buds and blossoms in several almond production areas in California. CDPR claims that these freeze events caused direct crop losses in the form of blasted flowers, dropped fruit, and shoot dieback affecting future fruiting wood on the tree. CDPR claims that frost injury has been described as one of the main limiting factors to crop production in many locations in California. Some plants' frost injuries have been shown to involve an interaction of certain leaf surface bacteria and low temperature stress. Some epiphytic bacteria such as *P. syringae* cause frost-sensitive plants to become more susceptible to freeze damage by initiating the formation of ice that results in frost injury. Many pathovars of *P. syringae* are active in ice nucleation and are the most common ice nucleation active bacteria found on plants in the United States.

After having reviewed the submission, EPA determined that an emergency condition exists for this State, and that the criteria for approval of an emergency exemption were met. EPA has authorized a specific exemption under FIFRA section 18 for the use of kasugamycin on almond trees for control of bacterial blast in almonds in California.

As part of its evaluation of the emergency exemption application, EPA assessed the potential risks presented by residues of kasugamycin in or on almonds. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing this tolerance without notice and opportunity for public comment as provided in FFDCA section 408(l)(6). Although these time-limited tolerances expire on December 31, 2023, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on almond after that date will not be unlawful, provided the pesticide was applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by these time-limited tolerances at the time of that application. EPA will take action to revoke these time-limited tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because these time-limited tolerances are being approved under emergency conditions, EPA has not made any decisions about whether kasugamycin meets FIFRA's registration requirements for use on almonds or whether permanent tolerances for this use would be appropriate. Under these circumstances, EPA does not believe that this time-limited tolerance decision serves as a basis for registration of kasugamycin by a State for special local needs under FIFRA section 24(c). Nor does this tolerance by itself serve as the authority for persons in any State other than California to use this pesticide on the applicable crops under FIFRA section 18 absent the issuance of an emergency exemption applicable within that State. For additional information regarding the emergency exemption for kasugamycin, contact the Agency's Registration Division at the address provided under **FOR FURTHER INFORMATION CONTACT**.

IV. Aggregate Risk Assessment and Determination of Safety

On March 6, 2018, EPA published in the **Federal Register** a final rule establishing tolerances for residues of

kasugamycin in or on cherry subgroup 12–12A and walnut based on the Agency's conclusion that aggregate exposure to kasugamycin is safe for the general population, including infants and children. *See* (83 FR 9442) (FRL–9972–96). EPA is including the following portions of that document by reference here, as they have not changed in the Agency's current assessment of kasugamycin tolerances: The toxicological profile, assumptions for exposure assessment, and the Agency's determination regarding the children's safety factor, which have not changed. The Agency is also incorporating the toxicological points of departure that are referenced in that document and published in **Federal Register** published on August 29, 2014 (79 FR 51492) (FRL–9911–57), which have not changed.

EPA's exposure assessments have been updated to include the additional exposure from use of kasugamycin from use on almonds, assuming both tolerance-level residues and 100 percent crop treated.

An acute dietary endpoint was not identified for kasugamycin, as a result, acute dietary risk is not of concern and a separate acute dietary exposure analysis was not performed. Chronic dietary risk estimates for kasugamycin are below the Agency's level of concern of 100% of the chronic population adjusted dose (cPAD) for all population subgroups. The most highly exposed population subgroup, children 1–2 years old, had a risk estimate of 4.5% of the cPAD, while the general US population had a risk estimate of 1.3% of the cPAD. There are no dietary risk estimates of concern associated with the section 18 use of kasugamycin on almonds in California, when considered along with existing uses of the fungicide.

Since there are no residential uses of kasugamycin and no commercial uses that could result in residential exposure, aggregate risk estimates are equivalent to dietary risk estimates, which are not of concern.

Occupational handler exposures to kasugamycin were estimated assuming the maximum application rate, and label-recommended equipment and methods, and standard assumptions with respect to the area treated. In the absence of chemical-specific data to assess handler's exposure and risk, EPA relied on surrogate unit exposure data to estimate exposure and risk. The Agency assumed a single layer of clothing (baseline), without additional personal protective equipment (PPE). The resulting handler risk estimates, or margins of exposures, are all above 100, and are not of concern.

Therefore, based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to kasugamycin residues. More detailed information on the Agency's analysis to establish a time-limited tolerance in or almonds can be found at *http://www.regulations.gov* in the document titled ''Kasugamycin. Human Health Risk Assessment for the Proposed Section 3 Registration of New Uses of the Antibiotic Fungicide on Cherry Subgroup 12–12A and Walnuts'' dated September 27, 2017, in docket ID EPA–HQ–OPP–2016–0519 and the document titled, ''Kasugamycin. 20CA01. Human Health Risk Assessment for the Proposed Section 18 Specific Exemption for Use on Almonds'' dated April 15, 2020, in docket ID number EPA–HQ–OPP–2020–0338.

V. Other Considerations

A. Analytical Enforcement Methodology

An adequate enforcement methodology (a reverse-phase, ion pairing HPLC/UV method (Morse Laboratories Method #Meth-146, Revision #4)) is available for collecting data and enforcing tolerances for kasugamycin in plant commodities.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established MRLs for kasugamycin.

VI. Conclusion

Therefore, time-limited tolerances are established for residues of kasugamycin, (3-O-[2-amino-4-[(carboxyimino-methyl)amino]-2,3,4,6-tetradeoxy-α-D-arabino-hexopyranosyl]-D-chiro-inositol), in or on Almond at 0.04 ppm and Almond, hulls at 0.4 ppm. These tolerances expire on December 31, 2023.

VII. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(l)(6) in response to an emergency exemption application submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), nor is it considered a regulatory action under Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established in support of a FIFRA section 18 emergency exemption do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, but does not directly regulate states or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or

tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

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

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: August 25, 2020.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

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

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

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

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

■ 2. In § 180.614 add paragraph (b) to read as follows:

§ 180.614 Kasugamycin; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* Time-limited tolerances specified in the following table are established for residues of kasugamycin, including metabolites and degradates, in or on the specified agricultural commodities, resulting from use of the pesticide pursuant to FIFRA section 18 emergency exemptions. Compliance with the tolerance levels specified is to be determined by measuring only kasugamycin (3-O-[2-amino-4-[(carboxyimino-methyl)amino]-2,3,4,6-tetradeoxy-α-D-arabino-hexopyranosyl]-D-chiro-inositol) in or on the commodity. The tolerances expire on the date specified in the table.

Commodity	Parts per million	Expiration date
Almond	0.04	December 31, 2023.
Almond, hulls ..	0.4	December 31, 2023.

* * * * *

[FR Doc. 2020–19761 Filed 10–7–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2016–0416 and EPA–HQ–OPP–2019–0101; FRL–10003–93]

Afidopyropen; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of the insecticide afidopyropen, including its metabolites and degradates, in or on multiple food and animal commodities identified and discussed later in this document. BASF Corporation and the Interregional Research Project #4 requested these tolerances under section 346a of the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective October 8, 2020. Objections and requests for hearings must be received on or before December 7, 2020, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The dockets for this action, identified by docket identification (ID) numbers EPA–HQ–OPP–2016–0416 and EPA–HQ–OPP–2019–0101, are available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those

objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID numbers EPA–HQ–OPP–2016–0416 and EPA–HQ–OPP–2019–0101 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before December 7, 2020. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID numbers EPA–HQ–OPP–2016–0416 and EPA–HQ–OPP–2019–0101, by one of the following methods:

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

II. Summary of Petitioned-For Tolerances

In the **Federal Register** of May 9, 2019 (84 FR 20320) (FRL–9992–36), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8E8732) by the Interregional Research Project #4 (IR–4), Rutgers, The State University of New Jersey, 500 College Road East, Suite 201 W, Princeton, NJ 08540–6635. This petition requested that 40 CFR 180.700 be amended by establishing permanent tolerances for residues of the insecticide afidopyropen, [(3*S*,4*R*,4a*R*,6*S*,6a*S*,12*R*,12a*S*,12b*S*)-3-[(cyclopropylcarbonyl)oxy]-1,3,4,4a,5,6,6a,12,12a,12b-decahydro-6,12-dihydroxy-4,6a,12b-trimethyl-11-oxo-9-(3-pyridinyl)-2*H*,11*H*-naphtho[2,1-b]pyrano[3,4-e]pyran-4-yl]methyl cyclopropanecarboxylate, including its metabolites and degradates, in or on Strawberry at 0.15 parts per million (ppm) and Vegetable, fruiting, group 8–10 at 0.30 ppm. This petition also requested the removal of the existing tolerance for Vegetable, fruiting, group 8–10 upon establishment of the new group 8–10 tolerance. This document referenced a summary of the petition prepared by the IR–4, which is available in docket ID EPA–HQ–OPP–2019–0101, which can be found at *http://www.regulations.gov.* Comments were received on this notice of filing related to the IR–4 petition (8E8732). EPA's response to these comments is discussed in Unit IV.C.

In addition, in the **Federal Register** of February 11, 2020 (85 FR 7708) (FRL–10005–02), EPA issued another document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9F8734) by BASF Corporation (BASF), 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709–3528. This petition requested that 40 CFR 180.700 be amended by establishing permanent tolerances for residues of the insecticide afidopyropen, [(3*S*,4*R*,4a*R*,6*S*,6a*S*,12*R*,12a*S*,12b*S*)-3-[(cyclopropylcarbonyl)oxy]-1,3,4,4a,5,6,6a,12,12a,12b-decahydro-6,12-dihydroxy-4,6a,12b-trimethyl-11-oxo-9-(3-pyridinyl)-2*H*,11*H*-naphtho[2,1-b]pyrano[3,4-e]pyran-4-yl]methyl cyclopropanecarboxylate, including its metabolites and degradates, in or on Alfalfa, seed at 0.30 ppm; Almond, hulls at 0.30 ppm; Animal feed, nongrass, group 18, forage at 4.0 ppm; Animal feed, nongrass, group 18, hay at 9.0 ppm; Animal feed, nongrass, group 18, straw at 5.0 ppm; Cattle, meat at 0.25 ppm; Cattle, meat byproducts at 0.15 ppm; Egg at 0.02 ppm; Goat, meat at 0.25 ppm; Goat, meat byproducts at 0.15 ppm; Grain, aspirated fractions at 20 ppm; Grass, forage, fodder and hay, group 17 at 10.0 ppm; Hog, meat at 0.02 ppm; Hog, meat byproducts at 0.06 ppm; Horse, meat at 0.25 ppm; Horse, meat byproducts at 0.15 ppm; Milk at 0.04 ppm; Poultry, meat byproducts at 0.02 ppm; Sheep, meat at 0.25 ppm; Sheep, meat byproducts at 0.15 ppm; Sorghum, grain, forage at 0.30 ppm; Sorghum, grain, grain at 0.20 ppm; Sorghum, grain, stover at 0.30 ppm; Sorghum, sweet, grain at 0.20 ppm; Sorghum, sweet, forage at 0.30 ppm; Sorghum, sweet, stalk at 0.30 ppm; Sorghum, sweet, stover at 0.30 ppm; Soybean, forage at 0.15 ppm; and Soybean, hay at 0.40 ppm. This document referenced a summary of the petition prepared by BASF, which is available in docket ID EPA–HQ–OPP–2016–0416 at *http://www.regulations.gov.* There were no substantive comments received in response to the notice of filing related to the BASF petition (PP 9F8734).

Based upon review of the data supporting these petitions and in accordance with its authority under FFDCA section 408(d)(1)(A)(i), EPA is establishing tolerances that vary from what the petitioners sought. The reasons for these changes are explained in detail in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of these actions. EPA has enough data to assess the hazards of and to make a determination on aggregate exposure for afidopyropen, including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with afidopyropen follows.

A. Toxicological Profile for Afidopyropen and Its Metabolite, Cyclopropane Carboxylic Acid (CPCA)

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as

the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Applications of afidopyropen result in pesticide chemical residues of concern in or on food of both the parent compound afidopyropen and its metabolite cyclopropane carboxylic acid (CPCA). Because the parent and degradate have different toxicities, EPA assessed aggregate exposure from afidopyropen and from CPCA separately as part of the effort to evaluate the safety of afidopyropen tolerances. Detailed information on the studies received and the nature of the adverse effects caused by afidopyropen and CPCA can be found in the following documents: (1) ''Afidopyropen. Human Health Risk Assessment for Section 3 Requests for a New Active Ingredient,'' dated April 4, 2018; (2) ''Afidopyropen. Human Health Risk Assessment for the Section 3 Request for New Use on Animal Feed, Nongrass (Crop Group 18); Grass, forage, fodder and Hay (Crop Group 17); and Sorghum, and a Request for Increased Application to Tree Nuts,'' dated December 9, 2019; and (3) ''Afidopyropen. Human Health Risk Assessment for Section 3 Request for Greenhouse Use on Cucumber, Strawberry and Vegetable, Fruiting (Group 8–10),'' dated October 30, 2019, by going to *http://www.regulations.gov.* The first two listed documents are available in docket ID EPA–HQ–OPP–2016–0416. The third listed document is available in docket ID EPA–HQ–OPP–2019–0101.

B. Toxicological Points of Departure/ Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern (LOC) to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/ safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological doses and endpoints selected for use in the human health risk assessment for afidopyropen and CPCA is shown in Tables 1 and 2 of this Unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR AFIDOPYROPEN FOR USE IN DIETARY AND NON-OCCUPATIONAL HUMAN HEALTH RISK ASSESSMENTS

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute Dietary (General population).	An endpoint was not identified because effects of concern for this population were not observed in the toxicology database.		
Acute Dietary (Females 13–49 years old).	NOAEL = 16 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 0.16 mg/kg/day. aPAD = 0.16 mg/kg/day	Rabbit Prenatal Developmental Study: Maternal and developmental LOAEL = 32 mg/kg/day, based on increased early resorptions per litter.
Chronic Dietary (All populations including females 13–49 years old).	NOAEL = 8 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.08 mg/kg/day. cPAD = 0.08 mg/kg/day	2 Co-critical Studies: Chronic Dog Study: LOAEL = 20 mg/kg/day, based on hyaline droplet deposition in hepatocytes and vacuolation of the white matter and neuropil of the cerebrum of male dogs. 2-Generation Rat Reproduction Study: Offspring LOAEL = 41 mg/kg/day, based on decreased absolute body weight, and decreased spleen and thymus weights of male rats.
Dermal, Short-term (1–30 days)	NOAEL = 8 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100 Dermal absorption = 15%.	2-Generation Rat Reproduction Study: Offspring LOAEL = 41 mg/kg/day, based on decreased absolute body weight, and decreased spleen and thymus weights of male rats.
Cancer (Oral, Dermal, Inhalation).	Classification: ''*Suggestive Evidence of Carcinogenic Potential.*'' The chronic RfD will be protective of potential carcinogenicity.		

TABLE 2—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR CPCA FOR USE IN DIETARY AND NON-OCCUPATIONAL HUMAN HEALTH RISK ASSESSMENTS

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute Dietary	An endpoint was not identified because effects of concern for this population were not observed in the toxicology database.		

TABLE 2—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR CPCA FOR USE IN DIETARY AND NON-OCCUPATIONAL HUMAN HEALTH RISK ASSESSMENTS—Continued

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Chronic Dietary	NOAEL = 10 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 10x	Chronic RfD = 0.1 mg/kg/day. cPAD = 0.01 mg/kg/day	Subchronic Rat Study: LOAEL = 30 mg/kg/day, based on clinical chemistry alterations, as well as microscopic findings in the liver, thymus heart, and pancreas.
Cancer (Oral, Dermal, Inhalation).	A cancer classification for CPCA has not been determined; however, a structural-activity relationship analysis indicated no structural alerts for genotoxicity or carcinogenicity. There were no reports of a tumorigenic response in the open literature.		

Tables 1 and 2 abbreviations: Point of Departure (POD) = A data point or an estimated point that is derived from observed dose-response data and used to mark the beginning of extrapolation to determine risk associated with lower environmentally relevant human exposures. NOAEL = no observed adverse effect level. LOAEL = lowest observed adverse effect level. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). FQPA SF = FQPA Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. LOC = level of concern.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* Separate dietary exposure assessments were conducted for afidopyropen (acute and chronic) and the afidopyropen metabolite CPCA (chronic) as the toxicological endpoints are different for these compounds. In evaluating dietary exposure to afidopyropen and the metabolite CPCA, EPA considered exposure under the petitioned-for tolerances and existing tolerances as described below.

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. In estimating acute dietary (food + drinking water) exposure for afidopyropen, EPA used food consumption information from the Dietary Exposure Evaluation Model–Food Commodity Intake Database (DEEM–FCID™, Version 3.16), which incorporates 2003–2008 consumption data from the United States Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). The acute dietary assessment for afidopyropen was conducted using recommended tolerance-level residues and 100% crop treated (PCT) assumptions. Empirical and default processing factors were also used. An acute dietary exposure assessment was not conducted for CPCA since an acute dietary endpoint was not identified.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used DEEM–FCID™, Version 3.16, which incorporates 2003–2008 consumption data from the USDA's NHANES/WWEIA. The chronic dietary assessments for afidopyropen and CPCA were conducted using recommended tolerance-level residues and 100 PCT assumptions. Empirical and default processing factors were also used.

iii. *Cancer.* Quantification of risk using a non-linear approach (*i.e.,* a cPAD) will adequately account for all chronic toxicity, including carcinogenicity, that could result from exposure to afidopyropen and/or CPCA; the chronic aggregate assessment did not result in estimates of concern. Therefore, a separate cancer assessment was not conducted.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use any anticipated residue or PCT information in the dietary assessment for afidopyropen or CPCA. Tolerance-level residues and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening-level water exposure models in the dietary exposure analysis and risk assessment for afidopyropen and CPCA in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of afidopyropen and/or CPCA.

Afidopyropen and/or CPCA may be transported to surface water and groundwater via runoff, leaching, or spray drift. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling, taking into account data on the physical and fate characteristics of afidopyropen. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Because of the difference in structure and mode of action, EPA calculated separate estimated drinking water concentrations (EDWCs) for afidopyropen and CPCA. Afidopyropen degrades in soil and water to form a wide range of structurally similar transformation products. All degradates, except CPCA, are included as residues of concern in the afidopyropen total toxic residues (TTR) analysis. Due to differences in both structure and mode of action, CPCA is not included in the TTR analysis for afidopyropen, and EDWCs were calculated for CPCA separately.

The highest modeled EDWCs for afidopyropen and for CPCA used in the dietary risk assessments were entered directly into the latest version of the Pesticides in Water Calculator (PWC 1.52). EDWCs were calculated for both surface water and groundwater based on the maximum annual application rate (0.33 lb a.i./A) and a Percent Cropped Area (PCA) of 1.0 that are listed on current afidopyropen labels. For afidopyropen in surface water, the highest EDWC for the acute assessment is 7.1 ppb and for the chronic assessment is 3.9 ppb; for CPCA, the highest EDWCs are 3.6 ppb for acute assessment and 2.7 ppb for chronic assessment. For afidopyropen in groundwater, the highest EDWCs are negligible for acute assessment and not expected for chronic assessment; for CPCA, the highest EDWCs are 54 ppb for acute assessment and 35 for chronic assessment.

For acute dietary risk assessment for afidopyropen, the EDWC value of 7.1 ppb was used to assess the contribution to drinking water. For chronic and cancer dietary risk assessment for afidopyropen, the EDWC value of 3.9 ppb was used to assess the contribution to drinking water. An acute dietary risk assessment was not conducted for CPCA since an acute dietary endpoint was not identified. Therefore, the only EDWC used for assessing the contribution to

drinking water for CPCA is 35 ppb for the chronic dietary risk assessment.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Afidopyropen is registered for use on residential ornamentals. EPA has assumed that there will not be residential handler exposure based on a presumption that label language requiring the use of specific clothing or personal protective equipment indicates that the pesticide will be marketed for commercial use and not applied by residential handlers. There is a potential for the registered and proposed uses to result in post-application dermal exposure to afidopyropen, due to activities in treated gardens. EPA aggregated the worst-case risk estimates from post-application exposures (*i.e.,* dermal exposures to adults and children (6 to <11 years old) from activities in treated gardens) in its aggregate assessment. CPCA is not a residue of concern for residential exposures.

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

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to afidopyropen and any other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that afidopyropen has a common mechanism of toxicity with other substances.

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10x) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10x, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Conclusion for afidopyropen.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1x for all afidopyropen exposure scenarios. That decision is based on the following findings:

i. The toxicology database for afidopyropen is considered complete for evaluating and characterizing toxicity, assessing children's susceptibility under FQPA, and selecting endpoints for the exposure pathways of concern.

ii. Acute oral (gavage) and sub-chronic oral (dietary) neurotoxicity studies were conducted in rats with effects seen only in the acute study at the limit dose. In subchronic studies with mice and dogs, indications of neurotoxicity were limited to vacuolation of white matter and/or spinal cord, which may have been an artifact of not preparing the tissues properly. Further, the nervous tissue vacuolation was observed at doses 7.5x–115x higher than the POD for the chronic dietary risk assessment. Thus, the potential effects are well-characterized with clearly established NOAEL/LOAEL values and the selected PODs are protective for the observed effects.

Based on the weight of the evidence and taking into consideration the PODs selected for risk assessment, a developmental neurotoxicity study is not required at this time. Clear NOAELs have been established for all life stages, the selected PODs are protective of all pre- and/or post-natal toxicity observed throughout the toxicology database, and no specific neuropathological effects were noted. A DNT with rat (the typical test species) would not be expected to contribute meaningfully to the database, as the rat is expected to be less sensitive than dogs and mice.

iii. There is evidence of increased susceptibility following pre- and/or post-natal exposure to afidopyropen. Clear NOAELs have been established for the developmental effects in rats and rabbits as well as the offspring effects in the 2-generation reproduction studies. The NOAELs chosen for all selected endpoints are protective of all developmental and offspring effects seen in the database.

iv. There are no residual uncertainties identified in the exposure databases. The dietary assessment is based on high-end assumptions such as tolerance-equivalent residue levels of the parent compound and CPCA in foods, 100 PCT, default processing factors, and modeled, high-end estimates of residues in drinking water. All the exposure estimates are based on high-end assumptions and are not likely to underestimate risk. In addition, the residential exposure assessment was conducted based on the Residential SOPs such that residential exposure and risk will not be underestimated.

3. *Conclusion for CPCA.* EPA is retaining the default FQPA safety factor of 10x to account for a subchronic to chronic duration extrapolation and the lack of data to assess developmental and reproductive CPCA toxicity. No developmental or reproductive toxicity studies are available for CPCA to assess pre- and/or post-natal toxicity.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate- and chronic-term risks are evaluated by comparing the estimated aggregate food, water and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

Separate dietary assessments were conducted for afidopyropen and CPCA as the toxicological endpoints are different for these compounds.

1. *Acute risk.* An acute endpoint for afidopyropen was not identified for the U.S. general population because acute effects of concern for this population subgroup were not observed in the toxicology database; therefore, an acute dietary exposure assessment was not conducted for these populations. An acute endpoint for afidopyropen was identified for females 13–49 year old, though. Using the exposure assumptions discussed in this Unit for acute exposure, the estimated acute dietary exposure (food + drinking water) for afidopyropen is 3.7% of the aPAD for females 13–49 years old (the only population subgroup for which an acute endpoint was identified), at the 95th percentile of exposure, and is below the LOC (<100% of the aPAD). An acute dietary endpoint is not identified for CPCA; therefore, the Agency does not expect acute risk from exposure to CPCA.

2. *Chronic risk.* Using the exposure assumptions discussed in this Unit for chronic exposure, the estimated chronic dietary (food + drinking water) risk for afidopyropen and for CPCA is below the LOC (<100% of the cPAD) for the U.S. general population and all population

subgroups. The most highly exposed population subgroup is for children 1–2 years old at 6.5% of the cPAD. The estimated chronic dietary (food + drinking water) risk for CPCA is below the LOC (<100% of the cPAD) for the U.S. general population and all subgroups. The most highly exposed population subgroup is children 1–2 years old at 30% of the cPAD. Residential exposures to afidopyropen or CPCA is not expected to occur on a chronic basis; therefore, the chronic aggregate risk estimates are equivalent to the chronic dietary risk estimates, and are below the LOC.

3. *Short-term risk.* Short-term aggregate exposure considers short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). In estimating the short-term aggregate risk, EPA has aggregated the total short-term residential exposure and average dietary (food + drinking water) exposure. The short-term aggregate exposure assessment applies only to afidopyropen since residential exposure to CPCA is not expected. The short-term aggregate exposure assessment combines residential exposures (adults and children (6 to <11 years old contacting previously treated ornamentals) and average dietary (food + drinking water) exposures. The short-term aggregate MOEs for adults (1,900) and children (1,200) are above the LOC (<100) and are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Because no intermediate-term exposure is anticipated, afidopyropen and CPCA are not expected to pose an intermediate-term aggregate risk.

5. *Aggregate cancer risk for U.S. population.* As indicated in Unit III.A., afidopyropen and/or CPCA is classified as having ''suggestive evidence of carcinogenicity in humans.'' Quantification of risk using a non-linear approach (*e.g.,* a cPAD) will adequately account for all chronic toxicity, including carcinogenicity, that could result from exposure to afidopyropen and/or CPCA; the chronic aggregate assessment did not result in risk estimates of concern.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the U.S. general population, or to infants and children from aggregate exposure to afidopyropen, including CPCA residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Suitable tolerance enforcement methods for plants and livestock using liquid chromatography/mass spectrometer/mass spectrometer (LC–MS/MS) analyses are available for the analysis of afidopyropen. In addition, a new acceptable enforcement method (using LC–MS/MS) has been submitted for determining afidopyropen and CPCA in livestock commodities.

The Quick Easy Cheap Effective Rugged Safe (QuEChERS) multi-residue method D1514/01 is considered suitable for the analysis of afidopyropen in plant and livestock commodities. However, this multi-residue method is not suitable for determination of CPCA in livestock commodities.

Analytical standards for afidopyropen and CPCA are currently unavailable in the EPA National Pesticide Standards Repository. Supplies of analytical standards will be replenished to the repository at the following address: USEPA National Pesticide Standards Repository/Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Road, Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). Codex has no established MRLs for afidopyropen.

C. Response to Comments

Three comments were received in response to the notice of filing for the IR–4 petition (PP 8E8732). Two comments opposed the proposed tolerances on strawberry and vegetable, fruiting, crop group 8–10 as being too high; the other comment was not related to the afidopyropen tolerances. The commenters who were concerned that the tolerances were too high incorrectly misread the petitioned-for tolerances as 15 ppm rather than 0.15 ppm and 20 ppm rather than 0.20 ppm. The Agency is not establishing tolerances at those higher levels. Regardless, the comments seek even lower tolerances values, essentially no residues of the pesticide on strawberries and fruiting vegetables. Although the Agency recognizes that some individuals believe that pesticides should be banned on agricultural crops, the existing legal framework provided by section 408 of the FFDCA authorizes EPA to establish tolerances when it determines that the tolerance is safe. Upon consideration of the validity, completeness, and reliability of the available data as well as other factors the FFDCA requires EPA to consider, EPA has determined that these afidopyropen tolerances are safe. The commenters have provided no information to indicate that afidopyropen is not safe.

D. Revisions to Petitioned-For Tolerances

Several petitioned-for tolerance levels are different from those being established by EPA. Many of these differences are attributable to the petitioned-for levels not being consistent with Organization for Economic Cooperation and Development (OECD) rounding class practice. The Sorghum, grain, grain and Sorghum, sweet, grain tolerance levels are lower than the petitioned-for level due to the differences in the number of significant figures used in the MRL calculation. EPA is establishing a higher tolerance for Grain, aspirated fractions based upon calculations using the highest average field trial (HAFT) from Sorghum, grain (0.10 ppm) and multiplying that figure by the calculated aspirated grains processing factor (PF) of 560x and then rounding up using OECD rounding class practice to the tolerance value of 60 ppm.

Tolerances being established for livestock commodities vary from the petitioned-for tolerances due to different models used in determining dietary burden and anticipated residues. The petitioner proposed tolerances using different models to determine dietary burden and scaled anticipated residues from the feeding study at different dose levels (transfer factor approach) to calculate a proposed tolerance. EPA has determined the appropriate tolerance value using the Dietary Burden Calculator PMRA v.2.8 to calculate dietary burden and Langmuir Model v.1.5 to determine tolerance level. The difference in dietary burden calculations for poultry and swine lead to EPA's conclusion that egg, poultry meat byproducts, and hog meat/meat byproducts had no reasonable expectation of finite residues, and that tolerances are not currently needed for these commodities.

A tolerance level of 0.30 ppm was proposed for Vegetable, fruiting, group 8–10 based on the OECD MRL calculator using the greenhouse pepper data,

although the petitioner pointed out that all residues in the greenhouse pepper study were below the current tolerance of 0.20 ppm for Vegetable, fruiting, group 8–10. Based on the submitted field trial data, residues of afidopyropen in greenhouse-grown commodities in the vegetable, fruiting, group 8–10 are not expected to exceed the current tolerance of 0.20 ppm. Further, maintaining the current tolerance level harmonizes with PMRA's proposed MRL of 0.2 ppm. Therefore, EPA is maintaining the tolerance at the current level of 0.20 ppm for Vegetable, fruiting, group 8–10 while revising the value to 0.2 ppm to be consistent with OECD rounding class practice.

V. Conclusion

Therefore, tolerances are established for residues of the insecticide afidopyropen, [(3*S*,4*R*,4a*R*,6*S*,6a*S*,12*R*,12a*S*,12b*S*)-3-[(cyclopropylcarbonyl)oxy]-1,3,4,4a,5,6,6a,12,12a,12b-decahydro-6,12-dihydroxy-4,6a,12b-trimethyl-11-oxo-9-(3-pyridinyl)-2*H*,11*H*-naphtho[2,1-b]pyrano[3,4-e]pyran-4-yl]methyl cyclopropanecarboxylate, including its metabolites and degradates, in or on Alfalfa, seed at 0.3 ppm; Almond, hulls at 0.3 ppm; Animal feed, nongrass, group 18, forage at 4 ppm; Animal feed, nongrass, group 18, hay at 9 ppm; Animal feed, nongrass, group 18, straw at 5 ppm; Cattle, meat at 0.2 ppm; Cattle, meat byproducts at 0.2 ppm; Goat, meat at 0.2 ppm; Goat, meat byproducts at 0.2 ppm; Grain, aspirated fractions at 60 ppm; Grass, forage, fodder and hay, group 17 at 10 ppm; Horse, meat at 0.2 ppm; Horse, meat byproducts at 0.2 ppm; Milk at 0.04 ppm; Sheep, meat at 0.2 ppm; Sheep, meat byproducts at 0.2 ppm; Sorghum, grain, forage at 0.3 ppm; Sorghum, grain, grain at 0.15 ppm; Sorghum, grain, stover at 0.3 ppm; Sorghum, sweet, grain at 0.15 ppm; Sorghum, sweet, forage at 0.3 ppm; Sorghum, sweet, stalk at 0.3 ppm; Sorghum, sweet, stover at 0.3 ppm; Soybean, forage at 0.15 ppm; Soybean, hay at 0.4 ppm; Strawberry at 0.15 ppm, and Vegetable, fruiting, group 8–10 at 0.2 ppm.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) or Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

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

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

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

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: September 16, 2020.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.700:

■ a. Dedesignate paragraph (a) introductory text as paragraph (a)(1) and revise newly designated paragraph (a)(1) introductory text;

■ b. In the table in newly designated paragraph (a)(1):

■ i. Add a heading for the table;

■ ii. Add an entry for ''Alfalfa, seed'' in alphabetical order;

■ iii. Revise the entry for ''Almond, hulls;''

■ iv. Add entries for ''Animal feed, nongrass, group 18, forage,'' ''Animal feed, nongrass, group 18, hay,'' and ''Animal feed, nongrass, group 18, straw'' in alphabetical order;

■ v. Revise the entry for ''Grain, aspirated fractions;''

■ vi. Add entries for ''Grass, forage, fodder and hay, group 17,'' ''Sorghum, grain, forage,'' ''Sorghum, grain, grain,'' ''Sorghum, grain, stover,'' ''Sorghum, sweet, forage,'' ''Sorghum, sweet, grain,'' ''Sorghum, sweet, stalk,'' ''Sorghum, sweet, stover,'' ''Soybean, forage,'' ''Soybean, hay,'' and ''Strawberry'' in alphabetical order; and

■ vii. Revise the entry for ''Vegetable, fruiting, group 8–10;'' and

■ c. Add paragraph (a)(2).

The additions read as follows:

§ 180.700 Afidopyropen; tolerances for residues.

(a) *General.* (1) Tolerances are established for residues of afidopyropen, including its metabolites and degradates, in or on the commodities in table 1 to this paragraph (a)(1). Compliance with the tolerance levels specified in this paragraph (a)(1) is to be determined by measuring only afidopyropen, [(3*S*,4*R*,4a*R*,6*S*,6a*S*,12*R*,12a*S*,12b*S*)-3-[(cyclopropylcarbonyl)oxy]-1,3,4,4a,5,6a,12,12a,12b-decahydro-6,12-dihydroxy-4,6a,12b-trimethyl-11-oxo-9-(3-pyridinyl)2*H*,11*H*-naphtho[2,1-*b*]pyrano[3,4-*e*]pyran-4-yl]methyl cyclopropanecarboxylate, in or on the following food commodities:

TABLE 1 TO PARAGRAPH (a)(1)

Commodity	Parts per million
Alfalfa, seed	0.3
Almond, hulls	0.3
Animal feed, nongrass, group 18, forage	4
Animal feed, nongrass, group 18, hay	9
Animal feed, nongrass, group 18, straw	5
* * * * * * *	
Grain, aspirated fractions	60
Grass, forage, fodder and hay, group 17	10
* * * * * * *	
Sorghum, grain, forage	0.3
Sorghum, grain, grain	0.15
Sorghum, grain, stover	0.3
Sorghum, sweet, forage	0.3
Sorghum, sweet, grain	0.15
Sorghum, sweet, stalk	0.3
Sorghum, sweet, stover	0.3
Soybean, forage	0.15
Soybean, hay	0.4
* * * * * * *	
Strawberry	0.15
* * * * * * *	
Vegetable, fruiting, group 8–10	0.2
* * * * * * *	

(2) Tolerances are established for residues of afidopyropen, including its metabolites and degradates, in or on the commodities in table 2 to this paragraph (a)(2). Compliance with the tolerance levels specified in this paragraph (a)(2) is to be determined by measuring only the sum of afidopyropen, [(3*S*,4*R*,4a*R*,6*S*,6a*S*,12*R*,12a*S*,12b*S*)-3-[(cyclopropylcarbonyl)oxy]-1,3,4,4a,5,6a,12,12a,12b-decahydro-6,12-dihydroxy-4,6a,12b-trimethyl-11-oxo-9-(3-pyridinyl)2*H*,11*H*-naphtho[2,1-*b*]pyrano[3,4-*e*]pyran-4-yl]methyl cyclopropanecarboxylate and its metabolite cyclopropanecarboxylic acid carnitine (CPCA-carnitine), calculated as the stoichiometric equivalent of afidopyropen in or on the following animal commodities:

TABLE 2 TO PARAGRAPH (a)(2)

Commodity	Parts per million
Cattle, meat	0.2
Cattle, meat byproducts	0.2
Goat, meat	0.2

TABLE 2 TO PARAGRAPH (a)(2)—Continued

Commodity	Parts per million
Goat, meat byproducts	0.2
Horse, meat	0.2
Horse, meat byproducts	0.2
Milk	0.04
Sheep, meat	0.2
Sheep, meat byproducts	0.2

* * * * *

[FR Doc. 2020–21119 Filed 10–7–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No.200623–0167; RTID 0648–XA519]

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Quota Transfer From NH to NC

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

ACTION: Notification; quota transfer.

SUMMARY: NMFS announces that the State of New Hampshire is transferring a portion of its 2020 commercial bluefish quota to the State of North Carolina. This quota adjustment is necessary to comply with the Atlantic Bluefish Fishery Management Plan quota transfer provisions. This announcement informs the public of the

revised commercial bluefish quotas for New Hampshire and North Carolina.

DATES: Effective October 5, 2020, through December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Laura Hansen, Fishery Management Specialist, (978) 281–9225.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic bluefish fishery are found in 50 CFR 648.160 through 648.167. These regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through Florida. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.162, and the final 2020 allocations were published on June 29, 2020 (85 FR 38794).

The final rule implementing Amendment 1 to the Bluefish Fishery Management Plan (FMP) published in the **Federal Register** on July 26, 2000 (65 FR 45844), and provided a mechanism for transferring bluefish quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the NMFS Greater Atlantic Regional Administrator, can request approval to transfer or combine bluefish commercial quota under § 648.162(e)(1)(i) through (iii). The Regional Administrator must approve any such transfer based on the criteria in § 648.162(e). In evaluating requests to transfer a quota or combine quotas, the Regional Administrator shall consider whether: The transfer or combinations would preclude the overall annual quota from being fully harvested; the transfer addresses an unforeseen variation or contingency in the fishery; and the transfer is consistent with the objectives of the FMP and the Magnuson-Stevens Act.

New Hampshire is transferring 9,000 lb (4,082 kg) of bluefish commercial quota to North Carolina through mutual agreement of the states. This transfer was requested to ensure that North Carolina would not exceed its 2020 state quota. The revised bluefish quotas for 2020 are: New Hampshire, 2,468 lb (1,119 kg) and North Carolina, 946,058 lb (429,125 kg).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 648.162(e)(1)(i) through (iii), which was issued pursuant to section 304(b), and is exempted from review under Executive Order 12866.

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

Dated: October 2, 2020.

Jennifer M. Wallace,

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

[FR Doc. 2020–22232 Filed 10–5–20; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 196
Thursday, October 8, 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.

FEDERAL TRADE COMMISSION

16 CFR Part 640

RIN 3084–AB63

Duties of Creditors Regarding Risk-Based Pricing Rule

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 Creditors Regarding Risk-Based Pricing Rule (''Risk-Based Pricing Rule'') as part of the FTC's systematic review of all current Commission regulations and guides. In addition, the FTC is proposing to amend the Rule to correspond to changes made to the Fair Credit Reporting Act (''FCRA'') by the Dodd-Frank Act.

DATES: Written comments must be received on or before December 22, 2020.

ADDRESSES: Interested parties may file a comment online or on paper by following the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Amendment to the Risk-Based Pricing Rule, 16 CFR part 640, Project No. P205408'' on your comment and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex B), 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 B), 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 Risk-Based Pricing 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. Section 311 of the FACT Act added section 615(h), 15 U.S.C. 1681m(h), to the FCRA to address risk-based pricing. Risk-based pricing refers to the practice of setting or adjusting the price and other terms of credit offered or extended to a particular consumer to reflect the risk of nonpayment by that consumer. Information from a consumer report is often used in evaluating the risk posed by the consumer. Creditors that engage in risk-based pricing generally offer more favorable terms to consumers with good credit histories and less favorable terms to consumers with poor credit histories.

Under section 615(h) of the FCRA, a person generally must provide a risk-based pricing notice to a consumer when the person uses a consumer report in connection with an extension of credit and, based in whole or in part on the consumer report, extends credit to the consumer on terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers. The risk-based pricing notice is designed primarily to improve the accuracy of consumer reports by alerting consumers to the existence of negative information in their consumer reports, so that consumers can, if they choose, check their consumer reports for accuracy and correct any inaccurate information. The Federal Reserve Board and the Commission jointly published regulations implementing these risk-based pricing provisions on January 15, 2010.[1] The Rule was amended in July 2011 to include a requirement that, if a credit score is used in making the credit decision, the creditor must disclose that score and certain information relating to the credit score.[2]

B. Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') was signed into law in 2010.[3] 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.[4] Accordingly, in 2012, the Commission rescinded several of its FCRA rules that had been replaced by rules issued by the CFPB.[5] The FTC retained rulemaking authority for other rules promulgated under the Acts to the extent the rules apply to motor vehicle dealers described in section 1029(a) of the Dodd-Frank Act[6] that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.[7] The retained rules include the Risk-Based Pricing Rule, which now applies only to motor vehicle dealers.[8] Consumer report users that are not motor vehicle dealers are covered by the CFPB's rule.[9]

II. Technical Changes To Correspond to Statutory Changes Resulting From the Dodd-Frank Act

A. Scope

The Commission promulgated the Risk-Based Pricing 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 Risk-Based Pricing Rule, it did narrow the Commission's rulemaking authority with respect to the Rule. It now covers only motor vehicle dealers.[10] The amendments in the Dodd-Frank Act necessitate technical revisions to the Risk-Based Pricing Rule to ensure that it is consistent with the text of the amended FCRA. Accordingly, the Commission proposes to modify the Risk-Based Pricing Rule to reflect the Rule's scope.

[1] 75 FR 2723 (January 15, 2010).

[2] 76 FR 41602 (July 15, 2011).

[3] Public Law 111–203 (2010).

[4] 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).

[5] 77 FR 22200 (April 13, 2012); 12 U.S.C. 5519.

[6] 15 U.S.C. 5519.

[7] 77 FR 22200 (April 13, 2012).

[8] *Id.*

[9] 12 CFR 1022.70–75.

[10] 15 U.S.C. 1681s(e)(1); 12 U.S.C. 5519.

The proposed amendment to § 640.1(a) narrows the description of the scope of the Risk-Based Pricing Rule to those entities set forth in the Dodd-Frank Act that are predominantly engaged in the sale and servicing of motor vehicles, excluding those dealers that directly extend credit to consumers and do not routinely assign the extensions of credit to an unaffiliated third party.[11] It does so by replacing the broad term ''person'' with ''motor vehicle dealer,'' as defined in amended § 640.2. The proposed amendment replaces ''person'' with ''motor vehicle dealer'' throughout the Rule, whenever ''person'' is used to describe the entity covered by the Rule. In provisions where ''person'' does not refer to a motor vehicle dealer covered by the Rule, such as §§ 640.4(c)(2) and 640.6(b)(2), the term ''person'' is retained.[12]

The proposed amendment also removes § 640.1(b), which describes the process by which the Commission worked with the Federal Reserve Board to issue the Risk-Based Pricing Rule, and states that the Commission's and the Board's rules are substantively identical. The Commission proposes to remove this section because the Dodd-Frank Act transferred the Board's rulemaking authority for the Risk-Based Pricing Rule to the CFPB.

The proposed amendment to § 640.2 adds a definition of ''motor vehicle dealer'' that defines motor vehicle dealers as those entities excluded from the CFPB's jurisdiction under the Dodd-Frank Act.[13] The proposed amendment also updates the definition of ''open-end credit'' by replacing the statutory reference to 15 U.S.C. 1602(i) with a citation to 15 U.S.C. 1602(j). It also changes references to the Federal Reserve Board's regulation to the CFPB's regulation.

In addition, the proposed amendments update references to the risk-based pricing notices in §§ 640.4(a)(1)(viii), 640.4(a)(2)(viii), 640.5(d)(1)(ii)(I), 640.5(e)(1)(ii)(L), and 640.5(f)(iii)(I) from the Board's website to the CFPB's website to reflect the CFPB's authority under the Dodd-Frank Act.

B. Examples

The Rule contains examples that apply to entities no longer within the scope of the Rule because of the Dodd-Frank Act. Retaining these examples may lead to confusion about the actual scope of the Risk-Based Pricing Rule. Accordingly, in addition to changing the term ''person'' to ''motor vehicle dealers'' in some examples as discussed above, the Commission proposes to modify some of the examples to provide clearer guidance to financial institutions that are covered motor vehicle dealers. For example, the proposal removes references to utility companies and charge cards (§ 640.2(n)(3)); student loans, secured and unsecured credit cards, and fixed and variable rate mortgages (§ 640.3(b)); and replaces references to ''credit card issuers'' with ''motor vehicle dealers'' (§§ 640.4(d)(2); 640.5(a)(2); 640.5(c)(3)). These modifications to the cited examples are not intended to modify the substantive requirements of the Rule, as the examples simply illustrate the Rule's application in a particular context.[14]

III. Regulatory Review of the Risk-Based Pricing 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. It has been ten years since the Rule was enacted. Consistent with its practice of reviewing all 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 Risk-Based Pricing Rule; possible conflict between the Risk-Based Pricing Rule and state, local, or other federal laws or regulations; and the effect on the Risk-Based Pricing 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 Risk-Based Pricing Rule? Why or why not?

2. What benefits has the Risk-Based Pricing Rule provided to consumers? What evidence supports the asserted benefits?

3. What modifications, if any, should be made to the Risk-Based Pricing 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 Risk-Based Pricing Rule?

4. What significant costs, if any, has the Risk-Based Pricing Rule imposed on consumers? What evidence supports the asserted costs?

5. What modifications, if any, should be made to the Risk-Based Pricing 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 Risk-Based Pricing Rule?

6. What benefits, if any, has the Risk-Based Pricing Rule provided to businesses, including small businesses? What evidence supports the asserted benefits?

7. What modifications, if any, should be made to the Risk-Based Pricing 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 Risk-Based Pricing 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 Risk-Based Pricing Rule imposed on businesses, including small businesses? What evidence supports the asserted costs?

9. What modifications, if any, should be made to the Risk-Based Pricing Rule

[11] 12 U.S.C. 5519.

[12] For consistency, the proposed amendments also change any use of the term ''auto dealer'' to ''motor vehicle dealer.'' *See, e.g.,* 16 CFR 640.4(c)(2)(ii).

[13] 12 U.S.C. 5519.

[14] The Commission recognizes that there are substantive provisions of the Risk-Based Pricing Rule that typically would not apply to motor vehicle dealers. For example, motor vehicle dealers rarely issue credit cards, even though that term is defined broadly as ''any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.'' The Commission has chosen, however, not to remove these provisions from the Rule for two reasons. First, the current Rule is substantively identical to the CFPB's risk-based pricing rule. The Commission believes that it is beneficial to maintain this conformity and has opted to make no substantive changes to the rule, including for situations where motor vehicle dealers covered by the Rule interact with banks or other entities covered by the CFPB's rule. Second, to the extent that motor vehicle dealers do not engage in particular conduct, *e.g.,* issuing credit cards, then those requirements would not apply.

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 Risk-Based Pricing Rule?

10. What evidence is available concerning the degree of industry compliance with the Risk-Based Pricing Rule?

11. What modifications, if any, should be made to the Risk-Based Pricing Rule to account for changes in relevant technology or economic conditions? What evidence supports the proposed modifications?

12. Does the Risk-Based Pricing 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 Rule be modified? If so, why, and how? If not, why not?

13. Should the Risk-Based Pricing Rule be amended to remove provisions addressing circumstances that do not apply, or typically do not apply, to motor vehicle dealers?

14. Can the examples set forth in the Rule be amended further to make them more helpful and informative to motor vehicle dealers? Would additional examples be helpful, and if so, what examples? Should examples that relate to types of transactions that are not typical in the motor vehicle context be removed?

15. The Commission proposes to amend the Rule now that it applies exclusively to motor vehicle dealers. Are the proposed modifications 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 December 22, 2020. Write ''Risk-Based Pricing Rule, 16 CFR part 640, 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.

If you file your comment on paper, write ''Risk-Based Pricing Rule, 16 CFR part 640, 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 B), 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 B), 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 *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 that your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential,'' as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2), including in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. 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 December 22, 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 Risk-Based Pricing 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''). 44 U.S.C. 3501 *et seq.* OMB has approved the Rule's existing information collection requirements through August 31, 2020 (OMB Control No. 3084–0145). Under the existing clearance, the FTC has attributed to itself the estimated burden regarding all motor vehicle dealers and then shares equally the remaining estimated PRA burden with the CFPB for other persons for which both agencies have enforcement authority regarding the Risk-Based Pricing Rule.

This proposal would amend 16 CFR part 640. The collections of information related to the Risk-Based Pricing Rule have been previously reviewed and approved by OMB in accordance with the PRA.[16]

The proposed amendments do not modify or add to information collection requirements that were previously approved by OMB. The amendments make no substantive changes to the

[15] 16 CFR 1.26(b)(5).

[16] OMB Control No. 3084–0145.

Rule, other than to clarify that the scope of the Rule is limited to motor vehicle dealers. The Rule's OMB clearance already reflects that scope. Therefore, the Commission does not believe the proposed amendments would modify substantially or materially 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.[17] 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 Risk-Based Pricing 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:

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. 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. 1681m(h).

[17] 5 U.S.C. 603–605.

C. Description of Small Entities to Which the Proposed Rule Will Apply

Determining a precise estimate of the number of small entities[18] 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 Rules.

E. 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. The Commission is requesting comment on the extent to which other federal standards involving consumer reports may duplicate, satisfy, or possibly 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 on small entities—specifically institutions that would be newly covered financial institutions—if there are any.

[18] 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.*

IX. Proposed Rule Language

List of Subjects in 16 CFR Part 640

Consumer protection, Credit, Trade practices.

■ For the reasons stated above, the Federal Trade Commission proposes to amend title 16 of the Code of Federal Regulations by revising part 640 to read as follows:

PART 640—DUTIES OF CREDITORS REGARDING RISK-BASED PRICING

Sec.
640.1 Scope.
640.2 Definitions.
640.3 General requirements for risk-based pricing notices.
640.4 Content, form, and timing of risk-based pricing notices.
640.5 Exceptions.
640.6 Rules of construction.

Authority: 15 U.S.C. 1681m(h); 12 U.S.C. 5519(d); Sec. 311, Pub. L. 108–159.

§ 640.1 Scope.

(a) *Coverage*—(1) *In general.* This part applies to any motor vehicle dealer as defined in § 640.2 that both—

(i) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to a consumer that is primarily for personal, family, or household purposes; and

(ii) Based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to the consumer on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers from or through that motor vehicle dealer.

(2) *Business credit excluded.* This part does not apply to an application for, or a grant, extension, or other provision of, credit to a consumer or to any other applicant primarily for a business purpose.

(b) *Enforcement.* The provisions of this part will be enforced in accordance with the enforcement authority set forth in sections 621(a) and (b) of the FCRA.

§ 640.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Adverse action* has the same meaning as in 15 U.S.C. 1681a(k)(1)(A).

(b) *Annual percentage rate* has the same meaning as in 12 CFR 1026.14(b) with respect to an open-end credit plan

and as in 12 CFR 1026.22 with respect to closed-end credit.

(c) *Closed-end credit* has the same meaning as in 12 CFR 1026.2(a)(10).

(d) *Consumer* has the same meaning as in 15 U.S.C. 1681a(c).

(e) *Consummation* has the same meaning as in 12 CFR 1026.2(a)(13).

(f) *Consumer report* has the same meaning as in 15 U.S.C. 1681a(d).

(g) *Consumer reporting agency* has the same meaning as in 15 U.S.C. 1681a(f).

(h) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(i) *Creditor* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(j) *Credit card* has the same meaning as in 15 U.S.C. 1681a(r)(2).

(k) *Credit card issuer* has the same meaning as in 15 U.S.C. 1681a(r)(1)(A).

(l) *Credit score* has the same meaning as in 15 U.S.C. 1681g(f)(2)(A).

(m) *Firm offer of credit* has the same meaning as in 15 U.S.C. 1681a(l).

(n) *Material terms* means—

(1)(i) Except as otherwise provided in paragraphs (n)(1)(ii) and (n)(3) of this section, in the case of credit extended under an open-end credit plan, the annual percentage rate required to be disclosed under 12 CFR 226.6(a)(1)(ii) or 12 CFR 226.6(b)(2)(i), excluding any temporary initial rate that is lower than the rate that will apply after the temporary rate expires, any penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, and any fixed annual percentage rate option for a home equity line of credit;

(ii) In the case of a credit card (other than a credit card that is used to access a home equity line of credit or a charge card), the annual percentage rate required to be disclosed under 12 CFR 226.6(b)(2)(i) that applies to purchases (''purchase annual percentage rate'') and no other annual percentage rate, or in the case of a credit card that has no purchase annual percentage rate, the annual percentage rate that varies based on information in a consumer report and that has the most significant financial impact on consumers;

(2) In the case of closed-end credit, the annual percentage rate required to be disclosed under 12 CFR 226.17(c) and 226.18(e); and

(3) In the case of credit for which there is no annual percentage rate, the financial term that varies based on information in a consumer report and that has the most significant financial impact on consumers, such as a deposit required in connection with an extension of credit.

(o) *Materially less favorable* means, when applied to material terms, that the terms granted, extended, or otherwise provided to a consumer differ from the terms granted, extended, or otherwise provided to another consumer from or through the same motor vehicle dealer such that the cost of credit to the first consumer would be significantly greater than the cost of credit granted, extended, or otherwise provided to the other consumer. For purposes of this definition, factors relevant to determining the significance of a difference in cost include the type of credit product, the term of the credit extension, if any, and the extent of the difference between the material terms granted, extended, or otherwise provided to the two consumers.

(p) *Motor vehicle dealer* means any person excluded from Consumer Financial Protection Bureau jurisdiction as described in 12 U.S.C. 5519.

(q) *Open-end credit plan* has the same meaning as in 15 U.S.C. 1602(j), as interpreted by the Board in Regulation Z and the Official Staff Commentary to Regulation Z.

(r) *Person* has the same meaning as in 15 U.S.C. 1681a(b).

§ 640.3 General requirements for risk-based pricing notices.

(a) *In general.* Except as otherwise provided in this part, a motor vehicle dealer must provide to a consumer a notice (''risk-based pricing notice'') in the form and manner required by this part if the motor vehicle dealer both—

(1) Uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit to that consumer that is primarily for personal, family, or household purposes; and

(2) Based in whole or in part on the consumer report, grants, extends, or otherwise provides credit to that consumer on material terms that are materially less favorable than the most favorable material terms available to a substantial proportion of consumers from or through that motor vehicle dealer.

(b) *Determining which consumers must receive a notice.* A motor vehicle dealer may determine whether paragraph (a) of this section applies by directly comparing the material terms offered to each consumer and the material terms offered to other consumers for a specific type of credit product. For purposes of this section, a ''specific type of credit product'' means one or more credit products with similar features that are designed for similar purposes. Examples of a specific type of credit product include new automobile loans and used automobile loans. As an alternative to making this direct comparison, a motor vehicle dealer may make the determination by using one of the following methods:

(1) *Credit score proxy method*—(i) *In general.* A motor vehicle dealer that sets the material terms of credit granted, extended, or otherwise provided to a consumer, based in whole or in part on a credit score, may comply with the requirements of paragraph (a) of this section by—

(A) Determining the credit score (hereafter referred to as the ''cutoff score'') that represents the point at which approximately 40 percent of the consumers to whom it grants, extends, or provides credit have higher credit scores and approximately 60 percent of the consumers to whom it grants, extends, or provides credit have lower credit scores; and

(B) Providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit whose credit score is lower than the cutoff score.

(ii) *Alternative to the 40/60 cutoff score determination.* In the case of credit that has been granted, extended, or provided on the most favorable material terms to more than 40 percent of consumers, a motor vehicle dealer may, at its option, set its cutoff score at a point at which the approximate percentage of consumers who historically have been granted, extended, or provided credit on material terms other than the most favorable terms would receive risk-based pricing notices under this section.

(iii) *Determining the cutoff score*—(A) *Sampling approach.* A motor vehicle dealer that currently uses risk-based pricing with respect to the credit products it offers must calculate the cutoff score by considering the credit scores of all or a representative sample of the consumers to whom it has granted, extended, or provided credit for a specific type of credit product.

(B) *Secondary source approach in limited circumstances.* A motor vehicle dealer that is a new entrant into the credit business, introduces new credit products, or starts to use risk-based pricing with respect to the credit products it currently offers may initially determine the cutoff score based on information derived from appropriate market research or relevant third-party sources for a specific type of credit product, such as research or data from companies that develop credit scores. A motor vehicle dealer that acquires a credit portfolio as a result of a merger or acquisition may determine the cutoff score based on information from the party which it acquired, with which it

merged, or from which it acquired the portfolio.

(C) *Recalculation of cutoff scores.* A motor vehicle dealer using the credit score proxy method must recalculate its cutoff score(s) no less than every two years in the manner described in paragraph (b)(1)(iii)(A) of this section. A motor vehicle dealer using the credit score proxy method using market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio as permitted by paragraph (b)(1)(iii)(B) of this section generally must calculate a cutoff score(s) based on the scores of its own consumers in the manner described in paragraph (b)(1)(iii)(A) of this section within one year after it begins using a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio. If such a motor vehicle dealer does not grant, extend, or provide credit to new consumers during that one-year period such that it lacks sufficient data with which to recalculate a cutoff score based on the credit scores of its own consumers, the motor vehicle dealer may continue to use a cutoff score derived from market research, third-party data, or information from a party which it acquired, with which it merged, or from which it acquired the portfolio as provided in paragraph (b)(1)(iii)(B) of this section until it obtains sufficient data on which to base the recalculation. However, the motor vehicle dealer must recalculate its cutoff score(s) in the manner described in paragraph (b)(1)(iii)(A) of this section within two years, if it has granted, extended, or provided credit to some new consumers during that two-year period.

(D) *Use of two or more credit scores.* A motor vehicle dealer that generally uses two or more credit scores in setting the material terms of credit granted, extended, or provided to a consumer must determine the cutoff score using the same method the motor vehicle dealer uses to evaluate multiple scores when making credit decisions. These evaluation methods may include, but are not limited to, selecting the low, median, high, most recent, or average credit score of each consumer to whom it grants, extends, or provides credit. If a motor vehicle dealer that uses two or more credit scores does not consistently use the same method for evaluating multiple credit scores (*e.g.,* if the motor vehicle dealer sometimes chooses the median score and other times calculates the average score), the motor vehicle dealer must determine the cutoff score using a reasonable means. In such cases, use of any one of the methods that the motor vehicle dealer regularly uses or the average credit score of each consumer to whom it grants, extends, or provides credit is deemed to be a reasonable means of calculating the cutoff score.

(iv) *Credit score not available.* For purposes of this section, a motor vehicle dealer using the credit score proxy method who grants, extends, or provides credit to a consumer for whom a credit score is not available must assume that the consumer receives credit on material terms that are materially less favorable than the most favorable credit terms offered to a substantial proportion of consumers from or through that motor vehicle dealer and must provide a risk-based pricing notice to the consumer.

(v) *Examples.* (A) A motor vehicle dealer engages in risk-based pricing and the annual percentage rates it offers to consumers are based in whole or in part on a credit score. The motor vehicle dealer takes a representative sample of the credit scores of consumers to whom it extended loans within the preceding three months. The motor vehicle dealer determines that approximately 40 percent of the sampled consumers have a credit score at or above 720 (on a scale of 350 to 850) and approximately 60 percent of the sampled consumers have a credit score below 720. Thus, the motor vehicle dealer selects 720 as its cutoff score. A consumer applies to the motor vehicle dealer for a loan. The motor vehicle dealer obtains a credit score for the consumer. The consumer's credit score is 700. Since the consumer's 700 credit score falls below the 720 cutoff score, the motor vehicle dealer must provide a risk-based pricing notice to the consumer.

(B) A motor vehicle dealer engages in risk-based pricing, and the annual percentage rates it offers to consumers are based in whole or in part on a credit score. The motor vehicle dealer takes a representative sample of the consumers to whom it extended loans over the preceding six months. The motor vehicle dealer determines that approximately 80 percent of the sampled consumers received credit at its lowest annual percentage rate, and 20 percent received credit at a higher annual percentage rate. Approximately 80 percent of the sampled consumers have a credit score at or above 750 (on a scale of 350 to 850), and 20 percent have a credit score below 750. Thus, the motor vehicle dealer selects 750 as its cutoff score. A consumer applies to the motor vehicle dealer for an automobile loan. The motor vehicle dealer obtains a credit score for the consumer. The consumer's credit score is 740. Since the consumer's 740 credit score falls below the 750 cutoff score, the motor vehicle dealer must provide a risk-based pricing notice to the consumer.

(C) A motor vehicle dealer engages in risk-based pricing, obtains credit scores from one of the nationwide consumer reporting agencies, and uses the credit score proxy method to determine which consumers must receive a risk-based pricing notice. A consumer applies to the motor vehicle dealer for credit to finance the purchase of an automobile. A credit score about that consumer is not available from the consumer reporting agency from which the lender obtains credit scores. The motor vehicle dealer nevertheless grants, extends, or provides credit to the consumer. The motor vehicle dealer must provide a risk-based pricing notice to the consumer.

(2) *Tiered pricing method*—(i) *In general.* A motor vehicle dealer that sets the material terms of credit granted, extended, or provided to a consumer by placing the consumer within one of a discrete number of pricing tiers for a specific type of credit product, based in whole or in part on a consumer report, may comply with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer who is not placed within the top pricing tier or tiers, as described in paragraphs (b)(2)(ii) and (iii) of this section.

(ii) *Four or fewer pricing tiers.* If a motor vehicle dealer using the tiered pricing method has four or fewer pricing tiers, the motor vehicle dealer complies with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who does not qualify for the top tier (that is, the lowest-priced tier). For example, a motor vehicle dealer that uses a tiered pricing structure with annual percentage rates of 8, 10, 12, and 14 percent would provide the risk-based pricing notice to each consumer to whom it grants, extends, or provides credit at annual percentage rates of 10, 12, and 14 percent.

(iii) *Five or more pricing tiers.* If a motor vehicle dealer using the tiered pricing method has five or more pricing tiers, the motor vehicle dealer complies with the requirements of paragraph (a) of this section by providing a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who does not qualify for the top two tiers (that is, the two lowest-priced tiers) and any other tier that, together

with the top tiers, comprise no less than the top 30 percent but no more than the top 40 percent of the total number of tiers. Each consumer placed within the remaining tiers must receive a risk-based pricing notice. For example, if a motor vehicle dealer has nine pricing tiers, the top three tiers (that is, the three lowest-priced tiers) comprise no less than the top 30 percent but no more than the top 40 percent of the tiers. Therefore, a motor vehicle dealer using this method would provide a risk-based pricing notice to each consumer to whom it grants, extends, or provides credit who is placed within the bottom six tiers.

(c) *Application to credit card issuers*—(1) *In general.* A credit card issuer subject to the requirements of paragraph (a) of this section may use one of the methods set forth in paragraph (b) of this section to identify consumers to whom it must provide a risk-based pricing notice. Alternatively, a credit card issuer may satisfy its obligations under paragraph (a) of this section by providing a risk-based pricing notice to a consumer when—

(i) A consumer applies for a credit card either in connection with an application program, such as a direct-mail offer or a take-one application, or in response to a solicitation under 12 CFR 226.5a, and more than a single possible purchase annual percentage rate may apply under the program or solicitation; and

(ii) Based in whole or in part on a consumer report, the credit card issuer provides a credit card to the consumer with an annual percentage rate referenced in § 640.2(n)(1)(ii) that is greater than the lowest annual percentage rate referenced in § 640.2(n)(1)(ii) available in connection with the application or solicitation.

(2) *No requirement to compare different offers.* A credit card issuer is not subject to the requirements of paragraph (a) of this section and is not required to provide a risk-based pricing notice to a consumer if—

(i) The consumer applies for a credit card for which the card issuer provides a single annual percentage rate referenced in § 640.2(n)(1)(ii), excluding a temporary initial rate that is lower than the rate that will apply after the temporary rate expires and a penalty rate that will apply upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit; or

(ii) The credit card issuer offers the consumer the lowest annual percentage rate referenced in § 640.2(n)(1)(ii) available under the credit card offer for which the consumer applied, even if a lower annual percentage rate referenced in § 640.2(n)(1)(ii) is available under a different credit card offer issued by the card issuer.

(3) *Examples.* (i) A credit card issuer sends a solicitation to the consumer that discloses several possible purchase annual percentage rates that may apply, such as 10, 12, or 14 percent, or a range of purchase annual percentage rates from 10 to 14 percent. The consumer applies for a credit card in response to the solicitation. The card issuer provides a credit card to the consumer with a purchase annual percentage rate of 12 percent based in whole or in part on a consumer report. Unless an exception applies under § 640.5, the card issuer may satisfy its obligations under paragraph (a) of this section by providing a risk-based pricing notice to the consumer because the consumer received credit at a purchase annual percentage rate greater than the lowest purchase annual percentage rate available under that solicitation.

(ii) The same facts as in the example in paragraph (c)(3)(i) of this section, except that the card issuer provides a credit card to the consumer at a purchase annual percentage rate of 10 percent. The card issuer is not required to provide a risk-based pricing notice to the consumer even if, under a different credit card solicitation, that consumer or other consumers might qualify for a purchase annual percentage rate of 8 percent.

(d) *Account review*—(1) *In general.* Except as otherwise provided in this part, a motor vehicle dealer is subject to the requirements of paragraph (a) of this section and must provide a risk-based pricing notice to a consumer in the form and manner required by this part if the motor vehicle dealer—

(i) Uses a consumer report in connection with a review of credit that has been extended to the consumer; and

(ii) Based in whole or in part on the consumer report, increases the annual percentage rate (the annual percentage rate referenced in § 640.2(n)(1)(ii) in the case of a credit card).

(2) *Example.* A credit card issuer periodically obtains consumer reports for the purpose of reviewing the terms of credit it has extended to consumers in connection with credit cards. As a result of this review, the credit card issuer increases the purchase annual percentage rate applicable to a consumer's credit card based in whole or in part on information in a consumer report. The credit card issuer is subject to the requirements of paragraph (a) of this section and must provide a risk-based pricing notice to the consumer.

§ 640.4 Content, form, and timing of risk-based pricing notices.

(a) *Content of the notice*—(1) *In general.* The risk-based pricing notice required by § 640.3(a) or (c) must include:

(i) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;

(ii) A statement that the terms offered, such as the annual percentage rate, have been set based on information from a consumer report;

(iii) A statement that the terms offered may be less favorable than the terms offered to consumers with better credit histories;

(iv) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(v) The identity of each consumer reporting agency that furnished a consumer report used in the credit decision;

(vi) A statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies;

(viii) A statement directing consumers to the websites of the Consumer Financial Protection Bureau and Federal Trade Commission to obtain more information about consumer reports; and

(ix) If a credit score of the consumer to whom a motor vehicle dealer grants, extends, or otherwise provides credit is used in setting the material terms of credit:

(A) A statement that a credit score is a number that takes into account information in a consumer report, that the consumer's credit score was used to set the terms of credit offered, and that a credit score can change over time to reflect changes in the consumer's credit history;

(B) The credit score used by the motor vehicle dealer in making the credit decision;

(C) The range of possible credit scores under the model used to generate the credit score;

(D) All of the key factors that adversely affected the credit score, which shall not exceed four key factors, except that if one of the key factors is the number of enquiries made with respect to the consumer report, the number of key factors shall not exceed five;

(E) The date on which the credit score was created; and

(F) The name of the consumer reporting agency or other person that provided the credit score.

(2) *Account review.* The risk-based pricing notice required by § 640.3(d) must include:

(i) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that credit history;

(ii) A statement that the credit card issuer has conducted a review of the account using information from a consumer report;

(iii) A statement that as a result of the review, the annual percentage rate on the account has been increased based on information from a consumer report;

(iv) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(v) The identity of each consumer reporting agency that furnished a consumer report used in the account review;

(vi) A statement that federal law gives the consumer the right to obtain a copy of a consumer report from the consumer reporting agency or agencies identified in the notice without charge for 60 days after receipt of the notice;

(vii) A statement informing the consumer how to obtain a consumer report from the consumer reporting agency or agencies identified in the notice and providing contact information (including a toll-free telephone number, where applicable) specified by the consumer reporting agency or agencies;

(viii) A statement directing consumers to the websites of the Consumer Financial Protection Bureau and Federal Trade Commission to obtain more information about consumer reports; and

(ix) If a credit score of the consumer whose extension of credit is under review is used in increasing the annual percentage rate:

(A) A statement that a credit score is a number that takes into account information in a consumer report, that the consumer's credit score was used to set the terms of credit offered, and that a credit score can change over time to reflect changes in the consumer's credit history;

(B) The credit score used by the credit card issuer in making the credit decision;

(C) The range of possible credit scores under the model used to generate the credit score;

(D) All of the key factors that adversely affected the credit score, which shall not exceed four key factors, except that if one of the key factors is the number of enquiries made with respect to the consumer report, the number of key factors shall not exceed five;

(E) The date on which the credit score was created; and

(F) The name of the consumer reporting agency or other person that provided the credit score.

(b) *Form of the notice*—(1) *In general.* The risk-based pricing notice required by § 640.3(a), (c), or (d) must be:

(i) Clear and conspicuous; and

(ii) Provided to the consumer in oral, written, or electronic form.

(2) *Model forms.* Model forms of the risk-based pricing notice required by § 640.3(a) and (c) are contained in appendices A–1 and A–6 of part 698. Appropriate use of Model form A–1 or A–6 is deemed to comply with the requirements of § 640.3(a) and (c). Model forms of the risk-based pricing notice required by § 640.3(d) are contained in appendices A–2 and A–7 of part 698. Appropriate use of Model form A–2 or A–7 is deemed to comply with the requirements of § 640.3(d). Use of the model forms is optional.

(c) *Timing*—(1) *General.* Except as provided in paragraph (c)(3) of this section, a risk-based pricing notice must be provided to the consumer—

(i) In the case of a grant, extension, or other provision of closed-end credit, before consummation of the transaction, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit, is communicated to the consumer by the motor vehicle dealer required to provide the notice;

(ii) In the case of credit granted, extended, or provided under an open-end credit plan, before the first transaction is made under the plan, but not earlier than the time the decision to approve an application for, or a grant, extension, or other provision of, credit is communicated to the consumer by the motor vehicle dealer required to provide the notice; or

(iii) In the case of a review of credit that has been extended to the consumer, at the time the decision to increase the annual percentage rate (annual percentage rate referenced in § 640.2(n)(1)(ii) in the case of a credit card) based on a consumer report is communicated to the consumer by the motor vehicle dealer required to provide the notice, or if no notice of the increase in the annual percentage rate is provided to the consumer prior to the effective date of the change in the annual percentage rate (to the extent permitted by law), no later than five days after the effective date of the change in the annual percentage rate.

(2) *Application to certain automobile lending transactions.* When a person to whom a credit obligation is initially payable grants, extends, or provides credit to a consumer for the purpose of financing the purchase of an automobile from an motor vehicle dealer or other party that is not affiliated with the person, any requirement to provide a risk-based pricing notice pursuant to this part is satisfied if the person:

(i) Provides a notice described in §§ 640.3(a), 640.5(e), or 640.5(f) to the consumer within the time periods set forth in paragraph (c)(1)(i) of this section, § 640.5(e)(3), or § 640.5(f)(4), as applicable; or

(ii) Arranges to have the motor vehicle dealer or other party provide a notice described in §§ 640.3(a), 640.5(e), or 640.5(f) to the consumer on its behalf within the time periods set forth in paragraph (c)(1)(i) of this section, § 640.5(e)(3), or § 640.5(f)(4), as applicable, and maintains reasonable policies and procedures to verify that the motor vehicle dealer or other party provides such notice to the consumer within the applicable time periods. If the person arranges to have the motor vehicle dealer or other party provide a notice described in § 640.5(e), the person's obligation is satisfied if the consumer receives a notice containing a credit score obtained by the dealer or other party, even if a different credit score is obtained and used by the person on whose behalf the notice is provided.

(3) *Timing requirements for contemporaneous purchase credit.* When credit under an open-end credit plan is granted, extended, or provided to a consumer in person or by telephone for the purpose of financing the contemporaneous purchase of goods or services, any risk-based pricing notice required to be provided pursuant to this part (or the disclosures permitted under § 640.5(e) or (f)) may be provided at the earlier of:

(i) The time of the first mailing by the motor vehicle dealer to the consumer after the decision is made to approve the grant, extension, or other provision of open-end credit, such as in a mailing containing the account agreement or a credit card; or

(ii) Within 30 days after the decision to approve the grant, extension, or other provision of credit.

(d) *Multiple credit scores*—(1) *In general.* When a motor vehicle dealer obtains or creates two or more credit scores and uses one of those credit scores in setting the material terms of credit, for example, by using the low, middle, high, or most recent score, the notices described in paragraphs (a)(1) and (2) of this section must include that credit score and information relating to that credit score required by paragraphs (a)(1)(ix) and (a)(2)(ix) of this section. When a motor vehicle dealer obtains or creates two or more credit scores and uses multiple credit scores in setting the material terms of credit by, for example, computing the average of all the credit scores obtained or created, the notices described in paragraphs (a)(1) and (2) of this section must include one of those credit scores and information relating to credit scores required by paragraphs (a)(1)(ix) and (a)(2)(ix) of this section. The notice may, at the motor vehicle dealer's option, include more than one credit score, along with the additional information specified in paragraphs (a)(1)(ix) and (a)(2)(ix) of this section for each credit score disclosed.

(2) *Examples.* (i) A motor vehicle dealer that uses consumer reports to set the material terms of automobile loans granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. That motor vehicle dealer must disclose the low score in the notices described in paragraphs (a)(1) and (2) of this section.

(ii) A motor vehicle dealer that uses consumer reports to set the material terms of automobile loans granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies, each of which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. That motor vehicle dealer may choose one of these scores to include in the notices described in paragraph (a)(1) and (2) of this section.

§ 640.5 Exceptions.

(a) *Application for specific terms*—(1) *In general.* A motor vehicle dealer is not required to provide a risk-based pricing notice to the consumer under § 640.3(a) or (c) if the consumer applies for specific material terms and is granted those terms, unless those terms were specified by the motor vehicle dealer using a consumer report after the consumer applied for or requested credit and after the motor vehicle dealer obtained the consumer report. For purposes of this section, ''specific material terms'' means a single material term, or set of material terms, such as an annual percentage rate of 10 percent, and not a range of alternatives, such as an annual percentage rate that may be 8, 10, or 12 percent, or between 8 and 12 percent.

(2) *Example.* A consumer receives a firm offer of credit from a motor vehicle dealer. The terms of the firm offer are based in whole or in part on information from a consumer report that the motor vehicle dealer obtained under the FCRA's firm offer of credit provisions. The solicitation offers the consumer a loan with an annual percentage rate of 12 percent. The consumer applies for and receives a loan with an annual percentage rate of 12 percent. Other customers of the motor vehicle dealer have an annual percentage rate of 10 percent. The exception applies because the consumer applied for specific material terms and was granted those terms. Although the motor vehicle dealer specified the annual percentage rate in the firm offer of credit based in whole or in part on a consumer report, the motor vehicle dealer specified that material term before, not after, the consumer applied for or requested credit.

(b) *Adverse action notice.* A motor vehicle dealer is not required to provide a risk-based pricing notice to the consumer under § 640.3(a), (c), or (d) if the motor vehicle dealer provides an adverse action notice to the consumer under section 615(a) of the FCRA.

(c) *Prescreened solicitations*—(1) *In general.* A motor vehicle dealer is not required to provide a risk-based pricing notice to the consumer under § 640.3(a) or (c) if the motor vehicle dealer:

(i) Obtains a consumer report that is a prescreened list as described in section 604(c)(2) of the FCRA; and

(ii) Uses the consumer report for the purpose of making a firm offer of credit to the consumer.

(2) *More favorable material terms.* This exception applies to any firm offer of credit offered by a motor vehicle dealer to a consumer, even if the motor vehicle dealer makes other firm offers of credit to other consumers on more favorable material terms.

(3) *Example.* A motor vehicle dealer obtains two prescreened lists from a consumer reporting agency. One list includes consumers with high credit scores. The other list includes consumers with low credit scores. The motor vehicle dealer mails a firm offer of credit to the high credit score consumers with an annual percentage rate of 10 percent. The motor vehicle dealer also mails a firm offer of credit to the low credit score consumers with an annual percentage rate of 14 percent. The motor vehicle dealer is not required to provide a risk-based pricing notice to the low credit score consumers who receive the 14 percent offer because use of a consumer report to make a firm offer of credit does not trigger the risk-based pricing notice requirement.

(d) *Loans secured by residential real property—credit score disclosure*—(1) *In general.* A motor vehicle dealer is not required to provide a risk-based pricing notice to a consumer under § 640.3(a) or (c) if:

(i) The consumer requests from the motor vehicle dealer an extension of credit that is or will be secured by one to four units of residential real property; and

(ii) The motor vehicle dealer provides to each consumer described in paragraph (d)(1)(i) of this section a notice that contains the following—

(A) A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(C) A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(D) The information required to be disclosed to the consumer pursuant to section 609(g) of the FCRA;

(E) The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score using the same scale as that of the credit score that is provided to the consumer, presented in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar or by other clear and readily understandable graphical means, or a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers. Use of a graph or statement obtained from the person providing the credit score that meets the requirements of this paragraph (d)(1)(ii)(E) is deemed to comply with this requirement;

(F) A statement that the consumer is encouraged to verify the accuracy of the

information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(G) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

(H) Contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(I) A statement directing consumers to the websites of the Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Form of the notice.* The notice described in paragraph (d)(1)(ii) of this section must be:

(i) Clear and conspicuous;

(ii) Provided on or with the notice required by section 609(g) of the FCRA;

(iii) Segregated from other information provided to the consumer, except for the notice required by section 609(g) of the FCRA; and

(iv) Provided to the consumer in writing and in a form that the consumer may keep.

(3) *Timing.* The notice described in paragraph (d)(1)(ii) of this section must be provided to the consumer at the time the disclosure required by section 609(g) of the FCRA is provided to the consumer, but in any event at or before consummation in the case of closed-end credit or before the first transaction is made under an open-end credit plan.

(4) *Multiple credit scores*—(i) *In general.* When a motor vehicle dealer obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraph (d)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a motor vehicle dealer obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by computing the average of all the credit scores obtained, the notice described in paragraph (d)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. The notice may, at the motor vehicle dealer's option, include more than one credit score, along with the additional information specified in paragraph (d)(1)(ii) of this section for each credit score disclosed.

(ii) *Examples.* (A) A motor vehicle dealer that uses consumer reports to set the material terms of credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies and uses the low score when determining the material terms it will offer to the consumer. That motor vehicle dealer must disclose the low score in the notice described in paragraph (d)(1)(ii) of this section.

(B) A motor vehicle dealer that uses consumer reports to set the material terms of mortgage credit granted, extended, or provided to consumers regularly requests credit scores from several consumer reporting agencies, each of which it uses in an underwriting program in order to determine the material terms it will offer to the consumer. That motor vehicle dealer may choose one of these scores to include in the notice described in paragraph (d)(1)(ii) of this section.

(5) *Model form.* A model form of the notice described in paragraph (d)(1)(ii) of this section consolidated with the notice required by section 609(g) of the FCRA is contained in 16 CFR part 698, appendix A. Appropriate use of Model Form A–3 is deemed to comply with the requirements of § 640.5(d). Use of the model form is optional.

(e) *Other extensions of credit—credit score disclosure*—(1) *In general.* A motor vehicle dealer is not required to provide a risk-based pricing notice to a consumer under § 640.3(a) or (c) if:

(i) The consumer requests from the motor vehicle dealer an extension of credit other than credit that is or will be secured by one to four units of residential real property; and

(ii) The motor vehicle dealer provides to each consumer described in paragraph (e)(1)(i) of this section a notice that contains the following—

(A) A statement that a consumer report (or credit report) is a record of the consumer's credit history and includes information about whether the consumer pays his or her obligations on time and how much the consumer owes to creditors;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time to reflect changes in the consumer's credit history;

(C) A statement that the consumer's credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(D) The current credit score of the consumer or the most recent credit score of the consumer that was previously calculated by the consumer reporting agency for a purpose related to the extension of credit;

(E) The range of possible credit scores under the model used to generate the credit score;

(F) The distribution of credit scores among consumers who are scored under the same scoring model that is used to generate the consumer's credit score using the same scale as that of the credit score that is provided to the consumer, presented in the form of a bar graph containing a minimum of six bars that illustrates the percentage of consumers with credit scores within the range of scores reflected in each bar, or by other clear and readily understandable graphical means, or a clear and readily understandable statement informing the consumer how his or her credit score compares to the scores of other consumers. Use of a graph or statement obtained from the person providing the credit score that meets the requirements of this paragraph (e)(1)(ii)(F) is deemed to comply with this requirement;

(G) The date on which the credit score was created;

(H) The name of the consumer reporting agency or other person that provided the credit score;

(I) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the report;

(J) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free report from each of the nationwide consumer reporting agencies once during any 12-month period;

(K) Contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(L) A statement directing consumers to the websites of the Federal Reserve Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Form of the notice.* The notice described in paragraph (e)(1)(ii) of this section must be:

(i) Clear and conspicuous;

(ii) Segregated from other information provided to the consumer; and

(iii) Provided to the consumer in writing and in a form that the consumer may keep.

(3) *Timing.* The notice described in paragraph (e)(1)(ii) of this section must be provided to the consumer as soon as reasonably practicable after the credit score has been obtained, but in any event at or before consummation in the

case of closed-end credit or before the first transaction is made under an open-end credit plan.

(4) *Multiple credit scores*—(i) *In General.* When a motor vehicle dealer obtains two or more credit scores from consumer reporting agencies and uses one of those credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by using the low, middle, high, or most recent score, the notice described in paragraph (e)(1)(ii) of this section must include that credit score and the other information required by that paragraph. When a motor vehicle dealer obtains two or more credit scores from consumer reporting agencies and uses multiple credit scores in setting the material terms of credit granted, extended, or otherwise provided to a consumer, for example, by computing the average of all the credit scores obtained, the notice described in paragraph (e)(1)(ii) of this section must include one of those credit scores and the other information required by that paragraph. The notice may, at the motor vehicle dealer's option, include more than one credit score, along with the additional information specified in paragraph (e)(1)(ii) of this section for each credit score disclosed.

(ii) *Examples.* The manner in which multiple credit scores are to be disclosed under this section are substantially identical to the manner set forth in the examples contained in paragraph (d)(4)(ii) of this section.

(5) *Model form.* A model form of the notice described in paragraph (e)(1)(ii) of this section is contained in 16 CFR part 698, appendix A. Appropriate use of Model Form A–4 is deemed to comply with the requirements of § 640.5(e). Use of the model form is optional.

(f) *Credit score not available*—(1) *In general.* A motor vehicle dealer is not required to provide a risk-based pricing notice to a consumer under § 640.3(a) or (c) if the motor vehicle dealer:

(i) Regularly obtains credit scores from a consumer reporting agency and provides credit score disclosures to consumers in accordance with paragraphs (d) or (e) of this section, but a credit score is not available from the consumer reporting agency from which the motor vehicle dealer regularly obtains credit scores for a consumer to whom the motor vehicle dealer grants, extends, or provides credit;

(ii) Does not obtain a credit score from another consumer reporting agency in connection with granting, extending, or providing credit to the consumer; and

(iii) Provides to the consumer a notice that contains the following—

(A) A statement that a consumer report (or credit report) includes information about the consumer's credit history and the type of information included in that history;

(B) A statement that a credit score is a number that takes into account information in a consumer report and that a credit score can change over time in response to changes in the consumer's credit history;

(C) A statement that credit scores are important because consumers with higher credit scores generally obtain more favorable credit terms;

(D) A statement that not having a credit score can affect whether the consumer can obtain credit and what the cost of that credit will be;

(E) A statement that a credit score about the consumer was not available from a consumer reporting agency, which must be identified by name, generally due to insufficient information regarding the consumer's credit history;

(F) A statement that the consumer is encouraged to verify the accuracy of the information contained in the consumer report and has the right to dispute any inaccurate information in the consumer report;

(G) A statement that federal law gives the consumer the right to obtain copies of his or her consumer reports directly from the consumer reporting agencies, including a free consumer report from each of the nationwide consumer reporting agencies once during any 12-month period;

(H) The contact information for the centralized source from which consumers may obtain their free annual consumer reports; and

(I) A statement directing consumers to the websites of the Board and Federal Trade Commission to obtain more information about consumer reports.

(2) *Example.* A motor vehicle dealer that uses consumer reports to set the material terms of credit granted, extended, or provided to consumers regularly requests credit scores from a particular consumer reporting agency and provides those credit scores and additional information to consumers to satisfy the requirements of paragraph (e) of this section. That consumer reporting agency provides to the motor vehicle dealer a consumer report on a particular consumer that contains one trade line, but does not provide the motor vehicle dealer with a credit score on that consumer. If the motor vehicle dealer does not obtain a credit score from another consumer reporting agency and, based in whole or in part on information in a consumer report, grants, extends, or provides credit to the consumer, the motor vehicle dealer may provide the notice described in paragraph (f)(1)(iii) of this section. If, however, the motor vehicle dealer obtains a credit score from another consumer reporting agency, the motor vehicle dealer may not rely upon the exception in paragraph (f) of this section, but may satisfy the requirements of paragraph (e) of this section.

(3) *Form of the notice.* The notice described in paragraph (f)(1)(iii) of this section must be:

(i) Clear and conspicuous;

(ii) Segregated from other information provided to the consumer; and

(iii) Provided to the consumer in writing and in a form that the consumer may keep.

(4) *Timing.* The notice described in paragraph (f)(1)(iii) of this section must be provided to the consumer as soon as reasonably practicable after the motor vehicle dealer has requested the credit score, but in any event not later than consummation of a transaction in the case of closed-end credit or when the first transaction is made under an open-end credit plan.

(5) *Model form.* A model form of the notice described in paragraph (f)(1)(iii) of this section is contained in 16 CFR part 698, appendix A. Appropriate use of Model Form A–5 is deemed to comply with the requirements of § 640.5(f). Use of the model form is optional.

§ 640.6 Rules of construction.

For purposes of this part, the following rules of construction apply:

(a) *One notice per credit extension.* A consumer is entitled to no more than one risk-based pricing notice under § 640.3(a) or (c), or one notice under § 640.5(d), (e), or (f), for each grant, extension, or other provision of credit. Notwithstanding the foregoing, even if a consumer has previously received a risk-based pricing notice in connection with a grant, extension, or other provision of credit, another risk-based pricing notice is required if the conditions set forth in § 640.3(d) have been met.

(b) *Multi-party transactions*—(1) *Initial creditor.* The motor vehicle dealer to whom a credit obligation is initially payable must provide the risk-based pricing notice described in § 640.3(a) or (c), or satisfy the requirements for and provide the notice required under one of the exceptions in § 640.5(d), (e), or (f), even if that motor vehicle dealer immediately assigns the credit agreement to a third party and is not the source of funding for the credit.

(2) *Purchasers or assignees.* A purchaser or assignee of a credit contract with a consumer is not subject to the requirements of this part and is not required to provide the risk-based pricing notice described in § 640.3(a) or (c), or satisfy the requirements for and provide the notice required under one of the exceptions in § 640.5(d), (e), or (f).

(3) *Examples.* (i) A consumer obtains credit to finance the purchase of an automobile. If the motor vehicle dealer is the person to whom the loan obligation is initially payable, such as where the motor vehicle dealer is the original creditor under a retail installment sales contract, the motor vehicle dealer must provide the risk-based pricing notice to the consumer (or satisfy the requirements for and provide the notice required under one of the exceptions noted in paragraph (b) of this section), even if the motor vehicle dealer immediately assigns the loan to a bank or finance company. The bank or finance company, which is an assignee, has no duty to provide a risk-based pricing notice to the consumer.

(ii) A consumer obtains credit to finance the purchase of an automobile. If a bank or finance company is the person to whom the loan obligation is initially payable, the bank or finance company must provide the risk-based pricing notice to the consumer (or satisfy the requirements for and provide the notice required under one of the exceptions noted in paragraph (b) of this section) based on the terms offered by that bank or finance company only. The motor vehicle dealer has no duty to provide a risk-based pricing notice to the consumer. However, the bank or finance company may comply with this rule if the motor vehicle dealer has agreed to provide notices to consumers before consummation pursuant to an arrangement with the bank or finance company, as permitted under § 640.4(c).

(c) *Multiple consumers*—(1) *Risk-based pricing notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a motor vehicle dealer must provide a notice to each consumer to satisfy the requirements of § 640.3(a) or (c). Whether the consumers have the same address or not, the motor vehicle dealer must provide a separate notice to each consumer if a notice includes a credit score(s). Each separate notice that includes a credit score(s) must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer. If the consumers have the same address, and the notice does not include a credit score(s), a motor vehicle dealer may satisfy the requirements by providing a single notice addressed to both consumers.

(2) *Credit score disclosure notices.* In a transaction involving two or more consumers who are granted, extended, or otherwise provided credit, a motor vehicle dealer must provide a separate notice to each consumer to satisfy the exceptions in § 640.5(d), (e), or (f). Whether the consumers have the same address or not, the motor vehicle dealer must provide a separate notice to each consumer. Each separate notice must contain only the credit score(s) of the consumer to whom the notice is provided, and not the credit score(s) of the other consumer.

(3) *Examples.* (i) Two consumers jointly apply for credit with a creditor. The creditor obtains credit scores on both consumers. Based in part on the credit scores, the creditor grants credit to the consumers on material terms that are materially less favorable than the most favorable terms available to other consumers from the creditor. The creditor provides risk-based pricing notices to satisfy its obligations under this subpart. The creditor must provide a separate risk-based pricing notice to each consumer whether the consumers have the same address or not. Each risk-based pricing notice must contain only the credit score(s) of the consumer to whom the notice is provided.

(ii) Two consumers jointly apply for credit with a creditor. The two consumers reside at the same address. The creditor obtains credit scores on each of the two consumer applicants. The creditor grants credit to the consumers. The creditor provides credit score disclosure notices to satisfy its obligations under this part. Even though the two consumers reside at the same address, the creditor must provide a separate credit score disclosure notice to each of the consumers. Each notice must contain only the credit score of the consumer to whom the notice is provided.

By direction of the Commission, Commissioner Slaughter and Commissioner Wilson not participating.

April J. Tabor,

Acting Secretary.

[FR Doc. 2020–19529 Filed 10–7–20; 8:45 am]

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POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2020–13; Order No. 5694]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is acknowledging a recent filing requesting the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports (Proposal Six). This document informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 24, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

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

SUPPLEMENTARY INFORMATION:

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I. Introduction

On September 15, 2020, the Postal Service filed a petition pursuant to 39 CFR 3050.11, requesting that the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports.[1] The Petition identifies the proposed analytical changes filed in this docket as Proposal Six.

II. Proposal Six

Background. Proposal Six introduces a new methodology for estimating volume variabilities for certain mail processing cost pools: Delivery Barcode Sorter (DBCS), Automated Flats Sorting Machine (AFSM) 100, and Flats Sequencing System (FSS). Petition, Proposal Six at 1. The cost pools at issue involve labor expenses associated with the distribution of letters (DBCS) and flats (AFSM 100 and FSS). *Id.* at 2. The

[1] Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Six), September 15, 2020 (Petition). The Petition was accompanied by a study supporting its proposal. *See* A. Thomas Bozzo & Tim Huegerich, Analysis of Labor Variability for Automated Letter and Flat Sorting, Christensen Associates, September 15, 2020 (Variability Report). The Postal Service also filed a notice of filing of public and non-public materials relating to Proposal Six. Notice of Filing of USPS–RM2020–13–1 and USPS–RM2020–13–NP1 and Application for Nonpublic Treatment, September 15, 2020.

Postal Service states that accrued labor costs in these three cost pools totaled $2.3 billion in FY 2019. *Id.* at 1.

The main factor determining labor requirements for sorting operations is the number of pieces inducted into the operation for processing, total pieces fed (TPF) in the Management Operating Data System (MODS). *Id.* at 2; Variability Report at 7. In automated distribution operations, the actual number of handlings are directly counted by the sorting equipment and automatically transmitted from the equipment to the Web End-of-Run (WebEOR) system. Petition, Proposal Six at 2. MODS collects and aggregates piece handlings and runtime data through automated interfaces with WebEOR. *Id.* Labor usage or workhour data by operation are derived from time clock rings reported to MODS through the Time and Attendance Collection System. *Id;* Variability Report at 15.

Currently, In-Office Cost System tallies are used to partition the mail processing cost pools into activities assumed to be 100-percent volume-variable, and other activities assumed to be non-volume-variable. *Id.* The basis for such determination was an assumption that mail processing costs should vary in proportion to the volume of mail or articles processed. *See* Variability Report at 4. For the operations that are the subject of this analysis, the associated mail processing costs were taken to be 99.1-percent volume-variable in FY 2019 under the accepted methodology. *Id.*

This methodology has been in use since Docket No. R71–1, and its origins predate the Postal Reorganization Act and the development of the automated mail processing technologies in this proposal. Petition, Proposal Six at 2. The Postal Service states that the Commission previously declined to adopt any empirical models for mail processing variability, citing data and econometric issues. *Id.* at 3. However, the Postal Service explains that several factors merit re-examination, including volume changes, the reliability of automated counts of mailpiece handlings, and the availability of machine utilization data. *Id.* at 4.

Proposal. The proposed methodology is based on econometric analysis of workhour and workload data collected by the Postal Service on an ongoing basis. *Id.* at 1. Specifically, the estimation of the proposed variabilities employs monthly MODS datasets compiled into a multi-year panel dataset. *Id.* at 5. The variabilities are derived from a regression equation of the natural logarithm, where workhours are used as a dependent variable and the TPF (current and lagged) as well as seasonal dummy variables are used as explanatory variables. *Id.* The regression sample periods cover the most recent 4 fiscal years and would be rolled forward to allow for re-estimating the variabilities annually. *Id.* The variabilities estimated for the three cost pools during a FY 2016–FY 2019 sample period are 0.976 for DBCS, 0.774 for AFSM 100, and 0.804 for FSS. *Id.* at 6.

Impact. The proposed methodology would permit re-estimation of the variabilities because the underlying data are produced in the course of Postal Service operations and are already included in the Annual Compliance Report. *Id.* at 1–2. The Postal Service concludes that the proposed methodology would reduce FY 2019 volume-variable labor costs for the three cost pools by 8.3 percent overall. *Id.* at 6. The Postal Service also states that, including piggybacks, the proposal reduces measured volume-variable and product-specific costs in the Cost and Revenue Analysis C Report by 0.79 percent. *Id.* The Postal Service provides a table showing the effects of the proposed variabilities on product unit costs. *Id.* at 6–8. In a separate table filed under seal, the Postal Service shows the impacts of the proposal on individual Competitive products.[2]

III. Notice and Comment

The Commission establishes Docket No. RM2020–13 for consideration of matters raised by the Petition. More information on the Petition may be accessed via the Commission's website at *http://www.prc.gov.* Interested persons may submit comments on the Petition and Proposal Six no later than November 24, 2020. Pursuant to 39 U.S.C. 505, Lawrence Fenster is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2020–13 for consideration of the matters raised by the Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Six), filed September 15, 2020.

2. Comments by interested persons in this proceeding are due no later than November 24, 2020.[3]

3. Pursuant to 39 U.S.C. 505, the Commission appoints Lawrence Fenster to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2020–21416 Filed 10–7–20; 8:45 am]

BILLING CODE 7710–FW–P

[2] *See* Library Reference USPS–RM2020–13/NP1, September 15, 2020.

[3] The Commission reminds interested persons that its revised and reorganized Rules of Practice and Procedure became effective April 20, 2020, and should be used in filings with the Commission after April 20, 2020. The new rules are available on the Commission's website and can be found in Order No. 5407. *See* Docket No. RM2019–13, Order Reorganizing Commission Regulations and Amending Rules of Practice, January 16, 2020 (Order No. 5407).

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2019–0018; FXES11130900000–190–FF09320000]

RIN 1018–BE09

Endangered and Threatened Wildlife and Plants; Reclassification of the Red-Cockaded Woodpecker From Endangered to Threatened With a Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to reclassify the red-cockaded woodpecker (*Dryobates* (= *Picoides*) *borealis*) as a threatened species with a rule issued under section 4(d) of the Endangered Species Act of 1973 (Act), as amended. If we finalize this rule as proposed, it would reclassify the red-cockaded woodpecker from endangered to threatened on the List of Endangered and Threatened Wildlife (List). This proposal is based on a thorough review of the best available scientific and commercial data, which indicate that the species' status has improved such that it is not currently in danger of extinction throughout all or a significant portion of its range. We are also proposing a rule under the authority of section 4(d) of the Act that provides measures that are necessary and advisable to provide for the conservation of the red-cockaded woodpecker. In addition, we correct the

List to reflect that *Picoides* is not the current scientifically accepted generic name for this species. We seek information, data, and comments from the public regarding this proposal.

DATES: We will accept comments received or postmarked on or before December 7, 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 public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by November 23, 2020.

ADDRESSES: 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–R4–ES–2019–0018, 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, click on 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 or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2019–0018, U.S. Fish and Wildlife Service, MS: JAO/1N, 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: This proposed rule and supporting documents (including the species status assessment report and references cited) are available at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2019–0018 and at the Southeast Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Aaron Valenta, Chief, Division of Restoration and Recovery, U.S. Fish and Wildlife Service, Southeast Regional Office, 1875 Century Boulevard, Atlanta, GA 30345; telephone 404–679–4144. 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, a species may warrant reclassification from endangered to threatened if it no longer meets the definition of an endangered species. The red-cockaded woodpecker is listed as endangered, and we are proposing to reclassify it as threatened because we have determined it is no longer in danger of extinction throughout all or a significant portion of its range. However, we have determined that the species meets the definition of a threatened species, in that it is in danger of extinction in the foreseeable future throughout all of its range. We may only list, reclassify, or delist a species by issuing a rule to do so; therefore, for the red-cockaded woodpecker, we must first publish a proposed rule in the **Federal Register** to reclassify the species and request public comments on the proposal. Furthermore, take prohibitions of section 9 of the Act can only be applied to threatened species by issuing a section 4(d) rule. Finally, we are changing the scientific name of the red-cockaded woodpecker in the List of Endangered and Threatened Wildlife from *Picoides borealis* to *Dryobates borealis,* and such action can only be taken by issuing a rule.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species based on any one or a combination of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. The factors for downlisting a species (changing its status from endangered to threatened) are the same as for listing it. We have determined that the red-cockaded woodpecker is no longer at risk of extinction and, therefore, does not meet the definition of endangered, but it is still affected by the following current and ongoing stressors to the extent that the species meets the definition of a threatened species under the Act:

- Lack of suitable roosting, nesting, and foraging habitat due to legacy effects from historical logging, incompatible forest management, and conversion of forests to urban and agricultural uses (Factor A).
- Fragmentation of habitat, with resulting effects on genetic variation, dispersal, and connectivity to support demographic populations (Factor A).
- Stochastic events such as hurricanes, ice storms, and wildfires, exacerbated by the environmental effects of climate change (Factor E).
- Small populations (Factor E).

We are also proposing a section 4(d) rule. When a species is listed as threatened, section 4(d) of the Act allows for the issuance of regulations that are necessary and advisable to provide for the conservation of the species. Accordingly, we are proposing a 4(d) rule for the red-cockaded woodpecker that would, among other things, prohibit incidental take associated with actions that would result in the further loss or degradation of red-cockaded woodpecker habitat, including impacts to cavity trees, actions that would harass red-cockaded woodpeckers during breeding season, and use of insecticides near clusters. The section 4(d) rule would also prohibit incidental take associated with the installation of artificial cavities and inspections of cavity contents, unless covered under a section 10(a)(1)(A) permit. The section 4(d) rule would also, among other things, except from prohibitions incidental take associated with conservation or habitat restoration activities carried out in accordance with a Service- or State-approved management plan providing for red-cockaded woodpecker conservation, incidental take associated with red-cockaded woodpecker management and military training activities on Department of Defense installations with a Service-approved integrated natural resources management plan, certain actions that would harm or harass red-cockaded woodpeckers during breeding season associated with existing infrastructure that are not increases in the existing activities, and activities authorized by a permit under § 17.32.

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 sought the expert opinions of six appropriate specialists regarding the species status assessment (SSA) report that informed this proposed rule. The purpose of peer review is to ensure that our reclassification determination is based on scientifically sound data, assumptions, and analyses. The peer reviewers have expertise in: (1) The life history and population dynamics of the red-cockaded woodpecker; (2) fire ecology and forest habitat conditions; and (3) conservation management.

Information Requested

We intend that any final action resulting from this 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 and information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested party concerning this proposed rule.

We particularly seek comments on:

(1) Information concerning the biology and ecology of the red-cockaded woodpecker.

(2) Relevant data concerning any stressors (or lack thereof) to the red-cockaded woodpecker, particularly the effects of habitat loss, small populations, habitat fragmentation, and hurricanes and other severe natural events.

(3) Current or planned activities within the geographic range of the red-cockaded woodpecker that may negatively impact or benefit the species.

(4) Reasons why we should or should not reclassify the red-cockaded woodpecker from an endangered species to a threatened species under the Act (16 U.S.C. 1531 *et seq.*).

(5) Information about current or proposed land management plans and conservation plans for the red-cockaded woodpecker, and whether they may negatively impact or benefit the species, including the likelihood of such plans and their associated management activities persisting into the future.

(6) Information on regulations that are necessary and advisable for the conservation and management of the red-cockaded woodpecker and that the Service can consider in developing a 4(d) rule for the species, including whether the measures outlined in the proposed 4(d) rule are necessary and advisable for the conservation of the red-cockaded woodpecker. We particularly seek comments concerning:

(a) The extent to which we should include any of the section 9 prohibitions in the 4(d) rule, including whether there are additional activities or management actions that should be prohibited or excepted from the prohibitions for incidental take of the red-cockaded woodpecker;

(b) Whether it is appropriate to prohibit use of insecticides and herbicides on standing pine trees within 0.50 mile from the center of an active cavity tree cluster, including whether the spatial area covered by this prohibition is appropriate;

(c) Whether it is appropriate to prohibit operations conducted near active cavity trees that render cavity trees unusable to red-cockaded woodpeckers, and what types of operations and actions should be included in this prohibition;

(d) Whether any other forms of take should be excepted from the prohibitions in the 4(d) rule, including activities that should be excepted from the prohibitions for incidental take of the red-cockaded woodpecker once a property is being managed in accordance with a Service- or State-approved management plan, and what factors should be included in a Service- or State-approved management plan;

(e) What additional conditions, if any, should be placed upon State-approved management plans such that they provide adequate protection to red-cockaded woodpeckers, for example, the type and extent of monitoring and reporting to the Service;

(f) Whether an exception should be made for habitat regeneration activities without a Service- or State-approved management plan, and what limiting conditions should be placed on such activities;

(g) Whether it is appropriate to except from the prohibitions red-cockaded woodpecker management and military training activities on Department of Defense installations with a Service-approved integrated natural resources management plan;

(h) Whether the installation of artificial cavities should be excepted from the prohibitions for incidental take of red-cockaded woodpecker for individuals who have completed training and have achieved a certain level of proficiency, and what that training and proficiency should be; and,

(i) Whether there are additional provisions the Service may wish to consider for the 4(d) rule in order to conserve, recover, and manage the red-cockaded woodpecker. Please include sufficient information (such as scientific journal articles, or other credible publications) to allow the Service to verify any scientific or commercial information you include.

(7) Whether the red-cockaded woodpecker warrants delisting.

Please note that submissions merely stating support for or opposition to the listing 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.''

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 hard copy 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,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Southeast Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5)(E) 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** at least 15 days before the hearing.

Previous Federal Actions

The red-cockaded woodpecker was listed as endangered on October 13, 1970 (35 FR 16047) under the Endangered Species Conservation Act of 1969, and received Federal protection with the passage of the Endangered Species Act in 1973. The most recent revision to the red-cockaded woodpecker recovery plan was released on January 27, 2003 (USFWS 2003, entire; see 68 FR 13710, March 20, 2003). The latest 5-year review was completed on October 5, 2006 (USFWS 2006 entire); that 5-year review did not recommend changing the classification of the red-cockaded woodpecker. However, since the 5-year review, we have acquired new information and conducted a thorough analysis, documented in an SSA report (USFWS 2020, entire). We also initiated another 5-year review for the species on August 6, 2018 (83 FR 38320); because we have determined the species now meets the definition of a threatened species under the Act, this proposed rule will equate to our 5-year review.

Background

A thorough review of the taxonomy, life history, ecology, and overall viability of the red-cockaded woodpecker is presented in the SSA report (USFWS 2020, entire; available at *https://www.fws.gov/southeast/* and at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2019–0018). Below is a summary of the information presented in the SSA report. For further details, please refer to the SSA report.

Species Description and Needs

The red-cockaded woodpecker is a territorial, non-migratory bird species that makes its home in mature pine forests in the southeastern United States. Once a common bird distributed contiguously across the southeastern United States, the red-cockaded woodpecker's rangewide estimates made around the time of listing in 1970 indicated a decline to fewer than 10,000 individuals (approximately 1,500 to 3,500 active clusters; an aggregate of cavity trees used by a group of woodpeckers for nesting and roosting) in widely scattered, isolated, and declining populations (Jackson 1971, pp. 12–20; Jackson 1978, entire; USFWS 1985, p. 22; Ligon *et al.* 1986, pp. 849–850).

Due to changes in how red-cockaded woodpecker populations have been defined and surveyed over the years and with more comprehensive surveys over time, it is difficult to make accurate comparisons today with the species' status when it was listed. The species continued to decline even after listing until the early-1990s. However, by 1995, the red-cockaded woodpecker population had increased to about 4,694 active clusters or active territories rangewide (Costa and Walker 1995, p. 86). Today, the Service's conservative estimate is about 7,800 active clusters rangewide (USFWS 2020, pp. 14, 106–108), between 2 and 5 times the number of clusters at the time of listing.

Red-cockaded woodpeckers were once common throughout open, fire-maintained pine ecosystems, particularly longleaf pine that covered approximately 92 million acres before European settlement (Frost 1993, p. 20). The birds inhabited the open pine forests of the Southeast from New Jersey, Maryland, and Virginia to Florida, and west to Texas and north to portions of Oklahoma, Missouri, Tennessee, and Kentucky (Jackson 1971, entire). Original pine forests were old and open, and contained a structure dominated by two layers, a canopy and diverse herbaceous ground cover, maintained by frequent low-intensity fire (Brockway et al. 2006, pp. 96–98). Both the longleaf pine and other open pine ecosystems were eliminated from much of their original range because of early (1700s) European settlement, widespread commercial timber harvesting, and the naval stores/turpentine industry (1800s). Early to mid-1900 commercial tree farming, urbanization, and agriculture contributed to further declines. Much of the remaining habitat is very different from the vast, historical pine forests in which the red-cockaded woodpecker evolved. The second growth longleaf pine forests of today, rather than being dominated by centuries-old trees as the original forests were, are just reaching that age (90–100 years) required to meet all the needs of the red-cockaded woodpecker. Furthermore, in many cases, the absence of fire has caused the original open savannahs to degrade into dense pine/hardwood forest. Much of today's forest is young and dense, and dominated by loblolly pine, with a substantial hardwood component and little or no herbaceous groundcover (Noel *et al.* 1998, entire; Frost 2006, pp. 37–38).

Nesting and roosting habitat of red-cockaded woodpeckers varies across the species' range. The largest populations tend to occur in the longleaf pine woodlands and savannahs of the East Gulf Coastal Plain, South Atlantic Coastal Plain, Mid-Atlantic Coastal Plain, and Carolina Sandhills (Carter 1971, p. 98; Hooper *et al.* 1982, entire; James 1995, entire; Engstrom *et al.* 1996, p. 334). The shortleaf/loblolly forests of the Piedmont, Cumberlands, and Ouachita Mountain regions (Mengel 1965, pp. 306–308; Sutton 1967, pp. 319–321; Hopkins and Lynn 1971, p. 146; Steirly 1973, p. 80) are another important habitat type. Red-cockaded woodpeckers also occupy a variety of additional pine habitat types at the edges of their range, including slash (*Pinus elliottii*), pond (*P. serotina*), pitch (*P. rigida*), and Virginia pines (*P. virginiana*) (Steirly 1957, entire; Lowery 1974, p. 415; Mengel 1965, pp. 206–308; Sutton 1967, pp. 319–321; Jackson 1971, pp. 12–20; Murphy 1982, entire). Where multiple pine species exist, red-cockaded woodpeckers appear to prefer longleaf pine (Lowery 1974, p. 415; Hopkins and Lynn 1971, p. 146; Jackson 1971, p. 15; Bowman and Huh 1995, pp. 415–416).

The red-cockaded woodpecker is a relatively small woodpecker. Adults measure 20 to 23 centimeters (8 to 9 inches) and weigh roughly 40 to 55 grams (1.5 to 1.75 ounces) (Jackson 1994, p. 3; Conner *et al.* 2001, pp. 53–54). Both male and female adult red-cockaded woodpeckers are black and white with a ladder back and large white cheek patches. These cheek patches distinguish red-cockaded woodpeckers from all other woodpeckers in their range. The red ''cockade'' of the species' common name is actually a tiny red streak on the upper cheek of males that is very difficult to see in the field.

Red-cockaded woodpeckers were first described as *Picus borealis* (Vieillot 1807, p. 66). The species' English common name is a reference to the several red feathers on the cheek of males, which are briefly displayed when the male is excited (Wilson 1810, p. 103). The original rule identifying the red-cockaded woodpecker as an endangered species (35 FR 16047; October 13, 1970) listed its scientific name as *Dendrocopus borealis,* based on the American Ornithological Union (AOU) 1946 22nd supplement to the 4th AOU checklist edition (AOU 1947, p. 449). The AOU 6th edition (AOU 1982, p. 10CC) classified the species as *Picoides borealis,* the scientific name under which the red-cockaded woodpecker is currently identified in the Federal List of Endangered and Threatened Wildlife (List). The AOU has since merged with the Cooper Ornithological Society and is now known as the American Ornithological Society (AOS). In the recent 59th supplement to the AOS' checklist of North American birds, the AOS Committee on Classification and Nomenclature (Committee) changed the classification of *Picoides borealis* to *Dryobates borealis* (Chesser *et al.* 2018, pp. 798–800). In doing so, the Committee considered, among other data, results of phylogenetic analyses with nuclear and mitochondrial DNA (Weibel and Moore 2002a, entire; Weibel and Moore 2002b, entire; Winkler *et al.* 2014, entire; Fuchs and Pons 2015, entire; Shakya *et al.* 2017, entire) indicating that the genus *Picoides* was not monophyletic (descended from a common evolutionary ancestor or ancestral group). As a result, the genus *Picoides* was retained for the American three-toed woodpecker (*P. dorsalis*) and the black-backed woodpecker (*P. arcticus*), but all other North American woodpeckers formerly in *Picoides* were transferred to *Dryobates.* We accept the change of the red-cockaded woodpecker's classification from *Picoides borealis* to *Dryobates borealis,* and in this rulemaking, we amend the scientific name to match the currently accepted AOS nomenclature.

Red-cockaded woodpeckers live in groups that share, and jointly defend,

territories throughout the year. Group living is a characteristic of their cooperative breeding system. In cooperative breeding systems, some mature adults forego reproduction and instead assist in raising the offspring of the group's breeding male and female (Emlen 1991, entire). In red-cockaded woodpecker groups, these helpers are typically male, and participate in incubation, feeding, and brooding of nestlings and in feeding of fledglings, as well as territory defense, nest defense, and cavity excavation (Lennartz *et al.* 1987, entire). A potential breeding group may consist of zero to as many as five helpers, but most potential breeding groups consist of only a breeding pair plus one to two helpers. A red-cockaded woodpecker group occupying and defending its territory usually consists of a potential breeding group. A red-cockaded woodpecker group in about 10 percent of cases consists of single-male that defends its territory while awaiting an adult breeding female. Red-cockaded woodpeckers are highly monogamous (Haig *et al.* 1994b, entire). Group living, however, strongly affects population dynamics. While not actively breeding themselves, helpers provide a pool of replacement breeders and thereby act as a buffer between mortality and productivity. In other words, the number of groups within a red-cockaded woodpecker population is not strongly affected by either productivity or mortality in the previous year. Instead, the number of helpers is affected by these variables, while the number of potential breeding groups remain constant.

Young birds either disperse in their first year or remain on the natal territory and become a helper. First-year dispersal is the dominant strategy for females, but both strategies are common among males (Walters *et al.* 1988, pp. 287–301; Walters and Garcia 2016, pp. 69–72). Male helpers may become breeders by inheriting breeding status on their natal territory or by dispersing to fill a breeding vacancy at another territory (Walters *et al.* 1992, p. 625). When helpers move, it is usually to an adjacent or nearby territory; they rarely disperse across more than two territories (Kesler *et al.* 2010, entire). Female helpers almost never inherit the breeding position on their natal territory, instead relying on dispersal to neighboring territories to become breeders. Although some young birds disperse long distances (more than 100 kilometers (km) in a few cases; Conner *et al.* 1997c, entire; Ferral *et al.* 1997, entire; Costa and DeLotelle 2006, pp. 79–83), typical dispersal distance of juvenile females is only two territories from the natal site, with 90 percent dispersing one to four territories from the natal site (Daniels 1997, pp. 59–61; Daniels and Walters 2000a, pp. 486–487; Kesler *et al.* 2010, entire). Juvenile males are even more sedentary; about 70 percent of males remain on their natal territory or an immediately adjacent territory at age one, mostly as helpers with a few as breeders (Walters 1991, pp. 508–510; Daniels 1997, p. 66; Kesler *et al.* 2010, pp. 1339–1340; Conner *et al.* 2001 p. 143).

Red-cockaded woodpeckers are unique among North American woodpeckers in that they nest and roost in cavities they excavate in living pines (Steirly 1957, p. 282; Jackson 1977, entire). Cavities are an essential resource for red-cockaded woodpeckers throughout the year, because the birds use them for roosting year-round, as well as nesting seasonally. Each individual in a group has its own roost cavity, and the group usually nests in the breeding male's cavity. The aggregation of active and inactive cavity trees within the area defended by a single group is termed the cavity tree cluster (Conner *et al.* 2001, p. 106). This aggregation of cavity trees is dynamic, changing in shape as new cavity trees are added through excavation and existing cavity trees are lost to death or a neighboring group. Excavation of cavities in live pines is an extremely difficult task, making a cluster of cavity trees an extremely valuable resource. Expansion into new territories, therefore, happens more frequently through ''budding,'' or the splitting of an existing territory with cavity trees into two, rather than ''pioneering,'' or the construction of a new cavity tree cluster.

The development of techniques to construct artificial cavities (Copeyon 1990, entire; Allen 1991, entire) offset the lack of natural cavities and provided managers a new tool to greatly increase cavity availability, especially after storms. Red-cockaded woodpeckers readily adopt these artificial cavities. Thousands of artificial cavities have been installed since the early 1990s, and most populations are currently dependent on the installation and maintenance of artificial cavities for their viability.

Red-cockaded woodpeckers require open pine woodlands and savannahs with large, old pines for nesting and roosting. Old pines are required as cavity trees because cavity chambers must be completely within the heartwood to prevent pine resin in the sapwood from entering the chamber (Conner *et al.* 2001, pp. 79–155); a tree must be old and large enough to have sufficient heartwood to contain a cavity. In addition, old pines have a higher incidence of the heartwood decay that greatly facilitates cavity excavation. Cavity trees must be in open stands with little or no hardwood midstory and few or no overstory hardwoods. Hardwood encroachment on cavity trees resulting from fire suppression is a well-known cause of cluster abandonment.

Fire suppression also affects foraging. Over 75 percent of the red-cockaded woodpecker's diet consists of arthropods. Individuals generally capture arthropods on and under the outer bark of live pines and in dead branches of live pines. A large proportion of the arthropods on pine trees crawl up into the trees from the ground, which implies the condition of the ground cover is an important factor influencing abundance of prey for red-cockaded woodpecker (Hanula and Franzreb 1998, entire). The density of pines has a negative relationship with arthropod abundance and biomass, likely due at least in part to the negative effect of pine density on ground cover, from which some of the prey comes (Hanula *et al.* 2000, entire). Arthropod abundance and biomass also increase with the age and size of pines (Hooper 1996, entire; Hanula *et al.* 2000, entire), which is another reason older pines are so critical to this species. Accordingly, suitable foraging habitat generally consists of mature pines with an open canopy, low densities of small pines, a sparse hardwood or pine midstory, few or no overstory hardwoods, and abundant native bunchgrass and forb groundcovers. Frequent fire likely increases foraging habitat quality by reducing hardwoods and by increasing the abundance and perhaps nutrient value of prey (James *et al.* 1997, entire; Hanula *et al.* 2000, entire; Provencher *et al.* 2002, entire). Thus, frequent growing season fire may be critical in providing red-cockaded woodpeckers with abundant prey.

Home ranges of red-cockaded woodpeckers vary from 40.5 to 161.9 hectares (ha) (100 to 400 acres (ac)) per group, depending on the quality of foraging habitat. Red-cockaded woodpecker groups in high-quality habitat, particularly old growth or restored, fire-maintained habitat, exhibit much smaller home range and territory sizes than groups in fire-suppressed habitat (Nesbitt *et al.* 1983, entire; Engstrom and Sanders 1997, entire). The fitness of red-cockaded woodpecker groups also increases where foraging areas are burned regularly, resulting in sparse hardwood midstory and an abundant grass and forb groundcover.

Given the historical loss of significant portions of its native habitat, and generations of fire suppression degrading remaining old growth and new second-growth habitat, aggressive management of habitat through prescribed burning and other vegetation manipulation is key to the conservation strategy of red-cockaded woodpeckers. In addition, the small amount of old growth habitat that remains still has potential to attract woodpeckers if prescribed burning and other tools are deployed to reduce the midstory; therefore, these habitats should also be aggressively managed.

Currently, red-cockaded woodpeckers are distributed largely as discrete populations, with large gaps of unoccupied land between. An improvement from the species' status at the time of listing, these gains are due to intensive management implemented beginning in the 1990s. Except in rare instances, these populations remain dependent on conservation actions, such as prescribed fire, forest management with compatible silviculture, placement and maintenance of artificial cavities within existing clusters, creation of new recruitment clusters using artificial cavities and translocation, and monitoring of population and habitat conditions.

Summary of Stressors and Conservation Measures Affecting the Species

Section 4(a)(1) of the Act directs us to determine whether any species is an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. The factors for downlisting a species (changing its status from endangered to threatened) are the same as for listing it.

In the SSA report, we review the factors (*i.e.,* threats, stressors) that could be affecting the red-cockaded woodpecker now or in the future. However, in this proposed rule, we will focus our discussion on those factors that could meaningfully impact the status of the species. Below is a summary of those factors. The results of the SSA report are discussed later in this proposed rule. For further information, see the SSA report (USFWS 2020, entire).

The primary risk factor (*i.e.,* stressor) affecting the status of the red-cockaded woodpecker remains the lack of suitable habitat (Factor A). Wildfire, pine beetles, ice storms, tornadoes, hurricanes, and other naturally occurring disturbances that destroy pines used for cavities and foraging are stressors for the red-cockaded woodpecker (Factor E), especially given the high number of very small woodpecker populations (Factor E) (USFWS 2020, pp. 38–39, 81–83, 103, 119–127). Increases in number and severity of major hurricanes (Bender *et al.* 2010, entire; Knutson *et al.* 2010, entire; Walsh *et al.* 2014, pp. 41–42), is expected to increase in response to global climate change, and this could also disproportionately affect the smaller, less resilient woodpecker populations (Factor E). With rare exception, the vast majority of red-cockaded woodpecker populations remain dependent on artificial cavities due to the absence of sufficient old pines for natural cavity excavation and habitat treatments to establish and maintain the open, pine-savannah conditions favored by the species (Factor E). These populations will decline without active and continuous management to provide artificial cavities and to sustain and restore forest conditions to provide suitable habitat for natural cavities and foraging similar to the historical conditions (Conner *et al.* 2001, pp 220–239, 270–299; Rudolph *et al.* 2004, entire).

Habitat Loss and Degradation

The primary remaining threats to the red-cockaded woodpecker's viability have the same fundamental cause: Lack of suitable habitat. Historically, the significant impacts to red-cockaded woodpecker habitat occurred as a result of clearcutting, incompatible forest management, and conversion to urban and agricultural lands uses. These impacts have been significantly curtailed and replaced by beneficial conservation management that sustains and increases populations; however, stressors caused by adverse historical practices still linger, including insufficient numbers of cavities, low numbers of suitable old pines, habitat fragmentation, degraded foraging habitat, and small populations. These lingering impacts can negatively affect the ability of populations to grow, even when populations are actively managed for growth, as the carrying capacity of suitable forest areas across much of the range can be quite low. However, restoration activities such as prescribed fire and strategic placement of recruitment clusters can reduce gaps between populations and increase habitat and population size toward current carrying capacity. These activities are occurring across the range of the red-cockaded woodpecker on properties actively managed for red-cockaded woodpecker conservation.

Currently, stressors to the species resulting from exposure to habitat modification or destruction are minimal, especially when compared to historical levels. Periodically, military training on Department of Defense installations requires clearing of red-cockaded woodpecker habitat for construction of ranges, expansion of cantonments, and related infrastructure, but these installations have management plans to sustain and increase red-cockaded woodpecker populations. In addition, silvicultural management on Federal, State, and private lands also occasionally results in temporary impacts to habitat; for example, red-cockaded woodpecker habitat may be unavoidably, but temporarily, adversely affected in old, even-aged loblolly pine stands that require regeneration prior to stand senescence to sustain a matrix of future suitable habitat for a net long-term benefit. Similarly, red-cockaded woodpecker habitat may be temporarily destroyed in areas where offsite loblolly, slash, or other pines are removed and replaced by the more fire-tolerant native longleaf pine. However, the net result of these activities is a long-term benefit, as the goal is to restore these areas to habitat preferred by woodpeckers.

Natural Disturbances

Wildfire, pine beetles, ice storms, tornadoes, and hurricanes are naturally occurring disturbances that destroy pines used for cavities, with subsequent reductions to population size unless management actions are taken to reduce or ameliorate adverse impacts by providing artificial cavities, reducing hazardous fuels, and restoring forests to suitable habitat following these events. These disturbances can also destroy or degrade foraging habitat and cause direct mortality of woodpeckers. Small populations are the most vulnerable to these disturbances. See the SSA report for more information about these natural disturbances (USFWS 2020, pp. 119–127).

Habitat destruction caused by hurricanes is the most acute and potentially catastrophic disturbance because hurricanes can impact entire populations. According to the SSA report, of the 124 current demographic populations, about 63 populations in the East Gulf Coastal Plain, West Gulf Coastal Plain, the lower portion of the Upper West Gulf Coastal Plain, and

Florida Peninsula ecoregions are vulnerable to potential catastrophic impacts of hurricanes, particularly major hurricanes. Most (56 populations; 89 percent) of these 63 populations are identified as low or very low resiliency in the SSA report (see *Summary of the SSA Report,* below), which means they face a significant risk from hurricanes. In addition, the frequency and intensity of Atlantic basin hurricanes, particularly major Category 4 and 5 storms, are expected to increase in response to global climate change during the 21st century (Bender *et al.* 2010, entire; Knutson *et al.* 2010, entire; Walsh *et al.* 2014, pp. 41–42), although the location and frequency of future storms affected by climate change relative to particular red-cockaded woodpecker populations cannot be precisely predicted. While larger populations (greater than 400 active clusters) are the most likely to withstand a strike by a major hurricane without extirpation (*e.g.,* Hooper *et al.* 1990, entire; Hooper and McAdie 1995, entire; Watson *et al.* 1995, entire), smaller populations are more vulnerable to individual hurricanes, as well as to the effects of recurring storms depleting cavity trees and foraging habitat with reductions in population size. However, these populations may be able to withstand and persist after hurricanes if biologists and land managers implement prompt, effective post-storm recovery actions, such as installing artificial cavities, reducing hazardous fuels, and restoring forests to suitable habitat. Such actions have been occurring after storm events for managed populations, such as the quick response after Hurricane Michael in October 2018.

Conservation Management

The reliance on artificial cavities and active habitat management is not just restricted to post-hurricane recovery efforts. With the potential exception of several ecologically unique populations in pond pine and related habitat on organic soils in northeast North Carolina, none of the current or estimated future populations is capable of naturally persisting without ongoing management, for reasons discussed previously. Fortunately, most sites have active management, such as prescribed fire, artificial cavity installation, and habitat restoration to maintain these populations across the range of the species.

Other proactive management that must be maintained for the species to continue to persist and expand includes translocations into small populations. Most (108) of the current 124 demographic populations are small (fewer than 99 active clusters) with inherently very low or low resiliency. These are the most vulnerable to future extirpation due to stochastic demographic and environmental factors and inbreeding depression. Inbreeding depression in small, fragmented populations of up to 50 to 100 active clusters without adequate immigration can further increase the probability of decline and future extirpation; for these populations, red-cockaded woodpecker translocation programs reduce risks of adverse inbreeding impacts. In addition, as noted in the SSA report (see *Summary of the SSA Report,* below), while resiliency is moderate for 10 of the current populations with 100 to 249 active clusters and 6 populations exhibit high or very high resiliency, potential adaptive genetic variation is still expected to decline in all red-cockaded woodpecker populations (Bruggeman 2010, p. 22, appendix B pp. 39–42; Bruggeman *et al.* 2010, entire; Bruggeman and Jones 2014, pp. 29–33). This is because genetically effective (N_e) populations of 1,000 or more individuals are needed to avert the loss of genetic variation in a species (*e.g.,* Lande 1995, entire; Allendorf and Ryman 2002, p. 73–76). These large population sizes do not exist in red-cockaded woodpecker populations because not all birds in an active cluster may be breeders (Reed *et al.* 1988, entire, 1993, entire). Possible exceptions may be the two largest current red-cockaded woodpecker populations at Apalachicola National Forest/St. Marks National Wildlife Refuge/Tate's Hell State Forest (858 active clusters, ~764 potential breeding groups (PBG)) and North Carolina Sandhills (781 active clusters, ~695 PBGs). A PBG is a concept introduced in the 2003 recovery plan (see Recovery Plan and Recovery Implementation, below), to describe a cluster with a potentially breeding adult male and female, with or without adult helpers or successfully fledging young. An active cluster can be either a PBG or a single territorial bird. So, for example, a red-cockaded woodpecker population of 310–390 PBGs probably represents a genetically effective population of only 500 (Reed *et al.* 1993, p. 307). Effective management programs to sustain even the smallest populations are critical to reduce the risks of inbreeding, establish genetic connectivity among fragmented populations, and maintain ecological diversity and life-history demographic variation as patterns of representation within and across broad ecoregions. Because of the outstanding work of our conservation partners, and their ongoing commitment to continue implementing proactive management to benefit the red-cockaded woodpeckers, we expect many of these activities, as articulated in individual management plans, to continue.

Conservation Measures That Benefit the Species

As noted above, the red-cockaded woodpecker is a conservation-reliant species and responds well to active management. The vast majority of properties on public lands harboring red-cockaded woodpeckers have implemented management programs to sustain or increase populations consistent with population size objectives in the recovery plan or other plans. Plans are specific to each property or management unit, but generally contain the same core features. The most comprehensive plans call for intensive cavity management with the installation of artificial cavities to offset cavity loss in existing territories, maintenance of sufficient suitable cavities to avoid loss of active territories, and creation of new territories with recruitment clusters and artificial cavities in restored or suitable habitat to increase population size. These cavity management activities are necessary until mature forests are restored with abundant old pines 65 and more years of age for natural cavity excavation. Managers are also reducing fragmentation by restoring and increasing habitat with strategic placement of recruitment clusters to reduce gaps within and between populations. Furthermore, red-cockaded woodpecker subadults from large or stable donor populations are translocated to augment growth of small, vulnerable populations. Additionally, managers are implementing silviculturally compatible methods to sustain, restore, and increase habitat with an increased use of effectively prescribed fire. Finally, managers are implementing monitoring programs looking at both habitat and populations to provide feedback for effective management. The future persistence of the species will require these management actions to continue.

In the SSA, we identified 124 current demographic populations with a total of 7,794 active clusters. Seventy-one of the 124 currently delineated red-cockaded woodpecker populations occur on lands solely owned and managed by Federal agencies with 4,033 current active clusters. Seven additional populations with 2,026 active clusters occur on lands that are under mixed Federal and State ownership but are predominately managed by Federal agencies. Thirty-one populations are on lands managed

solely by State agencies with 557 active clusters. Thus, 88 percent of delineated populations with 6,059 active clusters (78 percent of all 7,794 active clusters in 124 populations) are on lands managed entirely by Federal and State agencies with statutes to require management plans addressing the conservation of natural resources. Two populations occur in a matrix of public and private lands, mostly Federal and State properties, with 816 active clusters. One population with 20 active clusters is managed by a State agency and private landowner. Twelve populations with 342 active clusters reside entirely on private lands, of which 10 populations with 295 active clusters are managed by landowners enrolled in the safe harbor program. Also, most of the private landowners are enrolled in the safe harbor program in the two previously described populations with a matrix of mostly public lands with some private lands. Landowners with safe harbor agreements (SHA) manage about 375 active clusters in all or parts of 12 populations. There are additional active clusters of red-cockaded woodpeckers on nongovernmental lands, enrolled in SHAs, but, as noted above, we did not have adequate data to spatially delineate all of these demographic populations on these lands. Of the 933 active clusters managed by safe harbor landowners in eight states (Alabama, Florida, Georgia, Louisiana, North Carolina, South Carolina, Texas and Virginia), demographic populations with respective population sizes have not been delineated for about 558 active clusters.

Below is a summary of the types of management plans that include elements directed at red-cockaded woodpecker management and conservation. Note that the numbers of populations below do not necessarily add up to the 124 current demographic populations identified in the SSA report, because some populations cross property boundaries and are managed by more than one landowner.

Department of Defense

Within the range of the red-cockaded woodpecker, the Department of Defense (DOD) manages habitat for 14 populations, of which 5 are in the moderate to very high resiliency categories, and 9 low to very low resiliency. The Sikes Act (16 U.S.C. 670 *et seq.*) requires DOD installations to conserve and protect the natural resources within their boundaries. Integrated natural resources management plans (INRMPs) are planning documents that outline how each military installation with significant natural resources will manage those resources, while ensuring no net loss in the capability of an installation to support its military testing and training mission. Within the range of the red-cockaded woodpecker, all DOD installations have current INRMPs that address protection and recovery of the species, both through broader landscape-scale ecosystem stewardship and more specific management activities targeted directly at red-cockaded woodpecker conservation. These activities include providing artificial cavities to sustain active clusters, installing recruitment clusters to increase population size, sustaining and increasing habitat through compatible forest management and prescribed fire, and increasing the number and distribution of old pines for natural cavity excavation. Each installation has a red-cockaded woodpecker property or population size objective with provisions for monitoring. For most installations, a schedule is available for reducing certain military training restrictions in active clusters in response to increasing populations and attaining population size thresholds.

U.S. Forest Service

The U.S. Forest Service manages habitat for 49 red-cockaded woodpecker populations on 17 National Forests and the Savannah River Site Unit (owned by the Department of Energy but managed by the U.S. Forest Service). Of these populations, 10 have moderate to very high resiliency and 39 identified as having low or very low resiliency. Under the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*), National Forests are required to develop plans that provide for multiple use and sustained yield of forest products and services, which includes timber, outdoor recreation, range, watershed, fish and wildlife, and wilderness resources. These plans, called ''land and resource management plans'' (LRMPs) and their amendments, have been developed for every National Forest in the current range of the red-cockaded woodpecker. However, LRMPs are not always up to date. The LRMPs for National Forests in three States (Louisiana, North Carolina, and Texas) predate the Service's 2003 recovery plan. Nevertheless, all National Forests (even those with outdated LRMPs) have implemented management strategies to protect and manage red-cockaded woodpecker habitat and increase populations. Current LRMPs approved prior to the 2003 recovery plan were developed in coordination with the Forest Service's 1995 regional plan for managing the red-cockaded woodpecker on southern National Forests (U.S. Forest Service 1995, entire). The 1995 regional plan includes most of the new and integrated management methods (Rudolph *et al.* 2004, entire) to sustain and increase populations as incorporated in the recovery plan. These include installing artificial cavities, increasing population size with recruitment clusters, and restoring suitable habitat with forest management treatments and prescribed fire. Some of the more recent LRMPs, such as for National Forests in Mississippi, are more broadly programmatic, but incorporate the 2003 recovery plan by reference for appropriate conservation methods and objectives.

U.S. Fish and Wildlife Service

The National Wildlife Refuge System manages 10 National Wildlife Refuges with red-cockaded woodpeckers, which includes all or part of 19 populations. We considered three of these populations to be moderate to very high resiliency in the SSA report, while 16 have low to very low resiliency. Under the National Wildlife Refuge System Improvement Act of 1997 (Pub. L. 105–57), refuges prepare comprehensive conservation plans (CCPs), which provide a blueprint for how to manage for the purposes of each refuge; address the biological integrity, diversity, and environmental health of a refuge; and facilitate compatible wildlife-dependent recreation. National Wildlife Refuges have assigned population objectives from the 2003 recovery plan through their CCPs or as stepped down or modified in habitat management plans. Specific tasks in these plans include installation of artificial cavities; translocation; establishing recruitment clusters; population monitoring; prescribed fire; and silvicultural treatments, such as mid-story removal, thinning of younger stands, and, where necessary, increasing stand age diversity with regeneration of pine stands.

National Park Service

The National Park Service (NPS) manages two red-cockaded woodpecker populations, one with low and the other with very low resilience, on Big Cypress National Preserve (Preserve) in Florida. The NPS's plans do not include specific provisions for red-cockaded woodpecker management; however, at the Preserve, the NPS conducts prescribed fire to maintain and improve the south Florida slash pine forest communities that support the species. The NPS also allows Florida Fish and Wildlife Conservation Commission

biologists to conduct red-cockaded woodpecker surveys, monitor, periodically install a limited number artificial cavities, and conduct translocations on occasion. From surveys and monitoring by the Florida Fish and Wildlife Conservation Commission, 75 percent of all cavity trees within the Preserve consist of natural cavities, which is an unusually high number relative to other populations, reflecting the predominately old condition of the Big Cypress south Florida slash pine forests (Spikler 2019, pers. comm).

State Lands

The States of Arkansas, Florida, Georgia, Louisiana, North Carolina, Oklahoma, South Carolina, Texas, and Virginia have red-cockaded woodpecker populations on State-owned lands. All or parts of 40 currently delineated populations occur on State lands. Seven populations on or partially on State lands have moderate to very high resiliency, while 32 populations have low to very low resiliency. These properties range from State Forest Service or Forest Commission holdings to Department of Wildlife, Department of Natural Resources, and State Park Service properties. The mission, and therefore the extent and type of management, of each unit varies. For example, some State lands are managed generally to provide ecosystem benefits, such as managing pine-dominated forests with prescribed fire. However, other State properties implement proactive conservation management specifically for the red-cockaded woodpecker. For example, the Florida Fish and Wildlife Conservation Commission manages all of its properties under the umbrella of the Florida Red-cockaded Woodpecker Management Plan, with other specific plans for the agency's wildlife management areas.

Other Lands

Eight states have a Service-approved programmatic safe harbor agreement program with a section 10(a)(1)(A) enhancement of survival permit under the Act to enroll non-Federal landowners that voluntarily provide beneficial management. Of 459 enrolled non-federal landowners, one is for a State property and all others are private nongovernmental lands. All or parts of 12 currently delineated demographic populations are covered under a current SHA. Again, we are aware of additional active clusters covered under SHAs, but we lack the data to delineate them as demographic populations. Safe harbor agreements are partnerships between landowners and the Service involving voluntary agreements under which the property owners receive formal regulatory assurances from the Service regarding their management responsibilities in return for contributions to benefit the listed species. For the red-cockaded woodpecker, this includes voluntary commitments by landowners to maintain and enhance red-cockaded woodpecker habitat to support baseline active clusters, which is the number of clusters at the time of enrollment, and additional above-baseline active clusters that increase in response to beneficial management. Beneficial management includes the maintenance and enhancement of existing cavity trees and foraging habitat through activities such as prescribed fire, mid-story thinning, seasonal limitations for timber harvesting, and management of pine stands to provide suitable foraging habitat and cavity trees. Because above-baseline active clusters and habitat covered under these plans can be returned to ''baseline'' conditions, any population growth on lands covered by SHAs may not be permanent. In addition, enrolled landowners can terminate their agreement at any time. However, fewer than 5 of the 459 enrolled landowners have ever used their permit authorities to return the number of active clusters to baseline conditions, and only 12 landowners have terminated their agreement. There currently are 241 active above-baseline clusters in the program.

In summary, the red-cockaded woodpecker is a conservation-reliant species, but one that responds very well to active management. The majority of red-cockaded woodpecker populations are managed under plans that address population enhancement and habitat management to sustain or increase populations, and to meet the 2003 recovery plan objectives for primary core, secondary core, and essential support populations. We expect these property owners will continue to implement their respective management plans, partially because, even if we reclassify the red-cockaded woodpecker as a threatened species, the woodpecker would remain protected under the Act.

Summary of Biological Status

As described in the preceding section, the Act directs us to determine whether any species is an endangered or a threatened species because of any of the factors listed in section 4(a)(1) affecting the species' continued existence. The SSA report documents the results of our comprehensive biological status review for the red-cockaded woodpecker, including an assessment of the potential stressors to the species. The SSA report does not represent a decision by the Service on whether the species should be listed as an endangered or a threatened species under the Act. It does, however, provide the scientific basis for our regulatory decision, which involves the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found on the Southeast Region's website at *https://www.fws.gov/southeast/* or at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2019–0018.

Summary of SSA Report

To assess the red-cockaded woodpecker's viability, we used the three conservation biology principles of resiliency, representation, and redundancy (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, random fluctuations in birth rates or annual variation in rainfall); representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes); and redundancy supports the ability of the species to withstand catastrophic events (for example, hurricanes). In general, the more redundant and resilient a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the red-cockaded woodpecker's ecological requirements for survival and reproduction at the individual, population and species, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. This process used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We utilized this

information to inform our regulatory decision.

For the red-cockaded woodpecker to maintain viability, its populations or some portion thereof must be resilient. The SSA assessed resiliency at the population level, primarily by evaluating the current population size as the number of active clusters and secondarily by the associated past growth rate. Red-cockaded woodpecker resiliency primarily depends upon a single factor: Amount of managed suitable habitat. Historically, impacts to the red-cockaded woodpecker occurred as a result of clearcutting, incompatible forest management, and conversion to urban and agricultural lands uses. While these impacts have been significantly curtailed and replaced by beneficial conservation management, legacy stressors stemming from these historical impacts still remain, including: (1) Insufficient numbers of natural cavities and suitable, abundant old pines for natural cavity excavation; (2) habitat fragmentation and its effects on genetic variation, dispersal, and connectivity to support demographic populations; (3) lack of suitable foraging habitat for population growth and expansion; and (4) small populations. Intensive management is ongoing to ameliorate these threats.

Representation can be measured by the breadth of genetic or environmental diversity within and among populations and gauges the probability that a species is capable of adapting to environmental changes. The SSA evaluated representation based on the extent and variability of habitat characteristics across the geographical range of the species and characterized representative units for the red-cockaded woodpecker using ecoregions. This analysis generally followed the approach to representation used in the species' recovery plan (USFWS 2003, pp. 148, 152–155). A genetic analysis of material prior to 1970 in eight ecoregions indicates the species appears to have been a single genetic unit or population without significant genetic structure or differentiation (Miller *et al.* 2019, entire). The best available rangewide genetic data indicate a loss of genetic variation after 1970 with development of significant contemporary genetic structure among ecoregions. This structuring is most likely in response to fragmentation of this historically more widespread and abundant species, reduced dispersal between populations and regions, and genetic drift (Stangel *et al.* 1992, entire; Haig *et al.* 1994a, p. 590; Haig *et al.* 1996, p. 730; Miller *et al.* 2019, entire). However, the similarity of genetic parameters between the 1992–1995 and 2010–2014 periods indicates that a further significant loss of genetic diversity with an increase in differentiation among ecoregions may have been ameliorated by conservation management that began in the 1990s to rapidly increase populations and translocate individuals from large populations to augment small populations (Miller *et al.* 2019, entire). Mitochondrial DNA haplotype diversity has declined significantly since the pre-1970s, but not to extent of a loss of any phylogenetically distinct lineages that may represent evolutionarily significant units (Miller *et al.* 2019, p. 9–10).

For the red-cockaded woodpecker to maintain viability, the species also needs to exhibit some degree of redundancy. Measured by the number of populations, their resiliency, and their distribution, redundancy increases the probability that the species has a margin of safety to withstand, or can bounce back from, catastrophic events. The SSA reported redundancy for red-cockaded woodpeckers as the total number and resilience of population segments and their distribution within and among representative units.

Current Condition

Resiliency

In the SSA report, we identified 124 demographic populations across the range of the red-cockaded woodpecker for which sufficient data were available to complete the SSA analyses for the recent past to current condition. We acknowledge there are other small occurrences of red-cockaded woodpeckers, particularly on private lands; however, spatial data for these other occurrences were incomplete, so for purposes of the SSA analysis, and subsequently throughout this proposed rule, we focused only on these 124 demographic populations that could be spatially delineated. The SSA categorizes two important parameters related to current population resiliency: Current population size and associated population growth rate. Population resilience size categories are defined as follows: Very low (fewer than 30 active clusters); low (30 to 99 active clusters); moderate (100 to 249 active clusters); high (250 to 499 active clusters); and very high (greater than or equal to 500 active clusters).

Population resilience size-classes were derived from spatially explicit individual-based models and simulations for this species (Letcher *et al.* 1998, entire; Walters *et al.* 2002, entire), the performance of which have been reasonably validated with reference to actual populations (Schiegg *et al.* 2005, entire; Walters *et al.* 2011, entire). We also considered subsequent modifications of these models and simulations that incorporated adverse effects of inbreeding depression on population persistence and growth (Daniels *et al.* 2000, entire; Schiegg *et al.* 2006, entire). These models were developed from extensive actual biological data and specifically designed to incorporate the dynamics of the red-cockaded woodpecker's cooperative breeding system that are not accurately represented in other types of population models (Zieglar and Walters 2014, entire). These models simulated populations of different initial sizes under natural conditions without any limiting habitat and cavity conditions that could impair population growth. We consider these results as indicators of inherent resilience because effects of conservation management actions to sustain and increase populations were not simulated. These beneficial management practices would include installation of recruitment clusters with artificial cavities to induce new red-cockaded woodpecker groups and translocation to augment the size and growth of small populations. The vast majority of the 124 current populations have been and currently are subject to specific conservation management actions for this species, including recruitment clusters. Thus, the inherent resilience size-classes derived from population models and simulations have been further qualified by actual growth rates as indicators of effects of beneficial management for this conservation-reliant species.

Populations with very low resiliency (fewer than 30 active clusters) are the most vulnerable to future extirpation following stochastic events with declining growth and future extirpation likely in 50 years. Populations with low resiliency (30 to 99 active clusters) are more persistent, but remain vulnerable to declining growth, inbreeding depression, and extirpation. Inbreeding depression reduces red-cockaded woodpecker egg hatching rates and survival of fledglings (Daniels and Walters 2000a, entire). Inbreeding in red-cockaded woodpeckers is a consequence of breeding among close relatives in response to naturally short dispersal distances of related birds among nearby breeding territories exacerbated by small populations and fragmentation among populations that reduce immigration rates of unrelated individuals (Daniels and Walters 2000a, entire; 2000b, entire; Daniels *et al.* 2000, entire; Schiegg *et al.* 2002, entire; 2006, entire). The consequences of inbreeding

depression further reduce population growth rates and increase the probabilities of extirpation in populations in sizes up to about 100 active clusters (Daniels *et al.* 2000, entire; Schiegg *et al.* 2006, entire). The largest populations in this class may have long-term average growth rates (λ or lambda) near 1.0 (a λ of 1.00 is considered stable, less than 1.00 is declining, and greater than 1.00 is increasing), but with slow rates of decline and a high risk of inevitable future extirpation. The moderate resiliency category (100 to 249 active clusters) is a large transitional class. Smaller populations without inbreeding likely will experience a slow decline, but without extirpation in 25 to 50 years because at least some territories will survive, although as much smaller and more vulnerable populations. The largest populations in this class may be relatively stable or nearly so. Populations with a high resiliency (250 to 499 active clusters) on average should be stable except perhaps for the very smallest that may have average growth rates slightly less than 1.00. In high resiliency populations, adverse demographic effects of inbreeding depression are not expected. Populations in the very high resiliency class (greater than or equal to 500 active clusters) are stable and the most resilient, with average growth rates of 1.0 or slightly greater. Based on the most recent data, 3 red-cockaded woodpecker populations fall within the very high category (totaling 2,143 clusters); 3 are high (1,364 total clusters); 10 are moderate (1,555 total clusters); 37 are low (1,923 total clusters); and 71 are very low (809 total clusters). In short, of the estimated 7,794 active clusters distributed among 124 populations across the range of the species, 5,062, or 65 percent, are in 16 moderate to very high resiliency populations.

The second resiliency parameter measured in the SSA was growth rate of the populations. For the SSA, there were only sufficient GIS data to delineate past demographic populations with population size data to compute past-to-current growth rates for 98 of the 124 populations. Of these 98 populations, the SSA determined that 13 (13.3 percent) were declining (λ <1.00), 19 (19.4 percent) were stable (λ = 1.00–1.02), and 66 (67.3 percent) were increasing (λ >1.02). Combining growth rates with population sizes of these 98 populations, growth rates have been stable to increasing for all of those moderate, high, and very high resiliency populations where growth rate could be measured. At the other end, of the 86 very low and low resiliency populations where growth rate could be measured, 73 populations demonstrated stable and positive growth rates, with several populations showing very high growth rates. This is indicative of the positive effects of red-cockaded woodpecker conservation management programs on these locations and the ability of such management to offset inherently low or very low population resilience. Growth rates are decreasing in only 13 (15 percent) of the low and very low resiliency populations where growth rate could be measured.

Current population conditions in the SSA report were derived from the number and location of active clusters primarily in 2016 and 2017. These conditions did not take into account Hurricane Michael, which came ashore near Mexico Beach, Florida, on October 10, 2018, as a Category 4 storm. More than 1,500 cavity trees were blown down or damaged in populations in the Apalachicola National Forest, Silver Lake Wildlife Management Area (WMA), Jones Ecological Research Center, and Tate's Hell State Forest (Dunlap 2018, entire; McDearman 2018, entire). These represented three demographic populations: Apalachicola National Forest-St. Marks NWR-Tate's Hell State Forest, Jones Ecological Research Center, and Silver Lake WMA. The effects of Hurricane Michael did not change current conditions for these populations in terms of their resilience size-classes as described in the SSA report, and as summarized here.

After this hurricane, 870 clusters were rapidly assessed in Apalachicola National Forest where 1,410 cavity trees were damaged or blown down, followed by the installation of 682 artificial cavities (Dunlap 2018, entire). In 2018, prior to this hurricane, the Apalachicola National Forest population survey estimate was 833 active clusters (Casto 2018, p. 4). After the hurricane, the 2019 survey estimate was 857 active clusters (Casto 2019, p. 9). At Silver Lake WMA, 154 cavity trees were damaged or lost; however, within two weeks of the storm more than 90 artificial cavities were installed (Burnham 2019a, p. 9). The pre-storm population was 36 active clusters and 32 potential breeding groups, with a post-storm decline to 33 active clusters and 28 potential breeding groups (Burnham 2019b, p. 6). About 24 percent of all cavity trees at the Jones Ecological Research Center were damaged or destroyed (Rutledge 2019, p. 13). The pre-storm Jones Center population was 38 active clusters with 34 potential breeding groups (Henshaw 2019, p. 4). Post-storm, after installation of artificial cavities, there were 40 active clusters with 31 potential breeding groups (Henshaw 2019, p. 4). At Tate's Hell State Forest, about 23 of 527 cavity trees among 61 active clusters and 51 PBGs were blown down (Alix 2018, pers. comm.). After post-storm management, the Tate's Hell State Forest currently consists of 64 active clusters and 54 PBGs (Alix 2019, pers. comm.). Overall, the total decline in number of active clusters from all of these properties is minor, demonstrating that with prompt, active management, the vulnerability of these populations to stochastic events can potentially be reduced. Additional intermediate and long-term habitat restoration treatments at these properties are still required to reduce hazardous fuels from large and small woody debris, restore habitat, and implement reforestation or regeneration in the most severely damaged pine stands. Overall, we do not anticipate that Hurricane Michael will affect long-term viability of these populations. However, we will continue to evaluate the success of the emergency, intermediate, and long-term response efforts.

In summary, although most of red-cockaded woodpecker populations for which we have data are still small, and remain vulnerable to stochastic events and possibly inbreeding depression, the vast majority of populations are showing stable or increasing growth rates, and the majority of birds and clusters occur in a few large, resilient populations. Of the 98 populations for which trend data are available, only 13 percent are declining. In addition, over 65 percent of red-cockaded woodpecker clusters are currently in moderate to very high resiliency populations.

Representation

We evaluated representation based on the extent and variability of habitat characteristics across the species' geographical range. For the red-cockaded woodpecker, the SSA report characterizes representative units using ecoregions, which align with the recovery units identified in the recovery plan (USFWS 2003, pp. 145–161). These ecoregions are broad areas defined by physiography, topography, climate, and major historical and current forest types and thus serve as surrogates for the variability of habitat characteristics across the species' range, such as ecology, life history, geography, and genetics. There are currently 13 ecoregions containing at least one red-cockaded woodpecker population: (1) Cumberland Ridge and Valley; (2) Florida Peninsula (= South/Central Florida); (3) East Gulf Coastal Plain; (4) Mid-Atlantic Coastal Plain; (5) Ouachita

Mountains; (6) Piedmont; (7) South Atlantic Coastal Plain; (8) Sandhills; (9) Upper East Gulf Coastal Plain; (10) Upper West Gulf Coastal Plain; (11) West Gulf Coastal Plain; and (12) Gulf Coast Prairie and Marshes and (13) Mississippi River Alluvial Plain, two ecoregions that the SSA includes that were not represented in the recovery plan because they only have one small population each. In the SSA report, figures 20 and 24 provide maps illustrating the ecoregions (USFWS 2019, pp. 91, 109), and figure 25 includes the historical county records for the range of the species (USFWS 2020, p. 116).

The historical range of the red-cockaded woodpecker included the entire distribution of longleaf pine ecosystems, but the species also inhabited open shortleaf, loblolly, slash pine, and Virginia pine forests, especially in the Ozark-Ouachita Highlands and the southern tip of the Appalachian Highlands with occasional occurrences noted for New Jersey, Pennsylvania, Maryland, and Ohio (Costa and Walker 1995, pp. 86–87). Red-cockaded woodpeckers no longer occur in six ecoregions (Ozarks, Central Mixed Grass Prairies, Cross Timbers and Southern Mixed Grass Prairies, Northern Atlantic Coast, Central Appalachian Forest, and Southern Blue Ridge). The recovery plan did not consider recovery in these areas to be essential to the conservation of the species.

The remaining 13 ecoregions still contain red-cockaded woodpeckers. In these ecoregions, red-cockaded woodpeckers occupy a wide variety of pine-dominated ecological settings scattered across a broad geographic range. Considerable geographic variation in habitat types exists, illustrating the species' ability to adapt to a wide range of ecological conditions within the constraints of mature or old growth, southern pine ecosystems. However, of these 13 ecoregions, only 4 currently have populations that are considered to have high or very high resiliency (East Gulf Coastal Plain, South Atlantic Coastal Plain, Sandhills, and Mid-Atlantic Coastal Plain), and 6 have populations that are low or very low resiliency (Florida Peninsula, Ouachita Mountains, Cumberland Ridge and Valley, Piedmont, Gulf Coast Prairie and Marshes, and Mississippi River Alluvial Plain). Of those six, the latter four have only one or two populations each, meaning these ecoregions, and the ecology, life history, geography, and genetics they represent, are particularly vulnerable to stochastic events. However, five of the six populations in these four ecoregions all demonstrate stable or increasing growth rates (growth rate for the sixth, Mitchell Lake in the Piedmont Ecoregion, could not be measured), primarily because they are being actively managed.

In summary, the species no longer persists in six ecoregions where it was historically present. However, it is still currently represented in the 13 remaining ecoregions, and this level of representation has not decreased further since the 2003 recovery plan revision, which did not consider the extirpated ecoregions necessary for recovery. Nevertheless, while populations persist in the 13 ecoregions, many of the ecoregions contain only populations that have low or very low resiliency, and four ecoregions only have one or two populations, which are all of low or very low resiliency, making them vulnerable to stochastic events.

Redundancy

In the SSA report, redundancy for red-cockaded woodpeckers is characterized by the number of resilient populations and their distribution within each ecoregion. Of the 124 current populations, there are 3 populations that have very high resiliency, 3 with high, 10 with moderate, 37 with low, and 71 with very low resiliency. As noted above, 4 of 13 ecoregions currently harbor high or very high resiliency populations: East Gulf Coastal Plain (2 populations), Mid-Atlantic Coastal Plain (1 population), Sandhills (2 populations), and South Atlantic Coastal Plain (1 population). In terms of redundancy, only two ecoregions, East Gulf Coastal Plain and Sandhills, have more than one population classified as having high or very high resiliency, and only these two ecoregions also have more than two populations classified as having moderate to very high resiliency. Redundancy of smaller populations is higher with a greater number of populations in the moderate, low, and very low resiliency categories within and across ecoregions. Four ecoregions (South Atlantic Coastal Plain, Mid-Atlantic Coastal Plain, West Gulf Coastal Plain, and Upper East Gulf Coastal Plain) have two populations exhibiting moderate to high resiliency, and thus some level of redundancy in terms of resilient populations. Most of the populations in these regions have moderately resiliency. The greatest number of current populations reside in the Mid-Atlantic Coastal Plain (24) and Florida Peninsula (22), although most of these are in the very low and low resiliency class. However, even for the more resilient populations, habitat fragmentation has resulted in wide gaps between forested areas, meaning there is little connectivity between populations.

Across the range of the red-cockaded woodpecker, the populations with the most resiliency (high or very high) populations tend to be in the eastern half of the range and in coastal or near coastal ecoregions rather than interior. Florida Peninsula and the western ecoregions currently only have populations in the moderate to very low resiliency categories. This concentration of the more resilient populations in coastal and near coastal areas could affect the species' ability to withstand catastrophic events such as hurricanes. Particularly for these populations, post-storm management actions are critical, as they can mitigate cavity loss and reduce hazardous fire fuels.

In summary, a species needs a suitable combination of all three characteristics (resiliency, representation, and redundancy) for long-term viability. Based on our analysis of the three factors, the red-cockaded demonstrates some degree of stability in all three factors. The species' viability is reduced over historical levels, but habitat conditions and population numbers are improving. In terms of resiliency, most of the populations are still quite small, but the vast majority are stable or even growing. The species has not lost any representative populations since the 2003 revised recovery plan, and while a few ecoregions still only contain one or two populations, most of these populations are stable or growing. Finally, there is a fair degree of redundancy within ecosystems across the range of the species, although, again, most of these populations are still quite small and are isolated from each other. The improving viability of the red-cockaded woodpecker has been largely due to intensive, extensive management, including actions immediately after large storm events to offset cavity loss and reduce hazardous fuels. Without this intervention, many populations, especially the low and very low resilience populations, likely would have been extirpated.

Future Conditions

Our analysis of stressors and risk factors, as well as the past, current, and future influences on what the red-cockaded woodpecker needs for long-term viability, revealed that the primary predictor of future viability of the species is the continuation of active management (including cavity management, midstory treatment such as prescribed fire, and translocation efforts).

We assessed future red-cockaded woodpecker population growth, population size (active clusters), and resiliency by first modeling past trends and variation in population size of demographically delineated populations as affected by factors including management treatments (*e.g.,* number of artificial cavities, recruitment clusters, birds received by translocations, and frequency of prescribed fire and mid-story hardwood control), dominant pine species, the density of active clusters, and parameters to account for unexplained sources of variation to population size by this procedure (USFWS 2020, chapter 6 and appendix 2). We obtained historical information for 87 demographically delineated populations and were also able to extrapolate missing data for certain populations by imputation with an expectation-maximization algorithm (USFWS 2020, appendix 1). Populations were separately modeled as small (6 to 29 clusters), medium (30 to 75 clusters), and large (more than 75 clusters) classes. Populations with fewer than six active clusters were not modeled because of high variation in growth rates.

For past growth rate of small populations, the most important variables were the number of new recruitment clusters, number of new artificial cavities in previously existing clusters (cavity management), midstory treatments by prescribed fire or mechanical methods, number of red-cockaded woodpeckers translocated into the population, and dominant pine type. Translocation had the greatest positive effect on growth of any management technique. For medium populations, recruitment clusters and midstory treatments by prescribed fire were significant management covariates. The best model for large populations included recruitment clusters, cavity management, and spatial configuration of active clusters. In all cases, effects of recruitment clusters, cavity management, midstory treatment, and translocation were positive.

We then used the best assessed future growth and conditions for each red-cockaded woodpecker population to assess viability under four future 25-year management scenarios: Low management, medium management, high management, and the ''Manager's Expectation.'' In the Manager's Expectation scenario, we elicited estimates for red-cockaded woodpecker conservation management treatments (*e.g.,* number of artificial cavities, number of recruitment clusters, midstory treatments, prescribed fire frequency, translocation, etc.) from property biologists, foresters, and managers.

For the low management scenario, values for each management covariate (*e.g.,* cavity management, prescribed fire treatments, number of recruitment clusters, midstory hardwood treatment, translocation) were set to zero. However, this scenario does not reflect no management, but rather, the absence of management techniques specific to red-cockaded woodpeckers and instead a reliance on ecosystem management. Thus, some baseline habitat management, which would indirectly provide some nesting and foraging habitat, would be expected under the low management scenario. However, because most of the past populations for which we had sufficient data have been actively managed more aggressively than this scenario, we were unable to accurately model this type of minimal baseline habitat management. Therefore, future simulated population growth in the low management scenario is probably overestimated. Management covariate parameters for the medium management scenario assume the average of the past parameters employed to conserve red-cockaded woodpeckers over the past 20 years will continue into the future. For the high management scenario, management treatments for simulated populations reflect the parameter values in the 90th percentile of all past population treatments, as if populations were more intensely and extensively managed. The high management scenario thus represents projections of what might potentially be achieved should the species be systematically managed more intensively across its range than it has been in the past. The Manager's Expectation scenario was based on what the experts, described above, thought was the most likely annual future number of recruitment clusters, artificial cavities, prescribed fire treatments, and other management parameters at 5-year intervals for a 25-year period.

We chose to project 25 years into the future because the combination of species' response to natural factors and management and the ability of managers to accurately predict future management treatments becomes highly uncertain at longer intervals. The red-cockaded woodpecker is a conservation-reliant species of naturally fire-dependent, open, and mature to old southern pine forests. These forest conditions do not currently occur without management due to the history of fire-exclusion, incompatible forest management, and other land uses. Planning and successfully implementing management and treatments for each active cluster and population requires extensive resources that are difficult for managers to accurately predict for longer than 25 years. In addition to a population's response to management, there is natural variation in nest success, number of fledglings, survival of young-of-year and adults, and cooperative breeding dynamics with replacement of adult breeders by other birds dispersing from other territories. In turn, this affects annual variation in population size (active clusters) and patterns of population growth or decline. Simulations of future population conditions under different management scenarios included effects of some management treatments, though not all, as model parameters. However, effects of these management treatment parameters did not account for all sources of annual variation affecting population size that still occurred in the model and simulations. Because of the variation in future simulated population size at 25 years (USFWS 2020, appendix 2), future estimates of population size after 25 years are more uncertain.

Table 1 summarizes the model outputs for the four scenarios at the end of the 25-year simulation period. Data from 106 of the 124 current populations were available for future simulations. Of those 106 populations, initial populations with fewer than 6 active clusters were not simulated unless they demographically merged with other populations to create new, larger populations during the 25-year period. In addition, the total number of simulated future populations at year 25 are not equal among management scenarios because of the different number of initial populations that demographically merge to establish new populations. In other words, a lower number of populations at the end than the start for each scenario does not mean that all those populations were extirpated, rather some of the populations increased and merged to create new, larger populations. Therefore, the initial starting number of populations, and predicted number of populations at the end of the simulation period, varied. We also compare the results of current and future population resiliency classes as percentages in this proposed rule rather than absolute numbers because of this variation. Furthermore, although the initial starting numbers varied for each of the scenarios for the reasons discussed above, we present the current condition of the 124 demographic populations as the starting place for each of these scenarios. The current condition (Past-to-Current in Table 1) for these

populations are: 57.3 percent have very low resiliency, 29.8 percent have low, 8.1 percent have moderate, 2.4 percent have high, and 2.4 percent have very high. For more details on the model, please see the SSA report (USFWS 2020, pp. 130–136, appendix 1, appendix 2).

TABLE 1—RESILIENCE SUMMARY BASED ON CURRENT CONDITION AND POPULATION SIMULATIONS UNDER 4 FUTURE MANAGEMENT SCENARIOS

Model series/scenario	Population resilience category percentages				
	Very low	Low	Moderate	High	Very high
Past-to-Current	57.3	29.8	8.1	2.4	2.4
Future Low	61.7	14.8	11.1	6.2	6.2
Future Medium	25.0	45.2	15.5	8.3	6.0
Future High	22.2	39.5	21.0	11.1	6.2
Future Manager's	28.6	42.9	14.3	8.3	5.9

Low management scenario: At the end of the 25-year simulation period, the predicted resiliency for the resulting 81 simulated demographic populations are: 6.2 percent of populations (5) very high; 6.2 percent (5) high; 11.1 percent (9) moderate; 14.8 percent (12) low; and 61.7 percent (50) very low. The low management scenario projects a modest increase in the percentage of current populations of moderate to very high resiliency from about 13 percent (16) to about 24 percent (19) of the 81 simulated populations compared to current conditions, but the majority of the populations that currently have low resiliency decline sufficiently to transition into the very low resiliency category. The projected outcome of this scenario clearly demonstrates the dependence of red-cockaded woodpecker population resiliency on intensive, species-specific management.

Medium management scenario: At the end of the 25-year simulation period, the predicted resiliency for the resulting 84 simulated demographic populations are: 6.0 percent of populations (5) very high; 8.3 percent (7) high; 15.5 percent (13) moderate; 45.2 percent (38) low; and 25.0 percent (21) very low. The medium management scenario projected a more substantial increase in the percentage of populations of moderate to very high resiliency from about 13 percent (16) to about 30 percent (25) of the populations. At the other end, the percentage of low and very low resiliency populations decreased.

High management scenario: At the end of the 25-year simulation period, the predicted resiliency for the resulting 81 demographic populations are as follows: 6.2 percent of populations (5) very high; 11.1 percent (9) high; 21.0 percent (17) moderate; 39.5 percent (32) low; and 22.2 percent (18) very low. The high management scenario projected an even more substantial increase in the percentage of populations of moderate to very high resiliency, increasing to about 38 percent (31) of the populations. However, the land base available for conservation has a substantial effect on the growth of these populations under this scenario. For example, none of the populations with low or very low resiliency in this scenario has the carrying capacity on their respective managed properties to transition to a higher resiliency category, regardless of the intensive management reflected in this scenario. Thus, there are 50 red-cockaded woodpecker populations that, in the absence of acquisition of additional habitat for population expansion, will always remain small regardless of the management efforts.

Manager's Expectation scenario: At the end of the 25-year simulation period, the predicted resiliency for the resulting 84 demographic populations are: 5.9 percent of the populations (5) very high; 8.3 percent (7) high; 14.3 percent (12) moderate; 42.9 percent (36) low; and 28.6 percent (24) very low. The results are very similar to the medium management scenario.

Future Representation and Redundancy of the Species: Under all management scenarios, five populations in four ecosystems are predicted to have very high resiliency (East Gulf Coastal Plain (2), Sandhills (1), Mid-Atlantic Coastal Plain (1), and South Atlantic Coastal Plain (1)). Under the Manager's Expectation and medium management scenarios, seven populations in five ecosystems are considered to have high resiliency (East Gulf Coastal Plain (2), South Atlantic Coastal Plain (1), Sandhills (2), Upper West Gulf Coastal Plain (1), and West Gulf Coastal Plain (1)). Also, compared to current conditions, the greater number of future high and very high resiliency populations are more widely distributed among ecoregions and include the western geographic range; however, over the whole range of the woodpecker, the occurrence of high and very high resiliency populations is most concentrated in the East Gulf Coastal Plain and Sandhills ecoregions.

Only two ecoregions (Cumberland Ridge and Valley and Gulf Coast Prairie and Marshes) have no simulated populations of moderate to very high resiliency in the Manager's Expectation, medium management, and high management scenarios, compared to six ecoregions (Florida Peninsula, Ouachita Mountains, Cumberland Ridge and Valley, Piedmont, Gulf Coast Prairie and Marshes, and Mississippi River Alluvial Plain) that currently do not have moderate to very high resiliency populations. The one current population in the Mississippi River Alluvial Plain ecoregion was not simulated in the future. In the low management scenario, four ecoregions (Cumberland Ridge and Valley, Gulf Coast Prairie and Marshes, Ouachita Mountains, and Piedmont) that currently only have low or very low resiliency populations are not projected to gain any moderate to very high resiliency populations at 25 years.

Summary: The total number of simulated populations at 25 years varied slightly among the management scenarios because of a different number of initial populations that demographically merged during simulations to establish new and larger populations. Results of the Manager's Expectation and medium management scenarios were most similar, while the low management and high management scenarios represented more extreme future resiliency conditions. These simulations, particularly for the low management and high management scenarios, illustrate the extent to which the red-cockaded woodpecker is a conservation-reliant species that responds positively or negatively to management, and how successful management can sustain small populations with low or very low resiliency. In all scenarios, most populations at year 25 were still in the

very low, low, and moderate resiliency categories. However, the majority of populations were projected to be stable or increasing in all but the low management scenario, highlighting how successful management can sustain even small populations, albeit with a greater inherent risk in response to poor or insufficient management. The low management scenario illustrates that without adequate species-level management, in contrast to ecosystem management alone, very little increase in the number of moderate to very high resiliency populations can be expected and small populations of low or very low resiliency are unlikely to persist. The high management scenario represents the limit of what can be accomplished given the current land base and carrying capacity to support populations. However, management at current levels, as represented by the medium management scenario, further increases the number of moderate to very high resiliency populations and projects that small populations can be preserved. In addition, at current (or greater) levels of future management, redundancy and representation are expected to improve significantly in response to increasing populations. Because, if we reclassify the red-cockaded woodpecker as a threatened species, the woodpecker would remain protected under the Act, current levels of management are expected to continue into the future.

Recovery and Recovery Plan Implementation

The original red-cockaded woodpecker recovery plan was first issued by the Service on August 24, 1979. A first revision was issued on April 11, 1995, and the second, and current, revision on January 27, 2003. The 2003 recovery plan provided management guidelines fundamental to the conservation and recovery of red-cockaded woodpeckers. The Service continues to strongly encourage the application of these guidelines to the management of woodpecker populations on public and private lands. As explained in *Conservation Measures that Benefit the Species,* above, implementation of the recovery plan has been carried out through the incorporation of management guidelines into various Federal and State land management plans. In addition to the management guidelines, the 2003 recovery plan provides guidelines to private landowners to follow on private lands occupied by red-cockaded woodpeckers. The 2003 recovery plan provides guidelines for installing artificial cavities; management of cavity trees and clusters; translocation; silviculture; and prescribed fire under the management guidelines, and guidelines for managing foraging habitat on private lands are provided under the private land guidelines. After the issuance of the 2003 recovery plan, two additional sets of foraging guidelines were developed (USFWS 2005, entire). As described in the 2005 guidance, the recovery standard for good quality foraging habitat is intended for recovery management to sustain and increase populations.

The recovery plan contains both downlisting and delisting criteria. The recovery criteria in the 2003 recovery plan are based on 39 designated populations in different viability size classes. Although these were not the only red-cockaded woodpecker populations known at the time, they were selected as recovery populations because of anticipated future management by their management agencies or entities, the estimated future capacity of the properties, and their geographic distribution within and among recovery units (*e.g.,* ecoregions). Each of these designated populations have a future population size objective with various potential roles toward achieving the downlisting and delisting criteria in the recovery plan. The populations are distributed within 11 recovery units or ecoregions that represent broad patterns of ecological and potential genetic variation and that enhance immigration to reduce the loss of genetic variation (*e.g.,* representation), with multiple populations to reduce risks of catastrophic impacts of periodic hurricanes, and adverse stochastic demographic, environmental, and genetic factors (*e.g.,* redundancy). The 39 designated recovery populations are either primary core (13), secondary core (10), or essential support (16), according to recovery population size potential breeding group (PBG) objectives. As described above, a PBG is a cluster with a potentially breeding adult male and female, with or without adult helpers or successfully fledging young. An active cluster can be either a PBG or a single territorial bird. Further discussion of these terms, along with the rationale for each delisting and downlisting criterion, can be found in the recovery plan (USFWS 2003, pp. 140–145). Further detail on the specific populations required to meet each criterion can also be found in the recovery plan.

Downlisting may be achieved by having a total of 20 designated recovery populations fulfilling the following criteria. Qualifying populations with the largest population sizes are listed for each criterion when a specific population is not required. No particular population may satisfy more than one criterion.

- *Downlisting Criterion 1: There is one stable or increasing population of 350 PBGs (400 to 500 active clusters) in the Central Florida Panhandle.* This criterion has been met. In our 2006 5-year review (USFWS 2006), we identified that part of one of the five properties (Apalachicola Ranger District-Apalachicola National Forest) comprising the Central Florida Panhandle Primary Core population alone had 451 PBGs. Now, there are 909 active clusters representing about 809 PBGs for the Central Florida Panhandle Primary Core population. The average growth rate for this population is increasing.
- *Downlisting Criterion 2: There is at least one stable or increasing population containing at least 250 PBGs (275 to 350 active clusters) in each of the six following recovery units: Sandhills, Mid-Atlantic Coastal Plain, South Atlantic Coastal Plain, West Gulf Coastal Plain, Upper West Gulf Coastal Plain, and Upper East Gulf Coastal Plain.* This criterion has been partially met. Currently, four of the six recovery units have a population that has reached the minimum required size to fulfill this criterion (Sandhills, North Carolina Sandhills East Primary Core; Mid-Atlantic Coastal Plain, Francis Marion Primary Core; South Atlantic Coastal Plain, Fort Stewart Primary Core; and Upper West Gulf Coastal Plain, Sam Houston Primary Core). The Vernon-Fort Polk primary core with 223 active clusters and 185 PBGs (West Gulf Coastal Plain) and Bienville Primary Core with 162 active clusters and 144 PBGs (Upper East Gulf Coastal Plain) have not fulfilled this criterion.
- *Downlisting Criterion 3: There is at least one stable or increasing population containing at least 100 PBGs (110 to 140 active clusters) in each of the four following recovery units: Mid-Atlantic Coastal Plain, Sandhills, South Atlantic Coastal Plain, and East Gulf Coastal Plain.* This criterion has been fulfilled by the following populations: Coastal North Carolina Primary Core (235 active clusters, 209 PBGs, Mid-Atlantic Coastal Plain), South Carolina Sandhills Secondary Core (237 active clusters, 211 PBGs, Sandhills), Osceola/Okefenokee Primary Core (212 active clusters, 189 PBGs, South Atlantic Coastal Plain), and Eglin Primary Core (526 active clusters, 462 PBGs, East Gulf Coastal Plain).
- *Downlisting Criterion 4: There is at least one stable or increasing population containing at least 70 PBGs (75 to 100 active clusters) in each of the following*

four recovery units: Cumberland Ridge and Valley, Ouachita Mountains, Piedmont, and Sandhills. In addition, in the Mid-Atlantic Coastal Plain, the Northeast North Carolina/Southeast Virginia Essential Support Population is stable or increasing and contains at least 70 PBGs (75 to 100 active clusters). This criterion has been partially met by two populations: North Carolina Sandhills West Essential Support (187 active clusters, 166 PBGs, Sandhills) and Oconee/Piedmont Secondary Core (85 active clusters, 76 PBGs, Piedmont). Three of the five populations presently do not meet the required population size: Ouachita Secondary Core (73 active, 69 PBGs, Ouachita Mountains), Northeast North Carolina/Southeast Virginia Essential Support (68 active clusters, 61 PBGs, Mid-Atlantic Coastal Plain), and Talladega/Shoal Creek Essential Support (45 active clusters, 43 PBGs, Cumberland Ridge and Valley). The Ouachita Secondary Core population in the Ouachita Mountains recovery unit, with an estimated 69 PBGs, is on the threshold of achieving the size criterion.

• *Downlisting Criterion 5: There are at least four populations each containing at least 40 PBGs (45 to 60 active clusters) on State and/or Federal lands in the South/Central Florida Recovery Unit.* This criterion has been met by four populations: Big Cypress Essential Support, (88 active clusters, 78 PBGs); Goethe Essential Support (63 active clusters, 52 PBGs); Ocala Essential Support (123 active clusters, 109 PBGs); Withlacoochee Citrus Tract (80 active clusters, 78 PBGs).

• *Downlisting Criterion 6: There are habitat management plans in place in each of the above populations identifying management actions sufficient to increase the populations to recovery levels, with special emphasis on frequent prescribed burning during the growing season.* This criterion has been mostly met. These 20 populations occur on properties owned by 6 Federal and 5 State agencies, and 2 nongovernmental entities. Agency management plans meet this criterion for 18 of these 20 populations. The remaining two populations, the Big Cypress Essential Support population and the Northeast North Carolina/Southeast Virginia Essential Support population, do not currently fulfill this management criterion for various reasons. The Big Cypress Essential Support population, on the Big Cypress National Preserve, has exceeded its recovery population size objective, and while the Preserve management plan doesn't mention species-specific management activities, appropriate habitat management is occurring along with a limited application of artificial cavity installation. In addition, because of the current distribution and number of natural cavities and continued excavation of natural cavities on the Preserve by woodpeckers, there may be sufficient old pines for natural cavity excavation to sustain this population even if the Preserve does not manage for artificial cavities in the future. The Northeast North Carolina/Southeast Virginia Essential Support population is spread over five properties with a mixture of management plans and management activities. For example, The Nature Conservancy does not have a management plan for the Piney Grove Preserve in Virginia; however, this population segment is intensively and successfully managed. Red-cockaded woodpeckers on the remaining four properties inhabit ecologically unique conditions that limit the application of the standard management techniques, and a management plan does not exist for one of these properties. In addition, the available management plans for these 20 populations include none to minimal provisions for post-hurricane or post-storm management, although such management generally does occur when needed.

Delisting can be achieved with a minimum 29 populations that fulfill required size criteria in, when required, specific recovery units. As with downlisting, a population that fulfills one criterion cannot be applied to meet another criterion. All of these populations must exist with suitable natural cavities and without dependence on continued artificial cavity management. Sufficient management and monitoring plans must be available by respective management agencies to continue to sustain these populations. Finally, the recovery plan indicates that only 11 of the 13 primary core populations must meet the delisting criteria because at any time 2 may be recovering from adverse impacts of hurricanes. Similarly, the requirement for secondary core populations is 9 of 10, and the requirement for essential support populations is 9 of 16 to allow for hurricane impacts.

Of the 29 populations required for delisting, only 12 (41.4 percent) currently meet delisting population size requirements. Of the following four recovery criteria with delisting population size requirements, Delisting Criterion 3, concerning populations in the South/Central Florida recovery unit, is the only criterion in which all populations have attained minimum size attributes. All of these 29 populations currently remain dependent on artificial cavities.

• *Delisting Criterion 1: There are 10 populations of red-cockaded woodpeckers that each contain at least 350 PBGs (400 to 500 active clusters), and one population that contains at least 1,000 PBGs (1,100 to 1,400 active clusters), from among 13 designated primary core populations, and each of these 11 populations is not dependent on continuing installation of artificial cavities to remain at or above this population size.* This criterion has not been met. Five of the 11 primary core populations in this criterion have met or positively exceeded the minimum population size, but all populations remain dependent on artificial cavities and no population has reached at least 1,000 PBGs: North Carolina Sandhills East Primary Core (520 active clusters, 514 PBGs), Fort Stewart Primary Core (504 active clusters, 480 PBGs), Eglin Primary Core (526 active clusters, 462 PBGs), Francis Marion Primary Core (465 active clusters, 414 PBGs), Fort Benning Primary Core (400 active clusters, 387 PBGs) The Central Florida Primary Core is the closest to achieving the 1,000 PBG goal (858 active clusters, 764 PBGs). In addition, the following populations have not yet met the goal of 350 PBGs: Sam Houston Primary Core (289 active clusters, 257 PBGs), Coastal North Carolina Primary Core (235 active clusters, 209 PBGs), Osceola/Okefenokee Primary Core (212 active clusters, 189 PBGs), Vernon/Fort Polk Primary Core (223 active clusters, 199 PBGs), and Bienville Primary Core (162 active clusters, 144 PBGs)

• *Delisting Criterion 2: There are nine populations of red-cockaded woodpeckers that each contain at least 250 PBGs (275 to 350 active clusters) from among 10 designated secondary core populations, and each of these nine populations is not dependent on continuing installation of artificial cavities to remain at or above this population size.* This criterion has not been met. None of the 10 designated secondary core populations harbors 250 PBGs, which range in size from 69 PBGs in the Ouachita Secondary Core to 211 PBGs in the South Carolina Sandhills Secondary Core, and all of these populations remain dependent on artificial cavities.

• *Delisting Criterion 3: There are at least 250 PBGs (275 to 350 active clusters) distributed among designated essential support populations in the South/Central Florida Recovery Unit, and six of these populations (including at least two of the following: Avon Park, Big Cypress, and Ocala) exhibit a minimum population size of 40 PBGs*

that is independent of continuing artificial cavity installation. This criterion has been partially met. The size of the six populations and total number of PBGs has been fulfilled: Babcock/Webb Essential Support (46 active clusters, 42 PBGs), Big Cypress Essential Support (88 active clusters, 78 PBGs), Goethe Essential Support (63 active clusters, 52 PBGs), Ocala Essential Support (123 active clusters, 109 PBGs), Three Lakes Essential Support (48 active clusters, 45 PBGs), and Withlacoochee Citrus Tract Essential Support (80 active clusters, 78 PBGs). All populations continue to be dependent on artificial cavities.

• *Delisting Criterion 4: There is one stable or increasing population containing at least 100 PBGs (110 to 140 active clusters) in northeastern North Carolina and southeastern Virginia, the Cumberland Ridge and Valley recovery unit (Talladega/Shoal Creek), and the Sandhills recovery unit (North Carolina Sandhills West), and these populations are not dependent on continuing artificial cavity installation to remain at or above this population size.* This criterion has been partially met. Of these three populations, the size objective of the North Carolina Sandhills West Essential Support (187 active clusters, 166 PBGs) has been fulfilled, while the Northeast North Carolina/Southeast Virginia Essential Support (73 active clusters, 65 PBGs) and the Talladega/Shoal Creek Essential Support (42 active clusters, 32 PBGs) have not achieved the population size objective. Also, all three populations continue to be dependent on artificial cavities.

• *Delisting Criterion 5: For each of the populations meeting the above size criteria, responsible management agencies shall provide (1) a habitat management plan that is adequate to sustain the population and emphasizes frequent prescribed burning, and (2) a plan for continued population monitoring.* This criterion has not been met. Once the populations required for delisting have achieved population size objectives and are not dependent on artificial cavities, this criterion requires adequate future management plans to continue to sustain habitat and populations with active habitat management and monitoring. Such management is essential to ensure populations do not decline and the species falls to an endangered or threatened status. These management and monitoring plans would represent post-delisting commitments by respective management entities for this conservation-reliant species. Various management plans currently exist for these populations, but not as continued commitments upon recovery and delisting of the red-cockaded woodpecker.

Summary

Since the recovery plan was last revised in 2003, the number of red-cockaded woodpecker active clusters has increased from 5,627 to over 7,800 (USFWS 2020, entire). The population size objectives to meet applicable downlisting criteria have been met for 15 of 20 designated populations. All of these designated populations show stable or increasing long-term population growth rates ($\lambda \geq 1$). However, not all of the designated recovery populations are demographically a single functional population as intended by the recovery plan. Nine of the 20 designated recovery populations toward fulfilling downlisting population size criteria consist of multiple smaller demographic populations. Based on the largest single demographic population for a designated recovery population, 14 of 20 designated recovery populations have achieved downlisting population size criteria. As to delisting criteria, because the delisting criteria all require all-natural cavities, none of the delisting criteria have been fully met. With continued forest management to retain and produce sufficient old pines for natural cavity excavation, future populations would no longer be dependent artificial cavities. Regardless, there has been encouraging progress towards meeting the delisting criteria, as 12 of 29 demographically delineated populations corresponding to designated recovery populations currently have achieved population sizes that meet the delisting criteria.

While recovery plans provide important guidance to the Service, States, and other partners on methods of minimizing threats to listed species and measurable objectives against which to measure progress towards recovery, they are guidance and not regulatory documents. Revisions to the List, including downlisting or delisting a species, must reflect determinations made in accordance with sections 4(a)(1) and 4(b) of the Act. Section 4(a)(1) requires that the Secretary determine whether a species is an endangered species or threatened species due to threats to the species. Section 4(b) of the Act requires that the determination be made ''solely on the basis of the best scientific and commercial data available.'' Therefore, while it is valuable to consider the progress a species has made towards meeting downlisting or delisting criteria, the decision to reclassify an endangered species as threatened or to delist a species due to recovery does not rely on the recovery plan. For the red-cockaded woodpecker, although the population objectives from the recovery plan have yet to be reached, the primary recovery task of increasing existing populations on Federal and State lands has been successful, and the population growth rates indicate sufficient resiliency to stochastic disturbances with effective management. In addition, redundancy of moderate to very high resiliency populations suggests that risks from future catastrophic events to overall viability is low.

Determination of Red-Cockaded Woodpecker Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of ''endangered species'' or ''threatened species.'' The Act defines an ''endangered species'' as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether a species meets the definition of ''endangered species'' or ''threatened species'' because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We must consider these same five factors in reclassifying (*e.g.,* changing a species status from endangered to threatened) or delisting a species.

Status Throughout All of Its Range

Red-cockaded woodpeckers were once considered a common bird across the southeastern United States. At the time of listing in 1970, the species was severely threatened by lack of adequate habitat due to historical logging, incompatible forest management, and conversion of forests to urban and agricultural uses. Fire-maintained old growth pine savannahs, on which the species depends, were extremely rare. What little habitat remained was mostly degraded due to fire suppression and silvicultural practices that hindered the development of older, larger trees

needed by the species for cavity development and foraging. Even after listing, the species continued to decline. However, new restoration techniques, such as artificial cavities, along with changes in silvicultural practices and wider use of prescribed fire to recreate open pine parkland structure, has led to stabilization of the species' viability and resulted in an increase in the number and distribution of populations. While most populations are still small and vulnerable to stochastic events, the majority of populations for which we were able to determine trends are stable or increasing ($\lambda = 1.0$ or greater), and only 13 percent are declining. There are currently at least 124 populations across 13 ecoregions.

When we modeled future scenarios, the majority of populations were projected to be stable or increasing in all but the low management scenario, highlighting how successful management can sustain even small populations, albeit with a greater inherent risk in response to poor or insufficient management. Future management at current and recent past levels, as represented by the medium management scenario, further increases the number of moderate to very high resiliency populations and projects that small populations can be preserved. In addition, at current (or greater) levels of management, redundancy and representation are expected to significantly improve because most populations are expected to increase in size across the ecoregions.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

We determined the foreseeable future to be 25 years from present, because it is a reasonable timeframe in which we can reasonably estimate population responses to natural factors and management. As discussed under *Future Conditions* above, in the SSA report, future population conditions under different management scenarios were simulated and modeled to 25 years into the future, and we determined that we can rely on the timeframe presented in the scenarios and predict how future stressors and management will affect the red-cockaded woodpecker. It is the timeframe in which the 95 percent confidence intervals around the future scenario modeling have reasonable bounds of uncertainty. This timeframe, given the species' life history, is also sufficient to identify any effects of stressors or conservation measures on the red-cockaded woodpecker's viability at both population and species levels. Finally, 25 years represents 4 to 5 generations of red-cockaded woodpecker, which would be sufficient time for population-level impacts from stressors and management to be detected.

The red-cockaded woodpecker still faces a variety of stressors due to inadequate habitat across its range, but these are now mostly legacy stressors resulting from historical forest conversion and fire suppression practices rather than current habitat loss. These legacy stressors include insufficient numbers of cavities and suitable, abundant old pines for natural cavity excavation; habitat fragmentation and its effects on genetic variation, dispersal, and connectivity to support demographic populations; lack of suitable foraging habitat for population growth and expansion; and small populations. The species also still faces stress from natural events, especially hurricanes. Immediate management response after natural disasters is key to preventing cluster abandonment in all populations and is critical to keeping smaller populations from being extirpated altogether. More broadly, this species remains conservation-reliant throughout its range. Red-cockaded woodpeckers rely on, and will continue to rely almost completely on, active management by property managers and biologists to install artificial cavities and manage clusters, restore additional habitat and strategically place recruitment clusters to improve connectivity, control the hardwood midstory through prescribed fire and silvicultural treatments, and translocate individuals to augment small populations and minimize loss of genetic variation. In addition, emergency response after severe storms and other natural disasters will continue to be necessary to prevent cluster abandonment and minimize wildfire fuel loading. However, both the emergency response and routine management are well-understood and are currently being implemented across the range of the woodpecker. In addition, much of the red-cockaded woodpecker's currently occupied habitat is now protected under various management plans. As a conservation-reliant species, securing management commitments for the foreseeable future would ensure that red-cockaded woodpecker populations grow or are maintained. This conclusion is reinforced by the future scenario simulations, which indicate that management efforts equal to or greater than current levels will further increase the number of moderate to very high resiliency populations and preserve small populations.

After evaluating the threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we find that, while the stressors identified above continue to negatively affect the red-cockaded woodpecker, new restoration techniques and changes in silvicultural practices has led to stabilization of the red-cockaded woodpecker's viability and even resulted in a substantial increase in the number and distribution of populations. Thirteen percent of all current red-cockaded woodpecker clusters are within moderate, high, or very highly resilient populations, and populations are spread across multiple ecoregions, providing for redundancy and representation. However, the species remains highly dependent on continued conservation management and the majority of populations contain small numbers of clusters. Thus, after assessing the best available information, we conclude that the red-cockaded woodpecker is not in danger of extinction throughout all of its range; however, it is likely to become in danger of extinction within the foreseeable future throughout all of its range.

However, if ongoing and future proactive red-cockaded woodpecker management were assured, the remaining negative factors identified above could be ameliorated. Therefore, in this proposed rule, we ask the public to provide comments regarding the adequacy of existing management plans for the conservation of the red-cockaded woodpecker, and the likelihood that those plans will continue to be implemented into the future (see Information Requested, above).

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center*

for Biological Diversity v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Center for Biological Diversity*), vacated the aspect of the 2014 Significant Portion of its Range Policy that provided that the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and, (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Center for Biological Diversity,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for the red-cockaded woodpecker, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.

For the red-cockaded woodpecker, we considered whether the threats are geographically concentrated in any portion of the species' range at a biologically meaningful scale. We examined the following stressors: Natural disasters such as hurricanes and vulnerability due to small population sizes and fragmentation. Other identified stressors, such as inadequate habitat, are uniform throughout the red-cockaded woodpecker's range. Although hurricanes may impact populations across the red-cockaded woodpecker's range, return intervals are shorter and impacts are more pronounced in near-coastal populations compared to inland populations (USFWS 2020, pp. 119–122). Furthermore, while small populations occur throughout the species' range, we found that there is a concentration of threats from the combination of both hurricanes and small population sizes in the Florida Peninsula, West Gulf Coastal Plain, and the southernmost near-coastal extension of the Upper West Gulf Coastal Plain ecoregions. This means these portions of the range together may constitute a portion of the species range where the species could have a different status because the threats are not uniform throughout the range and the species may face a greater level of imperilment where threats are concentrated.

Having determined that these are portions of the range where the species may be in danger of extinction, we next examined the question of whether these portions may be significant. In undertaking this analysis for the red-cockaded woodpecker, we considered whether the portions of the species' range identified above may be significant based on their biological importance to the overall viability of the species. Although these areas contain 49 of the 124 demographic populations identified in the SSA (40 percent), only three populations currently have moderate resiliency and the remaining populations demonstrate low and very low resiliency. One of the moderate populations is projected to increase to high resiliency in the low management scenario and two of three moderate populations are projected to increase to high resiliency in the remaining future scenarios. However, the majority of the populations remain in the low or very low resiliency category and do not contribute significantly, either currently or in the foreseeable future, to the species' total resiliency at a biologically meaningful scale compared to other representative areas. Although the populations in these ecoregions are relatively small, the current and future redundancy suggests that hurricanes would be unlikely to extirpate red-cockaded woodpeckers in an entire ecoregion, thus overall representation should not be impacted. Even if some populations in these portions were to become extirpated, the species would maintain sufficient levels of resiliency, representation, and redundancy in the rest of these ecoregions and in other ecoregions across its range, supporting the species' viability as a whole. Thus, we do not find that these are portions of the red-cockaded woodpecker's range that may be significant.

In conclusion, we do not find any portions of the species' range may be significant based on their biological importance to the overall viability of the red-cockaded woodpecker. Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best available scientific and commercial information indicates that the red-cockaded woodpecker meets the definition of a threatened species. Therefore, we propose to reclassify the red-cockaded woodpecker as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Effects of This Proposed Rule

This proposal, if made final, would revise 50 CFR 17.11(h) to reclassify the red-cockaded woodpecker from endangered to threatened. This reclassification is due to the substantial efforts made by Federal, State, and private landowners to recover the species. Adoption of this proposed rule would formally recognize that this species is no longer in danger of extinction throughout all or a significant portion of its range and, therefore, does not meet the definition of an endangered species. However, the species is still impacted by the effects of habitat loss and degradation, habitat fragmentation, and small populations such that it meets the Act's definition of a threatened species.

Proposed Section 4(d) Rule

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the ''Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation'' of species listed as threatened. The U.S. Supreme Court has noted that very similar statutory language like ''necessary and advisble'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.'' Additionally, the second sentence of section 4(d) of the Act states that the Secretary ''may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or 9(a)(2), in the case of plants.'' Thus, regulations promulgated under section 4(d) of the Act provide the Secretary with wide latitude of discretion to select

appropriate provisions tailored to the specific conservation needs of the threatened species. The statute grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife or included a limitated taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all the threats a species faces (see *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising its authority under section 4(d) of the Act, the Service has developed a proposed 4(d) rule that is designed to address the red-cockaded woodpeckers' specific threats and conservation needs. Although the statute does not require the Service to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in seciton 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the red-cockaded woodpecker. As discussed above, the Service has concluded that the red-cockaded woodpecker is likely to become an endangered species within the foreseeable future primarily due to threats stemming from lack of suitable habitat. Therefore, the provisions of this proposed 4(d) rule prohibit incidental take associated with actions that would result in the further loss or degradation of red-cockaded woodpecker habitat, including damage to or loss of cavity trees. Maintaining and expanding existing populations is also vital to the conservation of the species; therefore, the proposed 4(d) rule would also prohibit incidental take associated with actions that would harm or harass red-cockaded woodpeckers during breeding season as well as ban the use of insecticides and herbicides on standing pine trees in and around active cavity tree clusters (to provide for adequate foraging).

The red-cockaded woodpecker relies, and will continue to rely, on artificial cavities until a sufficient number of large mature pines becomes widely available; the installation and maintenance of artificial cavities is an essential management tool to sustain populations until such time as there are adequate natural cavities. However, the proper techniques to install cavity inserts, drill cavities, or install cavity restrictor plates require training and experience; therefore, the proposed 4(d) rule would prohibit incidental take associated with these activities, so that they can be properly regulated under a section 10(a)(1)(A) permit. Similarly, inspecting cavities to monitor eggs and hatchlings, typically using a video scope, drop light, or mirror inserted into the cavity, could cause incidental take, through flushing of adult or subadult birds resulting in possible injury or even death, if not done correctly. Therefore, the proposed 4(d) rule would prohibit incidental take associated with inspections of cavity contents, including the use of video scopes, drop lights, or mirrors, inserted into cavities; however, these activities could be covered under a section 10(a)(1)(A) permit.

The proposed 4(d) would also provide for certain exceptions to the prohibitions. In addition to certain standard exceptions, they include incidental take on Department of Defense installations under certain circumstances, incidental take associated with conservation and habitat restoration actions carried out in accordance with a Service- or State-approved management plan, and certain actions that would harm or harass red-cockaded woodpeckers during breeding season associated with existing infrastructure that are not increases in the existing activities. All of these prohibitions and exceptions are discussed in more detail below.

The provisions of this proposed 4(d) rule are one of many tools that the Service would use to promote the conservation of the red-cockaded woodpecker. This proposed 4(d) rule would apply only if and when the Service makes final the determination to reclassify the red-cockaded woodpecker as a threatened species.

Provisions of the Proposed 4(d) Rule

This proposed 4(d) rule would provide for the conservation of the red-cockaded woodpecker by prohibiting the following activities, except as otherwise authorized or permitted: Importing or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; and selling or offering for sale in interstate or foreign commerce. We also propose several standard exceptions to the prohibitions for the red-cockaded woodpecker, such as activities authorized by permits under § 17.32 of these regulations; take by employees of State conservation agencies operating under a cooperative agreement with the Service in accordance with section 6(c) of the Act; and take by an employee of the Service, Federal land management agency, or State conservation agency to aid sick or injured red-cockaded woodpeckers, which are set forth under Proposed Regulation Promulgation, below.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined by regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating intentional and incidental take would help preserve the species' remaining populations; enable beneficial management actions to occur; and decrease synergistic, negative effects from other stressors.

In this 4(d) rule, we propose to prohibit intentional take, including capturing, handling, and similar activities, because these activities require training and experience. Such activities include, but are not limited to, translocation, banding, collecting tissue samples, and research involving capturing and handling red-cockaded woodpeckers. While these activities are important to red-cockaded woodpecker recovery, there are proper techniques to capturing and handling birds that require training and experience. Improper capture, banding, or handling can cause injury or even result in death of red-cockaded woodpeckers. Therefore, to assure these activities continue to be conducted correctly by properly trained personnel, the proposed 4(d) rule would prohibit intentional take; however, these activities could be covered under a section 10(a)(1)(A) permit.

For the purposes of this rule, ''occupied habitat'' is defined as an active cavity tree cluster with surrounding suitable foraging habitat. An ''active cavity tree cluster'' is defined as the area delineated by a polygon of active cavity trees plus a 200-foot buffer, although there are some exceptions to this. Foraging habitat is delineated as surrogate foraging partitions according to described Service procedure and standard.

As discussed above under Summary of Stressors and Conservation Measures Affecting the Species, the lack of suitable habitat is the primary factor continuing to affect the status of the red-cockaded woodpecker. Historical clearcutting, incompatible forest management, and conversion to urban and agricultural lands uses resulted in the loss of the majority of longleaf and other open-canopy pine habitat across the range of the species. While these impacts have been significantly curtailed and mostly replaced by beneficial conservation management, stressors caused by adverse historical practices still linger, such as insufficient numbers of cavities, low numbers of suitable old pines, and habitat fragmentation. In addition, these types of actions do still occur within red-cockaded woodpecker habitat, so maintaining existing habitat is essential. Therefore, in addition to the activities prohibited above, this proposed 4(d) rule would prohibit incidental take of any red-cockaded woodpecker: (1) Associated with damage or conversion of currently occupied red-cockaded woodpecker nesting and foraging habitat to other land uses that result in conditions not able to support red-cockaded woodpeckers; and (2) associated with forest management practices in currently occupied red-cockaded woodpecker nesting and foraging habitat that result in conditions not able to support red-cockaded woodpeckers. Such actions could include, but are not necessarily limited to, timber harvesting for thinning or regeneration in occupied habitat that temporarily or permanently removes active cavity trees or suitable foraging habitat and renders the remaining habitat and timber insufficient for red-cockaded woodpeckers, or actions that permanently convert currently occupied red-cockaded woodpecker nesting and foraging habitat to other non-forest land uses, such as real estate development, cultivation or crops, firing ranges on military installations, roads, rights-of-way, and pasture.

However, under this 4(d) rule, we propose that habitat restoration activities that would sustain, improve, or increase quality and quantity of habitat for the red-cockaded woodpecker would be excepted from incidental take prohibitions if they are conducted under a Service- or State-approved management plan that provides for the conservation of the red-cockaded woodpecker. The Service encourages landowners and managers to conduct activities that maintain and improve red-cockaded woodpecker habitat. These habitat restoration activities may include, but are not limited to, thinning overstocked stands; converting loblolly, slash or other planted pines to more fire-tolerant native pines such as longleaf pine; regeneration of stands to provide more sustainable future habitat; and prescribed fire. Current conditions in certain pine stands can limit the amount of red-cockaded woodpecker habitat. For example, foraging habitat dominated by even-aged stands of old senescent pines may limit the ability of younger stands to grow and replace the future natural loss of older stands. Regeneration can be an important tool to provide a more sustainable future source of suitable red-cockaded woodpecker nesting and foraging habitat with trees of sufficient size and age. However, harvesting occupied red-cockaded woodpecker habitat for regeneration in these conditions could result in loss of suitable habitat, resulting in a reduction to the red-cockaded woodpecker population. Under this proposed 4(d) rule, we would under certain conditions except incidental take associated with habitat restoration activities that have short-term adverse effects to red-cockaded woodpecker, but that are intended to provide for improved habitat quality and quantity in the long term, with coinciding increase in numbers of red-cockaded woodpeckers. Current and future red-cockaded woodpecker habitat conditions that require such restoration can vary significantly among sites and properties, to the extent that it would be extremely difficult to prescribe a universal condition by which this exception would apply. Therefore, in this 4(d) rule we propose that these activities may proceed in compliance with a Service- or State-approved management plan, where the site-specific conditions can be strategically and accurately assessed. Suitable management plans may consist of stand-alone documents, or may be tiered to other plans, such as U.S. Forest Service Land and Resource Management Plans, National Wildlife Refuge System Comprehensive Conservation Plans, and wildlife management area plans, State Wildlife Action Plans, or other State agency plans.

Potentially, these management plans could cover more than just situations where land managers are seeking to alter habitat in the short term for long-term restoration of improved habitat. In this 4(d) rule we propose to except incidental take associated with other management activities conducted under Service- or State-approved red-cockaded woodpecker management plans. Public agencies and private landowners prepare a variety of plans for different purposes. A Service- or State-approved plan in this regard would include a red-cockaded woodpecker management component, whether as a part of a larger plan or a stand-alone plan, to address factors including, but not limited to, the red-cockaded woodpecker population size objective and how management for artificial cavities as needed and habitat management to sustain, restore, or increase habitat for foraging and cavity trees will attain population size objectives. For example, once certain population size objectives, such as those identified in the 2003 recovery plan, are met, and other parameters are established (such as commitments relating to the amount, extent, and location of any future incidental take), a landowner following a Service- or State-approved management plan could be excepted from incidental take for red-cockaded woodpecker conservation activities or habitat restoration activities, including, but not limited to silviculture and prescribed fire, activities causing harm or harassment of red-cockaded woodpeckers, and use of insecticides or herbicides on their lands. Again, the Service seeks to encourage comprehensive, proactive management that results in red-cockaded woodpecker population growth and stability. Excepting incidental take once such targets are met will encourage these beneficial management activities. However, because of the differences in needed management across the range of the species, it is appropriate to identify these population targets and other parameters on a case-by-case basis in a Service- or State-approved management plan, rather than in a blanket exception in this 4(d) rule. State agency Safe Harbor plans and agreements implemented for non-governmental landowners, as approved by the Service, do not need to be covered under this exception because they receive permits under the authority of section 10(a)(1)(A) of the Act that provides exemption from the prohibitions of incidental take.

We acknowledge the critical role that the States play in the conservation of

the red-cockaded woodpecker. As described in *Conservation Measures that Benefit the Species,* above, States solely own and manage lands occupied by at least 31 demographic populations and oversee State-wide safe harbor agreements that have enrolled 459 non-Federal landowners covering approximately 2.5 million acres. Because of their authorities and their close working relationships with landowners, State agencies are in a unique position to assist the Services in implementing conservation programs for the red-cockaded woodpecker. We also acknowledge the workload that will be associated with the management plans as envisioned, and the limited resources the Service may have to participate fully in developing these plans, especially if multiple landowners were to request to develop such plans if and when this 4(d) rule is made final. Our intention is that these management plans would be developed in coordination with all affected entities—the Service, the landowner or manager, and the State conservation agency. However, because of the States' unique relationship with landowners, and their experience and sustained performance implementing conservation programs for red-cockaded woodpeckers in their States, in this rule, we propose that management actions implemented under red-cockaded woodpecker management plans developed with and approved by State conservation agencies and not necessarily the Service are excepted from the incidental take prohibitions. The Service seeks comment on what conditions, if any, should be placed upon State-approved management plans such that they would provide both protections to red-cockaded woodpeckers and incentives to landowners similar to a Service-approved plan (see Information Requested, above).

The Service is also considering how to expand and provide further clarity regarding red-cockaded woodpecker conservation actions and habitat restoration activities that would be excepted from the incidental take prohibition in the 4(d) rule, and therefore we seek comment on our proposed provision excepting incidental take resulting from conservation or habitat management activities, including silviculture, prescribed fire, and use of insecticides or herbicides, with a Service- or State-approved management plan for red-cockaded woodpecker conservation (see Information Requested, above). In addition, we seek comment and information about the important factors that should be considered for these Service- or State-approved management plans. These factors may include the duration of the plan; personnel and funding for plan implementation; current habitat conditions and management limitations; the treatments to improve habitat and resolve limitations; desired future habitat conditions; and the past, current, and anticipated future size of the red-cockaded woodpecker population. In addition, these factors may include the role and extent of Service oversight of both Service- and State-approved plans, such as monitoring requirements and reporting to the Service any resulting take of red-cockaded woodpeckers. Continued conservation activities and beneficial land management are necessary to address habitat degradation and fragmentation, and it is the intent of this proposed rule to encourage these activities. We also seek comment on whether an exception could be made for beneficial long-term forest regeneration activities without a Service- or State-approved management plan, if limiting conditions were placed on the activities, such as red-cockaded woodpecker current population size and a future limit to the reduction of population size as a result of the restoration project, and what those limiting conditions should be.

The use of insecticides and herbicides within or near an active cavity tree cluster could expose red-cockaded woodpeckers and their invertebrate prey to toxic chemicals, even when application follows labeling requirements. Depending on chemical ingredients, toxicity, and dose exposure, there is an ecological risk that foraging red-cockaded woodpeckers could be adversely exposed and injured (National Research Council 2013, p. 3–15). Adverse impacts to red-cockaded woodpeckers include reduced quantity of insects available for foraging or ingestion of contaminated prey (*e.g.,* EPA 1993, p. 1–3; National Research Council 2013, pp. 3–15). This proposed 4(d) rule would prohibit incidental take associated with using insecticides and herbicides on any standing pine tree in habitat occupied by red-cockaded woodpeckers within 0.50-mile from the center of an active cavity tree cluster, the area in which red-cockaded woodpeckers in an active territory are most likely to forage (Convery and Walters 2004, entire).

This measure would not prohibit use of insecticides or herbicides in applications that do not result in an adverse chemical exposure to red-cockaded woodpeckers. The Service recognizes that herbicides can be safely applied in occupied habitat (McDearman 2012, entire). For example, hand application of herbicides by direct foliar spray in occupied habitat to control undesirable shrubs or hardwoods may not result in incidental take if no chemicals are applied—either directly or inadvertently—to standing pine trees where red-cockaded woodpeckers are expected to forage on uncontaminated invertebrates within the 0.50-mile radius of the center of the active cavity tree cluster. The use of insecticides or herbicides within these areas could be permitted under a Service- or State-approved management plan, as described above, with an appropriate toxicological risk analysis of the likelihood of an adverse oral, dermal or respiratory exposure to the red-cockaded woodpecker, and incidental take could be excepted when adverse short-term impacts are essential or unavoidable for a long-term benefit. We seek comment from the public on the spatial area covered by this prohibition, and whether the prohibition should apply to other vegetation, such as the herbaceous ground layer in addition to standing pine trees, within 0.50-mile from the center of an active cavity cluster, as well as the clarity of the prohibition, (see Information Requested, above).

The proposed 4(d) rule would also prohibit incidental take of actions that would render cavity trees unusable to red-cockaded woodpeckers. This could result from activities such as parking vehicles, stacking pallets, or piling logging slash or logging decks, pine straw, or other material near active cavity trees; activities that damage active cavity trees; and accidently-set wildfires, because such activities could render the cavity trees unusable to red-cockaded woodpeckers. This prohibition is intended to prevent incidental take resulting from operations in the vicinity of active cavity trees that may damage the trees through, for example, collision or compaction of tree roots. This prohibition would also apply to activities that result in damage to cavity trees, rendering them unusable to red-cockaded woodpeckers. For example, incidental take caused by accidently started fires that damage cavity trees or a small- or large-arms munitions ricochet that hit a cavity tree, causing damage that ultimately kills the tree, would be prohibited.

Within the range of the species, all Department of Defense Army, Air Force, and Marine Corps installations have red-cockaded woodpecker management plans and guidelines incorporated into their Service-approved INRMPs to

minimize the adverse effects of military training and to achieve recovery objectives. These plans and guidelines include red-cockaded woodpecker conservation and population size objectives, management actions to achieve conservation goals, monitoring and reporting, and specific training activities that are allowed or restricted within clusters and near cavity trees. Under the Sikes Act (16.U.S.C. 670 *et seq.*), the Service is required to review and approve INRMPs, when they are revised, at least every 5 years, and participate in annual reviews. As a result of these conservation programs under Service-approved INRMPs, red-cockaded woodpecker populations have increased on all installations. In fact, Fort Bragg, Fort Stewart, Eglin Air Force Base, Fort Benning, and Camp Blanding all have achieved or surpassed their red-cockaded woodpecker recovery plan population size objectives and are expected to continue to manage towards larger populations. Active and beneficial red-cockaded management to increase population sizes on military installations has been an essential component of sustaining the species, and it offsets the adverse effects of training. Therefore, the proposed 4(d) rule would except incidental take resulting from red-cockaded woodpecker management and military training activities on Department of Defense installations with a Service-approved INRMP. Any incidental take resulting from new proposed training or construction activities that is not incorporated into a Service-approved INRMP would not be excepted under this proposed rule, but could be excepted through an incidental take statement associated with a biological opinion resulting from section 7 consultation under the Act. The Service seeks comments on this exception (see Information Requested, above).

During the breeding season in particular, vehicles and equipment, floodlights, other construction activities, extraction activities, military maneuvers, or even just human presence can potentially harass breeding red-cockaded woodpeckers, resulting in nest failure. Therefore, this proposed 4(d) rule would also prohibit incidental take associated with the operation of vehicles or mechanical equipment, the use of flood lights at night, activities with a human presence, (including military activities), other actions associated with construction or repair, or extraction activities in an active cavity tree cluster during the breeding season. The breeding season for red-cockaded woodpeckers can vary across the latitudinal range and, depending on location, the season can start as early as March and end as late as July; therefore we do not propose specific dates for this prohibition in this rule. We furthermore acknowledge that incidental take from such activities can also occur outside of the breeding season, so we seek comments from the public about whether this prohibition should encompass the whole year, and not just during the breeding season (see Information Requested, above).

We acknowledge that there are active cavity tree clusters within areas with existing human presence, activities, and infrastructure, including Federal, State, and county roads, private forest access roads and trails, military installations, nature trails, golf courses, and residential areas. We also recognize the use of vehicles and mechanical equipment may need to be used for maintenance requirements to ensure safety and operational needs of existing infrastruture, including maintaining existing infrastructure such as firebreaks, roads, rights-of-way, fence lines, and golf courses, and we understand that these maintenance requirements to ensure human safety may need to take place during the breeding season. Incidental take resulting from these ongoing activities are excepted from this prohibition. In addition, we recognize there is existing human presence, activities, and infrastructure within active cavity tree clusters and that red-cockaded woodpeckers have demonstrated tolerance, or an ability to habituate, to these stressors without adversely affecting essential feeding, breeding, or sheltering behaviors. Therefore, for continuation of ongoing activities, as long as there is no increase in the frequency, intensity, duration, pattern, or extent of existing operations, use, or activities, such that red-cockaded woodpeckers would negatively respond to the stressor, the activities may continue (*i.e.,* are not prohibited), and any incidental take, although unlikely, resulting from existing operation of vehicles or mechanical equipment, use of lights at night, or activities with human presence are excepted from the incidental take prohibitions. An example of an activity that would be excepted from the incidental take prohibitions would be routine, ongoing road maintenance, such as mowing rights-of way or trimming back vegetation, during the breeding season on a forest road that bisects an active cavity tree cluster. Other examples of ongoing activities include a continuation of recreation at golf courses and parks and driving vehicles on existing highways and roads. On the other hand, new activities, or ongoing activities that increase in frequency, intensity, duration, or extent would not be excepted. For instance, new road construction initiated during the breeding season in an active cavity tree cluster would potentially increase the extent or duration of stressors beyond existing, routine operations, and therefore would be prohibited.

However, there are also operations conducted near active cavity trees that render the tree unusable to red-cockaded woodpeckers, through sustained harassment that prevents individual birds from using cavities. For example, staging and use of equipment such as generators and floodlights within an active cavity tree cluster can cause birds to roost outside of their cavities and become exposed to predation, disrupt incubation and kill eggs, or alter feeding of nestlings, which could result in their death. We seek comment on whether this prohibition should also apply to these situations where harassment is likely (see Information Requested, above).

Red-cockaded woodpeckers must have sufficient nesting and foraging habitat to survive. Maintaining an adequate number of suitable cavities in each woodpecker cluster is fundamental to the conservation of the species. Loss of natural cavity trees was a major factor in the species' decline, and availability of natural cavity trees currently limits many populations. Until a sufficient number of large, old pines become widely available, installation and maintenance of artificial cavities is an essential management tool to sustain populations and bring about population increases, and the Service continues to encourage the installation of artificial cavities. However, we also acknowledge that there are proper techniques to install cavity inserts, drill cavities, or install cavity restrictor plates, and these techniques require training and experience. Improperly installed artificial cavities can cause injury or even result in death of red-cockaded woodpeckers attempting to roost or nest in them. Therefore, to assure artificial cavities continue to be installed correctly by properly trained personnel, the proposed 4(d) rule would prohibit incidental take associated with the installation of artificial cavity inserts, drilled cavities, or cavity restrictor plates; however, these activities could be covered under a section 10(a)(1)(A) permit.

We acknowledge that many of our partners have the training and extensive experience in installing artificial

cavities. We, therefore, ask the public to comment regarding whether the installation of artificial cavities should be excepted from the incidental take prohibitions for individuals who have completed training and have achieved a certain level of proficiency, and what that training and proficiency should be (see Information Requested, above).

Similarly, we encourage monitoring of red-cockaded woodpecker clusters and populations, including inspecting cavities to monitor eggs and hatchlings, typically using a video scope, drop light, or mirror inserted into the cavity. However, these inspections can cause incidental take if not done correctly, as red-cockaded woodpeckers sometimes will flush from the cavity chamber and injure themselves trying to escape past the probe. Therefore, the proposed 4(d) rule would prohibit incidental take associated with inspections of cavity contents, including the use of video scopes, drop lights, or mirrors, inserted into cavities. These activities could be covered under a section 10(a)(1)(A) permit.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: Scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. There are also certain statutory exceptions from the prohibitions, which are found in sections 9 and 10 of the Act.

The Service recognizes the special and unique relationship with our State conservation agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, would be able to conduct activities designed to conserve the red-cockaded woodpecker that may result in otherwise prohibited take without additional authorization, including installation of artificial cavities.

Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the red-cockaded woodpecker. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service. We ask the public, particularly State agencies and other interested stakeholders that may be affected by the proposed 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that the Service could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested, above).

Required Determinations

Clarity of the Proposed 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:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) 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.

National Environmental Policy Act

We have determined that we do not need to prepare an environmental assessment or environmental impact statement, as defined in the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

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, 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. As we move forward with this reclassification process, we will continue to consult with tribes on a government-to-government basis as necessary.

References Cited

A complete list of references cited is available on the internet at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2019–0018 and upon request from the person listed under **FOR FURTHER INFORMATION CONTACT**, above.

Authors

The primary authors of this proposed rule are staff members of the Service's Southeastern Region, Division of Conservation and Classification.

Signing Authority

The Director, U.S. Fish and Wildlife Service, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the U.S. Fish and Wildlife Service. Aurelia Skipwith, Director, U.S. Fish and Wildlife Service, approved this document on September 24, 2020, for publication.

Dated: September 24, 2020.

Madonna Baucum,

Regulations and Policy Chief, Division of Policy, Economics, Risk Management, and Analytics, Joint Administrative Operations, U.S. Fish and Wildlife Service.

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. Amend § 17.11(h) by revising the entry for ''Woodpecker, red-cockaded'' under BIRDS in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
Birds				
*	*	*	*	*
Woodpecker, red-cockaded.	*Dryobates borealis*	Wherever found	T	35 FR 16047, 10/13/1970; [Insert **Federal Register** citation when published as a final rule]; 50 CFR 17.41(h).[4d]
*	*	*	*	*

■ 3. Amend § 17.41 by adding a paragraph (h) to read as follows:

§ 17.41 Special rules—birds.

* * * * *

(h) Red-cockaded woodpecker (*Dryobates borealis*).

(1) *Definition.* Under this paragraph (h), an ''active cavity tree cluster'' means the area delineated by a polygon of red-cockaded woodpecker active (*i.e.,* occupied) cavity trees with a 200-foot buffer.

(2) *Prohibitions.* The following prohibitions in this paragraph (h)(2) that apply to endangered wildlife also apply to red-cockaded woodpecker. Except as provided under paragraph (h)(3) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as set forth at § 17.21(b).

(ii) Intentional take, including capturing, handling, or other activities, except as set forth in paragraphs (h)(3)(ii) and (iii) of this section.

(iii) Possession, sale, delivery, carrying, transportation, or shipment, by any means whatsoever, of any red-cockaded woodpecker taken in violation of paragraphs (h)(2)(i) and (ii) of this section, except as set forth in paragraph (h)(3)(iv) of this section.

(iv) Incidental take resulting from the following activities:

(A) Damage or conversion of currently occupied red-cockaded woodpecker nesting and foraging habitat to other land uses that results in conditions not able to support red-cockaded woodpeckers.

(B) Forest management practices in currently occupied red-cockaded woodpecker nesting and foraging habitat, including, but not limited to, timber harvesting for thinning or regeneration, that result in conditions not able to support red-cockaded woodpeckers.

(C) Operation of vehicles or mechanical equipment, the use of floodlights, activities with a human presence, other actions associated with construction and repair, or extraction activities in an active cavity tree cluster during the red-cockaded woodpecker breeding season, except as set forth under paragraph (h)(3)(v)(C) of this section.

(D) Installation of artificial cavity inserts, drilled cavities, or cavity restrictor plates.

(E) Inspecting cavity contents, including, but not limited to, use of video scopes, drop lights, or mirrors inserted into cavities.

(F) Activities that render active cavity trees unusable to red-cockaded woodpeckers.

(G) Use of insecticide or herbicide on any standing pine tree within 0.50-mile from the center of an active cavity tree cluster of red-cockaded woodpeckers.

(iv) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1).

(v) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e).

(vi) Sale or offer for sale, as set forth at § 17.21(f).

(3) *Exceptions from prohibitions.* In regard to this species, you may:

(i) Conduct activities as authorized by a permit issued under § 17.32.

(ii) Take, as set forth at § 17.21(c)(2) through (c)(4) for endangered wildlife, and (c)(6) and (c)(7) for endangered migratory birds.

(iii) Take as set forth at § 17.31(b).

(iv) Possess and engage in other acts with unlawfully taken red-cockaded woodpeckers, as set forth at § 17.21(d)(2) through (d)(4) for endangered wildlife.

(v) Take incidental to an otherwise lawful activity caused by:

(A) Red-cockaded woodpecker management and military training activities on Department of Defense installations with a Service-approved integrated natural resources management plan.

(B) Habitat restoration activities carried out in accordance with a management plan providing for red-cockaded woodpecker conservation developed in coordination with, and approved by, the Service or a State conservation agency.

(C) Operation of vehicles or mechanical equipment, the use of lights at night, or activities with a human presence in active cavity tree cluster during the red-cockaded woodpecker breeding season provided that they:

(*1*) Are maintenance requirements to ensure safety and operational needs of existing infrastructure, including maintaining existing infrastructure such as firebreaks, roads, rights-of-way, fence lines, and golf courses; and

(*2*) Do not increase the frequency, intensity, duration, pattern, or extent of existing operation, use, or activities.

[FR Doc. 2020–21510 Filed 10–7–20; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register

Vol. 85, No. 196

Thursday, October 8, 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

Submission for OMB Review; Comment Request

October 5, 2020.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden 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 the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by November 9, 2020 will be considered. 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.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Appeals Division

Title: National Appeals Division Customer Service Survey.

OMB Control Number: 0503–0007.

Summary of Collection: The Secretary of Agriculture established the National Appeals Division (NAD) on October 20, 1994, by Secretary's Memorandum 1010–1, pursuant to the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Pub. L. 103–354, Section 271, dated October 13, 1994). The Act consolidated the appellate functions and staffs of several USDA agencies. The intent is to provide for independent hearing and review determinations that resulted from Agency adverse decisions. Administrative Judges conduct evidentiary hearing on adverse decisions or, when the appellant requests they review the Agency's record of the adverse decision without a hearing. NAD maintains a database to track appeal requests, the database contains only information necessary to process the appeal request, such as the name, address, filing data, and final results of the appeal. NAD will collect information using a survey.

Need and Use of the Information: NAD wants to gather current data to measure the appellant's perception of the quality of how easy the determination was to read; how intently the Administrative Judge listened to the appellant; and how courteous the Administrative Judge was during the appeal process. NAD will also use the information gathered from its surveys to tailor and prioritize training. Failure to collect this information will not impede NAD's ability to conduct administrative appeals; however, it will impair NAD's ability to develop and improve Customer Service Standards.

Description of Respondents: Individuals or households.

Number of Respondents: 2,400.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 353.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–22348 Filed 10–7–20; 8:45 am]

BILLING CODE 3410–WY–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2019–0049]

Import Requirements for the Importation of Fresh Blueberries From Chile Into the United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our decision to revise the import requirements for the importation of fresh blueberries from Chile into the United States by removing the methyl bromide fumigation requirement for blueberries from Regions VIII and XVI of Chile. Based on the findings of our commodity import evaluation, which we made available to the public for review and comment through a previous notice, we have determined that the application of the designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests via the importation of blueberries from Chile.

DATES: Imports under the revised requirements may be authorized beginning October 8, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. Tony Román, Senior Regulatory Policy Specialist, RCC, IRM, PHP, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1236; (301) 851–2242.

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in ''Subpart L-Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–12, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

Section 319.56–4 of the regulations provides the requirements for authorizing the importation of fruits and vegetables into the United States, as well as revising existing requirements for the importation of fruits and vegetables. Paragraph (c) of that section

provides that the name and origin of all fruits and vegetables authorized importation into the United States, as well as the requirements for their importation, are listed on the internet in APHIS' Fruits and Vegetables Import Requirements database, or FAVIR (*https://epermits.aphis.usda.gov/manual*). It also provides that, if the Administrator of APHIS determines that any of the phytosanitary measures required for the importation of a particular fruit or vegetable are no longer necessary to reasonably mitigate the plant pest risk posed by the fruit or vegetable, APHIS will publish a notice in the **Federal Register** making its pest risk documentation and determination available for public comment.

In accordance with that process, we published a notice [1] in the **Federal Register** on March 31, 2020 (85 FR 17850–17851, Docket No. APHIS–2019–0049), in which we announced the availability, for review and comment, of a commodity import evaluation document (CIED) that evaluated the risks associated with the importation into the United States of blueberries from two regions in Chile in which European grapevine moth (*Lobesia botrana,* EGVM) is known to exist, but in which the pest prevalence is low, without requiring fumigation with methyl bromide. The notice proposed to remove the methyl bromide fumigation requirement for blueberries from Regions VIII and XVI of Chile, under the provisions of a systems approach.

We solicited comments on the notice for 60 days ending June 1, 2020. We received 53 comments by that date. They were from growers, importers, buyers, ports, associations, and representatives of a foreign government. All but one of those comments were in favor of the proposal with no further questions. The remaining comment is discussed below.

In the initial notice, we proposed that the national plant protection organization (NPPO) of Chile would have to enter into an operational workplan with APHIS that details the activities and responsibilities that the NPPO would carry out in order to meet the requirements of the systems approach.

The commenter asked for further details on how the NPPO of Chile will ensure grower compliance with the operational workplan.

We also stated in the initial notice that all places of production would have to be registered with the NPPO of Chile. The NPPO of Chile will register a production site in Regions VIII or XVI for export without methyl bromide treatment only if it follows all regulatory steps and control measures required by Chile's National EGVM Control Program. The NPPO of Chile will monitor production sites for EGVM trap catches and immature stage finds, and will update the list of registered production sites as necessary based on the results of this monitoring. To further ensure grower compliance, the NPPO of Chile will inspect blueberries that have been packed for export for EGVM prior to export to the United States.

The commenter also requested confirmation that moth trapping and monitoring will be used and asked for further details on the levels of moth trapping and monitoring that growers will be required to undertake. The commenter asked that growers be required to place a minimum of one monitoring trap in each field planned for export, with any capture of EGVM in the traps triggering more detailed sampling. The commenter also asked for confirmation that monitoring will be undertaken by the NPPO of Chile.

EGVM trapping and control in each district in Regions VIII and XVI must follow the terms of the operational workplan, which currently align with guidelines for Chile's National EGVM Control Program. All blueberry production sites and grape production sites must be trapped at appropriate levels. The Chilean guidelines for trapping currently require one trap every 2.5 hectares, with at least two traps per field, and one trap in fields smaller than 2.5 hectares. In the event that Chile changes these guidelines, APHIS would continue to require the current trapping levels of one trap every 2.5 hectares, with at least two traps per field, and one trap in fields smaller than 2.5 hectares.

The NPPO of Chile will conduct all EGVM moth trapping. Any findings of EGVM would mean that any production within a 500-meter radius can only be exported with methyl bromide fumigation. Any production between 500 meters and 3,000 meters of an EGVM outbreak will be regulated for EGVM and can only export if the fields meet a pre-harvest fruit monitoring requirement, 1 to 30 days before harvest begins. This activity shall be performed by companies authorized by the NPPO of Chile. Any field with monitoring results including at least one finding of EGVM shall be stricken from access to the inspection system and their fruit must undergo a methyl bromide fumigation treatment to be exported to the United States.

The commenter also asked for further details on the process of reinstating production sites in the event that EGVM is found in a production site.

If the NPPO of Chile finds that a place of production or packinghouse is not complying with the requirements of the systems approach, no blueberries from the place of production or packinghouse will be eligible for export to the United States until APHIS and the NPPO of Chile conduct an investigation and appropriate remedial actions have been implemented.

Under the terms of the operational workplan, we are specifying that if 10 or more EGVM moths are trapped within 1 year in any urban area in Region VIII or Region XVI, all blueberry production sites within 5 kilometers of that urban area may only ship blueberries to the United States if they are fumigated with methyl bromide, either in Chile or at the United States port of entry.

Reinstatement of export status for a production site (to be able to export blueberries without methyl bromide fumigation) suspended from the program for larval finds during export inspection requires 1 year with no more than 1 adult EGVM trapped, and no immature stages of EGVM found in the field or in packed out blueberries. This will require a rolling trap count for each export production site in Region VIII and Region XVI to be maintained by the NPPO of Chile.

Finally, the commenter noted that sulfur dioxide has been identified as a successful mitigant against EGVM, and requested that APHIS and the NPPO of Chile discuss the use of sulfur dioxide for imports of Chilean blueberries as a further safeguard against EGVM when the Environmental Protection Agency (EPA) approves sulfur dioxide for use as a pest mitigant for blueberries in the United States.

The EPA must thoroughly evaluate pesticides to ensure that they meet Federal safety standards to protect human health and the environment before approving them for use in the United States. APHIS cannot make any decisions regarding the use of sulfur dioxide prior to any such evaluation and approval.

Therefore, in accordance with the regulations in § 319.56–4(c)(3)(iii), we are announcing our decision to revise the requirements for the importation of blueberries from Chile by removing the methyl bromide requirement for blueberries grown in Regions VIII and XVI of Chile, subject to the following phytosanitary measures:

- The NPPO of Chile must enter into an operational workplan with APHIS that details the activities and

[1] To view the notice, the CIED, and the comments we received, go to *https://www.regulations.gov/docket?D=APHIS-2019-0049.*

responsibilities that the NPPO would carry out in order to meet the requirements of the systems approach. APHIS must approve the workplan prior to implementation of the systems approach.

• Places of production and packinghouses must be registered with and approved by the NPPO of Chile. Additionally, packinghouses must be pest-exclusionary.

• If the NPPO of Chile determines that a registered place of production or packinghouse is not complying with the provisions of the systems approach, no blueberries from the place of production or packinghouse are eligible for export into the United States until APHIS and the NPPO conduct an investigation and appropriate remedial actions have been implemented.

• The NPPO of Chile must demonstrate continued low pest prevalence for EGVM in Regions VIII and XVI through a national trapping program for EGVM. Trapping density and servicing, as well as thresholds for low pest prevalence, will be detailed in the operational workplan.

• If the place of production is within an area of Region VIII or XVI that is designated by the NPPO of Chile as a regulated area for EGVM, the place of production must have a field inspection by the NPPO within 2 weeks prior to harvest with no finds of immature EGVM based on a biometric sample of plants. Places of production in control areas for EGVM are not authorized to export blueberries to the United States under the terms of the systems approach and blueberries from such areas must be fumigated with methyl bromide in order to be exported to the United States.

• Packed blueberries must be inspected by the NPPO of Chile prior to export under the auspices of APHIS' preclearance program within Chile.

• Each shipment must be accompanied by a phytosanitary certificate issued by the NPPO with an additional declaration that the blueberries were produced in an area of low pest prevalence for EGVM.

• Each shipment is subject to inspection for quarantine pests at the port of entry into the United States.

• If immature stages of EGVM are detected during field inspections or packinghouse inspections, or any life stage of EGVM is detected at a port of entry into the United States, the consignment may not be imported into the United States and the place of production will be suspended from the systems approach export program until reinstated. Blueberries from that place of production must be fumigated with methyl bromide in order to be exported to the United States until such reinstatement.

These revised conditions will be listed in the Fruits and Vegetables Import Requirements database (available at *https://epermits.aphis.usda.gov/manual*). In addition to these specific measures, blueberries from Chile will be subject to the general requirements listed in § 319.56–3 that are applicable to the importation of all fruits and vegetables. Please note that, in order to accommodate the revisions of this notice and remove redundancies, we are also removing the citation to Federal Order DA–2018–40 in FAVIR.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the burden requirements included in this notice are covered under the Office of Management and Budget control number 0579–0049.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this notice, please contact Mr. Joseph Moxey, APHIS' Information Collection Coordinator, at (301) 851–2483.

Congressional Review Act

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

Authority: 7 U.S.C. 1633, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 5th day of October 2020.

Michael Watson,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–22337 Filed 10–7–20; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2020–0029]

National Advisory Committee on Microbiological Criteria for Foods; Membership Nominations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice; soliciting nominations.

SUMMARY: Pursuant to the provisions of the rules and regulations of the Department of Agriculture and the Federal Advisory Committee Act (FACA), the U.S. Department of Agriculture (USDA) is soliciting nominations for membership on the National Advisory Committee on Microbiological Criteria for Foods (NACMCF). There are 9 vacancies. Advisory Committee members serve a two-year term that may be renewed for two additional consecutive terms, at the discretion of the Secretary of Agriculture.

DATES: All materials must be received by November 9, 2020.

ADDRESSES: Nomination packages should be sent by *email* to *john.jarosh@usda.gov* or mailed to: Sonny Perdue, Secretary, U.S. Department of Agriculture, 1400 Independence Avenue SW, Washington, DC 20250, Attn: FSIS\OPHS\National Advisory Committee on Microbiological Criteria for Foods (John Jarosh).

FOR FURTHER INFORMATION CONTACT: John Jarosh, Designated Federal Officer, by *telephone* at 202–690–6128 or by *email john.jarosh@usda.gov.*

The Food Safety and Inspection Service (FSIS) invites interested persons to submit comments on this **Federal Register** notice. Comments may be submitted by either of the following methods:

• *Federal eRulemaking Portal:* This website *(http://www.regulations.gov/)* provides the ability to type short comments directly into the comment field on this web page or attach a file for lengthier comments. Follow the online instructions at that site for submitting comments.

• *Mail,* including CD–ROMS and hand or courier delivered items: Send to Docket Clerk, Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Room 6065, Washington, DC 20250–3700 between 8:30 a.m. and 4:30 p.m., Monday through Friday.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2020–0029. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov/.*

Docket: For access to background documents or comments received, go to the FSIS Docket Room at Department of Agriculture, Food Safety and Inspection

Service, 1400 Independence Avenue SW, Mailstop 3758, Room 6065, Washington, DC 20250–3700 between 8:30 a.m. and 4:30 p.m., Monday through Friday. All comments submitted in response to this notice, as well as background information used by FSIS in developing this document, will be available for public inspection in the FSIS Docket Room at the address listed above between 8:30 a.m. and 4:30 p.m., Monday through Friday.

SUPPLEMENTARY INFORMATION: USDA is seeking NACMCF nominees with scientific expertise in the fields of microbiology, epidemiology, food technology (food, clinical, and predictive), toxicology, risk assessment, infectious disease, biostatistics, and other related sciences. USDA is seeking nominations for NACMCF from persons in academia, industry, State governments, and the Federal Government, as well as all other interested persons with the required expertise.

USDA is also seeking nominations for one individual affiliated with a consumer group to serve on the NACMCF. This member will serve as a representative member to provide a consumer viewpoint to the Committee. This member will not be required to have a scientific background and will not be subject to a conflict of interest review.

Members can serve on only one USDA advisory Committee at a time. All nominees will undergo a USDA background check. With the exception of the consumer representative member, any member who is not a Federal government employee will be appointed to serve as a non-compensated special government employee (SGE). SGEs will be subject to appropriate conflict of interest statutes and standards of ethical conduct.

Applicants that are federally registered lobbyists will not be considered for USDA's NACMCF federal advisory Committee, if the position of appointment will serve in a Special Government Employee capacity.

Nominations for membership on the NACMCF must be addressed to the Secretary of Agriculture and accompanied by a cover letter addressing the nomination. Additionally, a resume or curriculum vitae and a completed USDA Advisory Committee Membership Background Information form AD–755 (available online at: *https://www.ocio.usda.gov/document/ad-755)* must be included with the nomination. The resume or curriculum vitae must be limited to five one-sided pages and should include educational background, expertise, and a list of select publications, if available, that confirm the nominee's expertise for the related work. Any submissions with more than the prescribed five one-sided pages in length will have only the first five pages reviewed.

A person may self-nominate, or a nomination can be made on behalf of someone else.

Background

The NACMCF was established in March 1988, in response to a recommendation in a 1985 report of the National Academy of Sciences Committee on Food Protection, Subcommittee on Microbiological Criteria, ''An Evaluation of the Role of Microbiological Criteria for Foods.'' The current charter for the NACMCF and other information about the Committee are available to the public for viewing on the FSIS website at: *http://www.fsis.usda.gov/nacmcf.*

The Committee provides scientific advice and recommendations to the Secretary of Agriculture and the Secretary of Health and Human Services concerning the development of microbiological criteria by which the safety and wholesomeness of food can be assessed. For example, one of the most recent efforts of the Committee is to provide the best scientific information available on Shiga Toxin producing *E. coli,* including providing recommendations on optimal detection and identification methodologies.

Appointments to the Committee will be made by the Secretary of Agriculture after consultation with the Secretary of Health and Human Services to ensure that recommendations made by the Committee take into account the needs of the diverse groups served by the USDA.

The full Committee expects to meet at least once a year by teleconference or in-person, and the meetings will be announced in the **Federal Register**.

The subcommittees will meet as deemed necessary by the chairperson through working group meetings in an open public forum. Subcommittees may also meet through teleconference or by computer-based conferencing (webinars). Subcommittees may invite technical experts to present information for consideration by the subcommittee. The subcommittee meetings will not be announced in the **Federal Register**; however, FSIS will announce the agenda and subcommittee working group meetings through the Constituent Update, available online at: *http://www.fsis.usda.gov/cu.*

NACMCF holds subcommittee meetings in order to accomplish the work of NACMCF; all subcommittee work is reviewed and approved during a public meeting of the full Committee, as announced in the **Federal Register**. All data and records available to the full Committee are expected to be available to the public after the full Committee has reviewed and approved the work of the subcommittee. Advisory Committee members are expected to attend all in-person meetings during the two-year term to ensure the smooth functioning of the advisory Committee. However, on rare occasions, attendance through teleconferencing may be permitted.

Members must be prepared to work outside of scheduled Committee and subcommittee meetings and may be required to assist in document preparation. Committee members serve on a voluntary basis; however, travel expenses and per diem reimbursements are available.

Regarding Nominees Who Are Selected

All SGE and Federal government employee nominees who are selected must complete the Office of Government Ethics (OGE) 450 Confidential Financial Disclosure Report before rendering any advice or prior to their first meeting. With the exception of the consumer representative Committee member, all Committee members will be reviewed pursuant to 18 U.S.C. 208 for conflicts of interest relating to specific NACMCF work charges, and financial disclosure updates will be required annually. Members subject to financial disclosure must report any changes in financial holdings requiring additional disclosure. OGE 450 forms are available on-line at: *https://www2.oge.gov/web/oge.nsf/Confidential%20Financial%20Disclosure.*

Additional Public Notification

FSIS will announce this **Federal Register** notice online through the FSIS web page located at *http://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and

information. This service is available at: *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How To File a Complaint of Discrimination: To file a complaint of discrimination Complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative. Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410.

Fax: (202) 690–7442.

Email: program.intake@usda.gov.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC, on September 29, 2020.

Dated: September 29, 2020.

Cikena Reid,

Committee Management Officer, USDA.

[FR Doc. 2020–22293 Filed 10–7–20; 8:45 am]

BILLING CODE 3410–DM–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Nevada Advisory Committee

AGENCY: U.S. Commission on Civil Rights

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that a teleconference meeting of the Nevada Advisory Committee (Committee) to the Commission will be held at 2:00 p.m. (Pacific Time) Wednesday, October 14, 2020. The purpose will be to review and potentially vote on their project proposal on equity in education and distance learning.

DATES: The meeting will be held on Wednesday, October 14, 2020 at 2:00 p.m. PT.

Public Call Information: Dial: 800–367–2403; *Conference ID:* 5959088.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes (DFO) at *afortes@usccr.gov* or by phone at (202) 681–0857.

SUPPLEMENTARY INFORMATION: This meeting is available to the public through the following toll-free call-in number: 800–367–2403, conference ID number: 5959088. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012 or email Ana Victoria Fortes at *afortes@usccr.gov.*

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlJAAQ.*

Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome
II. Review Project Proposal
III. Public Comment
VI. Vote
V. Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102–3.150, the notice for this meeting is given less than 15 calendar days prior to the meeting because of the exceptional circumstances of the COVID crisis and DFO availability.

Dated: October 5, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–22309 Filed 10–7–20; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–138–2020]

Approval of Expansion of Subzone 18F; Lam Research Corporation; Hayward, California

On August 10, 2020, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the City of San Jose, grantee of FTZ 18, requesting to expand Subzone 18F on behalf of Lam Research Corporation in Hayward, California, subject to the existing activation limit of FTZ 18.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (85 FR 50803, August 18, 2020). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR Sec. 400.36(f)), the application to expand Subzone 18F was approved on October 2, 2020, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to FTZ 18's 2,000-acre activation limit.

Dated: October 2, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–22279 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–174–2020]

Foreign-Trade Zone 76—Bridgeport, Connecticut; Application for Subzone; ASML US, LLC; Wilton, Connecticut

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Bridgeport Port Authority, grantee of FTZ 76, requesting an expansion of Subzone 76A on behalf of ASML US, LLC, in Wilton Connecticut. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on October 5, 2020.

Subzone 76A currently consists of the following sites: Site 1 (29.23 acres) 71, 73 & 77 Danbury Road, Wilton; Site 2 (3.65 acres) 7 Edmund Road, Newtown; Site 3 (11.78 acres) 59 Danbury Road, Wilton; and, Site 4 (2.68 acres) 7 Francis Clarke Circle, Bethel.

The applicant is requesting authority to expand the subzone to include an additional site: Proposed Site 5 (1.125 acres) 50 Danbury Road, Wilton. No additional authorization for production activity has been requested at this time. The existing subzone and the proposed site would be subject to the existing activation limit of FTZ 76.

In accordance with the FTZ Board's regulations, Elizabeth Whiteman of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is November 17, 2020. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to December 2, 2020.

A copy of the application will be available for public inspection in the ''Reading Room'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: October 5, 2020.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2020–22317 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–859]

Steel Concrete Reinforcing Bar From Taiwan: Final Results of Antidumping Duty Administrative Review; 2017–2018

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

SUMMARY: The Department of Commerce (Commerce) determines that Power Steel Co., Ltd. (Power Steel) made sales of steel concrete reinforcing bar (rebar) from Taiwan at less than normal value (NV) during the period of review (POR), March 7, 2017 through September 30, 2018.

DATES: Applicable October 8, 2020.

FOR FURTHER INFORMATION CONTACT: Leo Ayala, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3945.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* on December 17, 2019, covering one company, Power Steel.[1] In the *Preliminary Results,* we rescinded the administrative review with respect to Lo-Toun Steel.[2] We invited interested parties to comment on the *Preliminary Results.* On January 24, 2020, and January 31, 2020, we received case and rebuttal briefs, respectively, from interested parties.[3] On January 16, 2020, the petitioner requested that Commerce conduct a hearing in this proceeding.[4] We scheduled a hearing for February 27, 2020; however, in the absence of the requesting party, we did not conduct the hearing.

On April 8, 2020, Commerce extended the deadline for these final results.[5] On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days,[6] thereby extending the deadline for these results until August 3, 2020. On July 21, 2020, Commerce tolled all deadlines for all preliminary and final results in administrative reviews by an additional 60 days,[7] thereby extending the deadline for these final results until September 30, 2020.[8] On September 30, 2020, Commerce extended the deadline for these final results.[9] Accordingly, the deadline for these final results is October 2, 2020. Commerce conducted this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The product covered by the *Order* is rebar from Taiwan.[10] For a full description of the scope, *see* Appendix I.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Issues and Decision Memorandum, which is hereby adopted by this notice. A list of the issues raised is attached to this notice as Appendix II. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/*

[1] *See Steel Concrete Reinforcing Bar from Taiwan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2017–2018,* 84 FR 68884 (December 17, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *Id.*

[3] *See* Petitioner's Letter, ''Steel Concrete Reinforcing Bar from Taiwan: Petitioner's Case Brief,'' dated January 24, 2020 (Petitioner's Case Brief); Power Steel's Letter, ''Steel Concrete Reinforcing Bar,'' dated January 24, 2020 (Power Steel's Case Brief); Petitioner's Letter, ''Steel Concrete Reinforcing Bar from Taiwan: Petitioner's Rebuttal Brief,'' dated January 31, 2020 (Petitioner's Rebuttal Brief); and Power Steel's Letter, ''Steel Concrete Reinforcing Bar,'' dated January 31, 2020 (Power Steel's Rebuttal Brief).

[4] *See* Petitioner's Letter, ''Steel Concrete Reinforcing Bar from Taiwan: Hearing Request,'' dated January 16, 2020.

[5] *See* Memorandum, ''Steel Concrete Reinforcing Bar from Taiwan: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' dated April 8, 2020.

[6] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID–19,'' dated April, 24, 2020.

[7] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,'' dated July 21, 2020.

[8] *See* Commerce's Letter, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID–19,'' dated April 24, 2020; and Commerce's Letter, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,'' dated July 21, 2020.

[9] *See* Memorandum, ''Steel Concrete Reinforcing Bar from Taiwan: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' dated September 30, 2020.

[10] *See Steel Concrete Reinforcing Bar from Taiwan: Antidumping Duty Order,* 82 FR 45809 (October 2, 2017) (*Order*).

index.html. The signed Issues and Decision Memorandum and the electronic version of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our review of the record and comments received from interested parties, we have used the U.S. sales database submitted in Power Steel's January 9, 2020 SQR for these final results.[11]

Final Results of the Administrative Review

We have determined the following weighted-average dumping margin exists for the period March 7, 2017 through September 30, 2018:

Producer or exporter	Weighted-average dumping margin (percent)
Power Steel Co. Ltd	3.27

Assessment Rates

Commerce has determined, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these final results of review.[12]

For Power Steel, because its weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent), Commerce has calculated an importer-specific *ad valorem* duty assessment rate based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by Power Steel for which the company did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate those entries at the all-others rate if there is no rate for the intermediate company involved in the transaction. We intend to issue instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate listed in the ''Final Results of the Administrative Review'' section will be equal to the weighted-average dumping margin established in the final results of this review; (2) for previously reviewed or investigated companies not included in the final results of this review, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company was reviewed; (3) if the exporter is not a firm covered in this review, a previous review, or the original less-than-fair-value (LTFV) investigation, but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 3.50 percent, the all-others rate established in the LTFV investigation.[13] These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(5).

Dated: October 2, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

The merchandise subject to the *Order* is steel concrete reinforcing bar imported in either straight length or coil form (rebar) regardless of metallurgy, length, diameter, or grade or lack thereof. Subject merchandise includes deformed steel wire with bar markings (*e.g.,* mill mark, size, or grade) and which has been subjected to an elongation test.

The subject merchandise includes rebar that has been further processed in the subject countries or a third country, including but not limited to cutting, grinding, galvanizing, painting, coating, or any other processing that would not otherwise remove the merchandise from the scope of the *Order* if performed in the country of manufacture of the rebar. Specifically excluded are plain rounds (*i.e.,* nondeformed or smooth rebar). Also excluded from the scope is deformed steel wire meeting ASTM A1064/A1064M with no bar markings (*e.g.,* mill mark, size, or grade) and without being subject to an elongation test.

The subject merchandise is classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) primarily under item numbers 7213.10.0000, 7214.20.0000, and 7228.30.8010. The subject merchandise may also enter under other HTSUS numbers including 7215.90.1000, 7215.90.5000, 7221.00.0017, 7221.00.0018, 7221.00.0030, 7221.00.0045, 7222.11.0001, 7222.11.0057, 7222.11.0059, 7222.30.0001, 7227.20.0080, 7227.90.6030, 7227.90.6035, 7227.90.6040, 7228.20.1000, and 7228.60.6000.

HTSUS numbers are provided for convenience and customs purposes; however, the written description of the scope remains dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes Since the Preliminary Results
V. Fraud Allegation
VI. Discussion of the Issues
  Comment 1: Whether a Particular Market Situation (PMS) Exists With Respect to the Taiwanese Billet Market.
  Comment 2: Whether Section 232 Duties Constitute Normal Duties Within Section 772(c)(2)(A) of the Tariff Act of 1930, As Amended (the Act).

[11] *See* Memorandum, ''Final Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Steel Concrete Reinforcing Bar from Taiwan: Power Steel Final Analysis,'' dated October 2, 2020 (Power Steel's Final Analysis Memorandum); and Power Steel's January 9, 2020 SQR.

[12] *See* 19 CFR 351.212(b).

[13] *See Order.*

Comment 3: Whether Certain Section 232 Duties Should be Deducted From Power Steel's U.S. Export Price (EP).
Comment 4: Whether Commerce Should Grant the Scrap Offset Reported by Power Steel.
VII. Recommendation

[FR Doc. 2020–22315 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Subsidy Programs Provided by Countries Exporting Softwood Lumber and Softwood Lumber Products to the United States; Request for Comment

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

SUMMARY: The Department of Commerce (Commerce) seeks public comment on any subsidies, including stumpage subsidies, provided by certain countries exporting softwood lumber or softwood lumber products to the United States during the period January 1, 2020 through June 30, 2020.

DATES: Comments must be submitted within 30 days after publication of this notice.

FOR FURTHER INFORMATION CONTACT: Kristen Johnson, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4793.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 805 of Title VIII of the Tariff Act of 1930 (the Softwood Lumber Act of 2008), the Secretary of Commerce is mandated to submit to the appropriate Congressional committees a report every 180 days on any subsidy provided by countries exporting softwood lumber or softwood lumber products to the United States, including stumpage subsidies. Commerce submitted its last subsidy report on June 24, 2020. As part of its newest report, Commerce intends to include a list of subsidy programs identified with sufficient clarity by the public in response to this notice.

Request for Comments

Given the large number of countries that export softwood lumber and softwood lumber products to the United States, we are soliciting public comment only on subsidies provided by countries which had exports accounting for at least one percent of total U.S. imports of softwood lumber by quantity, as classified under Harmonized Tariff Schedule of the United States (HTSUS) codes 4407.1001, 4407.1100, 4407.1200, 4407.1905, 4407.1906, 4407.1910, during the period January 1, 2020, through June 30, 2020. Official U.S. import data published by the United States International Trade Commission's DataWeb indicate that four countries (Brazil, Canada, Germany, and Sweden) exported softwood lumber to the United States during that time period in amounts sufficient to account for at least one percent of U.S. imports of softwood lumber products. We intend to rely on similar previous six-month periods to identify the countries subject to future reports on softwood lumber subsidies. For example, we will rely on U.S. imports of softwood lumber and softwood lumber products during the period July 1, 2020, through December 31, 2020, to select the countries subject to the next report.

Under U.S. trade law, a subsidy exists where an authority: (i) Provides a financial contribution; (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994; or (iii) makes a payment to a funding mechanism to provide a financial contribution to a person, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, and a benefit is thereby conferred.[1]

Parties should include in their comments: (1) The country which provided the subsidy; (2) the name of the subsidy program; (3) a brief description (no more than 3–4 sentences) of the subsidy program; and (4) the government body or authority that provided the subsidy.

Submission of Comments

As specified above, to be assured of consideration, comments must be received no later than 30 days after the publication of this notice in the **Federal Register**. All comments must be submitted through the Federal eRulemaking Portal at *http://www.regulations.gov,* Docket No. ITA–2020–0004. The materials in the docket will not be edited to remove identifying or contact information, and Commerce cautions against including any information in an electronic submission that the submitter does not want publicly disclosed. Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF formats only.

All comments should be addressed to Joseph A. Laroski Jr., Deputy Assistant Secretary for Policy and Negotiations, at U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

Dated: October 2, 2020.

Joseph A. Laroski Jr.

Deputy Assistant Secretary for Policy and Negotiations.

[FR Doc. 2020–22278 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See* section 771(5)(B) of the Tariff Act of 1930, as amended.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA551]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council, NEFMC) will hold a special, one-day meeting to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Due to federal and state travel restrictions, public gathering limitations, and updated guidance from the Centers for Disease Control and Prevention related to COVID–19, this meeting will be conducted entirely by webinar.

DATES: The webinar meeting will be held on Tuesday, October 27, 2020, beginning at 12:30 p.m.

ADDRESSES: All meeting participants and interested parties can register to join the webinar at *https://register.gotowebinar.com/register/8462938110464133132.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone: (978) 465–0492; *www.nefmc.org.*

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492, ext. 113.

SUPPLEMENTARY INFORMATION:

Agenda

Tuesday, October 27, 2020

After introductions and brief announcements, the Council will hear abbreviated reports on recent activities from its Chairman, the Greater Atlantic Regional Fisheries Office's Regional Administrator, and the Northeast Fisheries Science Center. Then, the Council will turn its attention to the two primary issues for this meeting: (1) 2021 Council Priorities; and (2) Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth, which was signed on May 7, 2020. The Council will discuss and finalize 2021 work priorities for all of its committees and various responsibilities. As part of and in addition to this discussion, the Council will develop a list of actions that respond directly to the requests outlined in Executive Order 13921. During appropriate opportunities and at the discretion of the Council Chairman, the public will be allowed to offer comments on these agenda items. The Council's ''Guidelines for Providing Public Comments'' can be found at *https://s3.amazonaws.com/nefmc.org/GuidelinesPubComment_Updated_June2020_final.pdf.*

Also, a guide for how to publicly comment through the webinar is available on the Council website at *https://s3.amazonaws.com/nefmc.org/NEFMC-meeting-remote-participation_generic.pdf.* Once the Council concludes its discussion on 2021 Council Priorities and the Executive Order, it will close out the meeting with other business.

Although non-emergency issues not contained on this agenda may come before the Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice 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 Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is being conducted entirely by webinar. Requests for auxiliary aids should be directed to Thomas A. Nies (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: October 5, 2020.

Tracey L. Thompson,

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

[FR Doc. 2020–22303 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA509]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to Ørsted Wind Power North America, LLC, (Ørsted) to incidentally harass, by Level B harassment only, marine mammals during marine site characterization surveys in coastal waters from New York to Massachusetts in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS–A 0486/0517, OCS–A 0487, and OCS–A 0500) and along potential export cable routes to shoreline locations from New York to Massachusetts.

DATES: This authorization is valid from September 25, 2020 through September 24, 2021.

FOR FURTHER INFORMATION CONTACT: Carter Esch, Office of Protected Resources, NMFS, (301) 427–8421. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained by visiting the internet at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

Summary of Request

On April 15, 2020, NMFS received a request from Ørsted for an IHA to take marine mammals incidental to marine site characterization surveys in the OCS–A 0486/0517, OCS–A 0487, and OCS–A 0500 Lease Areas designated and offered by the Bureau of Ocean Energy Management (BOEM) as well as along one or more export cable routes (ECRs) between the southern portions of the Lease Areas and shoreline locations from New York to Massachusetts, to support the development of offshore wind projects. NMFS deemed the application to be adequate and complete on July 1, 2020. Ørsted's request is for take, by Level B harassment only, of small numbers of 15 species or stocks of marine mammals. Neither Ørsted nor NMFS expects serious injury or mortality to result from this activity and the activity is expected to last no more than one year; therefore, an IHA is appropriate.

NMFS previously issued an IHA to Ørsted for similar activities (84 FR 52464, October 2, 2019); Ørsted has complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of that IHA.

Description of Activity

Overview

The purpose of the marine site characterization surveys in the Lease Areas and ECRs (herein Survey Area) is to obtain a baseline assessment of seabed/sub-surface soil conditions in the Survey Area to support the siting of potential future offshore wind projects. Underwater sound, produced by high-resolution geophysical (HRG) survey equipment, resulting from Ørsted's site characterization surveys, has the potential to result in incidental take of marine mammals. This take of marine mammals is expected to be in the form of harassment and no serious injury or mortality is anticipated, nor is any authorized in this IHA. Ørsted will conduct continuous HRG survey operations 12-hours per day (daylight only in shallow, nearshore locations) and 24-hours per day (offshore) using multiple vessels. Based on the planned 24-hours operations, the survey activities for all survey segments would require 1,302 vessel days if one vessel were surveying the entire survey line continuously. However, an estimated 5 vessels may be used simultaneously, with a maximum of no more than 9 vessels. Therefore, all the survey effort will be completed in one year.

A detailed description of Ørsted's survey activities, including types of survey equipment planned for use, is provided in the notice of the proposed IHA (85 FR 48179; August 10, 2020). Since that time, no changes have been made to the activities; therefore, a detailed description is not provided here. Please refer to that notice for the description of the specified activity. Mitigation, monitoring, and reporting measures are described in detail later in this document (please see Mitigation and Monitoring and Reporting below).

Comments and Responses

A notice of NMFS's proposal to issue an IHA to Ørsted was published in the **Federal Register** on August 10, 2020 (85 FR 48179). That notice described, in detail, Ørsted's activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30-day public comment period, NMFS received comment letters from the Marine Mammal Commission (Commission) and a group of environmental non-governmental organizations (ENGOs). The ENGOs' letter was submitted jointly by the Natural Resources Defense Council, National Wildlife Federation, Conservation Law Foundation, Mass Audubon, Friends of the Earth, All our Energy, Wildlife Conservation Society, NY4WHALES, Defenders of Wildlife, Southern Environmental Law Center, Surfrider Foundation, WDC Whale and Dolphin Conservation, Inland Ocean Coalition, Gotham Whale, International Fund for Animal Welfare, Marine Mammal Alliance Nantucket, and Seatuck Environmental Association. NMFS has posted the comments online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.* A summary of the public comments received from the Commission and ENGOs, as well as NMFS' responses to those comments, are below. Please see the comment letters, available online, for full details of the comments and rationale.

Comment 1: The Commission recommended that NMFS consider whether IHAs are necessary for HRG surveys given the size of the lease-stipulated Exclusion Zones (200 m, cetaceans and pinnipeds; 500 m North Atlantic right whales), which would minimize the potential for marine mammals to be exposed to sound levels expected to result in taking. The Commission suggested that NMFS overestimates Level B harassment zones, and that the lease-stipulated Exclusion Zones are adequate. As such, the Commission believes that the issuance of an incidental harassment authorization is unnecessary.

Response (waiting on feedback from OPR).

Comment 2: The ENGOs suggested that it should be NMFS' top priority to consider any initial data from passive acoustic monitoring data, opportunistic marine mammal sightings data, and other data sources, because the models used by NMFS do not adequately capture increased use of the survey areas by North Atlantic right whales. Further, these commenters state that the density models NMFS uses result in an underestimate of take, and do not fully reflect the abundance, distribution, and density of marine mammals for the U.S. East Coast.

Response: NMFS will review any recommended data sources and will continue to use the best available information. We welcome future input from interested parties on data sources that may be of use in analyzing the potential presence and movement patterns of marine mammals, including North Atlantic right whales, in New England waters. NMFS used the best scientific information available at the time the analyses for the proposed IHA were conducted—in this case the marine mammal density models developed by the Duke Marine Geospatial Ecology Lab (MGEL) (Roberts *et al.* 2016, 2017, 2018)—to inform our determinations in the IHA. The ENGOs are correct in their statement that North Atlantic right whale distribution has shifted in recent years. An updated North Atlantic right whale density model, recently released by Roberts *et al.* (2020), shows that the density of North Atlantic right whales in the Survey Area is approximately one third higher than was considered in the proposed IHA. We have adjusted the take estimates accordingly in the final IHA. In addition, we have shifted the Seasonal Restrictions from March through June to January through May, which will limit to three the number of vessels that can operate within the Survey Area during that timeframe. This mitigation measure will reduce the impact of survey activities, during the timeframe in which densities are highest in the Survey Area (Roberts 2020) and North Atlantic right whales have been consistently observed south of Martha's Vineyard (Pettis *et al.,* 2020).

Comment 3: The ENGOs recommended that NMFS should carefully analyze the cumulative impacts on the North Atlantic right whale and other protected species from the proposed survey activities and other survey activities contemplated in other lease areas, and ensure appropriate mitigation of the cumulative impacts. In addition, the ENGOs suggest that NMFS advance a programmatic incidental take regulation for site characterization activities.

Response: The MMPA grants exceptions to its broad take prohibition for a ''specified activity.'' 16 U.S.C. 1371(a)(5)(A)(i). Cumulative impacts (also referred to as cumulative effects) is a term that appears in the context of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), but it is defined differently in those contexts. Neither the MMPA nor NMFS' codified implementing regulations address consideration of other unrelated activities and their impacts on populations. However, the preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989) states, in response to comments, that the impacts from other past and ongoing anthropogenic activities are to be incorporated into the negligible impact analysis via their impacts on the baseline. Accordingly, NMFS here has factored into its negligible impact analysis the impacts of other past and ongoing anthropogenic activities via their impacts on the baseline (*e.g.,* as reflected in the density/distribution and status of the species, population size

and growth rate, and other relevant stressors).

Comment 4: The ENGOs asserted that the agency's assumptions regarding mitigation effectiveness are unfounded and cannot be used to justify any reduction in the number of takes authorized for North Atlantic right whales. The reasons cited include: (i) The agency's reliance on a 160 dB threshold for behavioral harassment that is not supported by the best available scientific information; (ii) the agency relies on the assumption that marine mammals will take measures to avoid the sound even though studies have not found avoidance behavior to be generalizable among species and contexts, and despite the possibility that avoidance may itself constitute take under the MMPA; and (iii) the mitigation and monitoring protocols prescribed by the agency are inadequate at protecting marine mammals and do not comply with the MMPA.

Response: The three comments provided by the ENGOs are addressed individually below.

(i) NMFS acknowledges that the 160-dB rms step-function approach is simplistic, and that an approach reflecting a more complex probabilistic function may more effectively represent the known variation in responses at different levels due to differences in the receivers, the context of the exposure, and other factors. The commenters suggested that our use of the 160-dB threshold implies that we do not recognize the science indicating that animals may react in ways constituting behavioral harassment when exposed to lower received levels. However, we do recognize the potential for Level B harassment at exposures to received levels below 160 dB rms, in addition to the potential that animals exposed to received levels above 160 dB rms will not respond in ways constituting behavioral harassment (*e.g.,* Malme *et al.,* 1983, 1984, 1985, 1988; McCauley *et al.,* 1998, 2000a, 2000b; Barkaszi *et al.,* 2012; Stone, 2015a; Gailey *et al.,* 2016; Barkaszi and Kelly, 2018). These comments appear to evidence a misconception regarding the concept of the 160-dB threshold. While it is correct that in practice it works as a step-function, *i.e.,* animals exposed to received levels above the threshold are considered to be ''taken'' and those exposed to levels below the threshold are not, it is in fact intended as a sort of mid-point of likely behavioral responses (which are extremely complex depending on many factors including species, noise source, individual experience, and behavioral context). What this means is that, conceptually, the function recognizes that some animals exposed to levels below the threshold will in fact react in ways that are appropriately considered take, while others that are exposed to levels above the threshold will not. Use of the 160-dB threshold allows for a simplistic quantitative estimate of take, while we can qualitatively address the variation in responses across different received levels in our discussion and analysis.

As behavioral responses to sound depend on the context in which an animal receives the sound, including the animal's behavioral mode when it hears sounds, prior experience, additional biological factors, and other contextual factors, defining sound levels that disrupt behavioral patterns is extremely difficult. Even experts have not previously been able to suggest specific new criteria due to these difficulties (*e.g.,* Southall *et al.* 2007; Gomez *et al.,* 2016).

(ii) The ENGOS disagreed with NMFS' assumption that marine mammals move away from sound sources. The ENGOS claimed that studies have not found avoidance behavior to be generalizable among species and contexts, and even though avoidance may itself constitute take under the MMPA. Importantly, the commenters mistakenly seem to believe that the NMFS' does not consider avoidance as a take, and that the concept of avoidance is used as a mechanism to reduce overall take—this is not the case. Avoidance of loud sounds is a well-documented behavioral response, and NMFS often accordingly accounts for this avoidance by reducing the number of injurious exposures, which would occur in very close proximity to the source and necessitate a longer duration of exposure. However, when Level A harassment takes are reduced in this manner, they are changed to Level B harassment takes, in recognition of the fact that this avoidance or other behavioral responses occurring as a result of these exposures are still take, NMFS does not reduce the overall amount of take as a result of avoidance.

(iii) The ENGOs questioned the effectiveness of the mitigation and monitoring measures proposed to be authorized, and NMFS' prior authorization of a reduced number of takes for North Atlantic right whales (relative to the estimated value) based on the anticipated protection afforded by mitigation measures. They specifically recommended that seasonal restrictions should be established and consideration should be given to species for which an unusual mortality event (UME) has been declared. Note that NMFS is requiring Ørsted to comply with restrictions associated with identified seasonal management areas (SMA) and they must comply with dynamic management area restrictions (DMAs), if any DMAs are established near the Survey Area. Furthermore, we have established a 500-m shutdown zone for North Atlantic right whales, which is more than three times as large as the greatest Level B harassment isopleth calculated for the specified activities for this IHA (141 m). Additionally, Seasonal Restrictions from January through May will limit the number of vessel that can operate within the Survey Area, thus providing an additional protective measure for North Atlantic right whales. Similar mitigation and monitoring measures have previously been required in numerous HRG survey IHAs and have been successfully implemented. Finally, we made no reductions in authorized takes of North Atlantic right whales by Level B harassment in this IHA. Rather, as a result of incorporating the updated NARW density model data, the number of takes authorized for right whales has been increased from the amount in the proposed IHA (from 24 to 37).

Comment 5: The ENGOs recommended that HRG surveys should commence, with ramp-up, during daylight hours only, to maximize the probability that North Atlantic right whales detected and confirmed clear of the exclusion zone.

Response: We acknowledge the limitations inherent in detection of marine mammals at night. However, no injury is expected to result even in the absence of mitigation, given the very small estimated Level A harassment zones. Any potential impacts to marine mammals authorized for take would be limited to short-term behavioral responses. Restricting surveys in the manner suggested by the commenters may reduce marine mammal exposures by some degree in the short term, but would not result in any significant reduction in either intensity or duration of noise exposure. Vessels would also potentially be on the water for an extended time, introducing noise into the marine environment. The restrictions recommended by the commenters could result in the surveys spending increased time on the water, which may result in greater overall exposure to sound for marine mammals and increase the risk of a vessel strike; thus, the commenters have not demonstrated that such a requirement would result in a net benefit. Furthermore, restricting the applicant to ramp-up only during daylight hours

would have the potential to result in lengthy shutdowns of the survey equipment, which could result in the applicant failing to collect the data they have determined is necessary and, subsequently, the need to conduct additional surveys the following year. This would result in significantly increased costs incurred by the applicant. Thus, the restriction suggested by the commenters would not be practicable for the applicant to implement. In consideration of potential effectiveness of the recommended measure and its practicability for the applicant, NMFS has determined that restricting survey start-ups to daylight hours when visibility is unimpeded is not warranted or practicable in this case.

Comment 6: The ENGOs recommended that NMFS require monitoring an exclusion zone (EZ) for North Atlantic right whales of *at least* 500 meters (m), and ideally 1,000 m, around each vessel conducting activities with noise levels that could result in injury or harassment to this species.

Response: Regarding the recommendation for a 1,000 m EZ specifically for North Atlantic right whales, we have determined that the 500 m EZ, as required in the IHA, is sufficiently protective. We note that the 500 m EZ exceeds the modeled distance to the largest Level B harassment isopleth distance (141 m) by a substantial margin. Thus, we are not requiring shutdown if a right whale is observed beyond 500 m.

Comment 7: The ENGOs recommended that a combination of visual monitoring by PSOs and passive acoustic monitoring (PAM) should be used at all times. Since PSOs are unable to visually monitor the exclusion area during nighttime hours, the ENGOs also recommended that NMFS require, for efforts that continue into the nighttime, a combination of night-vision, thermal imaging, and PAM.

Response: There are several reasons why we do not agree that use of PAM is warranted for 24-hour HRG surveys such as the one planned by Ørsted. While NMFS agrees that PAM can be an important tool for augmenting detection capabilities in certain circumstances, its utility in further reducing impact for Ørsted's HRG survey activities is limited. First, for this activity, the area expected to be ensonified above the Level B harassment threshold is relatively small (a maximum of 141 m as described in the Estimated Take section)—this reflects the fact that, to start with, the source level is comparatively low and the intensity of any resulting impacts would be lower level and, further, it means that inasmuch as PAM will only detect a portion of any animals exposed within a zone (see below), the overall probability of PAM detecting an animal in the harassment zone is low—together these factors support the limited value of PAM for use in reducing take with smaller zones. PAM is only capable of detecting animals that are actively vocalizing, while many marine mammal species vocalize infrequently or during certain activities, which means that only a subset of the animals within the range of the PAM would be detected (and potentially have reduced impacts). Additionally, localization and range detection can be challenging under certain scenarios. For example, odontocetes are fast moving and often travel in large or dispersed groups which makes localization difficult. In addition, the ability of PAM to detect baleen whale vocalizations is further limited because the PAM instruments are deployed from the stern of a vessel, which puts the PAM hydrophones in proximity to propeller noise and low frequency engine noise; this can mask the low frequency sounds emitted by baleen whales, including right whales.

Given that the effects to marine mammals from the types of surveys authorized in this IHA are expected to be limited to low level behavioral harassment even in the absence of mitigation, the limited additional benefit anticipated by adding this detection method (especially for right whales and other low frequency cetaceans, species for which PAM has limited efficacy), and the cost and impracticability of implementing a full-time PAM program, we have determined the current requirements for visual monitoring are sufficient to ensure the least practicable adverse impact on the affected species or stocks and their habitat.

As stated in the proposed IHA, Ørsted is required to use night-vision equipment (*i.e.,* night-vision goggles and/or infrared technology) during night time monitoring.

Comment 8: The ENGOs recommended that NMFS should require developers to operate sub-bottom profilers at power settings that achieve the lowest practicable source level for the objective.

Response: Ørsted has selected the equipment necessary to achieve their objectives. We have evaluated the effects expected as a result of use of this equipment, made the necessary findings, and imposed mitigation requirements sufficient to achieve the least practicable adverse impact on the affected species and stocks of marine mammals. It is not within NMFS' purview to make judgments regarding what constitutes the ''lowest practicable source level'' for an operator's survey objectives.

Comment 9: The ENGOs recommended that all project vessels operating within or transiting to/from the Survey Area, regardless of size, observe a mandatory 10 knot speed restriction during the entire survey period.

Response: NMFS does not concur with these measures. NMFS has analyzed the potential for ship strike resulting from Ørsted's activity and has determined that the mitigation measures specific to ship strike avoidance are sufficient to avoid the potential for ship strike. These include: a requirement that all vessel operators comply with 10 knot (18.5 km/hour) or less speed restrictions in any established DMA or SMA; a requirement that all vessel operators reduce vessel speed to 10 knots (18.5 km/hour) or less when any large whale, mother/calf pairs, pods, or large assemblages of non-delphinid cetaceans are observed within 100 m of an underway vessel; a requirement that all survey vessels maintain a separation distance of 500 m or greater from any sighted North Atlantic right whale; and a requirement that, if underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 knots or less until the 500 m minimum separation distance has been established. We have determined that the ship strike avoidance measures are sufficient to ensure the least practicable adverse impact on species or stocks and their habitat. Furthermore, no documented vessel strikes have occurred for any HRG surveys which were issued IHAs from NMFS.

Comment 10. The ENGOs objected to NMFS' process to consider extending any one-year IHA (which includes a truncated 15-day comment period), stating that it is contrary to the MMPA.

Response: NMFS' IHA Renewal process meets all statutory requirements. All IHAs issued, whether an initial IHA or a Renewal IHA, are valid for a period of not more than one year. And the public has at least 30 days to comment on all proposed IHAs, with a cumulative total of 45 days for IHA Renewals. As noted above, the *Request for Public Comments* section made clear that the agency was seeking comment on both the initial proposed IHA and the potential issuance of a Renewal for this project. Because any Renewal (as explained in the *Request for Public Comments* section) is limited to another year of identical or nearly identical activities in the same location (as

described in the *Description of Proposed Activity* section) or the same activities that were not completed within the one-year period of the initial IHA, reviewers have the information needed to effectively comment on both the immediate proposed IHA and a possible one-year Renewal, should the IHA holder choose to request one in the coming months.

While there will be additional documents submitted with a Renewal request, for a qualifying Renewal these will be limited to documentation that NMFS will make available and use to verify that the activities are identical to those in the initial IHA, are nearly identical such that the changes would have either no effect on impacts to marine mammals or decrease those impacts, or are a subset of activities already analyzed and authorized but not completed under the initial IHA. NMFS will also confirm, among other things, that the activities will occur in the same location; involve the same species and stocks; provide for continuation of the same mitigation, monitoring, and reporting requirements; and that no new information has been received that would alter the prior analysis. The Renewal request will also contain a preliminary monitoring report, to verify that effects from the activities do not indicate impacts of a scale or nature not previously analyzed. The additional 15-day public comment period provides the public an opportunity to review these few documents, provide any additional pertinent information and comment on whether they think the criteria for a Renewal have been met. Between the initial 30-day comment period on these same activities and the additional 15 days, the total comment period for a Renewal is 45 days.

Comment 11: The ENGOs recommended that NMFS develop, and subsequently require, a robust and effective real-time monitoring and mitigation system for North Atlantic right whales and other endangered and protected species (*e.g.,* fin whales, sei whales, humpback whales).

Response: NMFS is generally supportive of this concept. A network of near real-time baleen whale monitoring devices are active or have been tested in portions of New England and Canadian waters. These systems employ various digital acoustic monitoring instruments which have been placed on autonomous platforms including slocum gliders, wave gliders, profiling floats and moored buoys. Systems that have proven to be successful will likely see increased use as operational tools for many whale monitoring and mitigation applications.

NOAA Fisheries recently published ''Technical Memorandum NMFS-OPR-64: North Atlantic Right Whale Monitoring and Surveillance: Report and Recommendations of the National Marine Fisheries Service's Expert Working Group'' which is available at: *https://www.fisheries.noaa.gov/resource/document/north-atlantic-right-whale-monitoring-and-surveillance-report-and-recommendations.* This report summarizes a workshop NOAA Fisheries convened to address objectives related to monitoring North Atlantic right whales and presents the Expert Working Group's recommendations for a comprehensive monitoring strategy to guide future analyses and data collection. Among the numerous recommendations found in the report, the Expert Working Group encouraged the widespread deployment of auto-buoys to provide near real-time detections of North Atlantic right whale calls that visual survey teams can then respond to for collection of identification photographs or biological samples. Ørsted must consult NMFS' North Atlantic right whale reporting systems for the presence of North Atlantic right whales throughout survey operations and for the establishment of a Dynamic Management Area (DMA), and is immediately to report a sighting of a North Atlantic right whale to the NMFS North Atlantic Right Whale Sighting Advisory System.

Changes From the Proposed IHA to the Final IHA

As described above, NMFS increased the authorized take of North Atlantic right whales based on an updated density model that was released after the publication of the proposed IHA in the **Federal Register**. Table 4, 5, and 6 reflect the updated densities, take estimates by Survey Area segment, and total authorized take by Level B harassment for NARWs, respectively. In addition, the Seasonal Restrictions (see Mitigation section) timeframe was shifted from March through June to January through May, during which Ørsted must limit to three the number of vessels operating in the Survey Area.

Description of Marine Mammals in the Area of Specified Activity

Sections 3 and 4 of the IHA application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the affected species. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*www.fisheries.noaa.gov/find-species*).

All species that could potentially occur in the Survey Area are included in Table 6 of the IHA application. However, the temporal and/or spatial occurrence of several species listed in Table 6 of the IHA application is such that take of these species is not expected to occur, because they have very low densities in the Survey Area and/or are extralimital to the Survey Area. These are: The blue whale (*Balaenoptera musculus*), Cuvier's beaked whale (*Ziphius cavirostris*), four species of Mesoplodont beaked whale (*Mesoplodon* spp.), dwarf and pygmy sperm whale (*Kogia sima* and *Kogia breviceps*), short-finned pilot whale (*Globicephala macrorhynchus*), northern bottlenose whale (*Hyperoodon ampullatus*), killer whale (*Orcinus orca*), pygmy killer whale (*Feresa attenuata*), false killer whale (*Pseudorca crassidens*), melon-headed whale (*Peponocephala electra*), striped dolphin (*Stenella coeruleoalba*), white-beaked dolphin (*Lagenorhynchus albirostris*), pantropical spotted dolphin (*Stenella attenuata*), Fraser's dolphin (*Lagenodelphis hosei*), rough-toothed dolphin (*Steno bredanensis*), Clymene dolphin (*Stenella clymene*), spinner dolphin (*Stenella longirostris*), hooded seal (*Cystophora cristata*), and harp seal (*Pagophilus groenlandicus*). As take of these species is not anticipated as a result of the planned activities, these species are not analyzed further. In addition, the Florida manatee (*Trichechus manatus*) may be found in the coastal waters of the Survey Area. However, Florida manatees are managed by the U.S. Fish and Wildlife Service and are not considered further in this document.

Table 1 summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2020). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no mortality is anticipated or authorized, PBR and serious injury or mortality from anthropogenic sources are

included here as a gross indicator of the status of the species.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' Atlantic SARs (*e.g.,* Hayes *et al.,* 2020). All values presented in Table 1 are the most recent available at the time of publication and are available online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region.*

TABLE 1—MARINE MAMMALS KNOWN TO OCCUR IN THE SURVEY AREA THAT MAY BE AFFECTED BY ØRSTED'S HRG SURVEY ACTIVITY

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR [3]	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenidae:						
North Atlantic right whale	*Eubalaena glacialis*	Western North Atlantic	E/D; Y	428 (0; 418; n/a)	0.8	6.85
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine	-/-; N	1,396 (0; 1,380; See SAR)	22	12.15
Fin whale	*Balaenoptera physalus*	Western North Atlantic	E/D; Y	7,418 (0.25; 6,029; See SAR)	12	2.35
Sei whale	*Balaenoptera borealis*	Nova Scotia	E/D; Y	6,292 (1.015; 3,098; see SAR).	6.2	1
Minke whale	*Balaenoptera acutorostrata*	Canadian East Coast	-/-; N	24,202 (0.3; 18,902; See SAR).	189	8.2
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Physeteridae:						
Sperm whale	*Physeter macrocephalus*	NA	E; Y	4,349 (0.28;3,451; See SAR)	3.9	0
Family Delphinidae:						
Long-finned pilot whale	*Globicephala melas*	Western North Atlantic	-/-; Y	39,215 (0.30; 30,627)	306	21
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic Offshore.	-/-; N	62,851 (0.23; 51,914; See SAR).	519	28
Common dolphin	*Delphinus delphis*	Western North Atlantic	-/-; N	172,825 (0.21; 145,216; See SAR).	1,452	419
Atlantic white-sided dolphin.	*Lagenorhynchus acutus*	Western North Atlantic	-/-; N	93,233 (0.71; 54,443; See SAR).	544	26
Atlantic spotted dolphin	*Stenella frontalis*	Western North Atlantic	-/-; N	39,921 (0.27; 32,032; 2012)	320	0
Risso's dolphin	*Grampus griseus*	Western North Atlantic	-/-; N	35,493 (0.19; 30,289; See SAR).	303	54.3
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy	-/-; N	95,543 (0.31; 74,034; See SAR).	851	217
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Gray seal [4]	*Halichoerus grypus*	Western North Atlantic	-/-; N	27,131 (0.19; 23,158, 2016)	1,389	5,410
Harbor seal	*Phoca vitulina*	Western North Atlantic	-/-; N	75,834 (0.15; 66,884, 2018)	2,006	350

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region/.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[3] Potential biological removal, defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population size (OSP). Annual M/SI, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, subsistence hunting, ship strike). Annual M/SI values often cannot be determined precisely and is in some cases presented as a minimum value. All M/SI values are as presented in the 2020 SARs (Hayes *et al.,* 2020).

[4] NMFS stock abundance estimate applies to U.S. population only, actual stock abundance is approximately 505,000.

A detailed description of the species likely to be affected by Ørsted's activities, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence were provided in the notice of the proposed IHA (85 FR 48179; August 10, 2020). Since that time, we are not aware of any changes in the status (under the MMPA or ESA) of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that notice for these descriptions. Please also refer to NMFS' website (*www.fisheries.noaa.gov/find-species*) for generalized species accounts.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from Ørsted's survey activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the Survey Area. The notice of proposed IHA (85 FR 48179; August 10, 2020) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of

underwater noise from Ørsted's survey activities on marine mammals and their habitat. That information and analysis is incorporated by reference into this final IHA determination and is not repeated here; please refer to the notice of proposed IHA (85 FR 48179; August 10, 2020) for more details.

Estimated Take

This section provides an estimate of the number of incidental takes authorized through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment), or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to noise from certain HRG sources. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* exclusion zones and shutdown measures), discussed in detail below in Mitigation section, Level A harassment or and/or mortality is neither anticipated nor authorized. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds recommended by NMFS for use in evaluating when marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment, (2) the area or volume of water that will be ensonified above these levels in a day, (3) the density or occurrence of marine mammals within these ensonified area, and (4) and the number of days of activities. We note that while these basic factors can contribute to a rudimentary calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimate.

Acoustic Thresholds

NMFS recommends use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (*e.g.,* hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 microPascal root mean square (μPa rms) for continuous (*e.g.,* vibratory driving, drilling) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent, non-impulsive (*e.g.,* scientific sonar) sources. Ørsted's survey activity includes the use of impulsive (*i.e.,* boomers and sparkers) and intermittent, non-impulsive sources (*e.g.,* non-parametric sub-bottom profilers); therefore, the 160 dB re 1 μPa (rms) threshold is applicable.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (NMFS, 2018) identifies dual criteria thresholds to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The components of Ørsted's planned activity that may result in take of marine mammals include the use of impulsive (*e.g.,* boomers or sparkers) and intermittent, non-impulsive (*e.g.,* non-parametric sub-bottom profilers) sources. The thresholds described above are provided in Table 2. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 2—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1*: $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW); (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW); (Underwater)	*Cell 9*: $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10*: $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript ''flat'' is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds (L_E) indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here we describe operational and environmental parameters of the activity that will contribute to identifying the area ensonified above the acoustic thresholds, which include sources levels and a transmission loss coefficient.

NMFS has developed a user-friendly methodology for determining the rms sound pressure level (SPL_{rms}) at the 160-dB isopleth for the purposes of estimating the extent of Level B harassment isopleths associated with HRG survey equipment (NMFS, 2020). This methodology incorporates frequency and some directionality to refine estimated ensonified zones of influence (ZOIs). Ørsted used NMFS's methodology with additional modifications to incorporate a seawater absorption formula and account for energy emitted outside of the primary beam of the source. For sources that operate with different beam widths, the maximum beam width was used, and the lowest frequency of the source was used when calculating the absorption coefficient. Please see Table 3 of the IHA application for detailed information about HRG acoustic source parameters.

NMFS considers the data provided by Crocker and Fratantonio (2016) to represent the best available information on source levels associated with HRG equipment and, therefore, recommends that source levels provided by Crocker and Fratantonio (2016) be incorporated in the method described above to estimate isopleth distances to the Level A and Level B harassment thresholds. In cases when the source level for a specific type of HRG equipment is not provided in Crocker and Fratantonio (2016), NMFS recommends that either the source levels provided by the manufacturer be used, or, in instances where source levels provided by the manufacturer are unavailable or unreliable, a proxy from Crocker and Fratantonio (2016) be used instead. Table 3 of the IHA application details HRG equipment types that may be used during the planned surveys, and the associated sound levels.

Results of modeling using the methodology described above indicated that, of the HRG survey equipment planned for use by Ørsted that has the potential to result in Level B harassment of marine mammals, sound produced by the Applied Acoustics Dura-Spark UHD sparkers and GeoMarine Geo-Source sparker would propagate furthest to the Level B harassment threshold (141 m; Table 3). As described above, only a portion of Ørsted's survey activity days will employ boomers or sparkers; therefore, for the purposes of the exposure analysis, it was assumed that sparkers would be the dominant acoustic source for approximately 701 of the total 1,302 survey activity days. For the remaining 601 survey days, the TB Chirp III (54 m; Table 3) was assumed to be the dominant source. Thus, the distances to the isopleths corresponding to the threshold for Level B harassment for sparkers (141 m) and the TB Chirp III (54 m) were used as the basis of the take calculation for all marine mammals for 54% and 46% of survey activity days, respectively.

TABLE 3—MODELED RADIAL DISTANCES FROM HRG SURVEY EQUIPMENT TO ISOPLETHS CORRESPONDING TO LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS

Sound source	Radial distance to level a harassment threshold (m) *				Radial distance to Level B harassment threshold (m)
	Low frequency cetaceans	Mid frequency cetaceans	High frequency cetaceans	Phocid pinnipeds (underwater)	All marine mammals
ET 216 CHIRP	<1	<1	2.9	0	12
ET 424 CHIRP	0	0	0	0	4
ET 512i CHIRP	0	0	<1	0	6
GeoPulse 5430	<1	<1	36.5	<1	29
TB CHIRP III	<1	<1	16.9	<1	54
Innomar Parametric SBPs	<1	<1	1.7	<1	4
AA Triple plate S-Boom (700/1,000 J)	<1	0	4.7	<1	76
AA, Dura-spark UHD (500 J/400 tip)	<1	0	2.8	<1	141
AA, Dura-spark UHD 400+400	<1	0	2.8	<1	141
GeoMarine, Geo-Source dual 400 tip sparker	<1	0	2.8	<1	141
Pangeo Acoustic Corer (LF CHIRP)	<1	0	<1	<1	4
Pangeo Acoustic Corer (HF CHIRP)	<1	<1	<1	<1	4
USBL (all models)	0	0	1.7	0	50

* AA = Applied Acoustics; CHIRP = Compressed High-Intensity Radiated Pulse; ET = EdgeTech; SBP = Sub-bottom Profiler; TB = Teledyne Benthos; UHD = Ultra-high Definition; USBL = Ultra-short Baseline. Distances to the Level A harassment threshold based on the larger of the dual criteria (peak SPL and SEL_{cum}) are shown.

Isopleth distances to Level A harassment thresholds for all types of HRG equipment and all marine mammal functional hearing groups were modeled using the NMFS User Spreadsheet and NMFS Technical Guidance (2018), which provides a conservative approach to exposure estimation. The dual criteria (peak SPL and SEL_{cum}) were applied to impulsive HRG sources using the modeling methodology described above, and the isopleth distances for each functional hearing group were then carried forward in the exposure analysis. For the GeoMarine Geo-Source dual 400 tip sparker, Applied Acoustics Triple plate S-Boom and Dura-Spark models, the peak SPL metric resulted in larger isopleth distances for the high frequency hearing group. Distances to the Level A harassment thresholds for all equipment types are shown in Table 3.

Distances to the Level A harassment threshold for Innomar were calculated using a Matlab-based numerical model, which accounts for the source's extremely narrow beam width. Cumulative sound exposure level from a moving source to an assumed stationary marine mammal was calculated based on the safe distance

method described in Sivle et al. (2015), with modifications to include absorption loss and beamwidth. The cumulative received level was then frequency weighted using the NMFS (2018) frequency weighting function for each marine mammal functional hearing group. Finally, the safe horizontal distance (*i.e.,* isopleth distance to the Level A harassment threshold) was determined numerically at a point where the SEL_{cum} would not exceed the 24-hour $SEL_{cum.}$

Modeled distances to isopleths corresponding to the Level A harassment threshold are very small (<1 m) for three of the four marine mammal functional hearing groups that may be impacted by the survey activities (*i.e.,* low frequency and mid frequency cetaceans, and phocid pinnipeds; see Table 3). Based on the extremely small Level A harassment zones for these functional hearing groups, the potential for species within these functional hearing groups to be taken by Level A harassment is considered so low as to be discountable. These three functional hearing groups encompass all but one of the marine mammal species that may be impacted by the planned activities, listed in Table 1. There is one species (harbor porpoise) within the high frequency functional hearing group that may be impacted by the planned activities. However, the largest modeled distance to the Level A harassment threshold for the high frequency functional hearing group was only 36.5 m (Table 3), and this estimate is assumed to be conservative. Level A harassment would also be more likely to occur at close approach to the sound source or as a result of longer duration exposure to the sound source, and mitigation measures—including a 100 m exclusion zone for harbor porpoises—are expected to minimize the potential for close approach or longer duration exposure to active HRG sources. In addition, harbor porpoises are a notoriously shy species which is known to avoid vessels. Harbor porpoises would also be expected to avoid a sound source prior to that source reaching a level that would result in injury (Level A harassment). Therefore, we have determined that the potential for take by Level A harassment of harbor porpoises is so low as to be discountable. As NMFS has determined that the likelihood of take of any marine mammals in the form of Level A harassment occurring as a result of the surveys is so low as to be discountable, we therefore do not authorize the take by Level A harassment of any marine mammals. For more information about Level A harassment exposure estimation, please see section 6.2.1 of the IHA application.

Marine Mammal Occurrence

The habitat-based density models produced by the Duke University Marine Geospatial Ecology Laboratory (Roberts *et al.,* 2016a,b, 2017, 2018) and Roberts (2020) represent the best available information regarding marine mammal densities in the Survey Area. The density data presented by Roberts *et al.* (2016a,b, 2017, 2018) and Roberts (2020) incorporates aerial and shipboard line-transect survey data from NMFS and other organizations and incorporates data from 8 physiographic and 16 dynamic oceanographic and biological covariates, and controls for the influence of sea state, group size, availability bias, and perception bias on the probability of making a sighting. These density models were originally developed for all cetacean taxa in the U.S. Atlantic (Roberts *et al.,* 2016a,b). In subsequent years, certain models have been updated based on additional data as well as certain methodological improvements. More information is available online at *seamap.env.duke.edu/models/Duke-EC-GOM-2015/.* Marine mammal density estimates in the Survey Area (animals/km^2) were obtained using the most recent model results for all taxa (Roberts *et al.,* 2016b, 2017, 2018) and Roberts (2020). The updated models incorporate additional sighting data, including sightings from the NOAA Atlantic Marine Assessment Program for Protected Species (AMAPPS) surveys from 2010–2014 (NEFSC & SEFSC, 2011, 2012, 2014a, 2014b, 2015, 2016). In addition, Roberts (2020) further updates model results for NARWs by implementing three major changes: Increasing spatial resolution, generating monthly estimates for three time periods of survey data, and dividing the study area into five discrete regions. These changes are designed to produce estimates that better reflect the most current, regionally specific data, including observations collected during aerial surveys in the Massachusetts and Rhode Island Wind Energy Areas, conducted by the New England Aquarium from February 2017 through June 2018 (Quintana et al., 2019). More information, including the initial model results and supplementary information for each model, is available online at *seamap.env.duke.edu/models/Duke-EC-GOM-2015/.*

For the exposure analysis, density data from Roberts *et al.* (2016b, 2017, 2018) and Roberts (2020) were mapped using a geographic information system (GIS). Density grid cells that included any portion of the Survey Area were selected for all survey months. Densities for the recently split Lease Areas OCS–A 0486 and OCS–A 0517 were combined, as the Lease Areas occupy the same habitat and densities and, therefore, overlap. For each of the Survey Area segments (*i.e.,* OCS–A 0486/0517, OCS–A 0487. OCS–A 0500, and ECR Area), the densities of each species as reported by Roberts *et al.* (2016b, 2017, 2018) and Roberts (2020) were averaged by month; those values were then used to calculate a mean annual density for each species for each segment of the Survey Area. Estimated mean monthly and annual densities (animals per km^2) of all marine mammal species that may be taken by the survey activities, for all segments of the Survey Area, are shown in Tables 8, 9, 10, and 11 of the IHA application. The mean annual density values used to estimate take numbers are shown in Table 4 below.

For bottlenose dolphin densities, Roberts *et al.* (2016b 2017, 2018) does not differentiate by stock. The Western North Atlantic northern migratory coastal stock primarily occurs in coastal waters from the shoreline to approximately the 20 m isobath (Hayes *et al.,* 2018). As the Survey Area is located north of the northern extent of the range of the Western North Atlantic Migratory Coastal Stock and within depths exceeding 20 m, where only the offshore stock would be expected to occur, all calculated bottlenose dolphin exposures within the Survey Area are expected to be from the offshore stock. Similarly, Roberts *et al.* (2018) produced density models for all seals but did not differentiate by seal species. Because the seasonality and habitat use by gray seals roughly overlaps with that of harbor seals in the Survey Area, it was assumed that the mean annual density of seals could refer to either of the respective species and was, therefore, divided equally between the two species.

TABLE 4—MEAN ANNUAL MARINE MAMMAL DENSITIES (NUMBER OF ANIMALS PER 100 KM2) IN THE SURVEY AREA

Species	OCS–A 0486/0517	OCS–A 0487	OCS–A 0500	ECR area
North Atlantic right whale	0.26	0.29	0.27	0.12
Humpback whale	0.14	0.13	0.12	0.05
Fin whale	0.21	0.26	0.27	0.15
Sei whale	0.01	0.01	0.02	0.01
Minke whale	0.05	0.06	0.07	0.04
Sperm Whale	0.01	0.01	0.01	0.01
Pilot whale	0.16	0.33	0.68	0.37
Bottlenose dolphin	1.17	0.77	0.72	3.51
Common dolphin	4.68	7.58	4.40	2.60
Atlantic white-sided dolphin	1.46	2.55	3.86	1.98
Atlantic spotted dolphin	0.01	0.02	0.05	0.05
Risso's dolphin	0.00	0.00	0.01	0.01
Harbor porpoise	3.44	4.62	5.65	3.20
Gray seal	0.73	0.70	0.65	1.59
Harbor seal	0.73	0.70	0.65	1.59

Note: All density values derived from Roberts *et al.* (2016b, 2017, 2018) and Roberts (2020). Densities shown represent the mean annual density values.

Take Calculation and Estimates

Here we describe how the information provided above was brought together to produce a quantitative take estimate. In order to estimate the number of marine mammals predicted to be exposed to sound levels that would result in harassment, radial distances to predicted isopleths corresponding to Level B harassment thresholds were calculated, as described above. Those distances were then used to calculate the area(s) around the HRG survey equipment predicted to be ensonified to sound levels that exceed harassment thresholds. The area estimated to be ensonified to relevant thresholds in a single day was then calculated, based on areas predicted to be ensonified around the HRG survey equipment and the estimated trackline distance traveled per day by the survey vessel. The daily ensonified area was multiplied by the mean annual density of a given marine mammal species for each Survey Area segment. This value was then multiplied by the number of planned vessel days.

As noted previously, not all noise producing survey equipment/sources will be operated concurrently by each survey vessel on every vessel day. The greatest distance to the Level B harassment threshold for impulsive sources (*e.g.,* boomers and sparkers) is 141 m, while the greatest distance to the Level B harassment threshold for intermittent, non-impulsive sources (*e.g.,* CHIRPs, Innomar, USBL) is 54 m. Therefore, the distance used to estimate take by Level B harassment was 141 m for the portion of survey days (54%) employing boomers and sparkers and 54 m for the portion of survey days (46%) when only non-impulsive sources will be used.

Ørsted estimates that the surveys will achieve a maximum daily track line distance of 70 km per 24-hour day during the HRG survey activity days; this distance accounts for the vessel traveling at approximately 4.0 kn, during active survey periods only. Estimates of incidental take by Level B harassment for impulsive and non-impulsive HRG equipment were calculated using the 141 m and 54 m Level B harassment isopleths, respectively, to determine the daily ensonified areas for 24-hour operations (impulsive 19.8 km^2; non-impulsive 7.659 km^2), estimated daily vessel track of approximately 70 km, and the relevant species density, multiplied by the number of survey days estimated for the specific Survey Area segment (Tables 5 and 6).

Ørsted will establish a 500 m exclusion zone for the North Atlantic right whale, which substantially exceeds the distance to the Level B harassment isopleth for both survey days using impulsive sources (141 m) and survey days using non-impulsive sources (54 m). However, Ørsted will be operating 24 hours per day for a majority of the total of 1,302 vessel days. Even with the implementation of mitigation measures (including visual monitoring at night with use of night vision devices), it is reasonable to assume that night time operations for an extended period could result in a limited number of North Atlantic right whales being exposed to underwater sound exceeding Level B harassment levels. Take has been conservatively calculated based on the largest isopleth for both types of survey days (*i.e.,* using impulsive or non-impulsive sources), and is thereby likely an overestimate because the acoustic source resulting in the largest isopleth would not be used on 100 percent of survey days for each category. In addition, Ørsted will implement specific mitigation and monitoring protocols for both types of survey days (*e.g.,* night vision goggles with thermal clip-ons for nighttime operations, exclusion zones, ramp-up and shutdown protocols). NMFS predicts that, in the absence of mitigation, 37 North Atlantic right whales may be taken by Level B harassment throughout the Survey Area over the 12-month project duration. The conservative estimate of exposure at Level B harassment levels coupled with the monitoring and mitigation measures make it likely that this prediction is an overestimate.

As described above, NMFS has determined that the likelihood of take of any marine mammals in the form of Level A harassment occurring as a result of the surveys is so low as to be discountable; therefore, we do authorize take of any marine mammals by Level A harassment.

TABLE 5—NUMBERS OF POTENTIAL INCIDENTAL TAKE BY LEVEL B HARASSMENT OF MARINE MAMMALS IN EACH OF THE SURVEY SEGMENTS BY SURVEY TYPE AND DURATION

[*, I = Impulsive; NI = Non-impulsive]

Survey type	Estimated takes by Level B harassment							
	OCS–A 0486/0517		OCS–A 0487		OCS–A 0500		ECR area	
	I *	NI *	I	NI	I	NI	I	NI
Vessel days	114	103	97	164	112	52	378	283
Species:								
North Atlantic right whale	5.87	2.02	5.57	3.60	5.99	1.06	8.98	2.57
Humpback whale	3.16	1.09	2.50	1.61	2.66	0.47	3.74	1.07
Fin whale	4.74	1.64	4.99	3.23	5.99	1.06	11.23	3.21
Sei whale	0.23	0.08	0.19	0.12	0.44	0.08	0.75	0.21
Minke whale	1.13	0.39	1.15	0.74	1.55	0.28	3.0	0.86
Sperm whale	0.02	0.08	0.19	0.12	0.22	0.04	0.75	0.21
Long-finned pilot whale	3.61	1.25	6.34	4.10	15.08	2.68	27.69	7.93
Bottlenose dolphin (W N Atlantic Offshore)	26.40	9.12	14.79	9.56	15.97	2.83	262.70	75.19
Common dolphin	105.64	36.49	145.58	94.09	97.57	17.32	194.59	55.69
Atlantic white-sided dolphin	32.96	11.38	48.98	31.65	85.60	15.19	148.19	42.41
Atlantic spotted dolphin	0.23	0.08	0.45	0.25	1.11	0.20	3.74	1.07
Risso's dolphin	0.00	0.00	0.00	0.00	0.22	0.04	0.75	0.21
Harbor porpoise	77.65	26.82	88.73	57.35	125.29	22.24	239.50	68.54
Gray seal	16.48	5.69	13.44	8.69	14.41	2.56	119.00	34.06
Harbor seal	16.48	5.69	13.44	8.69	14.41	2.56	119.00	34.06

TABLE 6—NUMBERS OF POTENTIAL INCIDENTAL TAKE OF MARINE MAMMALS AUTHORIZED AND TAKES AS A PERCENTAGE OF POPULATION

Species	Estimated takes by Level B harassment	Total authorized takes by Level B harassment	Total authorized takes as a percentage of population
North Atlantic right whale	37	37	8.64
Humpback whale [1]	16	21	1.50
Fin whale	36	36	0.49
Sei whale	2	2	0.03
Minke whale [1]	9	13	0.05
Sperm whale [1]	2	3	0.07
Long-finned pilot whale	69	69	0.18
Bottlenose dolphin (W.N. Atlantic Offshore) [2]	417	419	0.67
Common dolphin [1 2]	747	2,211	1.28
Atlantic white-sided dolphin [2]	416	418	0.45
Atlantic spotted dolphin	7	7	0.02
Risso's dolphin [1]	1	30	0.08
Harbor porpoise [2]	706	916	0.96
Harbor seal [2]	214	215	0.28
Gray seal [2]	214	215	0.79

[1] The authorized takes (Level B harassment only) for these species has been increased from the estimated take number to mean group size (Risso's dolphin: Palka (2012); sperm whale: Barkaszi and Kelly (2018)) or increased based on PSO sighting observations from Ørsted's HRG survey activities in the same Survey Area in 2019 and 2020 (humpback and minke whales, and common dolphins).

[2] Total authorized take by Level B harassment has been increased to include modeled exposures resulting from estimation of take by Level A harassment, which is not anticipated (see Section 6.2.1 of the IHA application).

Orsted has requested additional take, by Level B harassment, authorizations beyond the modelled takes for humpback and minke whales and common dolphins, based on increased detection of these species during its 2019 survey. Orsted's justification for this request can be found in its application, which is available here: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Mitigation

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or

stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and

(2) the practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The mitigation measures described below are consistent with those required and successfully implemented under previous incidental take authorizations issued in association with HRG survey activities. Modeling was performed to estimate ZOIs (see ''Estimated Take''); these ZOI values were used to inform mitigation measures for HRG survey activities to eliminate Level A harassment and minimize Level B harassment, while providing estimates of the areas within which Level B harassment might occur.

In addition to the specified measures described below, Ørsted will conduct briefings for vessel operators and crews, the marine mammal monitoring teams, and when new personnel join the work, in order to explain responsibilities, communication procedures, the marine mammal monitoring protocol, and operational procedures.

Pre-Start Clearance, Exclusion and Monitoring Zones

Marine mammal exclusion zones (EZs) will be established around impulsive acoustic sources (*e.g.,* boomers and sparkers) and non-impulsive, non-parametric sub-bottom profilers and monitored by protected species observers (PSOs):

- 500 m EZ for North Atlantic right whales for use of impulsive acoustic sources (*e.g.,* boomers and/or sparkers) and non-impulsive, non-parametric sub-bottom profilers; and
- 100 m EZ for all other marine mammals for use of impulsive acoustic sources (*e.g.,* boomers and/or sparkers), with the exception of certain small delphinids specified below.

If a marine mammal is detected approaching or entering the EZs during the HRG survey, the vessel operator will adhere to the shutdown procedures described below to minimize noise impacts on the animals. Pre-start clearance, ramp-up and shutdown procedures (described below) are not required during HRG survey operations using only non-impulsive sources, excluding non-impulsive, non-parametric sub-bottom profilers. Pre-clearance and ramp-up, but not shutdown, are required when using non-impulsive, non-parametric sub-bottom profilers. These stated requirements will be included in the site-specific training to be provided to the survey team.

Pre-Start Clearance of the Exclusion Zones

Ørsted will implement a 30-minute pre-start clearance period of the specified EZs prior to the initiation of ramp-up of boomers, sparkers, and non-impulsive, non-parametric sub-bottom profilers. During this period, the EZs will be monitored by the PSOs, using the appropriate visual technology. Ramp-up may not be initiated if any marine mammal(s) is within its respective EZ. If a marine mammal is observed within an EZ during the pre-start clearance period, ramp-up may not begin until the animal(s) has been observed exiting its respective EZ or until an additional time period has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and seals, and 30 minutes for all other species).

Ramp-Up of Survey Equipment

When technically feasible, a ramp-up procedure will be used for boomers, sparkers, and non-impulsive, non-parametric sub-bottom profilers capable of adjusting energy levels at the start or re-start of survey activities. The ramp-up procedure will be used at the beginning of HRG survey activities in order to provide additional protection to marine mammals in the Survey Area by allowing them to vacate the area prior to the commencement of survey equipment operation at full power.

A ramp-up will begin with the powering up of the smallest acoustic HRG equipment at its lowest practical power output appropriate for the survey. When technically feasible, the power will then be gradually turned up and other acoustic sources will be added.

Ramp-up activities will be delayed if a marine mammal(s) enters its respective EZ, and may only recommence if the animal has been observed exiting its respective EZ or until an additional time period has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and seals, and 30 minutes for all other species).

Activation of survey equipment through ramp-up procedures may not occur when visual observation of the pre-clearance zone is not expected to be effective (*i.e.,* during inclement conditions such as heavy rain or fog). The Exclusion Zone must be fully visible during pre-start clearance and ramp-up operations.

Shutdown Procedures

An immediate shutdown of boomers and sparkers will be required if a marine mammal is sighted entering or within its respective EZ. No shutdown is required for surveys operating only non-impulsive acoustic sources (including non-parametric sub-bottom profilers). The vessel operator must comply immediately with any call for shutdown by the Lead PSO. Any disagreement between the Lead PSO and vessel operator should be discussed only after shutdown has occurred. Subsequent restart of the survey equipment can be initiated if the animal has been observed exiting its respective EZ or after an additional time period has elapsed since the observation (*i.e.,* 15 minutes for small odontocetes and seals and 30 minutes for all other species).

If a species for which authorization has not been granted, or, a species for which authorization has been granted but the authorized number of takes have been met, approaches or is observed within the Level B harassment zone (54 m, non-impulsive; 141 m impulsive), shutdown will occur.

If the acoustic source is shut down for reasons other than mitigation (*e.g.,* mechanical difficulty) for less than 30 minutes, it may be activated again without ramp-up if PSOs have maintained constant observation and no detections of any marine mammal have occurred within the respective EZs. If the acoustic source is shut down for a period longer than 30 minutes and PSOs have maintained constant observation, then pre-start clearance and ramp-up procedures will be initiated as described in the previous section.

The shutdown requirement is waived for small delphinids of the following genera: *Delphinus, Lagenorhynchus, Stenella,* and *Tursiops.* Specifically, if a delphinid from the specified genera is visually detected approaching the vessel or towed equipment, shutdown is not required. Furthermore, if there is uncertainty regarding identification of a marine mammal species (*i.e.,* whether the observed marine mammal(s) belongs to one of the delphinid genera for which shutdown is waived), PSOs must use best professional judgement in making the decision to call for a shutdown. Additionally, shutdown is required if a delphinid is detected in the EZ and

belongs to a genus other than those specified.

Vessel Strike Avoidance

Vessel strike avoidance measures include, but are not limited to, the following, except under circumstances when complying with these measures would put the safety of the vessel or crew at risk:

• All vessel operators and crews must maintain a vigilant watch for all protected species and slow down, stop their vessel, or alter course, as appropriate and regardless of vessel size, to avoid striking any protected species. A visual observer aboard the vessel must monitor a vessel strike avoidance zone around the vessel (distances stated below). Visual observers monitoring the vessel strike avoidance zone may be third-party observers (*i.e.,* PSOs) or crew members, but crew members responsible for these duties must be provided sufficient training to (1) distinguish protected species from other phenomena and (2) broadly to identify a marine mammal as a North Atlantic right whale, other whale (defined in this context as sperm whales or baleen whales other than North Atlantic right whales), or other marine mammal.

• All vessels must observe a 10-knot speed restriction in specific areas designated by NMFS for the protection of North Atlantic right whales from vessel strikes: Any dynamic management areas (DMAs) when in effect and the Mid-Atlantic SMAs (from November 1 through April 30). See *www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-ship-strikes-north-atlantic-right-whales* for specific detail regarding these areas.

• Vessel speeds must also be reduced to 10 knots or less when any large whale, mother/calf pairs, pods, or large assemblages of cetaceans are observed near a vessel.

• All vessels must maintain a minimum separation distance of 500 m from North Atlantic right whales. If a whale is observed but cannot be confirmed as a species other than a right whale, the vessel operator must assume that it is a right whale and take appropriate action.

• All vessels must maintain a minimum separation distance of 100 m from sperm whales and all other baleen whales.

• All vessels must, to the maximum extent practicable, attempt to maintain a minimum separation distance of 50 m from all other marine mammals, with an understanding that at times this may not be possible (*e.g.,* for animals that approach the vessel).

• When protected species are sighted while a vessel is underway, the vessel shall take action as necessary to avoid violating the relevant separation distance (*e.g.,* attempt to remain parallel to the animal's course, avoid excessive speed or abrupt changes in direction until the animal has left the area). If a NARW is sighted within the relevant separation distance, the vessel must steer a course away at 10 knots or less until the 500 m separation distance has been established.

• These requirements do not apply in any case where compliance would create an imminent and serious threat to a person or vessel or to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply.

Seasonal Restrictions

Ørsted will limit to three the number of survey vessels that will operate concurrently from January through May within the Lease Areas (OSC–A 0486/0517, OCS–A 0487, and OCS–A 500) and ECR Area north of the Lease Areas up to, but not including, coastal and bay waters. Ørsted will operate either a single vessel, two vessels concurrently or, for short periods, no more than three survey vessels concurrently in the Survey Area from January through May, when North Atlantic right whale densities are high (Roberts 2020). This practice will help to reduce the number of right whale takes and minimize the extent to which right whales may be exposed to project noise in a day.

Between watch shifts, members of the monitoring team will consult NOAA Fisheries North Atlantic right whale reporting systems for the presence of right whales throughout survey operations. The Survey Area occurs near the SMAs located off the coast of Rhode Island (Block Island Sounds SMA) and at the entrance to New York Harbor (New York Bight SMA). If survey vessels transit through these SMAs, they must adhere to the seasonal mandatory speed restrictions from November 1 through April 30. Throughout all survey operations, Ørsted will monitor NOAA Fisheries North Atlantic right whale reporting systems for the establishment of a DMA. If NOAA Fisheries should establish a DMA in the Survey Area, the vessels will abide by speed restrictions in the DMA per the lease condition.

Based on our evaluation of the required measures, as well as other measures considered by NMFS, NMFS has determined that these mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an IHA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

• Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density).

• Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas).

• Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.

• How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.

• Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).

• Mitigation and monitoring effectiveness.

Monitoring Measures

Visual monitoring will be performed by qualified, NMFS-approved PSOs, the

resumes of whom will be provided to NMFS for review and approval prior to the start of survey activities. Ørsted will employ independent, dedicated, trained PSOs, meaning that the PSOs must (1) be employed by a third-party observer provider, (2) have no tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of marine mammals and mitigation requirements (including brief alerts regarding maritime hazards), and (3) have successfully completed an approved PSO training course appropriate for their designated task and/or have demonstrated experience in the role of independent PSO during a geophysical survey. On a case-by-case basis, non-independent observers may be approved by NMFS for limited, specific duties in support of approved, independent PSOs on smaller vessels with limited crew capacity operating in nearshore waters.

The PSOs will be responsible for monitoring the waters surrounding each survey vessel to the farthest extent permitted by sighting conditions, including EZs, during all HRG survey operations. PSOs will visually monitor and identify marine mammals, including those approaching or entering the established EZs during survey activities. It will be the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate the action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate.

During all HRG survey operations (*e.g.,* any day on which use of an HRG source is planned to occur), a minimum of one PSO must be on duty during daylight operations on each survey vessel, conducting visual observations at all times when acoustic sources are active. Two PSOs will be on watch during nighttime operations. PSO(s) will ensure 360° visual coverage around the vessel from the most appropriate observation posts and will conduct visual observations using binoculars and/or NVDs and the naked eye while free from distractions and in a consistent, systematic, and diligent manner. PSOs may be on watch for a maximum of four consecutive hours followed by a break of at least two hours between watches and may conduct a maximum of 12 hours of observation per 24-hour period. In cases where multiple vessels are surveying concurrently, any observations of marine mammals will be communicated to PSOs on all nearby survey vessels.

PSOs must be equipped with binoculars and have the ability to estimate distance and bearing to detected marine mammals, particularly in proximity to EZs. Reticulated binoculars must also be available to PSOs for use as appropriate based on conditions and visibility to support the sighting and monitoring of marine mammals. During nighttime operations, night-vision goggle with thermal clip-ons and infrared technology will be used. Position data will be recorded using hand-held or vessel GPS units for each sighting.

During good conditions (*e.g.,* daylight hours; Beaufort sea state (BSS) 3 or less), to the maximum extent practicable, PSOs will also conduct observations when the acoustic source is not operating for comparison of sighting rates and behavior with and without use of the active acoustic sources. Any observations of marine mammals by crew members aboard any vessel associated with the survey will be relayed to the PSO team.

Data on all PSO observations will be recorded based on standard PSO collection requirements. This will include dates, times, and locations of survey operations; dates and times of observations, location and weather; details of marine mammal sightings (*e.g.,* species, numbers, behavior); and details of any observed marine mammal behavior that occurs (*e.g.,* noted behavioral disturbances).

Reporting

Within 90 days after completion of survey activities, a final technical report will be provided to NMFS that fully documents the methods and monitoring protocols, summarizes the data recorded during monitoring, summarizes the number of marine mammals observed during survey activities (by species, when known), summarizes the mitigation actions taken during surveys (including what type of mitigation and the species and number of animals that prompted the mitigation action, when known), and provides an interpretation of the results and effectiveness of all mitigation and monitoring. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS.

In addition to the final technical report, Ørsted will provide the reports described below as necessary during survey activities.

In the event that Ørsted personnel discover an injured or dead marine mammal, Ørsted must report the incident to the NMFS Office of Protected Resources (OPR) and the NMFS New England/Mid-Atlantic Stranding Coordinator as soon as feasible. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

In the unanticipated event of a ship strike of a marine mammal by any vessel involved in the activities covered by the IHA, Ørsted must report the incident to the NMFS OPR and the NMFS New England/Mid-Atlantic Stranding Coordinator as soon as feasible. The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Species identification (if known) or description of the animal(s) involved;
- Vessel's speed during and leading up to the incident;
- Vessel's course/heading and what operations were being conducted (if applicable);
- Status of all sound sources in use;
- Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;
- Estimated size and length of animal that was struck;
- Description of the behavior of the marine mammal immediately preceding and following the strike;
- If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;
- Estimated fate of the animal (*e.g.,* dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and
- To the extent practicable, photographs or video footage of the animal(s).

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not

reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, our analysis applies to all the species listed in Table 1, given that NMFS expects the anticipated effects of the surveys to be similar in nature. NMFS does not anticipate that serious injury or mortality will occur as a result from HRG surveys, even in the absence of mitigation, and no serious injury or mortality is authorized. As discussed in the Potential Effects section, non-auditory physical effects and vessel strike are not expected to occur. We expect that all potential takes would be in the form of short-term Level B behavioral harassment in the form of temporary avoidance of the area or decreased foraging (if such activity was occurring), reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.,* Southall *et al.,* 2007). Even repeated Level B harassment of some small subset of an overall stock is unlikely to result in any significant realized decrease in viability for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. As described above, Level A harassment is not expected to occur given the nature of the operations, the estimated size of the Level A harassment zones, and the required shutdown zones for certain activities.

In addition to being temporary, the maximum expected harassment zone around a survey vessel is 141 m; almost half of survey days will include activity with a reduced acoustic harassment zone of 54 m per vessel, producing expected effects of particularly low severity. Consequently, the ensonified area surrounding each vessel is relatively small compared to the overall distribution of the animals in the area and their use of the habitat. Feeding behavior is not likely to be significantly impacted as prey species are mobile and are broadly distributed throughout the Survey Area; therefore, marine mammals that may be temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise. Because of the temporary nature of the disturbance and the availability of similar habitat and resources in the surrounding area, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

ESA-listed species for which takes are authorized are North Atlantic right, fin, sei, and sperm whales; impacts on these species are anticipated to be limited to lower level behavioral effects. NMFS does not anticipate that serious injury or mortality will occur to ESA-listed species, even in the absence of mitigation, and this authorization does not authorize any serious injury or mortality. The survey activities are not anticipated to affect the fitness or reproductive success of individual animals. Since impacts to individual survivorship and fecundity are unlikely, the survey activities are not expected to result in population-level effects for any ESA-listed species or alter current population trends of any ESA-listed species.

The status of the North Atlantic right whale population is of heightened concern, and merits additional analysis. In July 2020, the International Union for the Conservation of Nature (IUCN) moved the right whale from Endangered to Critically Endangered on the IUCN Red List. An increasing trend in right whale mortalities began in June 2017, primarily in Canada. Overall, preliminary findings support human interactions, specifically vessel strikes and entanglements, as the cause of death for the majority of right whales. The Survey Area includes a biologically important migratory route for right whales (effective March–April and November–December) that extends from Massachusetts to Florida (LeBrecque *et al.,* 2015). Off the south coast of Massachusetts and Rhode Island, this biologically important migratory area extends from the coast to beyond the shelf break. However, in recent years, the temporal and spatial scales of right whale distribution and migratory patterns have shifted (*e.g.,* Gowan *et al.,* 2019), and right whales are now observed year-round south of Martha's Vineyard and Nantucket (northeast of the Survey Area) (Pettis *et al.,* 2020). The spatial acoustic footprint of the survey is very small relative to the spatial extent of the available migratory habitat, thus, right whale migration is not expected to be impacted by the survey. As previously described, Seasonal Restrictions must be implemented to limit both the amount of vessel activity and acoustic impact of Ørsted's survey activities on right whales utilizing the habitat that overlaps with the Survey Area. Required vessel strike avoidance measures will also decrease risk of ship strike during migration, although no ship strike is expected to occur. Additionally, Ørsted is required to maintain a 500 m EZ and shutdown if a right whale is sighted at or within the EZ. The 500 m shutdown zone for right whales is conservative, considering the Level B harassment isopleth for the most impactful acoustic source (*i.e.,* GeoMarine Geo-Source 400 tip sparker) is estimated to be 141 m, and thereby minimizes the potential for behavioral harassment of this species. Finally, all survey vessels are required to maintain a 500 m separation distance from right whales, at all times.

The Survey Area includes a fin whale feeding BIA, effective between March and October. The fin whale feeding area is sufficiently large (2,933 km^2), and the acoustic footprint of the survey is sufficiently small that whale feeding habitat would not be reduced in any way, and any impacts to foraging behavior within the habitat are expected to be minimal. Behavioral harassment is typically context-dependent, and current literature demonstrates that some mysticetes are less likely to be susceptible to disruption of behavioral patterns when engaged in feeding (Southall *et al.,* 2007; Goldbogen *et al.,* 2013; Harris *et al.,* 2019). Any fin whales temporarily displaced from the Survey Area would be expected to have sufficient habitat available to them and would not be prevented from feeding in other areas within the biologically important feeding habitat. In addition, any displacement of fin whales from the BIA would be expected to be temporary

in nature. Therefore, we do not expect fin whale feeding to be negatively impacted by the survey.

As noted previously, there are several active UMEs occurring in the vicinity of Ørsted's Survey Area. Elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida since January 2016. Of the cases examined, approximately half had evidence of human interaction (ship strike or entanglement). The UME does not yet provide cause for concern regarding population-level impacts. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or distinct population segment (DPS)) remains stable at approximately 12,000 individuals.

Beginning in January 2017, elevated minke whale strandings have occurred along the Atlantic coast from Maine through South Carolina, with highest numbers in Massachusetts, Maine, and New York. This event does not provide cause for concern regarding population level impacts, as the likely population abundance is greater than 20,000 whales.

Elevated numbers of harbor seal and gray seal mortalities were first observed in July 2018 and have occurred across Maine, New Hampshire, and Massachusetts. Based on tests conducted so far, the main pathogen found in the seals is phocine distemper virus, although additional testing to identify other factors that may be involved in this UME are underway. The UME does not yet provide cause for concern regarding population-level impacts to any of these stocks. For harbor seals, the population abundance is over 75,000 and annual M/SI (350) is well below PBR (2,006) (Hayes *et al.,* 2018). The population abundance for gray seals in the United States is over 27,000, with an estimated overall abundance, including seals in Canada, of approximately 505,000. In addition, the abundance of gray seals is likely increasing in the U.S. Atlantic EEZ as well as in Canada (Hayes *et al.,* 2018).

The required mitigation measures are expected to reduce the number and/or severity of takes by providing animals the opportunity to move away from the sound source throughout the Survey Area before HRG survey equipment reaches full energy, thus preventing animals from being exposed to sound levels that have the potential to cause injury (Level A harassment) or more severe Level B harassment. No Level A harassment is anticipated or authorized.

NMFS expects that takes would be in the form of short-term Level B behavioral harassment by way of brief startling reactions and/or temporary vacating of the area, or decreased foraging (if such activity was occurring)—reactions that (at the scale and intensity anticipated here) are considered to be of low severity, with no lasting biological consequences. Since both the sources and marine mammals are mobile, animals would only be exposed briefly to a small ensonified area that might result in take. Additionally, required mitigation measures would further reduce exposure to sound that could result in more severe behavioral harassment.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality or serious injury is anticipated or authorized;
- No Level A harassment (PTS) is anticipated or authorized;
- Foraging success is not likely to be significantly impacted as effects on species that serve as prey species for marine mammals from the survey are expected to be minimal;
- The availability of alternate areas of similar habitat value for marine mammals to temporarily vacate the survey area during the planned survey to avoid exposure to sounds from the activity;
- Take is anticipated to be Level B behavioral harassment, consisting of brief startling reactions and/or temporary avoidance of the Survey Area;
- While the Survey Area is within areas noted as biologically important for North Atlantic right whale migration, the survey activities will occur in such a comparatively small area such that any avoidance of the Survey Area due to survey activities would not affect migration. Seasonal vessel restrictions from January through May will further reduce the potential overall impacts of survey activities on NARWs utilizing habitat in or near the Survey Area. In addition, the mitigation measure to shutdown if a North Atlantic right whale is observed nearing or entering the 500 m EZ would limit any take of the species. Similarly, due to the small footprint of the survey activities in relation to the size of a biologically important area for fin whales' foraging, the survey activities would not affect foraging success of this species; and
- The required mitigation measures, including visual monitoring and shutdowns, are expected to minimize potential impacts to marine mammals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is less than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

We authorize incidental take of fifteen marine mammal stocks. The numbers of marine mammals for which we authorize take, for all species and stocks, are small relative to the relevant stocks or populations (less than 9 percent for all species and stocks) as shown in Table 6. Based on the analysis contained herein of the planned activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of all affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes,

funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS Greater Atlantic Regional Fisheries Office (GARFO), whenever we propose to authorize take for endangered or threatened species. Within the Survey Area, fin, sei, humpback, North Atlantic right, and sperm whales are listed as endangered species under the ESA. Under section 7 of the ESA, BOEM consulted with NMFS on commercial wind lease issuance and site assessment activities on the Atlantic Outer Continental Shelf in Massachusetts, Rhode Island, New York, and New Jersey Wind Energy Areas. NOAA's GARFO issued a Biological Opinion concluding that these activities may adversely affect but are not likely to jeopardize the continues existence of the North Atlantic right, fin, sei, and sperm whale. The Biological Opinion can be found online at: *https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-biological-opinions-greater-atlantic-region.* Upon request from the NMFS Office of Protected Resources, NMFS GARFO issued an amended incidental take statement associated with this Biological Opinion to include the take of the ESA-listed marine mammal species authorized through this IHA in September, 2020.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our proposed action (*i.e.,* the promulgation of regulations and subsequent issuance of incidental take authorization) and alternatives with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 of the Companion Manual for NAO 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the planned action qualifies to be categorically excluded from further NEPA review.

Authorization

NMFS has issued an IHA to Ørsted for conducting marine site characterization surveys in coastal waters from New York to Massachusetts, for a period of one year, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: October 5, 2020.

Donna Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–22307 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA555]

Marine Mammals and Endangered Species

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

ACTION: Notice; issuance of permits and permit modifications.

SUMMARY: Notice is hereby given that permits and permit modifications have been issued to the following entities under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), as applicable.

ADDRESSES: The permits and related documents are available for review upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore (Permit No. 23932), Amy Hapeman (Permit Nos. 18238–03, 21111–02, and 23639), Erin Markin (Permit Nos. 23683, 23850, and 23851), Jordan Rutland (Permit No. 23310), and Sara Young (Permit No. 23188); at (301) 427–8401.

SUPPLEMENTARY INFORMATION: Notices were published in the **Federal Register** on the dates listed below that requests for a permit or permit modification had been submitted by the below-named applicants. To locate the **Federal Register** notice that announced our receipt of the application and a complete description of the research, go to *www.federalregister.gov* and search on the permit number provided in Table 1 below.

TABLE 1—ISSUED PERMITS AND PERMIT MODIFICATIONS

Permit No.	RTID	Applicant	Previous **Federal Register** notice	Issuance date
18238–03	0648–XA264	NMFS, Southwest Fisheries Science Center, 8901 La Jolla, Shores Drive, La Jolla, CA 92037 (Responsible Party: Robin LeRoux).	85 FR 40971; July 8, 2020.	September 18, 2020.
21111–02	0648–XA237	NMFS, Southwest Fisheries Science Center, 8901 La Jolla, Shores Drive, La Jolla, CA 92037 (Responsible Party: Robin LeRoux).	85 FR 37433; June 22, 2020.	September 18, 2020.
23188	0648–XR092	Institute of Marine Sciences, University of California at Santa Cruz, 130 McAllister Way, Santa Cruz, CA 95060 (Responsible Party: Daniel Costa, Ph.D.).	85 FR 31747; May 27, 2020.	September 25, 2020.
23310	0648–XA074	Patricia Fair, Ph.D., South Carolina Aquarium, 100 Aquarium Wharf, Charleston, SC 29401.	85 FR 14468; March 12, 2020.	September 15, 2020.
23639	0648–XA264	Coonamessett Farm Foundation, Inc., 277 Hatchville Road, East Falmouth, MA 02536, (Responsible Party: Ronald Smolowitz).	85 FR 40971; July 8, 2020.	September 25, 2020.
23683	0648–XA237	Guam Division of Aquatic and Wildlife Resources, 163 Dairy Road, Mangilao, Guam 96913, (Responsible Party: Jay Gutierrez).	85 FR 37433; June 22, 2020.	September 25, 2020.

TABLE 1—ISSUED PERMITS AND PERMIT MODIFICATIONS—Continued

Permit No.	RTID	Applicant	Previous **Federal Register** notice	Issuance date
23850	0648–XA264	Shigetomo Hirama, Florida Fish and Wildlife Conservation Commission, Fish and Wildlife Research Institute, 1105 S.W. Williston Road, Gainesville, FL 32601.	85 FR 40971; July 8, 2020.	September 25, 2020.
23851	0648–XA237	Michael Arendt, South Carolina Department of Natural Resources, Marine Resources, 217 Fort Johnson Road, Charleston, SC 29412.	85 FR 37433; June 22, 2020.	September 25, 2020.
23932	0648–XA287 and 0648–XA321.	New York Genome Center, 101 Avenue of the Americas, New York City, NY 10013 (Responsible Party: Catherine Reeves).	85 FR 43818; July 20, 2020 and 85 FR 47187; August 4, 2020 (Correction).	September 2, 2020.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

As required by the ESA, as applicable, issuance of these permit was based on a finding that such permits: (1) Were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in Section 2 of the ESA.

Authority: The requested permits have been issued under the MMPA of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), as applicable.

Dated: October 5, 2020.

Julia Marie Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–22333 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA537]

Fisheries of the South Atlantic; South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of a public meeting.

SUMMARY: The South Atlantic Fishery Management Council (Council) will convene a meeting of the South Atlantic Selectivity Workgroup via webinar to address gear selectivity for fishery stock assessments for species managed by the Council.

DATES: The South Atlantic Selectivity Workgroup meeting will be held via webinar on Tuesday, October 27, 2020, from 1 p.m. until 5 p.m.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Information, including a link to webinar registration and meeting materials will be posted on the Council's website at: *https://safmc.net/safmc-meetings/other-meetings/* as it becomes available.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Chip Collier, Deputy Director for Science, SAFMC; phone: (843) 302–8444 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *chip.collier@safmc.net.*

SUPPLEMENTARY INFORMATION: The South Atlantic Selectivity Workgroup consists of scientists with expertise in selectivity or gears used in fisheries in the South Atlantic region including members of the Council's Scientific and Statistical Committee chosen to participate. The Workgroup will provide recommendations on selectivity for species managed by the Council for consideration in upcoming stock assessments.

Agenda items include:

1. Review working papers developed by the South Atlantic Selectivity Workgroup on selectivity;

2. Provide recommendations on selectivity for Red Snapper, Vermilion Snapper; and Black Sea Bass;

3. Review and address the Terms of Reference for the Workgroup;

4. Review sections of the Workgroup report; and

5. Assign sections to Workgroup members.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 5 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: October 5, 2020.

Tracey L. Thompson,

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

[FR Doc. 2020–22301 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA547]

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The North Pacific Fishery Management Council (NPFMC) Charter Halibut Management Committee will meet via webconference on October 27, 2020.

DATES: The meeting will be held on Tuesday, October 27, 2020 from 9 a.m. to 3 p.m., Alaska time.

ADDRESSES: The meeting will be a webconference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/1568.*

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave, Anchorage, AK 99501–2252; telephone: (907) 271–2809. Instructions for attending the meeting are given under **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT: Jim Armstrong, Council staff; phone: (907) 271–2809 and email: *james.armstrong@noaa.gov.* For technical support please contact administrative Council staff, email: *npfmc.admin@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

Tuesday, October 27, 2020

The purpose of the Charter Halibut Management Committee meeting is to identify a range of potential management measures for the Area 2C and Area 3A charter halibut fisheries in 2021 using the management measures in place for 2020 as a baseline. For Area 2C, the baseline management measure includes regulations applicable to charter halibut fishing in all areas, and a daily limit of one fish less than or equal to 45 inches or greater than or equal to 80 inches. For Area 3A, the baseline management measure includes regulations applicable to charter halibut fishing in all areas, no annual limit, a daily limit of two fish, one fish of any size, and a second fish which must be 32 inches or less in length. No days are closed to charter halibut fishing. Committee recommendations will be incorporated into an analysis for Council review in December 2020. The Council will recommend preferred management measures for consideration by the International Pacific Halibut commission at its January 2021 meeting, for implementation in 2021. The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/1568* prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: *https://meetings.npfmc.org/Meeting/Details/1568.*

Public Comment

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/1568.*

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

Dated: October 5, 2020.

Tracey L. Thompson,

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

[FR Doc. 2020–22302 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA524]

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 71 South Atlantic Gag Grouper Data and Assessment Webinar.

SUMMARY: The SEDAR 71 assessment of the South Atlantic stock of Gag Grouper will consist of a data webinar and a series assessment webinars.

DATES: The SEDAR 71 Gag Grouper Data and Assessment Webinar has been scheduled for Wednesday October 28, 2020, from 9 a.m. to 12 p.m. EDT.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Registration is available online at: *https://attendee.gotowebinar.com/register/2390775194701123084.*

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4371; email: *Kathleen.Howington@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the SEDAR 71 Gag Grouper Data and Assessment Webinar are as follows:

- Discuss and make final recommendations on any ongoing data issues as needed
- Discuss modeling issues as needed

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice 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

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the South Atlantic Fishery Management Council office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: October 5, 2020.

Tracey L. Thompson,

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

[FR Doc. 2020–22300 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 201001–0262; RTID 0648–XA338]

Fish and Fish Product Import Provisions of the Marine Mammal Protection Act; Final 2020 List of Foreign Fisheries

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

ACTION: Notice of availability.

SUMMARY: NMFS is publishing its final 2020 List of Foreign Fisheries (LOFF), as required by the regulation implementing the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act (MMPA). The final 2020 LOFF reflects new information received during the comment period on interactions between commercial fisheries exporting fish and fish products to the United States and marine mammals and updates and revises the draft 2020 LOFF. NMFS classified commercial fisheries in this final 2020 LOFF into one of two categories, either ''export'' or ''exempt,'' based upon frequency and likelihood of incidental mortality and serious injury of marine mammals likely to occur incidental to each fishery. The classification of a fishery on the final 2020 LOFF determines which regulatory requirements will be applicable to that fishery for it to receive a Comparability Finding necessary to export fish and fish products to the United States from that fishery. The final 2020 LOFF can be found at: *https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries.*

FOR FURTHER INFORMATION CONTACT: Nina Young, NMFS IASI at *Nina.Young@noaa.gov, mmpa.loff@noaa.gov,* or 301–427–8383.

SUPPLEMENTARY INFORMATION: In August 2016, NMFS published a final rule (81 FR 54390; August 15, 2016) implementing the fish and fish product import provisions (section 101(a)(2)) of the MMPA (hereafter referred to as the MMPA Import Provisions Rule). This rule established conditions for evaluating a harvesting nation's regulatory programs to address incidental and intentional mortality and serious injury of marine mammals in its fisheries producing fish and fish products exported to the United States. Specifically, fish or fish products cannot be imported into the United States from commercial fishing operations that result in the incidental mortality or serious injury of marine mammals in excess of United States standards. The MMPA Import Provisions Rule established an initial five-year exemption period during which the import prohibitions do not apply. The exemption period allows time for harvesting nations to develop regulatory programs to mitigate marine mammal bycatch in their respective fisheries.

After the exemption period, fish and fish products identified by the Assistant Administrator as from export and exempt fisheries in the LOFF can only be imported into the United States if the harvesting nation has applied for and received a Comparability Finding from NMFS. The 2016 final rule established procedures that a harvesting nation must follow and conditions it must meet to receive a Comparability Finding for a fishery. The rule also established provisions for intermediary nations to ensure that such nations do not import and re-export to the United States fish or fish products that are subject to an import prohibition.

This final 2020 LOFF (see *https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries*) makes updates to the final 2017 LOFF, which was published on March 16, 2018 (83 FR 11703) and the draft 2020 LOFF, which was published on March 17, 2020 (85 FR 15116).

What is the List of Foreign Fisheries?

Based on information provided by nations, industry, the public, and other readily available sources, NMFS identified nations with commercial fishing operations that export fish and fish products to the United States and classified each of those fisheries based on their frequency of marine mammal interactions as either ''exempt'' or ''export'' fisheries (see Definitions below). The entire list of these export and exempt fisheries, organized by nation (or economy), constitutes the LOFF.

Why is the LOFF important?

Under the MMPA, the United States prohibits imports of commercial fish or fish products caught in commercial fishing operations resulting in the incidental killing or serious injury (bycatch) of marine mammals in excess of United States standards (16 U.S.C. 1371(a)(2)). NMFS published regulations implementing these statutory requirements of the MMPA in August 2016 (81 FR 54390; August 15, 2016) (MMPA Import Provisions Rule). The regulations apply to any foreign nation with fisheries exporting fish and fish products to the United States, either directly or through an intermediary nation.[1]

The LOFF lists foreign commercial fisheries that export fish and fish products to the United States and that have been classified as either ''export'' or ''exempt'' based on the frequency and likelihood of interactions or incidental mortality and serious injury of a marine mammal. All fisheries that export to the United States must be included on the LOFF by January 1, 2022. A harvesting nation must apply for and receive a Comparability Finding for each of its export and exempt fisheries on the LOFF to continue to export fish and fish products to the United States from those fisheries beginning January 1, 2022.

What do the classifications of ''exempt fishery'' and ''export fishery'' mean?

The classifications of ''exempt fishery'' or ''export fishery'' determine the criteria that a nation's fishery must meet to receive a Comparability Finding for that fishery. A Comparability Finding is required for both exempt and export fisheries, but the criteria for exempt and export fisheries differ.

For an exempt fishery, the criteria to receive a Comparability Finding are limited to conditions related only to the prohibition of intentional killing or injury of marine mammals (see 50 CFR 216.24(h)(6)(iii)(A)). For an export fishery, the criteria to receive a Comparability Finding include the conditions related to the prohibition of intentional killing or injury of marine mammals (see 50 CFR 216.24(h)(6)(iii)(A)) and the requirement to develop and maintain regulatory programs comparable in effectiveness to the U.S. regulatory program for reducing incidental marine mammal bycatch (see 50 CFR 216.24(h)(6)). The definitions of ''exempt fishery'' and ''export fishery'' are stated in the Definitions below.

[1] With respect to all references to ''nation'' or ''nations'' in the rule, it should be noted that the Taiwan Relations Act of 1979, Public Law 96–8, Section 4(b)(1), provides that [w]henever the laws of the United States refer or relate to foreign countries, nations, states, governments, territories or similar entities, such terms shall include and such laws shall apply with respect to Taiwan. 22 U.S.C. 3303(b)(1). This is consistent with the United States' one-China policy, under which the United States has maintained unofficial relations with Taiwan since 1979.

What type of fisheries are included in the List of Foreign Fisheries?

The LOFF contains only those commercial fishing operations authorized by the harvesting nation to fish and export fish and fish products to the United States. 50 CFR 18.3 defines ''commercial fishing operation'' as the lawful harvesting of fish from the marine environment for profit as part of an on-going business enterprise. This does not include sport-fishing activities, whether or not carried out by charter boat or otherwise, and whether or not the fish caught are subsequently sold. At 50 CFR 229.2, ''commercial fishing operation'' is defined as the catching, taking, or harvesting of fish from the marine environment (or other areas where marine mammals occur) that results in the sale or barter of all or part of the fish harvested. The term includes licensed commercial passenger fishing vessel (as defined in section 216.3 of 50 CFR 216) activities and aquaculture activities. Per the application of these two definitions, the LOFF contains export and exempt fisheries that are engaged in the lawful and authorized commercial harvest of fish from the marine environment. The term ''commercial fishing operation'' is used in the definitions of exempt fishery and export fishery (see Definitions below).

How did NMFS classify a fishery if a harvesting nation did not provide information?

Information on the frequency or likelihood of interactions or bycatch in most foreign fisheries was lacking or incomplete. Absent such information, NMFS used readily available information, noted below, to classify fisheries, which included drawing analogies to similar U.S. fisheries and gear types interacting with similar marine mammal stocks. Where no analogous fishery or fishery information existed, NMFS classified the commercial fishing operation as an export fishery until information becomes available to properly classify the fishery. Henceforth, in the year prior to the year in which a determination is required on a Comparability Finding application (*e.g.,* 2020 and 2024), NMFS will revise the LOFF. When revising the LOFF, NMFS may reclassify a fishery if a harvesting nation provides reliable information to reclassify the fishery or such information is readily available to NMFS (*e.g.,* during the comment periods, consultations, or in Progress Reports).

Frequently Asked Questions About the LOFF and the MMPA Import Provisions Definitions Within the MMPA Import Provisions

What is a ''Comparability Finding?''

A Comparability Finding is a finding by NMFS that the harvesting nation has implemented a regulatory program for an export or exempt fishery that has met the applicable conditions specified in the regulations (see 50 CFR 216.24(h)) subject to the additional considerations for Comparability Findings set out in the regulations. A Comparability Finding is required for a nation to export fish and fish products to the United States. To receive a Comparability Finding for an export fishery, the harvesting nation must maintain a regulatory program with respect to that fishery that is comparable in effectiveness to the U.S. regulatory program for reducing incidental marine mammal bycatch. This requirement may be met by developing, implementing, and maintaining a regulatory program that includes measures that are comparable, or that effectively achieve comparable results to the regulatory program under which the analogous U.S. fishery operates.

What is the definition of an ''export fishery?''

The definition of an export fishery can be found in the implementing regulations for section 101(a)(2) of the MMPA (see 50 CFR 216.3). NMFS considers export fisheries to be functionally equivalent to Category I and II fisheries under the U.S. regulatory program (see definitions at 50 CFR 229.2).

NMFS defines ''export fishery'' as a foreign commercial fishing operation determined by the Assistant Administrator to be the source of exports of commercial fish and fish products to the United States and that has more than a remote likelihood of incidental mortality and serious injury of marine mammals in the course of its commercial fishing operations.

Where reliable information on the frequency of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation is not provided by the harvesting nation, the Assistant Administrator may determine the likelihood of incidental mortality and serious injury as more than remote by evaluating information concerning factors such as fishing techniques, gear used, methods used to deter marine mammals, target fish species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, the species and distribution of marine mammals in the area, or other factors.

Commercial fishing operations not specifically identified in the current LOFF as either exempt or export fisheries are deemed to be export fisheries until a revised LOFF is posted, unless the harvesting nation provides the Assistant Administrator with information to properly classify a foreign commercial fishing operation not on the LOFF. To properly classify the foreign commercial fishing operation, the Assistant Administrator may also request additional information from the harvesting nation, as well as consider other relevant information about such commercial fishing operations and the frequency of incidental mortality and serious injury of marine mammals.

What is the definition of an ''exempt fishery?''

The definition of exempt fishery can be found in the implementing regulations for section 101(a)(2) of the MMPA (see 50 CFR 216.3). NMFS considers ''exempt'' fisheries to be functionally equivalent to Category III fisheries under the U.S. regulatory program (see definitions at 50 CFR 229.2).

NMFS defines an exempt fishery as a foreign commercial fishing operation determined by the Assistant Administrator to be the source of exports of commercial fish and fish products to the United States and that has a remote likelihood of, or no known, incidental mortality and serious injury of marine mammals in the course of commercial fishing operations. A commercial fishing operation that has a remote likelihood of causing incidental mortality and serious injury of marine mammals is one that, collectively with other foreign fisheries exporting fish and fish products to the United States, causes the annual removal of:

(1) Ten percent or less of any marine mammal stock's bycatch limit, or

(2) More than ten percent of any marine mammal stock's bycatch limit, yet that fishery by itself removes one percent or less of that stock's bycatch limit annually, or

(3) Where reliable information has not been provided by the harvesting nation on the frequency of incidental mortality and serious injury of marine mammals caused by the commercial fishing operation, the Assistant Administrator may determine whether the likelihood of incidental mortality and serious injury is ''remote'' by evaluating information such as fishing techniques, gear used, methods to deter marine

mammals, target fish species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, the species and distribution of marine mammals in the area, or other factors at the discretion of the Assistant Administrator.

A foreign fishery will not be classified as an exempt fishery unless the Assistant Administrator has reliable information from the harvesting nation, or other information, to support such a finding.

Developing the 2020 List of Foreign Fisheries

How is the list of foreign fisheries organized?

NMFS organized the LOFF by harvesting nation (or economy). The LOFF may include ''exempt fisheries'' and ''export fisheries'' for each harvesting nation. Each fishery is defined by target species, geographic location of harvest, gear-type or a combination thereof. Where known, the LOFF also includes a list of the marine mammals that co-occur with the fishery, a list of marine mammals that interact (*e.g.,* depredate the fishing gear, are killed or injured in, or are released from the fishery) with each commercial fishing operation, and numerical estimates of the incidental mortality and serious injury of marine mammals in each commercial fishing operation.

What sources of information did NMFS use to classify the commercial fisheries included in the LOFF?

NMFS reviewed and considered documentation provided by nations during the development of the 2017 LOFF, the draft 2020 LOFF, and the 2019 Progress Report. NMFS also reviewed and considered the information provided by the public and other available sources of information, including, but not limited to: Fishing vessel records; reports of on-board fishery observers; information from off-loading facilities, port-side government officials, enforcement entities and documents, transshipment vessel workers and fish importers; government vessel registries; RFMO or intergovernmental agreement documents, reports, national reports, and statistical document programs; appropriate catch certification programs; Food and Agricultural Organization (FAO) documents and profiles; and published literature and reports on commercial fishing operations with intentional or incidental mortality and serious injury of marine mammals. NMFS has used the available information to classify each fishery as ''export'' or ''exempt'' to develop the LOFF.

How did NMFS determine which species or stocks are included as incidentally or intentionally killed or seriously injured in a fishery?

The LOFF includes a column consisting of a list of marine mammals that co-occur with the commercial fisheries, that is, the distribution of marine mammals that overlaps with the distribution of commercial fishing activity. The marine mammals that co-occur with a fishery may or may not interact with or be incidentally or intentionally killed or injured in the fishery. The LOFF also includes a list of marine mammal species and/or stocks incidentally or intentionally killed or injured in a commercial fishing operation. The list of species and/or stocks incidentally or intentionally killed or injured includes ''serious'' and ''non-serious'' documented injuries and interactions with fishing gear, including interactions such as depredation.

NMFS reviewed information submitted by nations (for inclusion in the 2017 LOFF, draft 2020 LOFF, and in their 2019 Progress Report) and readily available scientific information including co-occurrence models demonstrating distributional overlap of commercial fishing operations and marine mammals to determine which species or stocks to include as incidentally or intentionally killed or injured in or interacting with a fishery. NMFS also reviewed, when available, injury determination reports, bycatch estimation reports, observer data, logbook data, disentanglement network data, fisher self-reports, and the information referenced in the definition of exempt and export fishery (see Definitions above or 50 CFR 216.3).

How often will NMFS revise the list of foreign fisheries?

NMFS will re-evaluate foreign commercial fishing operations and publish in the **Federal Register** the year prior to the expiration of the exemption period or previously issued Comparability Findings (*e.g.,* this year and again in 2024) a notice of availability of the draft LOFF for public comment and a notice of availability of the final revised LOFF. NMFS will revise the final LOFF, as appropriate, and publish a notice of availability in the **Federal Register** every four years thereafter. In revising the list, NMFS may reclassify a fishery if new, substantive information indicates the need to re-examine and possibly reclassify a fishery. After January 1, 2022, all fisheries exporting products to the United States must be on the LOFF and have a Comparability Finding (see 50 CFR 216.24(h)(1)).

After publication of the LOFF, if a nation wishes to commence exporting fish and fish products to the United States from a fishery not currently included in the LOFF, that fishery will be classified as an export fishery until the next LOFF is published and will be provided a provisional Comparability Finding for a period not to exceed twelve months. If a harvesting nation can provide the reliable information necessary to classify the commercial fishing operation at the time of the request for a provisional Comparability Finding or prior to the expiration of the provisional Comparability Finding, NMFS will classify the fishery in accordance with the definitions. The provisions for new entrants are discussed in the regulations implementing section 101(a)(2) of the MMPA (see 50 CFR 216.24(h)(8)(vi)).

How can a classification be changed?

To change a fishery's classification, nations or other interested stakeholders must provide observer data, logbook summaries (preferably over a five-year period), or reports that specifically indicate the presence or absence of marine mammal interactions, quantify such interactions wherever possible, provide additional information on the location and operation of the fishery, details about the gear type and how it is used, maps showing the distribution of marine mammals and the operational area of the fishery, information regarding marine mammal populations and the biological impact of that fishery on those populations, and/or any other documentation that clearly demonstrates that a fishery is either an export or exempt fishery. Data from independent onboard observer programs documenting marine mammal interaction and bycatch is preferable and is given higher consideration than self-reports, logbooks, fishermen interviews, or sales tickets or dockside interviews. Such data can be summarized and averaged over at least a five-year period and include information on the observer program including the percent coverage, number of vessels, and sets or hauls observed. Nations should also indicate whether bycatch estimates from observer data are observed minimum counts or extrapolated estimates for the entire fishery. Nations submitting logbook information should include details about the reporting system, including examples of forms and requirements for reporting. Nations may make formal

requests to NMFS to reconsider a fishy classification.

Classification Criteria, Rationale, and Process Used To Classify Fisheries

Process When Incidental Mortality and Serious Injury Estimates and Bycatch Limits Are Available

If estimates of the total incidental mortality and serious injury were available and a bycatch limit calculated for a marine mammal stock, NMFS used the quantitative and tiered analysis to classify foreign commercial fishing operations as export or exempt fisheries under the category definition within 50 CFR 229.2 and the procedures used to categorize U.S. fisheries as Category I, II, or III, at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-list-fisheries.*

Process When Only Incidental Mortality and Serious Injury Estimates Were Available

For most commercial fisheries, NMFS is still lacking detail regarding marine mammal interactions and/or lacking quantitative information on the frequency of interactions. Where nations provided estimates of bycatch or NMFS found estimates of bycatch in published literature, national reports, or through other readily available sources, NMFS classified the fishery as an export fishery if the information indicated that there was a likelihood that the mortality and serious injury was more than remote.

Alternative Approaches When Estimates of Marine Mammal Bycatch Are Unavailable

As bycatch estimates are lacking for most fisheries, NMFS relied on three considerations to assess the likelihood of bycatch or interaction with marine mammals, including: (1) Co-occurrence, the spatial and seasonal distribution and overlap of marine mammals and fishing operations as a measure of risk (Komoroske & Lewison 2015; FAO 2010; Watson *et al.,* 2006; Read *et al.,* 2006; Reeves *et al.,* 2004); (2) analogous gear, evaluation of records of bycatch and assessment of risk, where such information exists, in analogous U.S. fisheries (MMPA List of Fisheries found at: *https://www.fisheries.noaa.gov/action/list-fisheries-2019*) and international fisheries or gear types; and (3) overarching classifications, evaluation of gears and fishing operations and their risk of marine mammal bycatch (see section below for further discussion). NMFS also evaluated other relevant information including, but not limited to, information on fishing techniques, gear used, methods used to deter marine mammals, target fish species, and seasons and areas fished; qualitative data from logbooks or fisher reports; stranding data; and information on the species and distribution of marine mammals in the area, or other factors. Published scientific literature provides numerous risk assessments of marine mammal bycatch in fisheries, routinely using these approaches to estimate marine mammal mortality rates, identify information gaps, set priorities for conservation, and transfer technology for deterring marine mammals from gear and catch. Findings from the most recent publications cited in this **Federal Register** notice often demonstrate levels of risk by location, season, fishery, and gear.

Classification in the Absence of Information

When no analogous gear, fishery, or fishery information existed, or insufficient information was provided by the nation and information was not readily available, NMFS classified the commercial fishing operation as an export fishery per the definition of ''export fishery'' at 50 CFR 216.3. These fishing operations will remain classified as export fisheries until the harvesting nation provides the reliable information necessary to classify properly the fishery or, in the course of revising the LOFF, such information becomes readily available to NMFS.

Global Classifications for Some Fishing Gear Types

Due to a lack of information about marine mammal bycatch, NMFS used gear types to classify fisheries as either export or exempt. The detailed rationale for these classifications by gear type were provided in the **Federal Register** notice for the draft 2017 LOFF (82 FR 39762; August 22, 2017) and are summarized here. In the absence of specific information showing a remote likelihood of marine mammal bycatch in a particular fishery, NMFS classified fisheries using these gear types as export. Exceptions to those classifications are included in the discussion below.

NMFS classified as export all trap and pot fisheries because the risk of entanglement in float/buoy lines and groundlines is more than remote, especially in areas of co-occurrence with large whales. While many nations assert that marine mammals cannot enter the trap and become entangled, the risk is not from the trap but from the surface buoy line and the groundlines (lines that connect the traps). These lines represent an entanglement risk to large whales and some small cetaceans. However, NMFS classified as exempt trap and pot fisheries operating in the Gulf of Mexico and Caribbean due to the low co-occurrence with large whales in this region and an analogous U.S. Category III mixed species and lobster trap/pot fishery operating in the Gulf of Mexico and Caribbean. NMFS classifies as exempt small-scale fish, crab, and lobster pot fisheries using mitigation strategies to prevent large whale entanglements, including seasonal closures during migration periods, ropeless fishing, and vertical line acoustic release technology.

NMFS classified as export longline gear and troll line fisheries because the likelihood of marine mammal bycatch is more than remote. However, NMFS classified as exempt longline and troll fisheries with demonstrated bycatch rates that are less than remote or the fishery is analogous (by area, gear type, and target species) to U.S. Category III fishery operating in the area where the fishery occurs. The entanglement rates from marine mammals depredating longline gear is largely unknown. NMFS classifies as exempt snapper/grouper bottom-set longline fisheries operating in the Gulf of Mexico and the Caribbean because they are analogous to U.S. Category III bottom-set longline gear operating in these areas. NMFS also classifies as exempt longline fisheries using a cachalotera system (*e.g.,* system which protects bait and catch from marine mammal depredation), which prevents and, in some cases, eliminates marine mammal hook depredation and entanglement.

NMFS uniformly classified as export all gillnet, driftnet, set net, fyke net, trammel net, and pound net fisheries because the likelihood of marine mammal bycatch in this gear type is more than remote. Few nations provided evidence that the likelihood of marine mammal bycatch in these gillnet and set net fisheries was less than remote. Those that did, demonstrated that the gillnet fishing area of operation did not overlap with marine mammal habitat.

NMFS classified purse seine fisheries as export, unless the fishery is operating under an RFMO that has implemented conservation and management measures prohibiting the intentional encirclement of marine mammals by a purse seine. In those instances, NMFS classifies the purse seine fisheries as exempt because the evidence suggests that, where purse seine vessels do not intentionally set on marine mammals, the likelihood of marine mammal bycatch is generally

remote. However, if there is documentary evidence that a nation's purse seine fishery continues to incidentally kill or injure marine mammals despite such a prohibition, NMFS classified the fishery as an export fishery. Similarly, if any nation provided evidence that it had adopted and implemented a regulatory measure prohibiting the intentional encirclement of marine mammals by a purse seine vessel, that fishery would be designated as exempt, absent evidence that it continued to incidentally kill or injure marine mammals.

NMFS classified as export all trawl fisheries, including bream trawls, pair trawls, and otter trawls, because the likelihood of marine mammal bycatch in this gear type is more than remote, and this gear type often co-occurs with marine mammal stocks. However, the krill trawl fishery operating under the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in subareas 48.1–4 is classified as exempt due to the conservation and management measures requiring marine mammal excluding devices, observer coverage and reporting requirements, and because total estimated marine mammal mortalities are less than ten percent of the bycatch limit/PBR for these pinniped stocks that interact with that fishery.

There are several gear types that NMFS classified as exempt because they are highly selective, have a remote likelihood of marine mammal bycatch, or have analogous U.S. Category III fisheries. These gear types are: hand collection, diving, manual extraction, hand lines, hook and line, jigs, dredges, clam rakes, beach-operated hauling nets, ring nets, beach seines, small lift nets, cast nets, small bamboo weir, and floating mats for roe collection.

NMFS classified Danish seine fisheries as exempt based on the remote likelihood of marine mammal bycatch because of a lack of documented interactions with marine mammals. The exception is any Danish seine fisheries with documentary evidence of marine mammal interactions, which NMFS classified as export.

Finally, NMFS classified as exempt most forms of aquaculture, including lines and floating cages, unless documentary evidence indicates marine mammal interactions or entanglement, particularly of large whale entanglement in aquaculture seaweed or shellfish lines, or in cases where nations permit aquaculture facilities to intentionally kill or injure marine mammals.

Overview of the Final 2020 LOFF and the Response by Nations

The 2020 final LOFF is composed of 953 exempt fisheries and 1852 export fisheries from 131 nations (or economies). Eighty-five nations submitted updates to their draft 2020 LOFF, which NMFS used to create the final 2020 LOFF. The following nations are predominantly intermediary nations: Aruba, Belarus, Monaco, and Switzerland.

The 2017 LOFF, the draft 2020 LOFF, the final 2020 LOFF, as well as a list of intermediary nations (or economies) and their associated products and sources of those products, and a list of fisheries and nations where the rule does not apply, can be found at: *https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries.*

Nations Failing To Respond

More than 20 nations (or economies) [2] failed to submit updates to their 2017 LOFF entries, their 2019 Progress Report and the Draft 2020 LOFF. These nations include: Bahrain, British Virgin Islands, Cameroon, Cape Verde, Egypt, Haiti, Iran, Israel, Kiribati, Libya, Mauritania, Mozambique, Papua New Guinea, Romania, Solomon Islands, South Africa, Saint Kitts and Nevis, Saint Lucia, Tanzania, Tunisia, Turks and Caicos Islands, and Venezuela. These nations are not on a positive trajectory toward receiving Comparability Findings for their commercial fisheries and face a risk of trade restrictions.

NMFS was able to confirm that approximately 65 nations are not exporting or do not intend to export fish or fish products to the United States in the coming years: Afghanistan, Algeria, Andorra, Angola, Anguilla, Azerbaijan, Bermuda, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Burkina Faso, Central African Republic, Cayman Islands, Chad, Congo, Cuba, Czech Republic, Djibouti, Dominica, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gaza Strip, Georgia, Gibraltar, Guadeloupe, Guinea-Bissau, Iraq, Kosovo, Kuwait, Kyrgyzstan, Lebanon, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Martinique, Mongolia, Monserrat, Montenegro, Nauru, Nepal, Netherlands Antilles, Niger, Niue, North Macedonia, North Korea, Paraguay, Qatar, San Marino, Serbia, Sudan, Swaziland, Syria, Tajikistan, Tokelau, Tuvalu, Uzbekistan, West Bank, Western Sahara, Zambia, and Zimbabwe.

In the course of updating the draft2020 LOFF, NMFS added and/or re-confirmed that the following nations were exporting to the United States to identify if they should be included on the LOFF and, if so, how to list their fisheries: Albania, Aruba, Belarus, Jordan, Libya, Lithuania, Slovakia, Somalia, St. Lucia, Togo, and Yemen. NMFS continues to work with Burundi, British Virgin Islands, Cambodia, French Guiana, Kazakhstan, Laos, Moldova, and Rwanda.

NMFS urges nations to examine their exports to the United States over the last two decades and include all fisheries or processors and processed products which have, are, or in the future may be the source of fish and fish products exported to the United States. To ensure that no fisheries or processed products are overlooked in this process, nations should be as inclusive as possible. Nations or other entities should provide all the documentation and applicable references necessary to support any proposed modifications to the fisheries on the LOFF. If any nation on these lists intends to export fish and fish products to the United States, they should contact NMFS to ensure their fisheries are on the LOFF and that they apply for and receive a Comparability Finding.

General Changes From the Draft 2020 LOFF

Nations That Did Not Update Their Draft 2020 LOFF

Approximately 55 nations (or economies) did not update the information in their LOFF. These nations (or economies) include: Antigua and Barbuda, Armenia, Bahrain, Barbados, Benin, British Virgin Islands, Brunei, Cameroon, Cape Verde, Costa Rica, Dominican Republic, Egypt, Ghana, Grenada, Guatemala, Guinea, Haiti, Israel, Ivory Coast, Jamaica, Jordan, Kazakhstan, Kenya, Kiribati, Liberia, Libya, Madagascar, Malta, Mauritania, Mauritius, Mexico, Mozambique, Namibia, Papua New Guinea, Romania, Samoa, Senegal, Seychelles, Sierra Leone, Slovakia, Solomon Islands, Somalia, South Africa, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Tanzania, Togo, Tunisia, Turks and Caicos Islands, Uganda, United Arab Emirates, Vanuatu, and Yemen. As a result, the fishery classifications for these nations (or economies) for the most part remain unchanged from the draft2020 LOFF. It is uncertain what impact disruptions to government services or other extenuating

[2] The terms ''nation'' or ''harvesting nation'' includes foreign countries, nations, states, governments, territories, economies, or similar entities that have laws governing the fisheries operating under their control.

circumstances played in a nation's ability or failure to submit updates to its LOFF.

Updates to the Draft 2020 LOFF

Nations updated their draft2020 LOFF through the NMFS International Affairs Information Capture and Reporting System (IAICRS). The IAICRS enables NMFS to achieve greater consistency and standardization in the reporting of target species, gear types, area of operation, and marine mammal interactions. Nations were instructed to revise their fisheries information to reflect their fishery management regime. Throughout the exemption period, harvesting nations continued to update and refine their LOFF. These modifications continue to improve the quantity, quality, consistency, and accuracy of the final 2020 LOFF. A record of all modifications are retained within the IAICRS.

Harvesting nations undertook the following modifications:

- Linked exported seafood products to specific fisheries and identified the target (and associated non-target) species of those fisheries;
- aggregated multi-species fisheries into one fishery, as appropriate;
- updated gear types based on the FAO definitions of fishing gear, grouped by categories, in accordance with the FAO-recommended classification system, the International Standard Statistical Classification of Fishing Gear (ISSCFG);
- updated the area of operation using the FAO major fishing areas and subareas, and the nation's management areas within their EEZ within those FAO fishing subareas;
- eliminated fisheries that were solely for domestic consumption and added fisheries that export fish and fish products or intend in the future to export such products to the United States;
- updated their marine mammal abundance estimates;
- updated their marine mammal bycatch limits;
- updated their marine mammal bycatch estimates for some of their fisheries on the LOFF, including adding additional years of data (*e.g.,* in accordance with NMFS' recommendation to include at least five years bycatch data); and
- updated bycatch estimates including information on the number of marine mammals killed, injured, and released alive in the fishery.

NMFS maintains that the fisheries on the LOFF should reflect the commercial fisheries authorized by the harvesting nation, according to their fishery management system, to commercially fish and export fish and fish products to the United States. A list of commercial fisheries that were deleted from or added to the LOFF and modifications to the list of marine mammals that interact with fisheries that were retained on the LOFF can be found at: *https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries.*

After harvesting nations revised the LOFF, NMFS reviewed fisheries and identified gear types indicated in a fishery that should be classified as an export fishery rather than as an exempt fishery, or vice versa. NMFS reclassified such fisheries from export to exempt or from exempt to export, as appropriate. A list of commercial fisheries with revised classifications can be found at: *https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries.*

Finally, NMFS requested that nations update their list of marine mammals that co-occur with the fishery and specifically identify which marine mammals co-occur or overlap with commercial fishing operations from those that potentially or do interact with the fishery. This resulted in nations (such as Greenland, Turkey, and Cook Islands) revising their marine mammal lists to remove out-of-habitat marine mammals (*i.e.,* marine mammal species incorrectly specified as being associated with a fishery when those species do not, in fact, inhabit that water body), specifying previously unspecified marine mammal species (*i.e.,* changing from a designation of ''whale unspecified'' to an indication of a specific species), and removing species that may be distributed in or migrate through a nation's waters but those distributions do not overlap with the operation area of the fishery. Likewise, nations added to their lists of marine mammals that co-occur with their commercial fishing operations.

The final 2020 LOFF is the last LOFF prior to the deadline for submission of Comparability Finding applications by nations. The 2020 LOFF will be the foundation for all responses that nations must provide as part of their Comparability Finding application.

Nation-Specific Modifications Made to the Draft 2020 LOFF

Several nations undertook significant revisions to their LOFF. These revisions include analysis of fishery bycatch compared to the bycatch limit to demonstrate a remote likelihood of bycatch, comparative analysis of fisheries with analogous U.S. domestic fisheries, and modification to their list of co-occurring marine mammals. Following is a summary of those changes. The changes to each fishery can be found at *https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries.*

Canada

Canadian net pen finfish aquaculture facilities without a history of marine mammal incidental or intentional mortality were reclassified as exempt fisheries. The reclassification was based on a comparison to U.S. salmon aquaculture operations. The U.S. salmon net pen aquaculture facilities are classified as Category III. Canadian net pen aquaculture is known to have an equally low likelihood of marine mammal interactions, and intentional killing of marine mammals has recently been banned in Canada. The Minister of the Department of Fisheries and Oceans Canada (DFO) notified Canadian aquaculture operators on March 22, 2019, that the DFO would cease to authorize the lethal removal of nuisance seals effective immediately. At the same time, the DFO notified industry of its intention to prohibit this activity in regulation prior to 2022. Additionally, the Canadian Industry Alliance (CAIA) stated their members' commitment to ''no intentional mammal kill practices in [our] seafood farming operations within Canada,'' as well as their commitment to ''non-lethal and non-acoustic deterrence methods'' for marine mammals. The DFO has initiated the regulatory process to amend the Marine Mammal Regulations (MMR) and the Pacific Aquaculture Regulations (PAR) to remove regulatory provisions allowing aquaculture operators to use lethal force on marine mammals, with the exception of cases where there is an imminent threat to human life or humane dispatch of a seriously injured animal.

Canada also has regulatory mechanisms in place that require the immediate notification of marine mammal mortality or serious injury by aquaculture operators. The MMR, which apply on the east coast, and the PAR Conditions of License in British Columbia both stipulate that the DFO must be immediately notified of marine mammal mortalities. Additionally, aquaculture operators are required under Marine Mammal Management Plans or Farm Management Plans to have marine mammal mitigation measures in place. These plans can describe non-lethal marine mammal deterrence methods, such as anti-predatory netting. Additionally, the DFO has undertaken a study of marine

mammal deterrence methods and identified humane and effective deterrence methods.

Additionally, NMFS reclassified as exempt Canadian purse seine, tuck seine and bar seine fisheries. As stated in the 2020 draft LOFF (85 FR 15116, March 17, 2020), if any nation demonstrated that it had implemented a measure prohibiting the intentional encirclement of marine mammals by a purse seine vessel, that fishery would be designated as exempt, absent evidence that it continued to incidentally kill or injure marine mammals. In 2019, Canada implemented a measure under conditions of licenses prohibiting the encirclement of marine mammals in Atlantic purse seine, tuck seine, and bar seine fisheries. These fisheries operate in the Atlantic Regions and have a remote likelihood of marine mammal bycatch, as determined based on fishery monitoring (≥5 percent observer coverage and/or ≥5 percent electronic monitoring). These fisheries have either no documented marine mammal bycatch over at least five fishing seasons, or individual bycatch levels <1 percent of bycatch limit and cumulative fishery bycatch levels <10 percent of the bycatch limit; prohibit intentional killing of marine mammals; have mandatory reporting of marine mammal interactions; and are analogous with U.S. Category III fisheries.

NMFS also reclassified several other fisheries based on their having a remote likelihood of marine mammal bycatch and being analogous to U.S. Category III fisheries. The fisheries that were reclassified can be found at: *https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries.*

Chile

Chile's LOFF had an exhaustive list of marine mammal populations identified as co-occurring with its fisheries. Chile's initial approach was to use the International Union for Conservation of Nature (IUCN) data on geographic distribution to identify all marine mammals in Chilean waters regardless of whether they co-occurred with the fishery listed on the LOFF. After NMFS's technical consultations with Chile, Chile revised the list to reflect only marine mammal populations that actually co-occur or interact with its fisheries on the LOFF. Chile held workshops with marine mammal experts and reviewed the scientific literature to identify, on a precautionary basis, marine mammal species or stocks whose distribution overlaps with areas where fishing operations occur or that have some type of direct interaction with fisheries on the LOFF.

Description of the Columns on the LOFF

The final 2020 LOFF is again organized by nation, and has listed the exempt and export fisheries for each nation. This list is organized by columns contains the following information. ''Target Species or Product'' is a list of the target species and the non-target species associated with that exempt or export fishery. For standardization purposes, this list includes common and scientific names for the fishery's target and non-target species.

''Gear Type'' is the list of fishing gears used to harvest the target species. As previously discussed, the gears are designated according to the FAO definitions of fishing gear and are grouped by categories in accordance with the FAO-recommended ISSCFG classification system.

''Number of Vessels/Licenses/Participants, Aquaculture Facilities'' is an estimate of the number of vessels authorized to fish in this fishery, the number of fishing permits or licenses issued by the nation for vessels, or the number of participants authorized to legally fish or operate in this fishery. In the case of aquaculture, it is the number of facilities authorized by the nation to operate aquaculture operations.

''Area of Operation'' is the FAO global fishing area and sub-regional statistical area or division where the fishery operates. Nations may have also included fishery management areas specific to their laws and management structure with the FAO area, division, or subarea.

''Marine Mammal Interactions or Co-occurrence by Group, Species or Stock'' is a listing of marine mammal species or stocks of known marine mammals whose distribution overlaps the area of operation of the fishery. This list includes the marine mammal species/stock that may be found in or migrate through a nation's waters, specifically those marine mammals that have a regular and significant co-occurrence with this fishery, depredate on bait or catch, are captured and released alive, or are killed or injured in the fishery. Co-occurrence data is useful to develop risk assessment models in the absence of bycatch estimates.

''Marine Mammal Bycatch Estimates'' are the marine mammal species/stocks and the average annual bycatch estimate for that species as provided by the harvesting nation. This list is likely to be a subset of the marine mammal species/stocks listed in the ''Marine Mammal Interactions or Co-occurrence by Group, Species or Stock'' column.

''RFMO'' indicates that the fishery is operating under the jurisdiction of, or adhering to the management measures of, one or several regional fishery management organizations (RFMOs) or arrangements.

List of Intermediary Nations and Products for Nations That Are Processing Fish and Fish Products

For the purposes of identifying intermediary nations, the list of intermediary nations and products include instances where a nation sources raw material from another nation for processing and re-export to the United States, or if the nation is both the harvester and processor of the raw material, or if the fish and fish product is harvested or processed elsewhere and transshipped through that nation's jurisdiction. In addition, the intermediary nation list also identifies whether the specific fish or fish product was harvested in the nation's waters under an ''Access/License/Charter Agreement or Bilateral/Permitting Agreement.'' Nations have indicated whether the product was harvested by another nation operating under an agreement, and have indicated which nations are actively fishing in its waters for the listed product. If the product was not harvested in a nation's waters, but rather was imported into a nation from another nation for the purposes of processing, that nation indicated which nations provided the product or raw material. If the product was transshipped through a nation's border (*i.e.,* transport only, with no value added), thus changing the product's origin so that it becomes a product of the nation through which it is transshipped, that nation indicated that it is solely transshipping the product. If a nation is performing some form of value-added processing of the product, then the nation did not indicate that it is solely transshipping. Finally, if a nation is also the harvester of this product, that nation indicated that it is sourcing this product from other nations and possibly co-mingling the product with product from its own active-harvest fisheries already on the LOFF. The current list of intermediary products is at: *https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries.*

The List of Fisheries Listed in ''Rule Does Not Apply''

The MMPA Import Provisions do not apply to any land-based or freshwater aquaculture operations, as these

commercial fishing operations do not occur in marine mammal habitat. Nevertheless, NMFS is aiming to account for all fish and fish products exported by a nation to the United States in one of three categories: (1) LOFF (exempt and export fisheries); (2) Intermediary (processed or transshipped products); (3) Rule Does Not Apply (freshwater and inland fisheries/aquaculture). Fisheries that occur solely in fresh water outside any marine mammal habitat, and inland aquaculture operations, are exempt from this rule and are listed in the ''Rule Does Not Apply'' list.

Response to Comments

NMFS received ten comment letters on the draft 2020 LOFF (85 FR 15116; March 17, 2020). Several non-governmental organizations (NGOs) and an industry group submitted comments, which are summarized below. Nations provided either comments or substantive changes in the form of updates to their LOFF through the IAICRS, those updates are summarized above.

Several comments received were not germane to the draft LOFF and are not addressed in this section. These comments include references to actions outside the scope of the statutory mandate or actions covered under other rulemakings. Generally, comments from industry and the environmental community were supportive of NMFS's ongoing implementation of the MMPA Import Provisions. Both sectors recognize that the MMPA Import Provisions provide a mechanism to level the playing field for U.S. fishermen while improving fishing practices and the status of marine mammal populations worldwide. Animal Welfare Institute, Center for Biological Diversity, International Fund for Animal Welfare, Natural Resources Defense Council, and Whale and Dolphin Conservation (hereafter referred to as non-governmental organizations or NGOs) submitted extensive comments, which are summarized and responded to below. Comments received on the draft 2020 LOFF are available for review at *http://www.regulations.gov* under Docket ID NOAA–NMFS–2020–0001.

General Comments

Legal Comments on the MMPA Import Provisions Rule and the Protocol for LOFF Treatment of Fish and Fish Products From Commercial Fishing Operations Not Identified in the LOFF

Comment 1: NGOs commented that NMFS should provide clarity to exporters, importers, and the public that imports from commercial fishing operations not identified in the final LOFF as either exempt or export fisheries will be classified as an export fishery until the next List of Foreign Fisheries is published unless the Assistant Administrator has reliable information from the harvesting nation to properly classify the foreign commercial fishing operation (50 CFR 216.3, defining ''export fishery''). As such, fish and fish products entering the United States from such fisheries must have a valid Comparability Finding, be accompanied by a Certificate of Admissibility, or be accompanied by other documentation required by NMFS indicating that the fish or fish products were not caught or harvested in a fishery subject to an import prohibition (*Id.* § 216.24(h)(i)–(iii)). Otherwise, such fish and fish products will be banned from entry into the United States pursuant to Section 101(a)(2) of the MMPA. Without such a Comparability Finding (or Certificate of Admissibility or other documentation), there is no reasonable proof that imports are meeting U.S. standards and such imports must be barred from entry.

Response: The MMPA Import Provisions Rule (50 CFR 216.24(h)) clearly provides that all fisheries that export to the United States must be on the LOFF. It is equally clear that a harvesting nation must apply for and receive a Comparability Finding for each of its export and exempt fisheries on the LOFF to continue to export fish and fish products from those fisheries to the United States. For purposes of this section, a fish or fish product caught with commercial fishing technology which results in the incidental mortality or incidental serious injury of marine mammals in excess of U.S. standards is any fish or fish product harvested in an exempt or export fishery for which a valid Comparability Finding is not in effect. Accordingly, it is unlawful for any person to import, or attempt to import, into the United States for commercial purposes any fish or fish product if such fish or fish product that was caught or harvested in a fishery that does not have a valid Comparability Finding in effect at the time of import.

NMFS disagrees with these NGO commenters that a Certification of Admissibility must accompany each shipment from a nation. A Certification of Admissibility may only be required in situations where fish or fish products are subject to an import prohibition and the Assistant Administrator, to avoid circumvention of the import prohibition, requires that the same or similar fish and fish products caught or harvested in another fishery of the harvesting nation and not subject to the prohibition be accompanied by a Certification of Admissibility (50 CFR 216.24 (h)(9)(iii)).

Evaluating a Nation's Progress in Reducing Bycatch

Comment 2: NGOs commented that NMFS should strongly urge nations to demonstrate in their Comparability Finding applications that they meet all conditions established in Section (h)(6)(iii) of the regulations. For fisheries operating in their own EEZs, this includes prohibiting intentional mortality, conducting marine mammal stock assessments, maintaining a fisheries register, requiring bycatch reduction, conducting monitoring, and proving that bycatch does not exceed PBR (or a comparable scientific metric) (50 CFR 216.24(h)(6)(iii)).

Response: For any nation applying to receive a Comparability Finding for a fishery, NMFS must determine that the harvesting nation maintains a regulatory program with respect to the fishery that is comparable in effectiveness to the U.S. regulatory program regarding incidental mortality and serious injury of marine mammals in the course of commercial fishing operations, in particular by maintaining a regulatory program that includes or effectively achieves comparable results as the conditions in paragraph (h)(6)(iii)(C), (D), or (E). The term ''comparable in effectiveness'' means that the regulatory program effectively achieves comparable results to the U.S. regulatory program. This approach gives harvesting nations flexibility to implement the same type of regulatory program as the United States or a different program that achieves the same results. NMFS does not require that every nation implement every element outlined in 50 CFR 216.24 (h)(6)(iii). For example, if a particular fishery with high bycatch switches to non-entangling gear and can demonstrate that it has virtually eliminated its bycatch, that action can be considered comparable in effectiveness. Likewise, if a nation chooses to eliminate its bycatch by implementing time or area-based closures and can demonstrate the effectiveness of such closures, that regulatory program may be considered comparable in effectiveness. When making this determination, NMFS evaluates a harvesting nation's implementation of bycatch mitigation measures that will result in clear and significant bycatch reductions.

Comment 3: NGOs reiterated their concern with 50 CFR 216.24 (h)(7) of the MMPA Import Provisions Rule, which allows NMFS to make several

considerations in determining whether a nation's regulatory program is comparable. These considerations include the progress a foreign exporter has made in achieving its bycatch objectives, the likelihood a nation's regulations will reduce bycatch, and the extent to which the harvesting nation has successfully implemented bycatch measures (50 CFR 216.24(h)(7)(ii), (iii)). The commenters express concern that these considerations would give NMFS flexibility in determining whether nations' bycatch programs are comparable to the U.S. program, even if nations exceed PBR or a similar bycatch limit. They maintain that the MMPA Import Provisions require that NMFS shall ban fish imports if exporting fisheries' serious injury and mortality (SI/M) exceeds United States standards (16 U.S.C. 1371(a)(2)). The commenters claim the MMPA does not allow nations with fisheries with unknown or declining bycatch or bycatch in excess of PBR to enter the United States. They assert that NMFS has no statutory authority to deem nations comparable for half-measures taken or for mere improvement and that NMFS must require nations to meet U.S. bycatch standards.

Response: NMFS recognizes that there will be situations, similar to those encountered in our domestic fisheries, where Comparability Finding determinations will occur during a time when a harvesting nation may be implementing new regulations or revising existing regulations to meet the conditions of a Comparability Finding. NMFS believes that such actions should be encouraged rather than penalized. In those situations, NMFS must determine whether such regulations are likely to reduce marine mammal bycatch or are making progress toward reducing marine mammal bycatch. The Secretary must make that same determination when promulgating regulations to implement domestic take reduction measures, as the MMPA mandates that a take reduction plan shall include measures the Secretary expects will reduce, within 6 months of the plan's implementation, such mortality and serious injury to a level below the potential biological removal level (16 U.S.C. 1387(f)(5)(A)). NMFS cannot establish a standard for other nations that is more rigorous than the U.S. regulatory standard under which we operate.

Comment 4: NGO commenters state that NMFS must treat nations equally to ensure fairness but also to ensure any import bans will withstand a potential challenge under the World Trade Organization (''WTO''). NMFS must apply the same protective and statutorily required standard for all nations.

Response: NMFS is mindful of U.S. obligations under the WTO Agreement when implementing the provisions of the MMPA and works with the Office of the U.S. Trade Representative to ensure that any actions taken under the MMPA are consistent with these obligations. Agency actions and recommendations under the MMPA Import Provisions Rule, including this final LOFF, will be in accordance with U.S. obligations under the WTO and other applicable international law. Consistent with the WTO Agreement and U.S. obligations under other free trade agreements, NMFS will consider a harvesting nation's existing mechanisms where they provide for comparable protection of marine mammal species and are appropriate to the conditions in the harvesting nation. By taking into account different conditions in a nation's fishery, including conditions that could bear on the feasibility and effectiveness of certain bycatch mitigation measures, NMFS considers alternative measures implemented by the nation that are as effective or more effective than those applicable in U.S. fisheries.

Marine Mammal Mortality

Comment 5: NGOs requested that NMFS clarify how many years of mortality data may be used to calculate the ''Annual Average Mortality Estimate'' for each stock in a fishery. To ensure consistency for reporting, the commenters urged NMFS to recommend to nations that they use a five-year average unless a nation demonstrates that data quantity and quality for a particular fishery justifies a different average.

Response: NMFS uses the Guidelines for Preparing Stock Assessment Reports Pursuant to Section 117 of the Marine Mammal Protection Act (NMFS 2016) when advising nations on the development of their regulatory plans. The commenters should note that in the **Federal Register** notice (85 FR 15116 at 15119, March 17, 2020) under the section entitled ''Instructions to Nations Reviewing the Draft 2020 LOFF and Actions Needed by Nations,'' nations are requested to update their marine mammal bycatch estimates for each fishery on the LOFF, including adding additional years of data (*e.g.,* at least five years). IAICRS makes clear that we are requesting that the nation provide at least five years of data. The availability of bycatch data or estimates varies greatly over 129 nations and, just like within the United States, is a function of the bycatch monitoring or reporting program.

Basis for Exempt and Export Determinations

Comment 6: NGOs state that NMFS should disclose the basis for its determinations of whether a fishery is exempt or export. They stated that, unlike NMFS's draft and final 2017 LOFFs, the 2020 draft LOFF does not contain either references or detailed information and a few other critical categories (rationale, company name, etc.). The commenters state that this transparency is critical for the public to understand the decisions being made, whether the decisions are consistent, and whether they have sufficient support as is required under the Administrative Procedure Act (see *Ctr. for Biological Diversity* v. *Kempthorne,* 466 F.3d 1098, 1104 (9th Cir. 2006) ''It is insufficient for requisite determinations to be lurking in the administrative record yet be unidentified in the decision itself.'').

Response: The draft 2017 LOFF and final 2017 LOFF contained a summary of the information used to support the designations or identification of fisheries (see *https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries*). The draft 2017 LOFF (82 FR 39762, August 22, 2017), the final 2017 LOFF (83 FR 11703, March 16, 2018), the draft 2020 LOFF (85 FR 15116 at 15119, March 17, 2020), and this document explain the basis for the classification of the exempt and export fisheries in a clear and transparent manner. Additionally, the draft 2017 and final 2017 LOFF contained a ''Detailed Information'' column which served as a catch-all for information that did not fit within the confines of the excel format, or contained references used in identifying fisheries from non-responsive nations. The move to IAICRS allowed for a level of consistency in data capture that was not available in the 2017 format to capture this information in the relevant columns published in the 2020 LOFF versions.

Comment 7: The NGOs cite NMFS' stock assessment guidance to assert that logbook data alone should not be used as a basis for exempting a fishery from regulatory requirements. The commenters seek to understand the quality and level of statistical rigor of the data that nations are reporting, and they further assert a nation's report of no or insignificant bycatch based on logbook data alone should not be a basis for classifying a fishery as exempt, particularly if there is any evidence of bycatch in similar gear types.

Response: The **Federal Register** notices previously published for each LOFF clearly state that if estimates of the total incidental mortality and serious injury were available and a bycatch limit was calculated for a marine mammal stock, NMFS used the quantitative and tiered analysis to classify foreign commercial fishing operations as export or exempt fisheries under the category definition within 50 CFR 229.2 and the procedures used to categorize U.S. fisheries as Category I, II, or III, at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-list-fisheries* (85 FR 15116 at 15119, March 17, 2020). However, NMFS has only been able to use that process for one fishery, the krill trawl fishery operating under CCAMLR in the Antarctic Peninsula region. Norway provided evidence that the bycatch limit for Antarctic fur seals in this region has been calculated at 88,200 individuals and the estimated incidental mortality and serious injury for these krill fisheries operating in the CCAMLR Convention Area is less than ten percent of the bycatch limit, making these fisheries exempt (83 FR 11703, March 16, 2018).

As NMFS has reiterated in previous notices and this **Federal Register** notice, the lack of information about marine mammal bycatch (including bycatch limits derived from logbooks), requires that NMFS use gear types to classify fisheries as either export or exempt. The detailed rationales for these classifications by gear type were provided in the **Federal Register** notice for the draft 2017 LOFF (82 FR 39762; August 22, 2017) and are summarized above in this notice. In the absence of specific information showing a remote likelihood of marine mammal bycatch in a particular fishery, NMFS classified fisheries using these gear types as export. Exceptions to those classifications are discussed above.

Comments on Nations Listed as Not Exporting to the United States

Comment 8: The NGOs note that the **Federal Register** notice for the draft 2020 LOFF lists 72 nations that have no record of exporting fish and fish products to the United States (85 FR 15118; March 17, 2020). However, they claim that their review of import data, from both NOAA's Foreign Fishery Trade Data database and the commercial subscription Panjiva database (*https://panjiva.com/*), demonstrates that several of the listed nations do export fish to the United States. They state that NMFS must include each of these exporting nations on the LOFF and should conduct a 20-year review of these databases to ensure the LOFF is correct.

Response: In preparing the LOFF and engaging in technical consultations, NMFS periodically conducts a 20-year review of is Foreign Fishery Trade Data and continues to monitor seafood supply chains. NMFS continues to work with other U.S. trade programs, offices, and partner agencies to confirm trade data is accurate and verify active seafood import streams. NMFS routinely verifies exports to the United States as part of its ongoing consultations with nations as well as with relevant RFMOs. In the course of import verification, if NMFS identifies a nation not previously on the LOFF as newly exporting seafood products, NMFS reviews and confirms that the trade data is accurate. Then, NMFS consults with the nation on whether the product falls under the MMPA and adds that product to the LOFF as appropriate.

Comment 9: The NGOs highlight the MMPA Import Provisions Rule allowance of a one-year, provisional Comparability Finding for a fishery not listed on the LOFF if it is the source of new exports to the United States (50 CFR 216.24(h)(8)(vi)). They assert, however, any fish product that has in the past been exported to the United States cannot qualify as a ''new export,'' and NMFS cannot grant a one-year provisional Comparability Finding for the fishery. They further assert that NMFS must instead deny imports until the nation demonstrates comparability.

Response: NMFS disagrees because seafood supply chains are constantly changing. Moreover, vessels change flags, and fisheries are closed or halted for management purposes, while other fisheries commence on an experimental basis. The commenters' interpretation of a ''new export'' is unduly restrictive. Products that have not been exported to the United States for several years due to fishery closures or changes in patterns in trade should be considered ''new exports,'' especially if they are under a new fishery management regime. As soon as NMFS becomes aware of new sources of fish product imports, NMFS will notify the exporting nations and begin consultations to characterize the production methods and supply chain. Absent information to make an informed decision, imposing a trade restriction from the outset could unduly constrain otherwise admissible products. In addition, it would be difficult to work with U.S. Customs and Border Protection (CBP) to impose embargoes and/or documentation requirements without knowing the details of the supply chain. Imprecise instructions to CBP could disrupt legitimate trade. It is anticipated that such ''new export'' situations would not involve significant trade volumes and could be addressed in a short time frame through a consultative process.

Comment 10: The NGOs stated they reviewed NOAA's Foreign Fishery Trade Data for all 72 listed nations that are not on the LOFF due to lack of exports to find any imports of fish or fish products over the last 10 years (from 2010 to 2020). Their review identified 27 of these nations that exported fish or fish products during this period. They urged NMFS to contact the nations listed below that have exported and inform them that they must apply for a Comparability Finding for any fishery by March 2021, if they wish to export their product after January 1, 2022. The nations are: (1) Afghanistan; (2) Anguilla; (3) Aruba; (4) Bolivia; (5) Bosnia and Herzegovina; (6) Curaçao; (7) Burundi; (8) Cayman Islands; (9) Congo (Kinshasa); (10) Djibouti; (11) Gabon; (12) Georgia; (13) Gibraltar; (14) Guinea-Bissau; (15) French Guinea; (16) Kyrgyzstan; (17) Laos; (18) Lebanon; (19) Marshall Islands; (20) Martinique; (21) Niue; (22) Palau; (23) Serbia; (24) Sint Maarten (25) Tokelau; (26) Uzbekistan; (27) Zambia.

Response: As previously described, NMFS continues to verify trade data and consult with nations, including those with potentially newly identified imports. The LOFF reflects a nation's fisheries management authorities and its organization. In cases where an economy is a territory or otherwise grouped with another nation, we have seen misreporting due to issuing authorities that might be based in one jurisdictional area but are validating fish imports produced from another jurisdictional area. Following are NMFS's findings for the 27 nations identified by the NGO commenters. NMFS confirmed either data entry errors or country code error for: Bolivia, Bosnia and Herzegovina, Cayman Islands, Djibouti, Gabon, Georgia, Gibraltar, Guinea-Bissau, Kyrgyzstan, Martinique, Lebanon, Niue, Serbia, Tokelau, Uzbekistan, and Zambia. These errors can result in fish and fish products being identified as originating in a particular nation that does not export that product. NMFS is in consultation with, and is awaiting a response from, Burundi, Laos, and French Guiana regarding their export status (*e.g.,* harvesting nation, processing nation or both). The commenters should note that Marshall Islands and Palau are on both the 2017 and the 2020 LOFF. Based on NMFS consultations, we added Aruba to the 2020 LOFF. Finally, NMFS confirmed

that Afghanistan, Anguilla, Congo (Kinshasa), Curaçao, and Saint Maarten have no imports and do not intend to export seafood products to the United States.

Comments Regarding Classification of Certain Gear Types

Gillnet Fisheries

Comment 11: The NGOs assert that NMFS must presume all gillnet fisheries are export fisheries in the absence of specific information fully documenting that a particular fishery has had no bycatch for at least a five-year period, based on robust monitoring by observers or by tamper evident or tamper proof electronic monitoring (EM) systems that have been demonstrated to be effective at detecting bycatch. They also stated that as a general rule ''it is reasonable to assume that where fisheries coincide with coastally-distributed cetaceans, bycatch, however poorly documented, will occur.'' The commenters also asserted that even gillnet fisheries that are implementing mitigation techniques may not be addressing the problem sufficiently to be classified as exempt.

Response: NMFS agrees. It is precisely for this reason that NMFS uses co-occurrence information, analogous fisheries in the United States, and all available information, and has designated all gillnet fisheries as export fisheries as the default classification. Only three Canadian gillnet fisheries are classified as exempt after extensive consultation with Canada about the nature of these fisheries. The exempt classification is due to their location (inshore or near-shore estuaries), and the documented lack of co-occurrence with marine mammal populations in the region. The **Federal Register** notices for the 2017 LOFF and the draft 2020 LOFF make clear that nations wishing to challenge this designation must provide sufficient observer or logbook data that refutes this determination and that clearly demonstrates that a gillnet fishery poses a remote likelihood of incidental mortality and serious injury to marine mammals.

Trap/Pot Fisheries

Comment 12: The NGOs stated that NMFS must presume that all trap/pot fisheries in habitats of large whales are export fisheries in the absence of specific information fully documenting that a particular fishery has had no bycatch for at least a five-year period, based on robust monitoring by observers or electronic monitoring. The commenters asserted that trap/pot fisheries that use vertical lines to mark gear are responsible for baleen whale bycatch, and that it is difficult to estimate bycatch of large whales in trap/pot gear, as larger whales can carry gear long distances and, as a result, serious injury and mortality in trap/pot gear goes undetected.

Response: NMFS agrees and has classified all pot/trap fisheries as export fisheries, with the exception of those analogous to U.S. Category III trap/pot fisheries such as the Caribbean mixed species trap/pot and the Caribbean spiny lobster trap/pot.

Longline Fisheries

Comment 13: The NGOs assert that marine mammals are often entangled or hooked in longline gear, and subject to suffering, serious injury, and mortality and serious injury as a result of the interactions. Accordingly, NMFS must presume all longline fisheries are export fisheries in the absence of specific information fully documenting that a particular fishery has had no bycatch for at least a five-year period, based on robust monitoring by observers or electronic monitoring.

Response: NMFS agrees. The commenters should note that the **Federal Register** notice for the 2020 draft LOFF classifies longline gear and troll line fisheries as export fisheries because the likelihood of marine mammal bycatch is more than remote. However, NMFS classified as exempt longline and troll fisheries with a remote likelihood of bycatch or where the fishery is analogous (by area, gear type, and target species) to U.S. Category III fishery operating in the area where the fishery occurs. NMFS classifies as exempt snapper/grouper bottom-set longline fisheries operating in the Gulf of Mexico and the Caribbean because they are analogous to U.S. Category III bottom-set longline gear operating in these areas. NMFS also classifies longline fisheries using a cachalotera system as exempt, because the chachalotera system prevents, and in some cases eliminates, marine mammal hook depredation and entanglement.

Purse Seine Fisheries

Comment 14: NGOs state that NMFS must presume that all purse seine fisheries are export fisheries in the absence of specific information fully documenting that a particular fishery has had no bycatch for at least a five-year period, based on robust monitoring by observers or electronic monitoring.

Response: NMFS has classified purse seine fisheries as export fisheries, unless the fishery is operating under RFMO conservation and management measures or national regulations (comparable to those of the United States) prohibiting the intentional encirclement of marine mammals by a purse seine. In those instances, NMFS classifies the purse seine fisheries as exempt because the evidence suggests that where purse seine vessels do not intentionally set on marine mammals, the likelihood of marine mammal bycatch is generally remote. Exceptions include where a fishery is operating under a regulated non-encirclement provision and there is documentary evidence that such a provision is not being enforced. Fisheries of nations that are not enforcing non-encirclement provisions are classified as export fisheries.

Trawl Fisheries

Comment 15: NGOs assert that NMFS must presume that all trawl fisheries are export fisheries in the absence of specific information fully documenting that a particular fishery has had no bycatch for at least a five-year period based on robust monitoring by observers or electronic monitoring because, in the case of small cetaceans, mitigation is difficult as no reliably effective technical solutions to reduce small cetacean bycatch in trawl nets are available.

Response: NMFS classified as export all trawl fisheries, including beam trawls, pair trawls, and otter trawls, because the marine mammal bycatch in this gear type is more than remote and this gear type often co-occurs with marine mammal stocks. There are some exceptions to this, including some shellfish trawls and dredges classified as exempt due to the remote likelihood of interaction with marine mammals and analogous U.S. Category III fisheries, such as the: Atlantic shellfish bottom trawl, Gulf of Maine sea urchin dredge, Gulf of Maine mussel dredge, Gulf of Maine sea scallop dredge, U.S. Mid-Atlantic sea scallop dredge, Mid-Atlantic blue crab dredge, Mid-Atlantic soft-shell clam dredge, Mid-Atlantic whelk dredge, U.S. Mid-Atlantic/Gulf of Mexico oyster dredge, and the New England and Mid-Atlantic offshore surf clam/quahog dredge. Additionally, the trawl fisheries operating under CCAMLR for toothfish, mackerel icefish, and krill are classified as exempt due to the conservation and management measures requiring marine mammal excluding devices and because levels of marine mammal mortalities are less than ten percent of the bycatch limit/PBR for marine mammal stocks that interact with these fisheries.

Other Gear

Comment 16: NGOs raised concern with NMFS classifying several gear

types as exempt because the gear is highly selective or has a remote likelihood of bycatch, specifically handline gear and pole-and-line gear used in tuna fisheries, citing both gear types as having dolphin bycatch. The commenters also challenged the exempt classification for aquaculture and tuna fishing using fish aggregating devices (FADs), citing instances of entanglement.

Response: NMFS has reviewed the gear types cited by the commenters. However, individual instances of entanglement and mortality or entanglement and release are, by themselves, insufficient to justify reclassifying a fishery as an export fishery. Exempt fisheries are not required to have zero bycatch. An exempt fishery means a foreign commercial fishing operation determined by the Assistant Administrator to be the source of exports of commercial fish and fish products to the United States and to have a remote likelihood of, or no known, incidental mortality and serious injury of marine mammals in the course of commercial fishing operations. The fisheries the commenters cite are analogous to Category III fisheries in the United States. Moreover, all exempt and export fisheries are required to report marine mammal incidental mortality and serious injury. In the event that NMFS determines that an exempt fishery has more than a remote likelihood of incidental mortality and serious injury of marine mammals in the course of commercial fishing operations, that fishery will be reclassified as export fishery.

Comments on Specific Nation Bycatch

Comment 17: The NGOs provided charts for each nation within the Draft 2020 LOFF ''Comments on Specific Nation Bycatch.'' The charts list products from particular nation's fisheries that the NGOs believe are imported into the United States.

Response: The fish and fish product information provided by the commenters lack a reference to specific trade documentation for either the exporting nation or the United States as the importing nation. NMFS assumes that the commenters used United States trade data and attempted (based on unspecified assumptions) to link such products to fisheries either on, or omitted from, the LOFF as the source of those fish and fish products. NMFS has taken a more rigorous approach to identify the source fisheries for fish and fish products. NMFS has worked with nations to identify the target and associated non-target species for each fishery listed on the LOFF. NMFS provided nations with a list of fish and fish product descriptions and requested that nations identify whether they were the harvester, processor, or both for that product. This action required nations to investigate their seafood supply chains to provide this information. For harvesting nations, NMFS requested that they identify the fishery or fisheries that were the source of that product.

Mexico

Comment 18: The NGOs provide information about the unauthorized use of other gear types within the hand lines fishery and the hand operated pole-and-line fishery for Pacific sierra and Gulf weakfish.

Response: The LOFF contains only those commercial fishing operations authorized by the harvesting nation to fish and export fish and fish products to the United States. 50 CFR 18.3 defines a commercial fishing operation as the lawful harvesting of fish from the marine environment for profit as part of an on-going business enterprise. This does not include sport-fishing activities, whether or not they are carried out by charter boat or otherwise, or whether or not the fish so caught are subsequently sold. Regulations at 50 CFR 229.2 also define a commercial fishing operation as the catching, taking, or harvesting of fish from the marine environment (or other areas where marine mammals occur) that results in the sale or barter of all or part of the fish harvested. The term includes licensed commercial passenger fishing vessel activities (as defined in section 216.3 of 50 CFR 216) and aquaculture activities. Per the application of these two definitions, the LOFF contains export and exempt fisheries that are engaged in the lawful and authorized commercial harvest of fish from the marine environment. Additionally, fish and fish products from nations that do not seek to include unauthorized fisheries under the LOFF or that do not seek a Comparability Finding for an unauthorized fishery and products from a fishery without a Comparability Finding, are inadmissible under the MMPA Import Provisions.

Comment 19: NGOs identified the following fisheries as being omitted from Mexico's LOFF: Bigeye croaker/chano gillnet; sole gillnet; California halibut bottom set gillnets; rooster hind bottom set gillnets; Pacific jack mackerel; yellowfin tuna purse seine; and herring purse seine.

Response: NMFS investigated and determined that the species listed above are included on the LOFF and harvested either with the gear types listed or other gear types. Fish can be harvested with an array of authorized gear types, but not all authorized gear types are used to harvest fish that are exported to the United States. Generally, larger industrial fleets using purse seine, longline, and trawl gear export fish and fish products, while artisanal or small-scale fleets use gillnets to harvest fish for domestic consumption. NMFS worked with nations to identify the commercially authorized fisheries and their associated gear types that are the source of fish and fish products exported to the United States. While NMFS will continue to update and revise the LOFF in consultation with nations, commenters should not assume that all commercial fishing operations operating within a nation export fish and fish products to the United States and should, therefore, be included on the LOFF. Fish and fish products harvested by fisheries and retained for domestic consumption are not included on the LOFF.

Peru

Comment 20: NGOs identified two shark longline fisheries with marine mammal interactions, and cited instances where small cetacean meat was used as bait. They also noted that a shark driftnet fishery had interactions with several marine mammal species. Additionally, the commenters listed three fisheries, which they acknowledge have no record of exports to the United States, as being omitted from the LOFF (porbeagle longlines, Peruvian weakfish purse seines, red mullet gillnets).

Response: The LOFF for Peru includes shark fisheries using driftnets, longlines, and gillnets. Each fishery is listed as interacting with marine mammals. Peru continues to investigate and quantify its marine mammal bycatch in its fisheries. With regard to the use of small cetaceans for bait, Peru's laws prohibit the intentional killing, sale, or consumption of marine mammals. When documentary evidence indicates that a nation is not effectively enforcing its regulatory measures related to the intentional or incidental mortality or serious injury of marine mammals in the course of commercial fishing operations, NMFS will use the MMPA Import Provisions to consult and possibly reconsider any Comparability Finding. Regarding the three fisheries claimed to be missing from the LOFF, we note that these fisheries are not on the LOFF because fisheries that do not export products to the United States are not included on the LOFF.

Comment 21: NGOs noted a fishery for rays, flounder, lobster, and smooth hound caught with bottom set nets was omitted from the LOFF for Peru.

Response: Currently, rays are on the LOFF for Peru as an export fishery, as rays are caught in the shark driftnet fishery. Lobster is on the intermediary product list. Flounder have not been exported to the United States since 2005, and, therefore, are not included on the LOFF. Nevertheless, NMFS will consult with Peru regarding this fishery.

Ecuador

Comment 22: NGOs stated that the issue of marine mammal-baited FADs has recently emerged as a threat to the conservation of marine mammals in Ecuador and should be addressed. Incidentally captured, killed, or otherwise retrieved cetaceans and pinnipeds have been used as bait for improvised FADs. Approximately a fifth of dead marine mammals found stranded along Ecuador's beaches were associated with FADs over the period 2001 to 2017 (Castro et. al. 2020).

Response: Similar to Peru's laws, Ecuador's laws prohibit the intentional killing, sale, or consumption of marine mammals. When documentary evidence indicates that a nation is not effectively enforcing its regulatory measures related to the intentional or incidental mortality or serious injury of marine mammals in the course of commercial fishing operations, NMFS will use the MMPA Import Provisions to consult and possibly reconsider any Comparability Finding. Nevertheless, NMFS will consult with Ecuador regarding this fishery.

Comment 23: NGOs claim that shark, tuna, marlin, and bonito gillnet fisheries and a longline fishery for sharks were not included in the LOFF for Ecuador, and that, for some fisheries on the LOFF, interactions with certain marine mammal species are missing, such as sperm whale, bottlenose dolphin, common dolphin, pilot whales, and humpback whales.

Response: NMFS disagrees. On the LOFF for Ecuador there is a multi-species large pelagic gillnet fishery that includes tuna, marlin, bonito, swordfish, and sharks. There is also a longline fishery for these target species, including sharks. The species recorded as co-occurring or interacting with this fishery include all of the species the commenters assert as being omitted. The list includes: Common bottlenose dolphin, common dolphin, saddleback dolphin, dusky dolphin, humpback whale, killer whale/orca, offshore pantropical spotted dolphin, pygmy sperm whale, sea lion unspecified, sperm whale, and pilot whale unspecified.

India

Comment 24: NGOs highlight the significant bycatch in gillnets for tuna and tuna-like species of spinner dolphin (*Stenella longirostris*), Indo-Pacific bottlenose dolphin (*Tursiops aduncus*), long-beaked common dolphin (*Delphinus capensis*), Indo-Pacific humpbacked dolphin (*Sousa chinensis*), Risso's dolphin (*Grampus griseus*), and dolphins unspecified.

Response: NMFS is aware of this bycatch and recent literature that further elaborates on the extent of gillnet bycatch in Indian Ocean tuna fisheries. India indicated that there is no interaction, mortality, or injury in its tuna gillnet fisheries with the cetaceans listed as co-occurring with that fishery. In this case, NMFS has documentary evidence to the contrary and will be consulting with India to modify the LOFF where necessary in advance of issuing a Comparability Finding. Additionally, commenters should note that in 2016, NMFS issued a determination, under the Dolphin Protection Consumer Information Act (DPCIA), of regular and significant mortality and serious injury of dolphins in gillnet fisheries harvesting tuna by vessels flagged under the Government of India (81 FR 66625, September 28, 2016). NMFS' determinations under the DPCIA are based on review of scientific information and, when available, documentary evidence submitted by the relevant government. The NMFS 2016 determination triggered additional documentation requirements for tuna product from those fisheries that is exported to or offered for sale in the United States. Such tuna must be accompanied by a written statement executed by an observer participating in a national or international program acceptable to NMFS, in addition to a statement by the captain of the vessel that certifies that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught and that contains certain other required information regarding dolphin interactions and segregation of tuna.

Comment 25: NGOs identified sardine purse seine fisheries interacting with finless porpoise, and identified four shore seine fisheries for scad, sardine, snapper, mackerel, frigate tuna, and Indian prawn as also interacting with finless porpoise.

Response: On the LOFF for India, sardines are harvested by purse seines and gillnets, both of which are listed as interacting with finless porpoise. Regarding the shore seine fisheries, these fisheries are likely small-scale fisheries, and the products harvested by this gear-type are typically retained for domestic consumption. Fisheries only harvesting fish and fish products that are retained for domestic consumption are not on the LOFF. All species harvested by shore seines can be found on the LOFF as they are also harvested by other gear types in fisheries that do export products. Scad are found on the LOFF as ''Carangids nei'' and are listed as being caught by handlines, longlines, and gillnet gears, and listed as interacting with finless porpoise.

Spain

Comment 26: NGOs state that all aquaculture in Spain is based on stocking net pens with fish obtained from wild-capture harvest. The majority of captured tunas are fattened over time in the farming operation. These tuna are initially captured by purse seine, which represent more than 90 percent of the Mediterranean catches. Most of the catch is obtained through purse seine fishing on FADs, followed by capture with longlines. Farmed tuna is fed sardine (*Pilchardus* spp.), Sardinela or alacha (*Sardinella* spp), horse mackerel (*Trachurus trachurus*), mackerel (*Scomber scombrus*), starling (*Scomber japonicus*), and cephalopods, and NMFS must consider whether these fisheries for the feed inputs to tuna farms have interactions with marine mammals.

Response: Purse seine and longline fisheries in the Mediterranean operating under ICCAT for tuna and tuna-like species, including bluefin tuna, are included as export fisheries. The MMPA Import Provisions clearly state that the Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught (emphasis added) with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. This provision of the MMPA does not give NMFS the authority to regulate feed used in aquaculture facilities by means of trade restrictions on the end products from those facilities.

United Kingdom

Comment 27: NGOs noted that the longline fisheries in the SW Atlantic fall under CCAMLR monitoring and stated that it is not clear why the Falklands longline fishery for toothfish is an exempt fishery, whereas the United Kingdom South Georgia longline fishery for toothfish is an export fishery. Marine mammal mortality in the United Kingdom South Georgia fishery is rare

(four incidents reported since 2007), but there is no reason to think the Falklands fishery would necessarily have a lower risk.

Response: NMFS reviewed the toothfish fisheries operating under CCAMLR and moved those fisheries to the exempt category, because those fisheries have a remote likelihood of, or no known documented evidence of, interacting with marine mammals. The toothfish fisheries operating under CCAMLR that remain on the export list are those fisheries with a documented history of marine mammal interaction or an unknown level of marine mammal interaction if the nation failed to provide such information. NMFS will revisit these fisheries, particularly the United Kingdom South Georgia Island toothfish longline fisheries, at the time of application for the Comparability Finding and review information provided by nations on the interaction levels between marine mammals and these fisheries and re-assess the status of these fisheries at that time.

Fisheries for toothfish not listed as operating within the CCAMLR Convention Area and being subject to the conservation measures of CCAMLR, are evaluated based on the nation's regulatory program in place for that fishery. Many nations have implemented observer requirements and adhere to CCAMLR conservation and management measures and catch documentation requirements for all toothfish catch, regardless of whether the catch is from the Convention Area or that nation's exclusive economic zone (EEZ). Regarding the United Kingdom South Georgia Island fishery, this fishery is not recorded as operating within the CCAMLR area and the area of operation provided for this fishery does not fully correspond to South Georgia Island. NMFS will follow up with the United Kingdom to make sure this fishery is recorded correctly for the purposes of a Comparability Finding.

Comment 28: In the Atlantic halibut gillnet fishery and turbot trammel net fishery, NGOs noted that estimates of bycatch are given but the number of vessels is not given. The commenters assert that, to estimate bycatch, the number of vessels must have been estimated. They also assert there are other fisheries affecting the same cetacean populations that need to be taken into account; therefore, it is important to correctly identify the vessels involved with this fishery. Similarly, the commenters note that, in the Atlantic cod fishery and the herring sardine gillnet fishery, the number of vessels is given but bycatch is unknown; however, with the current data, it should be possible to provide some estimates based on the observed bycatch rates and days at sea.

Response: The commenters will note that, in the 2020 final LOFF, the United Kingdom updated or provided vessel numbers for the multispecies demersal gillnet fishery. Further, this comment provides conflicting information. The commenters state that, in order to estimate bycatch, vessel numbers must be known, but in the Atlantic cod gillnet fishery the commenters acknowledge that bycatch estimates could be derived from other units of effort, including days at sea. The latter is correct: the number of vessels is not required to estimate total bycatch so long as there is some unit of effort that reflects fishing effort in the fishery. The United Kingdom continues to update its bycatch estimates, including estimates of total bycatch from observed fisheries.

Comment 29: The NGOs note that, in the seabass bottom pair trawl fishery, stranding data identify a potential population level impact for common dolphin in this fishery, in combination with other fisheries in the region.

Response: NMFS agrees, and is in continuing discussions on this matter with nations.

Norway

Comment 30: NGOs note that the blue swimming crab, European lobster, and Norwegian lobster pot/trap fisheries pose an entanglement risk to large whales, and that humpback whales, specifically, should be listed as interacting with the Norwegian lobster pot/trap fishery. The commenters also state that the zero reported entanglement rates are not reliable, given recent studies which report large whale entanglement.

Response: Minke and humpback whales are included as having a co-occurrence risk in all three fisheries. Fin whales are included in all of these fisheries but the Norwegian lobster pot/trap fishery. NMFS recognizes the possible under-estimation of marine mammal bycatch in pot/trap gear and the challenges of attributing large whale entanglement to specific pot fisheries in instances where large whales become entangled and swim away with the gear, or in instances where gear that is retrieved from a whale does not allow identification to a specific fishery.

Chile

Comment 31: NGOs noted that, for the purse seine fishery for anchoveta on the northern coast of Chile (Arica, Iquique, Tocopilla, and Mejillones), short-beaked common dolphins and South American sea lions have been reported as entangled with mortalities since 2010. The NGO commenters noted that a 2019 news report indicated that some 20 dolphins were found dead in purse seine nets that were set for anchoveta. Additionally, for small pelagic purse seine nets for common sardines (Strangomera bentincki), anchovy (*Engraulis ringens*) and horse mackerel (*Trachurus murphyi)* (Valparaíso and Los Lagos Region and the area between Arica and Parinacota Region and the Antofagasta Region), observers reported captures of southern sea lions (*Otaria flavascens*), dusky dolphins (*Lagenorhynchus obscurus*), common dolphins (*Delphinus delphis*) and bottlenose dolphins (*Tursiops truncatus*).

Response: NMFS is aware of the 2019 purse seine mortality and has been in consultation with Chile to ensure that the bycatch is reflected in the LOFF. Additionally, Chile is working to implement both electronic monitoring and observer programs. Chile is also analyzing observer data to provide bycatch estimates for these fisheries.

Iceland

Comment 32: NGOs note that most of the LOFF listings for Iceland list the number of vessels as ''unknown.'' However, all Icelandic vessels are registered and assigned quotas, and the Directorate of Fisheries maintains a publicly accessible list of allowed catch and catches by species by individual licensed vessels (as well as total allowed catch and catches). Therefore, the number of vessels should be easily provided.

Response: NMFS has conferred with Iceland regarding the licensing of Icelandic fishing vessels and the best way to accurately reflect Iceland's fisheries in the LOFF, given the nature of the individual transferable quota system. As noted by the commenters, Icelandic fishing vessel information is publicly available from the Icelandic Directorate of Fisheries. However, a direct count of the vessels landing catch would lead to an over-representation of total Icelandic vessels, as Icelandic vessels are authorized to switch gear, transfer quota, and fish in multiple areas. NMFS, in consultation with Iceland, agreed that leaving the vessel number empty (with some fishery exceptions) was the best path forward to capture all of the relevant fisheries information, given the multi-species and multi-gear nature of many Icelandic fisheries.

Comment 33: NGOs note that in the blue mussel aquaculture operations only humpback whales are listed as co-occuring with the fishery. However, a

2015 paper by Madeline Young included interviews with mussel farmers around Iceland and noted that humpback whales, minke whales, and harbor porpoises were most frequently sighted. Long-finned pilot whales, orcas, and white beaked dolphins were also reported by separate respondents. Four respondents were aware of cetaceans swimming through, or very close (within 50 m) to, their mussel operation, and there was a known harbor porpoise entanglement in 1998, indicating potential concern.

Response: NMFS notes this information and will consult with Iceland to determine whether any modification to the list of co-occurring marine mammals is necessary.

Comment 34: NGOs highlight that pelagic purse seine and trawl fisheries for herring have known co-occurrences and bycatch for a number of species despite the lack of information in the LOFF. Species include humpback whales, minke whales, bottlenose dolphins, Atlantic white-sided dolphins, and killer whales. In 2008, an Icelandic herring trawler hauled a minke whale on board.

Response: Co-occurrence information is important for nations who may not have information about marine mammal bycatch. However, this is not the situation in Iceland. NMFS has focused discussions with Iceland on those marine mammal species with documented interactions and mortality with fisheries.

Other Nations' Exempt Fisheries

Comment 35: NGOs asked why tuna purse seine fisheries authorized by Indonesia (operating under the Indian Ocean Tuna Commission (IOTC) and the Western and Central Pacific Fisheries Commission (WCPFC)), by Italy (operating under the IOTC), and by South Korea (operating under IOTC and WCPFC) are exempt fisheries.

Response: NMFS has classified these purse seine fisheries as exempt because they are operating in fisheries managed by RFMOs and in compliance with conservation and management measures prohibiting the intentional encirclement of marine mammals by a purse seine. NMFS has determined that where purse seine vessels do not intentionally set on marine mammals, the likelihood of marine mammal bycatch is generally remote.

Comment 36: NGOs asked why some crab and lobster traps/pots are exempt. The commenters noted that some New South Wales lobster trap/pot fisheries are exempt, despite some past evidence of humpback whale entanglements.

Response: In 2018, NMFS, as part of its evaluation of the 2017 draft LOFF, changed the New South Wales eastern rock lobster trap from export to exempt; this fishery now uses an at-call acoustic release system (Galvanic Time Release (GTR)) that submerges the headgear of the trap and has been effective in eliminating large whale entanglements (83 FR 11703, March 16, 2018).

Comment 37: NGOs note that in New Zealand there are many Danish seine fisheries classified as exempt. The commenters highlight that in a recent ecological risk assessment the Australian fishery management authority identified one species, the Australian fur seal, as at risk from Danish seine fishing. The commenters further note that the populations of these species are in the proximity of Danish seine operations in the Commonwealth Trawl Sector, and, considering the susceptibility of seals to this method of fishing, Australia has adopted a code of practice to minimize interaction with seals in this fishery (*https://www.afma.gov.au/fisheriesmanagement/methods-andgear/danish-seine*). The commenters then assume that Danish seines in New Zealand pose a similar level of risk.

Response: NMFS classified Danish seine fisheries as exempt based on the remote likelihood of marine mammal bycatch, because of a lack of documented interactions with marine mammals. Danish seines are actively fished and can easily accommodate best practices for marine mammal bycatch mitigation or release, reducing the likelihood of marine mammal bycatch. The exceptions are Danish seine fisheries with documentary evidence of marine mammal interactions, which NMFS classified as export. NMFS does not have data indicating that New Zealand Danish seines have more than a remote likelihood of marine mammal incidental mortality and serious injury and therefore require reclassification as an export fishery.

Comment 38: NGOs state that the Norwegian longline fishery for bluefin tuna may be a risk, even if no bycatch has been reported to date.

Response: In 2018, as part of its evaluation of the 2017 draft LOFF, NMFS changed the Norwegian longline and purse seine tuna fisheries to exempt. NMFS based this determination on information Norway submitted to ICCAT. From 2014 through 2017 there was no reported or observed bycatch of marine mammals in the tuna longline/purse seine fisheries (83 FR 11703, March 16, 2018).

Comment 39: NGOs state that in the Philippines it is not clear why some ring net fisheries are exempt fisheries and some are export fisheries.

Response: Ring net fisheries are predominantly classified as exempt. Those ring nets/purse seine nets operating under the conservation and management measures of the WCPFC and the non-encirclement provisions of that RFMO are listed as exempt. The ring net fishery for bonitos and mackerel potentially has marine mammal bycatch associated with it and is therefore classified as an export fishery.

Comments on Other Nations' Export Fisheries

Comment 40: NGOs state that the western rock lobster pot/trap fishery in Australia is listed as export, and humpback whales are noted in marine mammal interactions/mortality, but no numbers are given.

Response: NMFS cannot identify the fishery that the commenters are referring to; however, there is an Australian spiny lobster (*Panulirus cygnus*), Chaceon geryons nei (*Chaceon* spp), Champagne crab (*Hypothalassia armata*), Red rock lobster (*Jasus edwardsii*), Tasmanian giant crab (*Pseudocarcinus gigas*) pot/trap fishery that interacts with humpback whales. NMFS recognizes the possible under-estimation of marine mammal bycatch in pot/trap gear and the challenges of attributing large whale entanglement to specific pot fisheries in instances where large whales become entangled and swim away with the gear, or in instances where gear retrieved from a whale does not allow identification to a specific fishery.

Comment 41: NGOs state that all estimates of bycatch are zero for German fisheries operating in the Baltic, which does not seem correct. They assert that the 2018 reports from ICES indicate that there is harbour porpoise bycatch in the Baltic Sea fisheries.

Response: The only fisheries on the LOFF for Germany indicated as operating in the Baltic Sea and exporting to the United States are those for Atlantic herring (*Clupea harengus*) midwater pair trawls, and midwater trawls (not specified), and purse seines, in the German EEZ, (FAO:27 Atlantic Northeast), subareas 27.3.a, 27.3.b.23, 27.3.c.22, 27.3.d.24. We have no information indicating that harbor porpoise are captured in these trawl and seine fisheries.

Comment 42: NGOs indicate that, on the LOFF for Italy, pair trawling for anchovy is listed as export, but no information on marine mammal interactions/mortality is associated with this fishery. In other areas (*e.g.,* English Channel bass fishery) pair trawling has

a high bycatch rate of common dolphins.

Response: First, these pair trawls are for a different target species and operate in a different area than the example that the commenters cite. Assumptions that bycatch is the same across oceans, gear types, and target species are not valid. NMFS continues to work with nations to ensure that the marine mammals that co-occur with that fishery and any bycatch of those marine mammals is recorded in the IAICRS.

Comment 43: NGOs indicate that for Netherland fisheries on the LOFF all bycatch estimates are zero. The commenters assert this is not correct for porpoises in the North Sea.

Response: The Netherlands undertook significant revisions to its information provided for the LOFF, including adding bycatch estimates. NMFS urges the commenters to review the LOFF for the Netherlands in the final 2020 LOFF.

Comment 44: Industry commenters noted the need for NMFS to examine the Canadian pelagic longline fishery. Commenters note that this fishery most certainly interacts with some of the same transboundary marine mammal stocks (*e.g.,* longfin pilot whales) as the U.S. fleet, and the commenters have serious doubts that the Canadian government has implemented a marine mammal conservation regulatory program that is comparable in effectiveness to that of the United States. The commenters strongly urge NMFS to carefully examine the comparability of the Canadian marine mammal regulatory program through the implementation of the MMPA Import Provisions.

Response: NMFS agrees and will evaluate these fisheries which interact with transboundary stocks of marine mammals currently included under the Pelagic Longline Take Reduction Plan in accordance with the MMPA Import Provisions.

MMPA and the Seafood Import Monitoring Program

Comment 45: Industry expressed concern that it will be difficult for NMFS to fully and accurately identify all intermediary nations in the LOFF, and to fully and accurately identify the fisheries from which intermediary nations' exports originate in order to determine if those fisheries meet the U.S. comparability standards. Failure to do so would very seriously undermine the effectiveness of the MMPA Import Provisions by providing a major loophole for those high seas fisheries to escape application of the U.S. comparability standards. To prevent this, the commenter urged NMFS to use its traceability data collection capabilities under the Seafood Import Monitoring Program (SIMP) to enforce the MMPA Import Provisions. The commenter urged NMFS to fully integrate the MMPA Import Provisions with SIMP to prevent this and other forms of circumvention that will surely develop once the MMPA Import Provisions take effect.

Response: NMFS continues to work with other U.S. trade programs, offices, and partner agencies to confirm the accuracy of trade data and verify active seafood import streams for harvesting nations and intermediary products. Data available for the thirteen species and species groups subject to SIMP has been used to assist in identifying intermediary nations. Trade data collected under SIMP is protected, and its usage to help verify intermediary products under the MMPA Import Provisions is conducted according to the Trade Secrets Act (18 U.S.C. 1905) and the confidentiality of information requirements under Magnuson-Stevens Act 16 U.S.C. 1881a(b).

Comment 46: One environmental group notes that the MMPA Import Provisions complement and strengthen the current SIMP requirements to ensure that species with high risk of being from illegal, unreported, and unregulated (IUU) fisheries or seafood products that are mislabeled are not sold in the United States. The commenter states that the documentation requirements of SIMP will complement the MMPA Import Provisions in preventing non-compliant seafood from entering the U.S. market. NMFS should discuss the overlap between SIMP and the MMPA Import Provisions, how the two programs enhance one another, and the effect of expansion of SIMP requirements on MMPA enforcement. The commenter encouraged NMFS to consider expanding the requirements of SIMP to include all seafood as a means to enforce the MMPA Import Provisions.

Response: NMFS routinely verifies exports to the United States as part of its ongoing consultations with nations as well as consultations with relevant trade programs to identify supply chains subject to the MMPA Import Provisions. At this time, NMFS is focused on effective implementation of SIMP in its current form. Expansion of SIMP to include additional species would require a full rulemaking process, which allows for public input from U.S. and foreign stakeholders. Enhancing the enforcement of the MMPA Import Provisions would be considered in determining whether, how and when to expand the species scope of SIMP through a full rulemaking process.

Other Comments

Comment 47: One environmental organization notes that if a fishery or fishery sector is not captured in the LOFF, it is the responsibility of that fishery or country to ensure that it is included in the next iteration of the LOFF rather than to ask for flexibility. Any ad hoc flexibility creates incentive to reclassify or recategorize fisheries and segments of fisheries to avoid regulation. This flexibility will create a scenario in which NMFS is behind the issue rather than leading with the firm requirements of the law. Future LOFF reviews will provide regular opportunity for corrections and additions, but the agency should not allow for any variance once the LOFF is finalized.

Response: NMFS will work with nations to ensure the accuracy of the LOFF, and to ensure that the LOFF reflects a nation's fishery management regime and its authorized fisheries.

Comment 48: One environmental organization states that countries that do not participate in the LOFF process despite ample opportunity to do so should not be given special consideration or expedited consideration outside of the regular LOFF process. The commenter further states that harvesting nations should not receive waivers, exemptions or exceptions to the requirements of the Marine Mammal Import Provisions and should be denied the ability to import fish and fish products into the United States until those countries demonstrate compliance through the LOFF process.

Response: After January 1, 2022, all nations and fisheries exporting to the United States must be on the LOFF and must have received a Comparability Finding for those fisheries. There are no exemptions or waivers. There are procedures for obtaining a Comparability Finding for new foreign commercial fishing operations wishing to export to the United States (50 CFR 216.24 (h)(8)(vi)).

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Dated: October 2, 2020.

Christopher Wayne Oliver,

Assistant Administrator, National Marine Fisheries Service.

[FR Doc. 2020–22290 Filed 10–7–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2020–SCC–0160]

Agency Information Collection Activities; Comment Request; Student Assistance General Provision—Subpart I—Immigration Status Confirmation

AGENCY: Office of Federal Student Aid, Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before December 7, 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–0159. 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 Beth Grebeldinger, (202) 377–4018.

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: Student Assistance General Provision—Subpart I—Immigration Status Confirmation.

OMB Control Number: 1845–0052.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments; Individuals or Households.

Total Estimated Number of Annual Responses: 81,572.

Total Estimated Number of Annual Burden Hours: 10,197.

Abstract: This request is for approval of a revision of the reporting requirements currently in the Student Assistance General Provisions, 34 CFR 668, Subpart I. This subpart governs the Immigration-Status Confirmation, as authorized by section 484(g) of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1091). The regulations may be reviewed at 34 CFR 668, Subpart I. The regulations are necessary to determine eligibility to receive program benefits and to prevent fraud and abuse of program funds. This collection updates the usage by individuals and schools. While the regulations refer to a secondary confirmation process and completion of the paper G–845 form these processes are no longer in use. DHS/USCIS replaced the paper secondary confirmation method with a fully electronic process, SAVE system and the use of the Third Step Verification Process. In April 2018, Federal Student Aid transitioned from the DHS–USCIS paper Form G–845 (for third step verification) to an electronic process via DHS' SAVE system.

Dated: October 2, 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. 2020–22218 Filed 10–7–20; 8:45 am]

BILLING CODE 4000–01–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: EC21–2–000.
Applicants: Milligan 1 Wind LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Milligan 1 Wind LLC.
Filed Date: 10/1/20.
Accession Number: 20201001–5219.
Comments Due: 5 p.m. ET 10/22/20.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG21–1–000.
Applicants: Muscle Shoals Solar, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Muscle Shoals Solar, LLC.
Filed Date: 10/1/20.
Accession Number: 20201001–5242.
Comments Due: 5 p.m. ET 10/22/20.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER20–2201–002.
Applicants: GridLiance High Plains LLC.
Description: Compliance filing: Gridliance HP Revised Winfield Joint Ownership Agreement to be effective 9/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5180.
Comments Due: 5 p.m. ET 10/22/20.

Docket Numbers: ER20–2726–001.
Applicants: Grand Energy, LLC.
Description: Tariff Amendment: Amendment to MBR Application Filing to be effective 9/1/2020.
Filed Date: 10/2/20.
Accession Number: 20201002–5040.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER20–3047–000.
Applicants: Public Service Company of New Mexico.
Description: § 205(d) Rate Filing: PNM EIM OATT Tariff Changes Attachment S to be effective 4/1/2021.
Filed Date: 9/30/20.
Accession Number: 20200930–5191.
Comments Due: 5 p.m. ET 10/21/20.

Docket Numbers: ER21–10–000
Applicants: Pacific Gas and Electric Company.
Description: § 205(d) Rate Filing: Amendment to Interim Black Start Agreement (RS 234) 2020 to be effective 11/30/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5246.
Comments Due: 5 p.m. ET 10/22/20.

Docket Numbers: ER21–11–000.
Applicants: Consolidated Edison Company of New York, Inc.
Description: § 205(d) Rate Filing: Amendment PASNY Tariff 10–1–2020 to be effective 10/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5276.
Comments Due: 5 p.m. ET 10/22/20.

Docket Numbers: ER21–12–000.
Applicants: NECEC Transmission LLC.
Description: Baseline eTariff Filing: Notice of Succession (Eversource) to be effective 10/2/2020.
Filed Date: 10/2/20.
Accession Number: 20201002–5048.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–13–000.
Applicants: NECEC Transmission LLC.
Description: Compliance filing: Notice of Succession (National Grid) to be effective 12/31/9998.
Filed Date: 10/2/20.
Accession Number: 20201002–5056.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–14–000.
Applicants: NECEC Transmission LLC.
Description: Compliance filing: Notice of Succession (Unitil) to be effective 12/31/9998.
Filed Date: 10/2/20.
Accession Number: 20201002–5057.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–15–000.
Applicants: NECEC Transmission LLC.
Description: Compliance filing: Notice of Succession (HQUS Eversource) to be effective 12/31/9998.
Filed Date: 10/2/20.
Accession Number: 20201002–5066.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–16–000.
Applicants: Public Service Company of Colorado.
Description: Tariff Cancellation: 2020–10–02_PSCo-NXER-Neptune-E&P–0.1.0–NOC to be effective 10/3/2020.
Filed Date: 10/2/20.
Accession Number: 20201002–5067.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–17–000.
Applicants: NECEC Transmission LLC.
Description: Compliance filing: Notice of Succession (HQUS National Grid) to be effective 12/31/9998.
Filed Date: 10/2/20.
Accession Number: 20201002–5068.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–18–000.
Applicants: NECEC Transmission LLC.
Description: Compliance filing: Notice of Succession (HQUS Unitil) to be effective 12/31/9998.
Filed Date: 10/2/20.
Accession Number: 20201002–5070.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–19–000.
Applicants: NECEC Transmission LLC.
Description: Compliance filing: Notice of Succession (HQUS Additional) to be effective 12/31/9998.
Filed Date: 10/2/20.
Accession Number: 20201002–5079.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–20–000.
Applicants: Central Maine Power Company.
Description: Tariff Cancellation: Notice of Cancellation to be effective 12/31/9998.
Filed Date: 10/2/20.
Accession Number: 20201002–5098.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–21–000.
Applicants: Harts Mill Solar, LLC.
Description: Baseline eTariff Filing: Reactive Power Compensation Filing to be effective 12/1/2020.
Filed Date: 10/2/20.
Accession Number: 20201002–5109.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–22–000.
Applicants: PacifiCorp.
Description: § 205(d) Rate Filing: BPA—NITSA (WEID) to be effective 10/1/2020.
Filed Date: 10/2/20.
Accession Number: 20201002–5114.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–23–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: § 205(d) Rate Filing: Filing of Service Agreement No. 612 to be effective 9/28/2020.
Filed Date: 10/2/20.
Accession Number: 20201002–5132.
Comments Due: 5 p.m. ET 10/23/20.

Docket Numbers: ER21–24–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: § 205(d) Rate Filing: Rate Schedule FERC No. 315 between Tri-State and SLVREC to be effective 11/5/2020.
Filed Date: 10/2/20.
Accession Number: 20201002–5153.
Comments Due: 5 p.m. ET 10/23/20.

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: October 2, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–22327 Filed 10–7–20; 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: RP20–1222–000.
Applicants: Enable Gas Transmission, LLC.
Description: Annual Report of Total Penalty Revenue Credits of Enable Gas Transmission, LLC under RP20–1222.
Filed Date: 9/24/20.
Accession Number: 20200924–5176.
Comments Due: 5 p.m. ET 10/6/20.

Docket Numbers: RP20–1223–000.
Applicants: Enable Gas Transmission, LLC.
Description: Annual Linked Firm Service Penalty Revenue Credits Report of Enable Gas Transmission, LLC under RP20–1223.
Filed Date: 9/24/20.
Accession Number: 20200924–5177.
Comments Due: 5 p.m. ET 10/6/20.

Docket Numbers: RP21–1–000.
Applicants: Viking Gas Transmission Company.
Description: § 4(d) Rate Filing: Update of Non-Conforming Agreements—AF0022 to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5000.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–2–000.
Applicants: NEXUS Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Releases eff 10–1 to be effective 10/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5001.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–3–000.
Applicants: Maritimes & Northeast Pipeline, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rates—Atlantic Bridge eff 10–01–2020 to be effective 10/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5002.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–4–000.
Applicants: Maritimes & Northeast Pipeline, L.L.C.
Description: § 4(d) Rate Filing: Atlantic Bridge—NC Agreement Filing to be effective 10/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5003.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–5–000.
Applicants: Guardian Pipeline, L.L.C.
Description: § 4(d) Rate Filing: EPCR Semi-Annual Adjustment—Fall 2020 to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5027.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–6–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Filing (PGE Core) to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5028.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–7–000.
Applicants: Columbia Gas Transmission, LLC.
Description: § 4(d) Rate Filing: TCO SWN Amendment—Cont. 198797 to be effective 10/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5051.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–8–000.
Applicants: Equitrans, L.P.
Description: § 4(d) Rate Filing: Negotiated Rate Capacity Release Agreements—10/1/2020 to be effective 10/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5052.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–9–000.
Applicants: Guardian Pipeline, L.L.C.
Description: § 4(d) Rate Filing: Transporter Use Gas Annual Adjustment—Fall 2020 to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5060.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–10–000.
Applicants: Kern River Gas Transmission Company.
Description: § 4(d) Rate Filing: 2020 Housekeeping Original Volume 1A to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5078.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–11–000.
Applicants: Chandeleur Pipe Line, LLC.
Description: § 4(d) Rate Filing: Chandeleur Updates to Gas Tariff to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5080.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–12–000.
Applicants: Cimarron River Pipeline, LLC.
Description: § 4(d) Rate Filing: Fuel Tracker 2020—Winter Season Rates to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5086.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–13–000.
Applicants: Viking Gas Transmission Company.
Description: § 4(d) Rate Filing: Semi-Annual Fuel and Losses Retention Adjustment—Winter 2020 Rate to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5100.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–14–000.
Applicants: Guardian Pipeline, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate PAL Agreements—Wis. Electric & Wis. Public Service Corp to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5115.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–15–000.
Applicants: Texas Gas Transmission, LLC.
Description: § 4(d) Rate Filing: 2020 Fuel Tracker Filing to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5124.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–16–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Non-Conforming Agreement Filing (UNS) to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5132.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–17–000.
Applicants: Saltville Gas Storage Company L.L.C.
Description: § 4(d) Rate Filing: SGSC 2020 Fuel Filing to be effective 11/1/2020.

Filed Date: 10/1/20.
Accession Number: 20201001–5135.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–18–000.
Applicants: Alliance Pipeline L.P.
Description: § 4(d) Rate Filing: APL 2020 Fuel Filing to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5146.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–19–000.
Applicants: Cheniere Corpus Christi Pipeline, LP.
Description: § 4(d) Rate Filing: TRA—November 2020 to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5182.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–20–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: AGT LINK URL Conversion Filing to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5194.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–21–000.
Applicants: East Tennessee Natural Gas, LLC.
Description: § 4(d) Rate Filing: ETNG LINK URL Conversion Filing to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5195.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–22–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Cap Rel Neg Rate Agmt (Mobile 42488 to Southern 53164) to be effective 10/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5199.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–23–000.
Applicants: Gulf South Pipeline Company, LLC.
Description: § 4(d) Rate Filing: Permanent Capacity Release Agreements (Aethon 52424, 53154) to be effective 10/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5201.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–24–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Initial Cash Out Refund/Surcharge Rate Filing to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5202.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–25–000.
Applicants: Sabal Trail Transmission, LLC.
Description: § 4(d) Rate Filing: STT LINK URL Conversion Filing to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5203.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–26–000.
Applicants: Northern Natural Gas Company.
Description: § 4(d) Rate Filing: 20201001 Carlton and DDVC Tariff Changes to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5208.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–29–000.
Applicants: Guardian Pipeline, L.L.C.
Description: § 4(d) Rate Filing: Update Non-Conforming Agreements FT2001, FT2002, and FT2003 to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5212.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–30–000.
Applicants: Dominion Energy Transmission, Inc.
Description: § 4(d) Rate Filing: DETI—October 1, 2020 Nonconforming Service Agreements to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5213.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–31–000.
Applicants: WBI Energy Transmission, Inc.
Description: Annual Penalty Revenues Credit Report of WBI Energy Transmission, Inc. under RP21–31.
Filed Date: 10/1/20.
Accession Number: 20201001–5229.
Comments Due: 5 p.m. ET 10/13/20.

Docket Numbers: RP21–32–000.
Applicants: Guardian Pipeline, L.L.C.
Description: § 4(d) Rate Filing: Update of Non-Conforming and Negotiated Rate Rate Agreements FT0001 and RT0183 to be effective 11/1/2020.
Filed Date: 10/1/20.
Accession Number: 20201001–5245.
Comments Due: 5 p.m. ET 10/13/20.

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: October 2, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–22328 Filed 10–7–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL20–73–000]

The Hoopa Valley Tribe and the Hoopa Valley Public Utilities District; Notice of Petition for Declaratory Order

Take notice that on September 28, 2020, pursuant to Rule 207(a)(2) of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207 (2019), The Hoopa Valley Tribe (HVT) and its wholly-owned entity The Hoopa Valley Public Utilities District (HVPUD) (Petitioner) hereby submits a petition for declaratory order (Petition) requesting that the Commission issue a declaratory order finding that HVT and HVPUD are public utilities that are exempt under section 201(f) of Part II of the Federal Power Act,[1] as more fully explained in the petition.

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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

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

[1] 16 U.S.C. 824(f).

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.

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.

Comment Date: 5:00 p.m. Eastern time on October 28, 2020.

Dated: October 2, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–22295 Filed 10–7–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP17–14–000]

UGI LNG, Inc; Notice of Request for Extension of Time

Take notice that on September 21, 2020, and amended on September 24, 2020, UGI LNG, Inc. (UGI) requested that the Federal Energy Regulatory Commission (Commission) grant an extension of time, until June 21, 2021, to complete construction of its Temple Truck Rack Expansion Project (Project) at its Temple liquefied natural gas (LNG) storage facility located in Ontelaunee Township, Berks County, Pennsylvania, as authorized in the October 18, 2018 Order Issuing Certificate (Certificate Order).[1] Ordering Paragraph B(1) of the Certificate Order required UGI to complete the construction of the proposed Project facilities and make them available for service within one year from of issuance, or by October 18, 2019.[2]

UGI states that it submitted its Implementation Plan for the Project in January 2019, but was unable to request notice to proceed with project construction activities until late June of 2019, as the Commission's Division of LNG Facility Review & Inspection required UGI LNG to submit a significant amount of additional information via phone calls and in-person meetings before work could begin on the Project. After submitting its initial request for notice to proceed, UGI submitted supplemental requests for notices to proceed and supplements to its Implementation Plan on July 10, August 16, and September 5, 2019. UGI LNG was granted full authorization to proceed with construction activities on September 18, 2019. In March 2020, UGI stopped work on the Project due to the Novel Coronavirus Disease (COVID–19) pandemic.

UGI states that it intended to request to extend its certificate authorization prior to October 18, 2019, but failed to do so due to an internal administrative oversight. UGI now belatedly requests an additional nine months, or until June 21, 2020, to complete the authorized construction of the Project facilities and make facilities available for service.

This notice establishes a 15-calendar day intervention and comment period deadline. Any person wishing to comment on UGI'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).[3]

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,[4] the Commission will aim to issue an order acting on the request within 45 days.[5] The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension.[6]

The Commission will not consider arguments that re-litigate the issuance of the April 15th 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.[7] 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.[8] The OEP Director, or his or her designee, will act on 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://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 COVID–19, issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern Time on October 19, 2020.

[1] *UGI LNG, Inc.,* 165 FERC ¶ 62,040 (Certificate Order) (2018).

[2] *Id.* at ordering para. (B)(1).

[3] 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).

[4] Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 CFR 385.2201(c)(1) (2020).

[5] *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 40 (2020).

[6] *Id.* P 40.

[7] 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.

[8] *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 40 (2020).

Dated: October 2, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–22296 Filed 10–7–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic 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* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket No.	File date	Presenter or requester
Prohibited:		
NONE.		
Exempt:		
CP16–9–000	10–2–2020	U.S. Representative Stephen F. Lynch.

Dated: October 2, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–22329 Filed 10–7–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2016–0093; FRL–10015–11]

Pesticides; Draft Guidance for Waiving Acute Dermal Toxicity Tests for Pesticide Technical Chemicals and Supporting Retrospective Analysis; Notice of Availability and Request for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of and seeking public comment on a draft guidance document entitled ''Guidance for Waiving Acute Dermal Toxicity Tests for Pesticide Technical Chemicals & Supporting Retrospective Analysis.'' Guidance documents are issued by the Office of Pesticide Programs (OPP) to inform pesticide registrants and other interested persons about important policies, procedures, and registration related decisions, and serve to provide guidance to pesticide registrants and OPP personnel. This draft guidance document provides information to pesticide registrants concerning the Agency's consideration to expand the potential for data waivers for acute dermal studies to single technical active ingredients (technical AIs) used to formulate end use products. The reasoning and analysis in this dermal waiver guidance for technical active ingredients is similar to what was presented in the 2016 guidance for end-use products. While more acute toxicity studies are submitted to OPP annually for formulated pesticide products than for technical AIS, there is still the potential for animal and resource savings from waivers for acute toxicity studies.

DATES: Comments must be received on or before November 9, 2020.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2016–0093, though the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Tara Flint, Antimicrobial Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 347–0398; email address: *flint.tara@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. Although this action may be of particular interest to those persons

who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.*

C. How can I get copies of this document and other related information?

A copy of the draft guidance document is available in the docket under docket ID number EPA–HQ–OPP–2016–0093.

II. What action is the Agency taking?

A. Authority

This guidance is provided under the authority of FIFRA (7 U.S.C. 136 *et seq.*) and addresses the utility of the acute dermal toxicity study for single technical chemicals in pesticide labelling, such as the signal word and precautionary statements as described in 40 CFR 156.64 and 40 CFR 156.70.

B. Background

EPA's OPP regularly receives acute lethality studies for oral, dermal and inhalation routes along with eye irritation, skin irritation, and skin sensitization—these data are required for both the registration of new and reregistration of existing pesticidal products.

In 2016, OPP published the ''Guidance for Waiving Acute Dermal Toxicity Tests for Pesticide Formulations & Supporting Retrospective Analysis'' to support the Agency's goal to reduce unnecessary animal testing. The retrospective analysis supports the conclusion that the dermal acute toxicity study for formulations provides little to no added value in regulatory decision making.

In 2017 Canada's Pest Management Regulatory Agency (PMRA) released their Acute Dermal Toxicity Waiver. This policy includes both end use products and technical active ingredients. Stakeholders have requested that EPA expand its waiver guidance for technical active ingredients to support North American harmonization.

In 2019 EPA Administrator Wheeler directed Agency leadership to prioritize animal testing reduction efforts.

This draft guidance document will expand the potential for data waivers for acute dermal studies to single active ingredient technical chemicals (technical chemicals) used to formulate end use products. The reasoning and analysis in this dermal waiver guidance for technical chemicals is similar to what was presented in the 2016 guidance for end-use products. While more acute toxicity studies are submitted to OPP annually for formulated pesticide products than for technical chemicals, there is still the potential for animal and resource savings from waivers for technical chemical acute toxicity studies. Further, this guidance would allow EPA to harmonize with the PMRA.

III. Do guidance documents contain binding requirements?

As guidance, this document is not binding on the Agency or any outside parties, and the Agency may depart from it where circumstances warrant and without prior notice. While EPA has made every effort to ensure the accuracy of the discussion in the guidance, the obligations of EPA and the regulated community are determined by statutes, regulations, or other legally binding documents. In the event of a conflict between the discussion in the guidance document and any statute, regulation, or other legally binding document, the guidance document would not be controlling.

Authority: 7 U.S.C. 136 *et seq.*

Dated: October 2, 2020.

Alexandra Dapolito Dunn,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2020–22325 Filed 10–7–20; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Privacy Act of 1974; System of Records

AGENCY: Farm Credit Administration.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, notice is hereby given that the Farm Credit Administration (FCA or Agency) is amending an existing system of records, FCA–7—Inspector General Investigative Files—FCA.

DATES: You may send written comments on or before November 9, 2020. FCA filed an amended System Report with Congress and the Office of Management and Budget on July 20, 2020. This notice will become effective without further publication on November 18, 2020 unless modified by a subsequent notice to incorporate comments received from the public.

ADDRESSES: We offer a variety of methods for you to submit your comments. For accuracy and efficiency, commenters are encouraged to submit comments by email or through the FCA's website. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at *reg-comm@fca.gov.*
- *FCA website: http://www.fca.gov.* Click inside the ''I want to . . .'' field, near the top of the page; select ''comment on a pending regulation'' from the dropdown menu; and click ''Go.'' This takes you to an electronic public comment form.
- *Mail:* David Grahn, Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of comments we receive at our office in McLean, Virginia, or from our website at *http://www.fca.gov.* Once you are in the website, click inside the ''I want to . . .'' field, near the top of the page; select ''find comments on a pending

regulation'' from the dropdown menu; and click ''Go.'' This will take you to the Comment Letters page, where you can select the SORN for which you would like to read public comments. The comments will be posted as submitted but, for technical reasons, items such as logos and special characters may be omitted. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce internet spam.

FOR FURTHER INFORMATION CONTACT: Autumn R. Agans, Privacy Act Officer, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4019.

SUPPLEMENTARY INFORMATION: The Inspector General Investigative Files—FCA system is used to document the conduct and outcome of investigations; to report results of investigations to other components of the FCA and other agencies and authorities for their use in evaluating programs and imposition of criminal, civil, or administrative sanctions; to report the results of investigations to other agencies or other regulatory bodies for an action deemed appropriate, and for retaining sufficient information to fulfill reporting requirements; and to maintain records related to the OIG's activities. The Agency is updating the notice to make administrative updates and non-substantive changes to conform to the SORN template requirements prescribed in the Office of Management and Budget (OMB) Circular No. A–108.

This publication satisfies the requirement of the Privacy Act of 1974 that agencies publish a system of records notice in the **Federal Register** when there is a revision, change, or addition to the system of records. The substantive changes and modifications to the currently published version of FCA–7—Inspector General Investigative Files—FCA include:

1. Identifying the records in the system as unclassified.
2. Revising the safeguards section to reflect updated cybersecurity guidance and practices.
3. Clarifying the system purpose, categories of records in the system, and categories of records sources.
4. Adding routine uses permitting the disclosure of records and information contained in the records system: (a) To facilitate qualitative assessment reviews of the OIG's investigative function by certain other federal agencies; (b) to facilitate the preparation of the annual report to the President by the Council of the Inspectors General on Integrity and Efficiency; (c) to respond to statutory reporting requirements; and (d) to the public and news media where there is a public interest and disclosure would not constitute and unwarranted invasion of personal privacy.
5. Removing a routine use for sharing information with independent auditors or other private firms responsible for carrying out work on behalf of OIG, as such sharing is otherwise covered by the Agency's General Statement of Routine Uses.
6. Revising the policies and procedures for retention and disposal of records to reflect an updated National Archives and Records Administration-approved records schedule.

Additionally, non-substantive changes have been made to the notice to align with the latest guidance from OMB.

The amended system of records is: FCA–7—Inspector General Investigative Files—FCA. As required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, FCA sent notice of this modified system of records to the Office of Management and Budget, the Committee on Oversight and Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate. The notice is published in its entirety below.

SYSTEM NAME AND NUMBER:

FCA–7—Inspector General Investigative Files—FCA.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Office of Inspector General (OIG), Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

SYSTEM MANAGER:

Inspector General, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Inspector General Act of 1978, as amended, 5 U.S.C. app.

PURPOSES OF THE SYSTEM:

We use information in this system: to facilitate and document the conduct of investigative activities relating to programs and operations of the FCA; to report results of investigative activities to other components of the FCA and other agencies and authorities for appropriate action; and to fulfill reporting requirements.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Subjects of complaints and investigations relating to FCA's programs and operations. Subjects include, but are not limited to, current and former FCA employees; current and former agents or employees of contractors and subcontractors in their personal capacity, where applicable; and other persons whose actions affect or relate to the FCA, its programs or operations. Businesses, proprietorships, and corporations are not covered by this system.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains correspondence relating to investigative activities; internal staff memoranda; copies of subpoenas issued, affidavits, witnesses' statements, transcripts and recordings of testimony taken, and accompanying exhibits; documents and records obtained from governmental or non-governmental sources, or copies thereof; interview notes, investigative notes, staff working papers, draft materials, and other investigative documents or records; investigative plans, progress reports, and closing reports; and other documents and information relating to the investigation of alleged or suspected criminal, civil, or administrative violations or similar wrongdoing relating to FCA programs and operations.

RECORD SOURCE CATEGORIES:

Records of the FCA and other federal, state, and local agencies; current and former employees of the FCA and other federal, state, and local agencies; private individuals and entities; contractors, subcontractors, FCA-regulated institutions, and other entities having some relationship with FCA or the FCA OIG.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

See the ''General Statement of Routine Uses.'' The information collected in the system will be used in a manner that is compatible with the purposes for which the information has been collected and, in addition to the general routine uses, may be disclosed for the following purposes:

(1) We may disclose information in this system of records to any source when the FCA OIG is conducting an investigation, audit, inspection, or evaluation, but only to the extent necessary to get information from that source relevant to and sought in furtherance of the investigation, audit, inspection, or evaluation.

(2) We may disclose the record or information in the record system to agencies, offices, or establishments of the executive, legislative, or judicial

branch of the Federal or State governments when we have a request and where the records or information is relevant and necessary to a decision on an employee's discipline or other administrative action (excluding a decision on hiring). We will take reasonable steps to ensure that the records are timely, relevant, accurate, and complete enough to assure fairness to the employee affected by the disciplinary or administrative action.

(3) We may disclose the record or information in the record system to an FCA contractor when a contractor-operated program has been subject to OIG investigation that has uncovered personnel problems so that the contractor can correct those problems.

(4) We may disclose the record or information in the record system to debt collection contractors to collect debts owed to the Government, as authorized under the Debt Collection Act of 1982, 31 U.S.C. 3718, and subject to applicable Privacy Act safeguards.

(5) We may disclose the record or information in the record system to any official charged with the responsibility to conduct qualitative assessment reviews of internal safeguards and management procedures employed in investigative operations. This disclosure category includes members of the Council of the Inspectors General on Integrity and Efficiency and officials and administrative staff within their investigative chain of command, as well as authorized officials of the Department of Justice.

(6) We may disclose the record or information in the record system to members of the Council of the Inspectors General on Integrity and Efficiency for the preparation of reports to the President and Congress on the activities of the Inspectors General.

(7) We may disclose the record or information in the record system to federal, state, or local agencies or to the public as required to meet statutory reporting obligations.

(8) We may disclose the record or information in the record system to the news media and the public, where there exists a legitimate public interest and disclosure would not constitute an unwarranted invasion of personal privacy.

Disclosure to consumer reporting agencies:

(1) We may disclose information from this system, pursuant to 5 U.S.C. 552a(b)(12), to consumer reporting agencies as defined in the Fair Credit Reporting Act, 15 U.S.C. 1681a(f) or the Federal Claims Collection Act of 1966, as amended, 31 U.S.C. 3701(a)(3), in accordance with section 3711(e) of title 31.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The OIG Investigative Files consist of digital records stored in network file folders, as well as paper records and data maintained on removable media, which are stored in file cabinets in OIG office space.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by the name of the subject of the investigation or complaint, a description of the subject matter of the investigation or complaint, or by a unique control number.

POLICIES AND PROCEDURES FOR RETENTION AND DISPOSAL OF RECORDS:

Records of investigations and complaints are destroyed 10 years after the end of the fiscal year in which the relevant investigation was closed or complaint resolved. Investigative files determined by the Inspector General to have historical significance are transferred to the National Archives for permanent retention.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

FCA implements multiple layers of security to ensure access to records is limited to FCA OIG personnel who need to know the information to perform their official duties. Physical records are stored in a secured environment using locked file rooms, file cabinets, or locked offices and other physical safeguards. Computer and network records are safeguarded through use of user roles, passwords, firewalls, encryption, and other information technology security measures.

RECORD ACCESS PROCEDURES:

To obtain a record, contact: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

CONTESTING RECORD PROCEDURES:

Direct requests for amendments to a record to: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

NOTIFICATION PROCEDURE:

Address inquiries about this system of records to: Privacy Act Officer, Farm Credit Administration, McLean, VA 22102–5090.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

Pursuant to 5 U.S.C. 552a(j)(2), records in this system are exempt from the provisions of 5 U.S.C. 552a, except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i), and corresponding sections of 12 CFR 603.355, to the extent a record in the system of records was compiled for criminal law enforcement purposes.

Pursuant to 5 U.S.C. 552a(k)(2), the system is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f), and the corresponding provisions of 12 CFR 603.355, to the extent the system of records consists of investigatory material compiled for law enforcement purposes. Material within the scope of the exemption at 5 U.S.C. 552a(j)(2) is also exempt. See 12 CFR 603.355.

HISTORY:

Federal Register Vol. 64, No. 100/ Tuesday, May 25, 1999, page 21875

Federal Register Vol. 69, No. 37/ Wednesday, February 25, 2004, page 8657

Dated: October 5, 2020.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2020–22351 Filed 10–7–20; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–XXXX; FRS 17119]

Information Collection Being Submitted to the Office of Management and Budget for Emergency Review and Approval

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, 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. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to

comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments or recommendations for the proposed information collection should be submitted on or before October 29, 2020.

ADDRESSES: Comments should be sent to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment

on the proposed information collection to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Nicole Ongele at (202) 418–2991. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) 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; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) 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. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

The Commission is requesting emergency OMB processing of the information collection requirement(s) contained in this notice and has requested OMB approval no later than November 6, 2020. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of Commission ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

OMB Control Number: 3060–XXXX.

Title: Certification of Eligibility for Exemption from Caller ID Authentication Implementation Mandate.

Form Number: N/A.

Type of Review: New information collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 817 respondents; 817 responses.

Estimated Time per Response: 3 hours.

Frequency of Response: One-time reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 1.4(b)(1), 1.103(a), 151–154, 227(e), 227b, 251(e), and 303(r).

Total Annual Burden: 2,451 hours.

Total Annual Cost: No Cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission will consider the potential confidentiality of any information submitted, particularly where public release of such information could raise security concerns (*e.g.,* granular location information). Respondents may request materials or information submitted to the Commission or to the Administrator be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this new information collection to the Office of Management and Budget (OMB) under their emergency processing procedures. The Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act obligates the Commission to, by December 30, 2020 exempt voice service providers that meet certain caller ID authentication implementation benchmarks from the implementation mandate established in the TRACED Act. In order to determine which voice service providers meet these criteria, the Commission establishes this collection to permit voice service providers voluntarily to certify that they satisfy the criteria. *See Call Authentication Trust Anchor,* WC Docket No. 17–97, Second Report and Order, FCC 20–136 (adopted Sept. 29, 2020). On September 29, 2020, the Commission adopted its *Call Authentication Trust Anchor Second Report and Order.* The *Second Report and Order* implemented section 4(b)(2) of the TRACED Act by establishing two exemptions: One exemption for a voice service provider's IP networks if it meets all four statutory criteria for all calls it originates or terminates in SIP, and one exemption for a voice service provider's non-IP networks if it meets both statutory criteria for all non-SIP calls it originates or terminates. The information received through the certification process will permit the Commission to determine which voice service providers qualify for one or both of these exemptions by the TRACED Act's statutory deadline of December 30, 2020.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–22305 Filed 10–7–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[WP Docket No. 07–100; DA 20–1048; FRS 17074]

Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau Announce Temporary Filing Freeze on the Acceptance and Processing of Certain Applications for the 4940–4990 MHz Band

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Public Safety and Homeland Security Bureau and the Wireless Telecommunications Bureau (the Bureaus) announce a temporary freeze, effective September 8, 2020, on the acceptance and processing of certain applications related to private land mobile radio services in the 4.9 GHz band (4940–4990 MHz). Pursuant to this freeze, applications for new or modified operations in the 4.9 GHz band will not be accepted and pending applications will not be processed unless they meet limited exceptions.

DATES: Effective September 8, 2020.

ADDRESSES: Federal Communications Commission, 445 12th Street SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information regarding this Public Notice, please contact Michael Wilhelm, Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, at (202) 418–0870 or Jon Markman, Attorney Advisor, Mobility Division, Wireless Telecommunications Bureau at (202) 418–7090.

SUPPLEMENTARY INFORMATION: In 2018, the Commission issued a Sixth Further Notice of Proposed Rulemaking (83 FR 20011), which sought comment on proposals to stimulate expanded use of and investment in the 4.9 GHz band. In order to stabilize the 4.9 GHz spectrum landscape and to maximize the Commission's flexibility in considering the appropriate rules governing the band, the Bureaus now suspend the acceptance and processing of certain 4.9 GHz band license applications.

Imposition of the freeze is procedural and, therefore, not subject to the notice and comment and effective date requirements of the Administrative Procedure Act. We find good cause for not delaying the effective date of the freeze pending publication of this Public Notice in the **Federal Register**, because delay would undermine the purpose of the freeze, which is to ensure that new applications do not compromise the Commission's flexibility to modify the rules governing the band to the extent the public interest may warrant.

Federal Communications Commission.

David Furth,

Deputy Bureau Chief.

[FR Doc. 2020–22217 Filed 10–7–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Notice and request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, with revision, the Financial Statements for Holding Companies (FR Y–9 reports; OMB Control Number 7100–0128) and the Consolidated Report of Condition and Income for Edge and Agreement Corporations (FR 2886b; OMB Control Number 7100–0086).

DATES: Comments must be submitted on or before December 7, 2020.

ADDRESSES: You may submit comments, identified by *FR Y–9* or *FR 2886b,* by any of the following methods:

- *Agency website: https://www.federalreserve.gov/.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include the OMB number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer—Alex Goodenough—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be available at *https://www.reginfo.gov/public/do/PRAMain,* if approved. These documents will also be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

Request for Comment on Information Collection Proposals

The Board invites public comment on the following information collections, which are being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed 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 proposed 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 collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal To Approve Under OMB Delegated Authority the Extension for Three Years, With Revision, of the Following Information Collections

(1) *Report title:* Financial Statements for Holding Companies.

Agency form numbers: FR Y–9C, FR Y–9LP, FR Y–9SP, FR Y–9ES, and FR Y–9CS.

OMB control number: 7100–0128.

Frequency: Quarterly, semiannually, and annually.

Respondents: Bank holding companies (BHCs), savings and loan holding companies (SLHCs), securities holding companies (SHCs), and U.S. intermediate holding companies (IHCs) (collectively, holding companies (HCs)).[1]

Estimated number of respondents: FR Y–9C (non-advanced approaches (AA) HCs) with less than $5 billion in total assets—124, FR Y–9C (non AA HCs) with $5 billion or more in total assets—218, FR Y–9C (AA HCs)—9, FR Y–9LP—416, FR Y–9SP—3,739, FR Y–9ES—78, FR Y–9CS—236.

Estimated average hours per response:

Reporting

FR Y–9C (non AA HCs) with less than $5 billion in total assets—40.65, FR Y–9C (non AA HCs) with $5 billion or more in total assets—46.62, FR Y–9C (AA HCs)—48.93, FR Y–9LP—5.27, FR Y–9SP—5.40, FR Y–9ES—0.50, FR Y–9CS—0.50.

Recordkeeping

FR Y–9C—1, FR Y–9LP—1, FR Y–9SP—0.50, FR Y–9ES—0.50, FR Y–9CS—0.50.

Estimated annual burden hours:

Reporting

FR Y–9C (non AA HCs) with less than $5 billion in total assets—20,162, FR Y–9C (non AA HCs) with $5 billion or more in total assets—40,653, FR Y–9C (AA HCs)—1,761, FR Y–9LP—8,769, FR Y–9SP—40,381, FR Y–9ES—39, FR Y–9CS—472.

Recordkeeping

FR Y–9C—1,404, FR Y–9LP—1,664, FR Y–9SP—3,739, FR Y–9ES—39, FR Y–9CS—472.

General description of report: The FR Y–9 family of reporting forms continues to be the primary source of financial data on HCs that examiners rely on in the intervals between on-site inspections. The Board requires HCs to provide standardized financial statements to fulfill the Board's statutory obligation to supervise these organizations. Financial data from these reporting forms are used to detect emerging financial problems, to review performance and conduct pre-inspection analysis, to monitor and evaluate capital adequacy, to evaluate HC mergers and acquisitions, and to analyze a HC's overall financial condition to ensure the safety and soundness of its operations. The FR Y–9C, FR Y–9LP, and FR Y–9SP serve as standardized financial statements for the HCs. The FR Y–9ES is a financial statement for HCs that are Employee Stock Ownership Plans. The Board uses the voluntary FR Y–9CS (a free-form supplement) to collect additional information deemed to be critical and needed in an expedited manner. HCs file the FR Y–9C on a quarterly basis, the FR Y–9LP quarterly, the FR Y–9SP semiannually, the FR Y–9ES annually, and the FR Y–9CS on a schedule that is determined when this supplement is used.

Legal authorization and confidentiality: The reporting and recordkeeping requirements associated with the Y–9 series of reports are authorized for BHCs pursuant to section 5 of the Bank Holding Company Act (''BHC Act'');[2] for SLHCs pursuant to section 10(b)(2) and (3) of the Home Owners' Loan Act, 12 U.S.C. 1467a(b)(2) and (3), as amended by sections 369(8) and 604(h)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''); for IHCs pursuant to section 5 of the BHC Act, as well as pursuant to sections 102(a)(1) and 165 of the Dodd-Frank Act;[3] and for securities holding companies pursuant to section 618 of the Dodd-Frank Act.[4] Except for the FR Y–9CS report, which is expected to be collected on a voluntary basis, the obligation to submit the remaining reports in the FR Y–9 series of reports and to comply with the recordkeeping requirements set forth in the respective instructions to each of the other reports, is mandatory.

With respect to the FR Y–9C report, Schedule HI's Memoranda item 7(g) ''FDIC deposit insurance assessments,'' Schedule HC–P's item 7(a) ''Representation and warranty reserves for 1–4 family residential mortgage loans sold to U.S. government agencies and government sponsored agencies,'' and Schedule HC–P's item 7(b) ''Representation and warranty reserves for 1–4 family residential mortgage loans sold to other parties'' are considered confidential commercial and financial information. Such treatment is appropriate under exemption 4 of the Freedom of Information Act (''FOIA''),[5] because these data items reflect commercial and financial information that is both customarily and actually treated as private by the submitter, and which the Board has previously assured submitters will be treated as confidential. It also appears that disclosing these data items may reveal confidential examination and supervisory information, and in such instances, the information also would be withheld pursuant to exemption 8 of the FOIA,[6] which protects information related to the supervision or examination of a regulated financial institution.

In addition, for both the FR Y–9C report and the FR Y–9SP report,

[1] An SLHC must file one or more of the FR Y–9 family of reports unless it is: (1) A grandfathered unitary SLHC with primarily commercial assets and thrifts that make up less than five percent of its consolidated assets; or (2) a SLHC that primarily holds insurance-related assets and does not otherwise submit financial reports with the SEC pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934.

[2] 12 U.S.C. 1844.

[3] 12 U.S.C. 5311(a)(1) and 5365; Section 165(b)(2) of Title I of the Dodd-Frank Act, 12 U.S.C. 5365(b)(2), refers to ''foreign-based bank holding company.'' Section 102(a)(1) of the Dodd-Frank Act, 12 U.S.C. 5311(a)(1), defines ''bank holding company'' for purposes of Title I of the Dodd-Frank Act to include foreign banking organizations that are treated as bank holding companies under section 8(a) of the International Banking Act, 12 U.S.C. 3106(a). The Board has required, pursuant to section 165(b)(1)(B)(iv) of the Dodd-Frank Act, 12 U.S.C. 5365(b)(1)(B)(iv), certain foreign banking organizations subject to section 165 of the Dodd-Frank Act to form U.S. intermediate holding companies. Accordingly, the parent foreign-based organization of a U.S. IHC is treated as a BHC for purposes of the BHC Act and section 165 of the Dodd-Frank Act. Because Section 5(c) of the BHC Act authorizes the Board to require reports from subsidiaries of BHCs, section 5(c) provides additional authority to require U.S. IHCs to report the information contained in the FR Y–9 series of reports.

[4] 12 U.S.C. 1850a(c)(1)(A).

[5] 5 U.S.C. 552(b)(4).

[6] 5 U.S.C. 552(b)(8).

Schedule HC's Memoranda item 2.b., the name and email address of the external auditing firm's engagement partner, is considered confidential commercial information and protected by exemption 4 of the FOIA,[7] if the identity of the engagement partner is treated as private information by HCs. The Board has assured respondents that this information will be treated as confidential since the collection of this data item was proposed in 2004.

Additionally, items on the FR Y–9C, Schedule HC–C for loans modified under Section 4013, data items Memorandum items 16.a, ''Number of Section 4013 loans outstanding''; and Memorandum items 16.b, ''Outstanding balance of Section 4013 loans'' are considered confidential. While the Board generally makes institution-level FR Y–9C report data publicly available, the Board is collecting Section 4013 loan information as part of condition reports for the impacted HCs and the Board considers disclosure of these items at the HC level would not be in the public interest.[8] Such information is permitted to be collected on a confidential basis, consistent with 5 U.S.C. 552(b)(8).[9] In addition, holding companies may be reluctant to offer modifications under Section 4013 if information on these modifications made by each holding company is publicly available, as analysts, investors, and other users of public FR Y–9C report information may penalize an institution for using the relief provided by the CARES Act. The Board may disclose Section 4013 loan data on an aggregated basis, consistent with confidentiality or as otherwise required by law.

Aside from the data items described above, the remaining data items collected on the FR Y–9C report and the FR Y–9SP report are generally not accorded confidential treatment. The data items collected on FR Y–9LP, FR Y–9ES, and FR Y–9CS [10] reports, are also generally not accorded confidential treatment. As provided in the Board's Rules Regarding Availability of Information,[11] however, a respondent may request confidential treatment for any data items the respondent believes should be withheld pursuant to a FOIA exemption. The Board will review any such request to determine if confidential treatment is appropriate, and will inform the respondent if the request for confidential treatment has been granted or denied.

To the extent the instructions to the FR Y–9C, FR Y–9LP, FR Y–9SP, and FR Y–9ES reports each respectively direct the financial institution to retain the workpapers and related materials used in preparation of each report, such material would only be obtained by the Board as part of the examination or supervision of the financial institution. Accordingly, such information is considered confidential pursuant to exemption 8 of the FOIA.[12] In addition, the workpapers and related materials may also be protected by exemption 4 of the FOIA, to the extent such financial information is treated as confidential by the respondent.[13]

(2) *Report title:* Consolidated Report of Condition and Income for Edge and Agreement Corporations.

Agency form number: FR 2886b.

OMB control number: 7100–0086.

Frequency: Quarterly and annually.

Reporters: Edge and agreement corporations.

Estimated annual reporting hours: Banking: Edge and agreement corporations (quarterly): 568; Banking: Edge and agreement corporations (annually): 16; Investment: Edge and agreement corporations (quarterly): 992; Investment: Edge and agreement corporations (annually): 76.

Estimated average hours per response: Banking: Edge and agreement corporations (quarterly): 15.77; Banking: Edge and agreement corporations (annually): 15.87; Investment: Edge and agreement corporations (quarterly): 11.81; Investment: Edge and agreement corporations (annually): 10.82.

Number of respondents: Banking: Edge and agreement corporations (quarterly): 9; Banking: Edge and agreement corporations (annually): 1; Investment: Edge and agreement corporations (quarterly): 21; Investment: Edge and agreement corporations (annually): 7.

General description of report: The FR 2886b reporting form is filed quarterly and annually by banking Edge and agreement corporations and investment (nonbanking) Edge and agreement corporations (collectively, ''Edges or Edge corporations''). The mandatory FR 2886b comprises a balance sheet, an income statement, two schedules reconciling changes in capital and reserve accounts, and 11 supporting schedules. The Board uses the FR 2886b data to help plan and target the scope of examinations of Edges and to evaluate applications from Edge corporations. Data from the FR 2886b are also used to monitor aggregate institutional trends, such as growth in assets and the number of offices, changes in leverage, and the types and locations of customers and to monitor and identify present and potential problems with Edge corporations.

Legal authorization and confidentiality: Sections 25 and 25A of the Federal Reserve Act authorize the Federal Reserve to collect the FR 2886b (12 U.S.C. 602, 625). The obligation to report this information is mandatory. The information collected on the FR 2886b is generally not considered confidential, but certain data may be exempt from disclosure pursuant to exemptions (b)(4) and (b)(7)(C) of FOIA, (5 U.S.C. 552(b)(4) and (b)(7)(C)). The information exempt from disclosure pursuant to (b)(4) consists of information provided on Schedule RC–M (with the exception for item 3) and on Schedule RC–V, both of which pertain to claims on and liabilities to related organizations.

I. Proposed Revisions

A. Revisions Related to Regulation D

In response to recent economic disruptions and volatility in U.S. financial markets caused by the spread of Coronavirus Disease 2019 (COVID–19), the Board adopted the Regulation D interim final rule. The interim final rule amended the ''savings deposit'' definition in Regulation D by deleting the six-transfer-limit provisions in this definition that required depository institutions either to prevent transfers and withdrawals in excess of the limit or to monitor savings deposits ex post for violations of the limit. The interim final rule also made conforming changes to other definitions in Regulation D that refer to ''savings deposit'' as necessary.

The interim final rule permits, but does not require, depository institutions to immediately suspend enforcement of the six-transfer limit and to allow their customers to make an unlimited number of convenient transfers and withdrawals from their savings deposits. The interim final rule did not amend the Regulation D provisions regarding the reporting of deposits by depository institutions.

[7] 5 U.S.C. 552(b)(4).

[8] See 12 U.S.C. 1464(v)(2).

[9] Exemption 8 of the Freedom of Information Act (FOIA) specifically exempts from disclosure information ''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.''

[10] The FR Y–9CS is a supplemental report that may be utilized by the Board to collect additional information that is needed in an expedited manner from HCs. The information collected on this supplemental report is subject to change as needed. Generally, the FR Y–9CS report is treated as public. However, where appropriate, data items on the FR Y–9CS report may be withheld under exemptions 4 or 8 of the FOIA, 5 U.S.C. 552(b)(4) and (8).

[11] 12 CFR part 261.

[12] 5 U.S.C. 552(b)(8).

[13] 5 U.S.C. 552(b)(4).

In connection with the interim final rule, the Board published supplemental instructions to the FR Y–9C, which included temporary revisions to the General Instructions for FR Y–9C Schedule HC–E, as well as the Glossary entries for ''Deposits,'' to remove references to the six-transfer limit. In addition, the supplemental instructions included temporary revisions to the General Instructions for FR Y–9C Schedule HC–E to state that if a depository institution chooses to suspend enforcement of the six-transfer limit on a ''savings deposit,'' the depository institution may continue to report that account as a ''savings deposit'' or may instead choose to report that account as a ''transaction account'' based on an assessment of certain characteristics of the account. Similar temporary revisions were applied to the General Instructions of FR 2886b Schedule RC–E to remove references of the six-transfer limit and to state that if a depository institution chooses to suspend enforcement of the six-transfer limit on a ''savings deposit,'' the depository institution may continue to report that account as a ''savings deposit'' or may instead choose to report that account as a ''transaction account'' based on an assessment of certain characteristics of the account. The temporarily revised instructions are published on the FR 2886b report form and instructions website.

However, the Board recognizes that the adopted temporary revisions to the instructions for the FR Y–9C and FR 2886b created a reporting option that could result in the collection of ambiguous data by allowing a depository institution to report a savings deposit as either a ''savings deposit'' or a ''transaction account'' if the institution suspends enforcement of the six-transfer limit. To resolve this potential issue, the Board proposes to revise the General Instructions for FR Y–9C Schedule HC–E and FR 2886b Schedule RC–E, effective beginning with reports as of December 31, 2020, to state that where the reporting institution has suspended the enforcement of the six-transfer limit rule on an account that otherwise meets the definition of a savings deposit, the institution must report such deposits as a ''savings deposit'' (and as a ''nontransaction account'') or a ''transaction account'' based on an assessment of the following characteristics:

(i) If the reporting institution does not retain the reservation of right to require at least seven days' written notice before an intended withdrawal, the account must be reported as a demand deposit (and as a ''transaction account'').

(ii) If the reporting institution retains the reservation of right to require at least seven days' written notice before an intended withdrawal and the depositor is eligible to hold a Negotiable Order of Withdrawal (NOW) account, the account must be reported as an Automatic Transfer Service (ATS) account, NOW account, or a telephone and preauthorized transfer account (and as a ''transaction account'').

(iii) If the reporting institution retains the reservation of right to require at least seven days' written notice before an intended withdrawal and the depositor is ineligible to hold a NOW account, the account must be reported as a savings deposit (and as a ''nontransaction account'').

The proposed revisions to the FR Y–9C and FR 2886b would be consistent with corresponding proposed revisions, related to the Regulation D amendments, to the Consolidated Reports of Condition and Income (Call Reports) (FFIEC 031, FFIEC 041and FFIEC 051; OMB No. 7100–0036) and the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (FFIEC 002; OMB Control Number: 7100–0032).

The proposed FR Y–9C and FR 2886b revisions related to Regulation D would be effective as of the December 31, 2020, report date. The Board may consider further modifying the treatment of ''savings deposits'' and ''transaction accounts'' in the instructions for the FR Y–9C and FR 2886b after a review of the reported data. Any such changes would be proposed by the Board through a separate **Federal Register** notice pursuant to the Paperwork Reduction Act.

B. Proposed Revisions Related to U.S. GAAP

The Board proposes to make a number of revisions to the FR Y–9C, FR Y–9LP and FR Y–9SP related to U.S. GAAP effective for reports with a March 31, 2021, as-of date, except for last-of-layer hedging, which would be implemented following the Financial Accounting Standards Board (FASB)'s adoption of a final standard.

1. Provisions for Credit Losses on Off-Balance-Sheet Credit Exposures

On June 16, 2016, the FASB issued Accounting Standards Update (ASU) No. 2016–13, Topic 326, Financial Instruments—Credit Losses (ASU 2016–13). Within Topic 326, paragraph 326–20–30–11 states: ''An entity shall report in net income (as a credit loss expense) the amount necessary to adjust the liability for credit losses for management's current estimate of expected credit losses on off-balance-sheet credit exposures.'' Off-balance-sheet credit exposures include unfunded loan commitments, financial standby letters of credit, and financial guarantees not accounted for as insurance, and other similar instruments except for those within the scope of Accounting Standards Codification (ASC) Topic 815 on derivatives and hedging.

Throughout Topic 326, the FASB refers to provisions for credit losses as ''credit loss expense.'' For example, paragraph 326–20–30–1 states: ''An entity shall report in net income (as a credit loss expense) the amount necessary to adjust the allowance for credit losses (ACL) for management's current estimate of expected credit losses on financial assets(s).'' Thus, Topic 326 does not prohibit recording the adjustment to the liability for expected credit losses on off-balance-sheet credit exposures within the provisions for credit losses reported in the income statement.

The FR Y–9C income statement instructions currently direct HCs that have adopted Topic 326 to report provisions for expected credit losses on off-balance-sheet credit exposures in Schedule HI, item 7.d, ''Other noninterest expense,'' and prohibit its inclusion in Schedule HI, item 4, ''Provision for loan and lease losses.'' [14] Therefore, to align regulatory reporting to the guidance within Topic 326, the Board proposes to change the FR Y–9C instructions to direct HCs that have adopted Topic 326 to report provisions for expected credit losses on off-balance-sheet credit exposures as part of the total amount of HCs' provisions for credit losses in Schedule HI, item 4.[15] These instructional changes would apply only to HCs that have adopted Topic 326.

The inclusion of provisions for expected credit losses on off-balance-sheet credit exposures in the provisions for credit losses presented in item 4 of the FR Y–9C income statement will cause a loss of transparency within the overall reported amount of provisions for credit losses between provisions attributable to on- and off-balance-sheet credit exposures. To enhance transparency and differentiate these provisions, the Board proposes adding a new Memorandum item 7, ''Provisions for credit losses on off-balance-sheet

[14] A footnote to Schedule HI, item 4, on the FR Y–9C forms currently states, ''Institutions that have adopted ASU 2016–13 should report in item 4 the provisions for credit losses on all financial assets that fall within the scope of the standard.''

[15] The existing footnote to Schedule HI, item 4, also would be revised in the same manner.

credit exposures,'' to Schedule HI–B, Part II, Changes in Allowances for Credit Losses, which would identify the portion of the overall amount of the provisions for credit losses reported in Schedule HI, item 4, attributable to the provisions for expected credit losses on off-balance-sheet credit exposures. Adding the new memorandum item to Schedule HI–B, Part II, would enable the Board to monitor the underlying components of the total amount of a HC's provisions for credit losses (*i.e.,* the separate provisions for expected credit losses attributable to loans and leases held for investment, held-to-maturity debt securities, available-for-sale (AFS) debt securities, other financial assets measured at amortized cost, and off-balance-sheet credit exposures) and how these components change over time in relation to the amounts of the various categories of financial assets and off-balance-sheet credit exposures within the scope of ASC Topic 326.

In addition, footnote 5 on Schedule HI–B, Part II, item 5, ''Provisions for credit losses,'' would be updated to reflect that ''For institutions that have adopted ASU 2016–13, the sum of item 5, Column A through Column C, plus Schedule HI–B, Part II, Memorandum items 5 and 7 below, must equal Schedule HI, item 4.''

Lastly, footnote 2 on Schedule SI of the FR Y–9SP report form for item 7, ''Other expenses'' and footnote 1 on Schedule PI of the FR Y–9LP, report form for item 2.c., ''Provision for loan and lease losses'' would be updated to direct HCs that have adopted ASU 2016–13 to report provisions for expected credit losses on off-balance-sheet credit exposures as part of their total amount of provisions for credit losses.

2. Expected Recoveries of Amounts Previously Charged Off Included Within the Allowances for Credit Losses

As noted above, the FASB issued ASU 2016–13 on June 16, 2016, and it has been amended by subsequent FASB ASUs. Within Topic 326, paragraph 326–20–30–1 states, ''The ACL is a valuation account that is deducted from, or added to, the amortized cost basis of the financial asset(s) to present the net amount expected to be collected on the financial asset. Expected recoveries of amounts previously written off and expected to be written off shall be included in the valuation account and shall not exceed the aggregate of amounts previously written off and expected to be written off by an entity.'' The terms ''written off'' as used in Topic 326 and ''charged off'' as used in FR Y–9C instructions are used interchangeably in this discussion.

Under GAAP, before an institution's adoption of Topic 326, expected recoveries of amounts previously written off would not be included in the measurement of the allowance for loan and lease losses; recoveries would be recorded only when received. Under Topic 326, including expected recoveries of amounts previously written off within ACL reduces the overall amount of these allowances. Amounts related to an individual asset are written off or charged off when deemed uncollectible. However, under ASC Topic 326, institutions can, in some circumstances, reduce the amount of the ACL that would otherwise be calculated for a pool of assets with similar risk characteristics that includes charged-off assets on the same day the charge-offs were taken by the estimated amount of expected recoveries of amounts written off on these assets. Reducing the ACL by amounts of expected recoveries prior to collection effectively ''reverses'' a charge-off. Therefore, to provide transparency for expected recoveries of amounts with inherently higher risk that, before an HC's adoption of ASC Topic 326, were not allowed to be recorded until they were received, the Board proposes to add new Memorandum item 8 to Schedule HI–B, Part II, Changes in Allowances for Credit Losses, to capture the ''Estimated amount of expected recoveries of amounts previously written off included within the ACL on loans and leases held for investment (included in item 7, column A, 'Balance end of current period,' above).'' This new item would be applicable to HCs only after they have adopted Topic 326.

Not including the proposed memorandum item for expected recoveries of amounts previously written off within the ACL on loans and leases would cause a loss of transparency within the reported amount of this allowance between the portions of the allowance attributable to (1) expected credit losses on the amortized cost basis of loans and leases held for investment net of expected recoveries of amounts expected to be charged off in the future and (2) expected recoveries of loan and lease amounts previously charged off. Proposed new Memorandum item 8 would enhance transparency and differentiate these amounts within the period-end balance of the ACL on loans and leases by separately identifying the estimated amount within this allowance attributable to expected recoveries of amounts previously written off. This proposed new memorandum item would enable Board data users, including its examiners, and the public to better understand key components underlying HCs' ACL on loans and leases (*i.e.,* amounts for expected credit losses on the amortized cost basis of loans and leases held for investment and amounts for expected recoveries of amounts previously written off on such loans and leases) and how these components change over time. This information would assist Board data users in monitoring amounts with inherently higher credit risk and changes therein that contribute to reductions in the overall amount of the ACL on loans and leases. This proposed new memorandum item would apply to loans and leases held for investment because this is the FR Y–9C category of financial assets that is expected to have the greatest amount of estimated expected recoveries of amounts previously written off.

3. Nonaccrual Treatment of Purchased Credit-Deteriorated Assets

ASU 2016–13 introduced the concept of purchased credit-deteriorated (PCD) assets. PCD assets are acquired financial assets that, at acquisition, have experienced more-than-insignificant deterioration in credit quality since origination. When recording the acquisition of PCD assets, the amount of expected credit losses as of the acquisition date is recorded as an allowance and added to the purchase price of the assets rather than recording these acquisition date expected credit losses through provisions for credit losses. The sum of the purchase price and the initial ACL establishes the amortized cost basis of the PCD assets at acquisition. Any difference between the unpaid principal balance of the PCD assets and the amortized cost basis of the assets as of the acquisition date is a noncredit discount or premium. The initial ACL and any noncredit discount or premium determined on a collective basis at the acquisition date are allocated to the individual PCD assets.

After acquisition, any noncredit discount or premium is accreted or amortized into interest income, as appropriate, over the remaining lives of the PCD assets on a level-yield basis. However, if a PCD asset is placed in nonaccrual status, institutions must cease accreting the noncredit discount or amortizing the noncredit premium into interest income consistent with the guidance in ASC paragraph 310–20–35–17.

The current instructions for FR Y–9C Schedule HC–N, Past Due and Nonaccrual Loans, Leases, and Other Assets, provide an exception to the

general rule for placing financial assets in nonaccrual status set forth in the FR Y–9C Glossary entry for ''Nonaccrual status'' for purchased credit-impaired (PCI) assets. Topic 326 replaces the concept of PCI assets in previous GAAP with the concept of PCD assets.[16] Although there is some similarity between the concepts of PCI and PCD assets, these two concepts are not identical. Nevertheless, ASU 2016–13 provides that, upon adoption of Topic 326, all PCI assets will be deemed to be, and accounted for prospectively as, PCD assets. However, the Schedule HC–N instructions indicate that the nonaccrual exception for PCI assets was not extended to PCD assets by stating that ''For purchased credit-deteriorated loans, debt securities, and other financial assets that fall within the scope of ASU 2016–13, nonaccrual status should be determined and subsequent nonaccrual treatment, if appropriate, should be applied in the same manner as for other financial assets held by an institution.''

As described in the FR Y–9C Supplemental Instructions for March 2020, if an HC has adopted ASU 2016–13 and has a PCD asset, including a PCD asset that was previously a PCI asset or part of a pool of PCI assets, that would otherwise be required to be placed in nonaccrual status (see the Glossary entry for ''Nonaccrual status''), the HC may elect to continue accruing interest income and not report the PCD asset as being in nonaccrual status if the following criteria are met:

(1) The HC reasonably estimates the timing and amounts of cash flows expected to be collected, and

(2) the HC did not acquire the asset primarily for the rewards of ownership of the underlying collateral, such as use of collateral in operations of the institution or improving the collateral for resale.

Additionally, these FR Y–9C Supplemental Instructions state that when a PCD asset that meets the criteria above is not placed in nonaccrual status, the asset should be subject to other alternative methods of evaluation to ensure that the HC's net income is not materially overstated. Further, an HC is not permitted to accrete the credit-related discount embedded in the purchase price of a PCD asset that is attributable to the acquirer's assessment of expected credit losses as of the date of acquisition (*i.e.,* the contractual cash flows the acquirer did not expect to collect at acquisition). Interest income should no longer be recognized on a PCD asset to the extent that the net investment in the asset would increase to an amount greater than the payoff amount. If an HC is required or has elected to carry a PCD asset in nonaccrual status, the asset must be reported as a nonaccrual asset at its amortized cost basis in FR Y–9C Schedule HC–N, column C.[17] For PCD assets for which the HC has made a policy election to maintain a previously existing pool of PCI assets as a unit of account for accounting purposes upon adoption of ASU 2016–13, the determination of nonaccrual or accrual status should be made at the pool level, not at the individual asset level.

For a PCD asset that is not reported in nonaccrual status, the delinquency status of the PCD asset should be determined in accordance with its contractual repayment terms for purposes of reporting the amortized cost basis of the asset as past due in Schedule HC–N, column A or B, as appropriate. If the PCD asset that is not reported in nonaccrual status consists of a pool of loans that were previously PCI assets that is being maintained as a unit of account after the adoption of ASU 2016–13, delinquency status should be determined individually for each loan in the pool in accordance with the individual loan's contractual repayment terms.

The Board is proposing to update the FR Y–9C instructions to revise the nonaccrual treatment for PCD assets to provide HCs the option to not report PCD assets in nonaccrual status if they meet the criteria described above. The instructions also would incorporate the other reporting guidance for PCD assets in the FR Y–9C Supplemental Instructions for March 2020 described above.

4. Last-of-Layer Hedging

In ASU No. 2017–12, Derivatives and Hedging (Topic 815)—Targeted Improvements to Accounting for Hedging Activities, the FASB added the last-of-layer method to its hedge accounting standards to lessen the difficulties institutions encountered under existing accounting rules when seeking to enter into a fair value hedge of the interest rate risk of a closed portfolio of prepayable financial assets or one or more beneficial interests secured by a portfolio of prepayable financial instruments. Typically, prepayable financial assets would be loans and available-for-sale debt securities.[18] Under ASU 2017–12, there are no limitations on the types of qualifying assets that could be grouped together in a last-of-layer hedge other than meeting the following two criteria: (1) They must be prepayable financial assets that have a contractual maturity date beyond the period being hedged and (2) they must be eligible for fair value hedge accounting of interest rate risk (for example, fixed-rate instruments). For example, fixed-rate residential mortgages, auto loans, and collateralized mortgage obligations could all be grouped and hedged together in a single last-of-layer closed portfolio. For a last-of-layer hedge, ASC paragraph 815–10–50–5B states that an institution may need to allocate the related fair value hedge basis adjustment (FVHBA) ''to meet the objectives of disclosure requirements in other Topics.'' This ASC paragraph then explains that the institution ''may allocate the basis adjustment on an individual asset basis or on a portfolio basis using a systematic and rational method.'' Due to the aggregation of assets in a last-of-layer closed portfolio, institutions may find it challenging to allocate the related FVHBA to the individual loan or AFS debt security level when necessary for financial reporting purposes.

In March 2018, the FASB added a project to its agenda to expand last-of-layer hedging to multiple layers, thereby providing more flexibility to entities when applying hedge accounting to a closed portfolio of prepayable assets. In connection with this project, the FASB anticipated that there would be diversity in practice if entities were required to allocate portfolio-level, last-of-layer FVHBAs to more granular levels, which in turn could potentially hamper data quality and comparability. In addition, the allocation would increase operational burden on institutions with little, if any, added value to risk management or to users of the financial statements. Therefore, for financial reporting purposes, the FASB Board has tentatively decided that it would require these FVHBAs to be presented as a reconciling item, *i.e.,* in the aggregate for loans and AFS debt securities, in disclosures required by other areas of GAAP.[19]

[16] According to ASC paragraph 310–30–15–2, PCI assets, in general, are loans and debt securities with evidence of deterioration of credit quality since origination acquired by completion of a transfer for which it is probable, at acquisition, that the investor will be unable to collect all contractually required payments receivable.

[17] Similarly, in the FFIEC 002, any PCD loans in nonaccrual status would be reported in Schedule N, column C.

[18] Prepayable held-to-maturity debt securities do not qualify for last-of-layer hedging.

[19] The tentative decision was made at the FASB Board meeting on October 16, 2019. The FASB Board meeting minutes are available at *https://www.fasb.org/jsp/FASB/Document_C/DocumentPage&cid=1176173617941.* Currently, no

For regulatory reporting purposes, the Board is proposing similar treatment for last-of-layer FVHBAs on FR Y–9C Schedule HC–C, Loans and Lease Financing Receivables, and Schedule HC–B, Securities. As such, following the FASB's adoption of a final last-of-layer hedge accounting standard, the instructions for Schedule HC–C, item 11, ''LESS: Any unearned income on loans reflected in items 1–9 above,'' would be revised to explicitly state that last-of-layer FVHBAs associated with the loans reported in Schedule HC–C, should be included in this item.

In addition, the Board is proposing on Schedule HC–B, Securities, to rename existing item 7, ''Investments in mutual funds and other equity securities with readily determinable fair values,'' as ''Unallocated last-of-layer fair value hedge basis adjustments.'' HCs would report amounts for last-of-layer FVHBAs on AFS debt securities only in item 7, column C, ''Available-for-sale: Amortized Cost.'' Only a small number of HCs that have not have yet adopted ASU 2016–01, which includes provisions governing the accounting for investments in equity securities, continue to report amounts in item 7. Because all institutions are required to adopt ASU 2016–01 for FR Y–9C purposes by the December 31, 2020, report date, the Board had previously determined that existing item 7 in Schedule HC–B would no longer be applicable to institutions for reporting purposes and could be removed as of that report date.[20] For these reasons, the Board is proposing to redesignate existing item 7, column C, on Schedule HC–B, as a new item for reporting unallocated FVHBAs applicable to AFS debt securities following the FASB's adoption of a final last-of-layer hedge accounting standard.

Board of Governors of the Federal Reserve System, October 2, 2020.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2020–22275 Filed 10–7–20; 8:45 am]

BILLING CODE 6210–01–P

exposure draft or ASU associated with this project has been issued.

[20] See 83 FR 945–946 (January 8, 2018).

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank 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 November 9, 2020.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Northwood Financial Services Corporation, Northwood, Iowa*; to acquire Titonka Savings Bank, Titonka, Iowa.

Board of Governors of the Federal Reserve System, October 5, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–22324 Filed 10–7–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–1553]

Premenopausal Women With Breast Cancer: Developing Drugs for Treatment; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Premenopausal Women with Breast Cancer: Developing Drugs for Treatment.'' This draft guidance provides recommendations regarding the inclusion of premenopausal women in breast cancer clinical trials. The guidance is intended to assist stakeholders, including sponsors and institutional review boards, responsible for the development and oversight of clinical trials for breast cancer drugs.

DATES: Submit either electronic or written comments on the draft guidance by December 7, 2020 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–D–1553 for ''Premenopausal Women with Breast Cancer: Developing Drugs for Treatment.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to Division of Drug Information, Center for Drug Evaluation and Research (CDER), Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002 or the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Jennifer Gao, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 2135, Silver Spring, MD 20993–0002, 240–402–4683; Julia Beaver, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 2100, Silver Spring, MD 20993–0002, 240–402–0489; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Premenopausal Women with Breast Cancer: Developing Drugs for Treatment.'' This draft guidance provides recommendations regarding the inclusion of premenopausal women, as defined by serum hormonal levels (including but not limited to follicle-stimulating hormone and estradiol), in breast cancer clinical trials. The issues of fertility and fertility preservation when treating premenopausal women with breast cancer are outside the scope of this draft guidance.

Historically, premenopausal women have been excluded from some trials that have investigated the efficacy of certain drugs that rely upon manipulation of the hormonal axis for the treatment of hormone receptor (HR) positive breast cancer. In some cases, separate studies have been conducted to confirm the benefit in this patient population, which has resulted in delays in the availability of these therapies for premenopausal women with HR-positive breast cancer. Certain groups of drugs such as chemotherapy, immunotherapy, and targeted therapy (which act independent of the hormonal axis) have similar efficacy in pre- and post-menopausal women with breast cancer. Based on a review of the literature, FDA believes hormonal drugs administered to premenopausal women with HR-positive breast cancer, with adequate estrogen suppression, are likely to have generally the same efficacy and safety profile as in postmenopausal women. The inclusion of premenopausal women in breast cancer oncology product development programs will result in more complete clinical information to inform clinical decision making and bring safe and effective therapies in a timely manner to this patient population.

The draft guidance encourages sponsors to discuss their breast cancer drug development plan with CDER and CBER, as applicable, early in development. The draft guidance recommends that menopausal status not be the basis for exclusion from any breast cancer clinical trial. The draft guidance includes recommendations regarding eligibility criteria and study planning and design intended to facilitate the inclusion of premenopausal women in breast cancer clinical trials.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Premenopausal Women with Breast Cancer: Developing Drugs for Treatment.'' 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. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved FDA 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 21 CFR part 312 have been approved under OMB control number 0910–0014, the collections of information in 21 CFR part 314 have been approved under OMB control number 0910–0001, and the collections of information in 21 CFR part 601 have been approved under 0910–0338.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-*

biologics/biologics-guidances, or *https://www.regulations.gov.*

Dated: October 2, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–22228 Filed 10–7–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Senior Executive Service Performance Review Board

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HRSA, an operating division of HHS, is publishing a list of persons who may be named to serve on the Performance Review Board that oversees the evaluation of performance appraisals for Senior Executive Service members within HRSA for the Fiscal Year 2021 and 2022 review period.

FOR FURTHER INFORMATION CONTACT: Georgia Lyons, HRSA, Executive Resources, Office of Human Resources, 5600 Fishers Lane, Rm 12N06C, Rockville, Maryland 20857, or (301) 443–4618.

SUPPLEMENTARY INFORMATION: Title 5, U.S.C. Section 4314(c)(4) of the Civil Service Reform Act of 1978, Public Law 95–454, requires that the appointment of Performance Review Board Members be published in the **Federal Register**. The following persons may be named to serve on the HRSA Performance Review Board:

Onyekachukwu Anaedozie
Leslie Atkinson
Cynthia Baugh
Tonya Bowers
Adriane Burton
Tina Cheatham
Laura Cheever
Natasha Coulouris
Cheryl Dammons
Elizabeth DeVoss
Diana Espinosa
Catherine Ganey
Alexandra Garcia
Heather Hauck
Laura Kavanagh
Martin Kramer
Torey Mack
James Macrae
Susan Monarez
Thomas Morris
Luis Padilla
Wendy Ponton
Michael Warren

Thomas J. Engels,

Administrator.

[FR Doc. 2020–22276 Filed 10–7–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting on the Advisory Commission on Childhood Vaccines; Correction

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice; correction.

SUMMARY: The original **Federal Register** Notice announcing the December 2020 Advisory Commission on Childhood Vaccines (ACCV) meeting indicated that this meeting would be held on December 3, 2020, and December 4, 2020. This meeting is not being conducted over two days, and instead will only take place on December 3, 2020.

FOR FURTHER INFORMATION CONTACT: Annie Herzog, Program Analyst, Division of Injury Compensation Programs (DICP), HRSA, in one of three ways: (1) Send a request to the following address: Annie Herzog, Program Analyst, DICP, HRSA, 5600 Fishers Lane, 08N186B, Rockville, Maryland 20857; (2) call (301) 443–6593; or (3) send an email to *ACCV@hrsa.gov.*

SUPPLEMENTARY INFORMATION: The ACCV will hold a public meeting on December 3, 2020, at 10:00 a.m. Eastern Time. The meeting will be held via Adobe Connect and telephone conference. The public can join the meeting by:

1. (Audio Portion) Calling the conference phone number 888–790–1734 and providing the following information:

Leader Name: Ms. Tamara Overby.

Passcode: 4177683.

2. (Visual Portion) Connecting to the ACCV Adobe Connect Meeting using the following URL: *https://hrsa.connectsolutions.com/accv/.* Participants should call and connect 15 minutes prior to the meeting in order for logistics to be set up. If you have never attended an Adobe Connect meeting, please test your connection using the following URL: *https://hrsa.connectsolutions.com/common/help/en/support/meeting_test.htm* and get a quick overview by following URL: *http://www.adobe.com/go/connectpro_overview.*

Meeting times could change. For the latest information regarding the meeting, including start time and the agenda, please access the ACCV website: *http://www.hrsa.gov/advisorycommittees/childhoodvaccines/index.html.*

This meeting will only take place on December 3, 2020, and is not being conducted over 2 days (December 3–4, 2020), as stated previously in ***Federal Register*** *notice 2019–28294 (85 FR 112, published on January 2, 2020, page 112–113).*

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2020–22209 Filed 10–7–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Cancer Therapy Evaluation Program (CTEP) Branch and Support Contracts Forms and Surveys (National Cancer Institute)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the National Cancer Institute (NCI) will publish periodic summaries of propose projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Michael Montello, Pharm. D., Cancer Therapy Evaluation Program (CTEP), 9609 Medical Center Drive, MSC 9742, Rockville, MD 20850 or call non-toll-free number 240–276–6080 or email your request, including your address to: *montellom@mail.nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: Written

comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, 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 those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: CTEP Support Contract Forms and Surveys (NCI), 0925–0753 Expiration Date 07/31/2021, REVISION, National Cancer Institute (NCI), National Institutes of Health (NIH).

Need and Use of Information Collection: The National Cancer Institute (NCI) Cancer Therapy Evaluation Program (CTEP) and the Division of Cancer Prevention (DCP) fund an extensive national program of cancer research, sponsoring clinical trials in cancer prevention, symptom management and treatment for qualified clinical investigators. As part of this effort, CTEP implements programs to register clinical site investigators and clinical site staff, and to oversee the conduct of research at the clinical sites. CTEP and DCP also oversee two support programs, the NCI Central Institutional Review Board (CIRB) and the Cancer Trial Support Unit (CTSU). The combined systems and processes for initiating and managing clinical trials is termed the Clinical Oncology Research Enterprise (CORE) and represents an integrated set of information systems and processes which support investigator registration, trial oversight, patient enrollment, and clinical data collection. The information collected is required to ensure compliance with applicable federal regulations governing the conduct of human subjects research (45 CFR 46 and 21 CRF 50), and when CTEP acts as the Investigational New Drug (IND) holder, FDA regulations pertaining to the sponsor of clinical trials and the selection of qualified investigators under 21 CRF 312.53). Survey collections assess satisfaction and provide feedback to guide improvements with processes and technology.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 151,716.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hours
CTSU IRB/Regulatory Approval Transmittal Form (Attach. A01).	Health Care Practitioner	2,444	12	2/60	978
CTSU IRB Certification Form (Attach. A02)	Health Care Practitioner	2,444	12	10/60	4,888
Withdrawal from Protocol Participation Form (Attach. A03).	Health Care Practitioner	279	1	10/60	47
Site Addition Form (Attach. A04)	Health Care Practitioner	80	12	10/60	160
CTSU Request for Clinical Brochure (Attach. A06).	Health Care Practitioner	360	1	10/60	60
CTSU Supply Request Form (Attach. A07)	Health Care Practitioner	90	12	10/60	180
RTOG 0834 CTSU Data Transmittal Form (Attach. A10).	Health Care Practitioner	12	76	10/60	152
CTSU Patient Enrollment Transmittal Form (Attach. A15).	Health Care Practitioner	12	12	10/60	24
CTSU Transfer Form (Attach. A16)	Health Care Practitioner	360	2	10/60	120
CTSU System Access Request Form (Attach. A17).	Health Care Practitioner	180	1	10/60	30
CTSU OPEN Rave Request Form (Attach. A18)	Health Care Practitioner	30	21	10/60	105
CTSU LPO Form Creation (Attach. A19)	Health Care Practitioner	5	2	120/60	20
CTSU Site Form Creation and PDF (Attach. A20)	Health Care Practitioner	400	10	30/60	2,000
CTSU PDF Signature Form (Attach. A21)	Health Care Practitioner	400	10	10/60	667
NCI CIRB AA & DOR between the NCI CIRB and Signatory Institution (Attach. B01).	Participants	50	1	15/60	13
NCI CIRB Signatory Enrollment Form (Attach. B02).	Participants	50	1	15/60	13
CIRB Board Member Application (Attach. B03)	Board Member	100	1	30/60	50
CIRB Member COI Screening Worksheet (Attach. B08).	Board Members	100	1	15/60	25
CIRB COI Screening for CIRB meetings (Attach. B09).	Board Members	72	1	15/60	18
CIRB IR Application (Attach. B10)	Health Care Practitioner	80	1	1	80
CIRB IR Application for Exempt Studies (Attach. B11).	Health Care Practitioner	4	1	30/60	2
CIRB Amendment Review Application (Attach. B12).	Health Care Practitioner	400	1	15/60	100
CIRB Ancillary Studies Application (Attach. B13)	Health Care Practitioner	1	1	1	1
CIRB Continuing Review Application (Attach. B14).	Health Care Practitioner	400	1	15/60	100
Adult IR of Cooperative Group Protocol (Attach. B15).	Board Members	65	1	180/60	195
Pediatric IR of Cooperative Group Protocol (Attach. B16).	Board Members	15	1	180/60	45

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Form name	Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hours
NCI Adult/Pediatric Continuing Review of Cooperative Group Protocol (Attach. B17).	Board Members	275	1	1	275
Adult Amendment of Cooperative Group Protocol (Attach. B19).	Board Members	40	1	120/60	80
Pediatric Amendment of Cooperative Group Protocol (Attach. B20).	Board Members	25	1	120/60	50
Pharmacist's Review of a Cooperative Group Study (Attach. B21).	Board Members	50	1	120/60	100
Adult Expedited Amendment Review (Attach. B23).	Board Members	348	1	30/60	174
Pediatric Expedited Amendment Review (Attach. B24).	Board Members	140	1	30/60	70
Adult Expedited Continuing Review (Attach. B25)	Board Members	140	1	30/60	70
Pediatric Expedited Continuing Review (Attach. B26).	Board Members	36	1	30/60	18
Adult Cooperative Group Response to CIRB Review (Attach. B27).	Health Care Practitioner	30	1	1	30
Pediatric Cooperative Group Response to CIRB Review (Attach. B28).	Health Care Practitioner	5	1	1	5
Adult Expedited Study Chair Response to Required Modifications (Attach. B29).	Board Members	40	1	30/60	20
Reviewer Worksheet- Determination of UP or SCN (Attach. B31).	Board Members	400	1	10/60	67
Reviewer Worksheet -CIRB Statistical Reviewer Form (Attach. B32).	Board Members	100	1	15/60	25
CIRB Application for Translated Documents (Attach. B33).	Health Care Practitioner	100	1	30/60	50
Reviewer Worksheet of Translated Documents (Attach. B34).	Board Members	100	1	15/60	25
Reviewer Worksheet of Recruitment Material (Attach. B35).	Board Members	20	1	15/60	5
Reviewer Worksheet Expedited Study Closure Review (Attach. B36).	Board Members	20	1	15/60	5
Reviewer Worksheet of Expedited IR (Attach. B38).	Board Members	5	1	30/60	3
Annual Signatory Institution Worksheet About Local Context (Attach. B40).	Health Care Practitioner	400	1	40/60	267
Annual Principal Investigator Worksheet About Local Context (Attach. B41).	Health Care Practitioner	1,800	1	20/60	600
Study-Specific Worksheet About Local Context (Attach. B42).	Health Care Practitioner	4,800	1	15/60	1,200
Study Closure or Transfer of Study Review Resp. (Attach. B43).	Health Care Practitioner	1,680	1	15/60	344
Unanticipated Problem or Serious or Continuing Noncompliance Reporting Form (Attach. (B44).	Health Care Practitioner	360	1	20/60	120
Change of Signatory Institution PI Form (Attach. B45).	Health Care Practitioner	120	1	20/60	40
Request Waiver of Assent Form (Attach. B46)	Health Care Practitioner	35	1	20/60	12
CIRB Waiver of Consent Request Supplemental Form (Attachment B47).	Health Care Practitioner	20	1	15/60	5
Review Worksheet CIRB Review for Inclusion of Incarcerated Participants (Attachment B48).	Board Members	20	1	1	20
Notification of Incarcerated Participant Form (B49).	Health Care Practitioner	20	1	20/60	7
CTSU OPEN Survey (Attach. C03)	Health Care Practitioner	10	1	15/60	3
CIRB Customer Satisfaction Survey (Attach. C04).	Participants	600	1	15/60	150
Follow-up Survey (Communication Audit) (Attach. C05).	Participants/Board Members.	300	1	15/60	75
CIRB Board Member Annual Assessment Survey (Attach. C07).	Board Members	60	1	15/60	15
PIO Customer Satisfaction Survey (Attach. C08)	Health Care Practitioner	60	1	5/60	5
Audit Scheduling Form (Attach. D01)	Group/CTMS Users	152	5	21/60	266
Preliminary Audit Findings Form (Attach. D02)	Auditor	152	5	10/60	127
Audit Maintenance Form (Attach. D03)	Group/CTMS Users	152	5	9/60	114
Final Audit Finding Report Form (Attach. D04)	Group/CTMS Users	75	11	1,098/60	15,098
Follow-up Form (Attach. D05)	Group/CTMS Users	75	7	27/60	236
Roster Maintenance Form (Attach. D06)	CTMS Users	5	1	18/60	2

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Form name	Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hours
Final Report and CAPA Request Form (Attach. D07).	CTMS Users	12	9	1,800/60	3,240
NCI/DCTD/CTEP FDA Form 1572 for Annual Submission (Attach. E01).	Physician	26,500	1	15/60	6,625
NCI/DCTD/CTE Biosketch (Attach. E02)	Physician; Health Care Practitioner.	48,000	1	120/60	96,000
NCI/DCTD/CTEP Financial Disclosure Form (Attach. E03).	Physician; Health Care Practitioner.	48,000	1	15/60	12,000
NCI/DCTD/CTEP Agent Shipment Form (ASF) (Attach. E04).	Physician	24,000	1	10/60	4,000
Totals		167,715	276		151,716

Dated: October 1, 2020.

Diane Kreinbrink,

Project Clearance Liaison, National Cancer Institute, National Institutes of Health.

[FR Doc. 2020–22265 Filed 10–7–20; 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: Digestive, Kidney and Urological Systems Integrated Review Group; Systemic Injury by Environmental Exposure.

Date: November 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: Yunshang Piao, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 6184, Bethesda, MD 20892, (301) 402–8402, *piaoy3@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Musculoskeletal, Rehabilitation and Skin Sciences.

Date: November 5–6, 2020.

Time: 9:00 a.m. to 11:00 a.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: Chi-Wing Chow, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4110, Bethesda, MD 20892, (301) 402–3912, *chowc2@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Oncology.

Date: November 5–6, 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: Reigh-Yi Lin, Ph.D.; Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Rm. 4152, MSC 7846, Bethesda, MD 20892, (301) 827–6009, *lin.reigh-yi@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Renal and Urological Sciences.

Date: November 5, 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: Santanu Banerjee, Ph.D.; Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 2106, Bethesda, MD 20892, (301) 496–0000, *banerjees5@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Topics in Bacterial Pathogenesis.

Date: November 5, 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: Richard G Kostriken, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7808, Bethesda, MD 20892, 240–519–7808, *kostrikr@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Molecular Genetics, Genetic Variation, Genetic/Macromolecular Evolution and Prokaryotic Cell Biology.

Date: November 5, 2020.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Methode Bacanamwo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2200, Bethesda, MD 20892, 301–827–7088, *methode.bacanamwo@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel RFA Panel: The Neuropathological Basis for Chemo Brain.

Date: November 5, 2020.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: 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*.

(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: October 2, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–22273 Filed 10–7–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Emergency Awards: Rapid Investigation of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV–2) and Coronavirus Disease 2019 (COVID–19).

Date: October 27–28, 2020.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41B, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Brenda Lange-Gustafson, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41B, Bethesda, MD 20892–9834, (240) 669–5047, *bgustafson@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: October 2, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–22269 Filed 10–7–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; A Generic Submission for Formative Research, Pre-Testing, Stakeholder (National Cancer Institute)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the National Cancer Institute (NCI) will publish periodic summaries of propose projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Amy Williams, Director of the Office of Advocacy Relations (OAR), NCI, NIH, 31 Center Drive, Bldg. 31, Room 10A28, MSC 2580, Bethesda, MD 20892, call non-toll-free number 240–781–3406, or email your request, including your address, to *amy.williams@nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: Written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, 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 minimizes the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: A Generic Submission for Formative Research, Pre-testing, Stakeholder Measures and Advocate Forms at NCI (NCI), 0925–0641, Expiration Date 1/31/2021, EXTENSION, National Cancer Institute (NCI), National Institutes of Health (NIH).

Need and Use of Information Collection: This is a request for OMB to approve the extension of the generic collection titled, ''A Generic Submission for Formative Research, Pre-testing, Stakeholder Measures and Advocate Forms at NCI'' for an additional three years of data collection. The Office of Advocacy Relations (OAR) disseminates cancer-related information to a variety of stakeholders, seeks input and feedback, and facilitates collaboration to advance NCI's authorized programs. It is beneficial for NCI, through the OAR, to pretest strategies, concepts, activities and materials while they are under development. Additionally, administrative forms are a necessary part of collecting demographic information and areas of interest for advocates. Since OAR is responsible for matching advocates to NCI programs and initiatives across the cancer continuum, it is necessary to measure the satisfaction of both internal and external stakeholders with this collaboration. This customer satisfaction research helps ensure the relevance, utility, and appropriateness of the many initiatives and products that OAR and NCI produce. The OAR will use a variety of qualitative (interviews) methodology to conduct this research, allowing NCI to: (1) Understand characteristics (attitudes, beliefs, and behaviors) of the intended target audience and use this information in the development of effective strategies, concepts, activities; (2) use a feedback loop to help refine, revise, and enhance OAR's efforts—ensuring that they have the greatest relevance, utility, appropriateness, and impact for/to target audiences; and (3) expend limited program resource dollars wisely and effectively. The anticipated respondents will consist of adult cancer research advocates; members of the public; health care professionals; and organizational representatives.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 18.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average time per response (in hours)	Total annual burden hour
Individual In-Depth Interviews	6	1	30/60	3
Profile Completion	30	1	30/60	15
Total	36			18

Dated: October 2, 2020.

Diane Kreinbrink,

Project Clearance Liaison, National Cancer Institute, National Institutes of Health.

[FR Doc. 2020–22266 Filed 10–7–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Secretary; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Interagency Pain Research Coordinating Committee.

The meeting will be open to the public. Individuals who plan to participate and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Interagency Pain Research Coordinating Committee.

Date: November 23, 2020.

Time: 11:00 a.m. to 5:00 p.m. Eastern Standard Time (EST).

Agenda: The meeting will cover committee business items related to COVID–19, pain research initiatives and member updates.

Webcast Live: http://videocast.nih.gov/.

Deadline: Submission of intent to submit written/electronic statement for comments: Tuesday, November 16th, by 5:00 p.m. ET.

Place: National Institutes of Health, Building 31, 31 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Linda L. Porter, Ph.D., Director, Office of Pain Policy and Planning, Office of the Director, National Institute of Neurological Disorders and Stroke, NIH, 31 Center Drive, Room 8A31, Bethesda, MD 20892, Phone: (301) 451–4460, Email: *Linda.Porter@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.

The meeting will be open to the public via NIH Videocast *https://videocast.nih.gov/.* Visit the IPRCC website for more information: *http://iprcc.nih.gov.* Agenda and any additional information for the meeting will be posted when available.

Dated: October 2, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–22264 Filed 10–7–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2010–0164]

National Boating Safety Advisory Council; Nov 2020 Teleconference

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Notice of Federal Advisory Committee teleconference meeting.

SUMMARY: The National Boating Safety Advisory Council (Council) and its subcommittees will meet via teleconference to discuss matters relating to recreational boating safety. The meeting will be open to the public.

DATES:

Meeting: The National Boating Safety Advisory Council and its subcommittees will meet by teleconference on Thursday, November 5, 2020 from 12:00 p.m. until 4:00 p.m., (Eastern Daylight Time). The teleconference may adjourn early if the Council has completed its business.

Comments and supporting documentation: To ensure your comments are received by Council members before the teleconference, submit your written comments no later than October 22, 2020.

ADDRESSES: To join the teleconference or to request special accommodations, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section no later than 1 p.m. on October 22, 2020, to obtain the needed information. The number of teleconferences lines is limited and will be available on a first-come, first-served basis.

Instructions: You are free to submit comments at any time, including orally at the teleconference as time permits, but if you want Council members to review your comments before the teleconference, please submit your comments no later than October 22, 2020. We are particularly interested in comments on the issues in the ''Agenda'' section below. We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individual in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. You must include the docket number [USCG–2010–0164]. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). If you encounter technical difficulties with comment submission, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

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

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Decker, Alternate Designated Federal Officer of the National Boating Safety Advisory Council, 2703 Martin Luther King Jr. Ave. SE, Stop 7509, Washington, DC 20593–7509, telephone 202–372–1507 or *NBSAC@uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given pursuant to the *Federal Advisory Committee Act,* (5 U.S.C, Appendix). Congress established the National Boating Safety Advisory Council in the *Federal Boat Safety Act of 1971* (Pub. L. 92–75). The National Boating Safety Advisory Council

provides advice and recommendations to the Department of Homeland Security on matters relating to recreational vessels and associated equipment and on other safety matters related to recreational vessels.

Agenda

The agenda for the National Boating Safety Advisory Council meeting is as follows:

Thursday, November 5, 2020

(1) Call to Order.
(2) Opening remarks.
(3) National Boating Safety Advisory Council Prevention Through People Subcommittee report on exemption from carriage of throwable personal flotation devices requirement for rafts/vessels 16 feet or more in length.
(4) Receipt and discussion of the following reports from the Office of Auxiliary and Boating Safety:
  (a) Strategic Planning.
  (b) Recreational Boating Regulations Status Report.
  (c) Current Grants Update and Areas of Interest for 2021.
  (d) Discussion of ''Fact Sheets'' to be developed from the National Recreational Boating Safety Survey.
  (e) Recap of National Boating Safety Advisory Council resolutions.
(5) Challenges and Issues with Boat Wakes.
(6) Public Comment.
(7) Effects of COVID–19 on recreational boating safety.
(8) Recognitions.
(9) Closing remarks/plans for next meeting under new Committee.
(7) Adjournment of meeting.

A copy of all meeting documentation will be available at *https://homeport.uscg.mil/missions/ports-and-waterways/safety-advisory-committees/nbsac* no later than October 22, 2020. Alternatively, you may contact Mr. Jeff Decker as noted in the **FOR FURTHER INFORMATION CONTACT** section above.

During the November 5, 2020 teleconference, a public comment period will be held from approximately 2:05 p.m.–2:20 p.m. Public comments will be limited to two minutes per speaker. Please note that the public comment periods will end following the last call for comments.

Please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section, to register as a speaker.

Dated: October 2, 2020.

Wayne R. Arguin, Jr.,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2020–22304 Filed 10–7–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0016]

Meeting To Implement Pandemic Response Voluntary Agreement Under Section 708 of the Defense Production Act

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Announcement of meeting; request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will convene a meeting remotely via web conference to implement the Voluntary Agreement for the *Manufacture and Distribution of Critical Healthcare Resources Necessary to Respond to a Pandemic.* A portion of the meeting will be open to the public.

DATES: The meeting will take place on Tuesday, October 13, 2020, from 1:00 to 3:30 p.m. Eastern Time (ET). The first portion of the meeting, from approximately 1:00 to 2:00 p.m., will be open to the public. Written comments for consideration at the meeting must be submitted and received by 12:00 p.m. ET on Monday, October 12, 2020. To register to attend the meeting or to make remarks during the public comment period of the meeting, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section below by 12:00 p.m. ET on Monday, October 12, 2020.

ADDRESSES: The meeting will be held via web conference. To register for the meeting, and to obtain information about how to attend the meeting, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section below by 12:00 p.m. ET on Monday, October 12, 2020, and provide your name, telephone number, email address, title, and organization.

Reasonable accommodations are available for people with disabilities. To request a reasonable accommodation, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section below as soon as possible. Last minute requests will be accepted but may not be possible to fulfill.

To facilitate public participation, members of the public are invited to provide written comments on the issues to be considered at the meeting. The Meeting Objectives listed below outline these issues. Written comments for consideration at the meeting must be submitted and received by 12:00 p.m. ET on Monday, October 12, 2020, identified by Docket ID FEMA–2020–0016, and submitted by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email:* FEMA's Office of Business, Industry, Infrastructure Integration, *OB3I@fema.dhs.gov.*

Instructions: All submissions must include the docket ID FEMA–2020–0016. Comments received, including any personal information provided, may be posted without alteration at *https://www.regulations.gov.*

Docket: For access to the docket and to read comments received by FEMA, go to *https://www.regulations.gov,* and search for Docket ID FEMA–2020–0016.

All speakers during the public comment period must limit their comments to three (3) minutes. Comments should be addressed to FEMA. Any comments not related to the Meeting Objectives, listed below, will not be considered at the meeting. To register to make remarks during the public comment period, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section below by 12:00 p.m. ET on Monday, October 12, 2020. If necessary, FEMA will limit the number of comments taken during the public meeting consistent with the time available, but will consider relevant and properly submitted written submissions from all interested parties.

FEMA encourages interested parties to make written submissions in advance of or following the meeting consistent with the instructions for submitting comments stated above. Follow-up comments must be received within five (5) business days of the meeting in order to be considered.

FOR FURTHER INFORMATION CONTACT: Robert Glenn, Office of Business, Industry, Infrastructure Integration, via email at *OB3I@fema.dhs.gov* or via phone at (202) 212–1666.

SUPPLEMENTARY INFORMATION: Notice of the meeting is provided as required by section 708(h)(8) of the Defense Production Act (DPA), 50 U.S.C. 4558(h)(8), and consistent with 44 CFR part 332.

The DPA authorizes the making of ''voluntary agreements and plans of action'' with, among others, representatives of industry and business to address conditions that may pose a direct threat to the national defense or its preparedness programs.[1] The President's authority to facilitate voluntary agreements has been

[1] 50 U.S.C. 4558(c)(1).

delegated to the Department of Homeland Security (DHS) generally in section 401 of Executive Order 13603,[2] ''National Defense Resources Preparedness,'' and specifically for response to the spread of COVID–19 within the United States in section 3 of Executive Order 13911,[3] ''Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID–19.'' The Secretary of Homeland Security has delegated this authority to the FEMA Administrator in section II of DHS Delegation 09052, Rev. 00.1, ''Delegation of Defense Production Act Authority to the Administrator of the Federal Emergency Management Agency'' (Apr. 1, 2020).

On August 17, 2020, after the appropriate consultations with the Attorney General and the Chairman of the Federal Trade Commission, FEMA completed and published in the **Federal Register** a ''Voluntary Agreement for the Manufacture and Distribution of Critical Healthcare Resources Necessary to Respond to a Pandemic'' (Voluntary Agreement).[4] Unless terminated prior to that date, the Voluntary Agreement is effective until August 17, 2025, and may be extended subject to additional approval by the Attorney General after consultation with the Chairman of the Federal Trade Commission. The Agreement may be used to prepare for or respond to any pandemic, including COVID–19, during that time.

The meeting will be chaired by the FEMA Administrator or his delegate, and attended by the Attorney General or his delegate and the Chairman of the Federal Trade Commission or his delegate. In implementing this agreement, FEMA will adhere to all procedural requirements of 50 U.S.C. 4558 and 44 CFR part 332.

Meeting Objectives: The purpose of the meeting is four-fold:

(1) Update interested parties on the status of the implementation of FEMA's Voluntary Agreement;

(2) Request that interested parties sign up to participate in the Voluntary Agreement;

(3) Request that specific parties sign up to participate in one or more specific Plans of Action; and

(4) Discuss activation of the first Plan of Action under the Voluntary Agreement to identify more efficient methods of allocating and distributing Personal Protective Equipment to meet national demand and ways of expanding the production of critical healthcare resources, with an initial focus on the manufacture of N95 masks.

Portions of the Meeting Closed to the Public: By default, the DPA requires meetings held to implement a Voluntary Agreement or Plan of Action be open to the public.[5] However, attendance may be limited if the Sponsor[6] of the Voluntary Agreement, in this case the FEMA Administrator, finds that the matter to be discussed at a meeting falls within the purview of matters described in 5 U.S.C. 552b(c). The FEMA Administrator has found that the portion of the meeting dedicated to achieving meeting objective 4, finalizing the first Plan of Action under the Voluntary Agreement, falls within the purview of matters described in 5 U.S.C. 552b(c) and should therefore be closed to the public.

Specifically, finalizing the Plan of Action may require Plan of Action Participants from the private sector to disclose trade secrets or commercial or financial information that is privileged or confidential. Disclosure of such information allows for a meeting to be closed pursuant to 5 U.S.C. 552b(c)(4). In addition, the success of the Voluntary Agreement depends on willing and enthusiastic participation of the private sector. If sensitive information that was shared during Plan of Action development were released, some or all of the Participants would likely withdraw their support from the Voluntary Agreement, which would significantly frustrate the implementation of the Voluntary Agreement and proposed Plan of Action. Frustration of an agency's objective due to premature disclosure of information allows for the closure of a meeting to pursuant to 5 U.S.C. 552b(c)(9)(B).

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–22419 Filed 10–7–20; 8:45 am]

BILLING CODE 9111–19–P

[2] 77 FR 16651 (Mar. 22, 2012).

[3] 85 FR 18403 (Apr. 1, 2020).

[4] 85 FR 50035 (Aug. 17, 2020). The Attorney General, in consultation with the Chairman of the Federal Trade Commission, made the required finding that the purpose of the voluntary agreement may not reasonably be achieved through an agreement having less anticompetitive effects or without any voluntary agreement and published the finding in the **Federal Register** on the same day. 85 FR 50049 (Aug. 17, 2020).

[5] *See* 50 U.S.C. 4558(h)(7).

[6] ''[T]he individual designated by the President in subsection (c)(2) [of section 708 of the DPA] to administer the voluntary agreement, or plan of action.'' 50 U.S.C. 4558(h)(7).

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2020–0039]

DHS Data Privacy and Integrity Advisory Committee

AGENCY: Privacy Office, Department of Homeland Security (DHS).

ACTION: Committee management; notice of Federal Advisory Committee meeting.

SUMMARY: The DHS Data Privacy and Integrity Advisory Committee will meet on Tuesday, October 27, 2020, via virtual conference. The meeting will be open to the public.

DATES: The DHS Data Privacy and Integrity Advisory Committee will meet on Tuesday, October 27, 2020, from 10:00 a.m. to 12:00 p.m. Please note that the virtual conference may end early if the Committee has completed its business. Written comments should be sent by October 20, 2020. Persons who wish to submit comments and who are not able to participate or speak at the meeting may submit comments by October 23, 2020.

ADDRESSES: The meeting will be held via a virtual forum (conference information will be posted on the Privacy Office website in advance of the meeting at *www.dhs.gov/privacy-advisory-committees*), or call (202) 343–1717, to obtain the information. For information on facilities or services for individuals with disabilities, or to request special assistance during the meeting, please contact Nicole Sanchez, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, as soon as possible.

To facilitate public participation, we invite public comment on the issues to be considered by the Committee as listed in the **SUPPLEMENTARY INFORMATION** section below. A public comment period will be held during the meeting, and speakers are requested to limit their comments to three minutes. If you would like to address the Committee at the meeting, we request that you register in advance by contacting Nicole Sanchez at the address provided below. The names and affiliations of individuals who address the Committee will be included in the public record of the meeting. Please note that the public comment period may end before the time indicated, following the last call for comments. Written comments should be sent to Nicole Sanchez, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee. All submissions

must include the Docket Number (DHS–2020–0039) and may be submitted by any *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: PrivacyCommittee@hq.dhs.gov.* Include the Docket Number (DHS–2020–0039) in the subject line of the message.
- *Fax:* (202) 343–4010.
- *Mail:* Nicole Sanchez, Designated Federal Officer, Data Privacy and Integrity Advisory Committee, Department of Homeland Security, 245 Murray Lane SW, Mail Stop 0655, Washington, DC 20528.

Instructions: All submissions must include the words ''Department of Homeland Security Data Privacy and Integrity Advisory Committee'' and the Docket Number (DHS–2020–0039). Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

If you wish to attend the meeting, you must call in no later than 9:50 a.m. The DHS Privacy Office encourages you to register for the meeting in advance by contacting Nicole Sanchez, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, at *PrivacyCommittee@hq.dhs.gov.* Advance registration is voluntary. The Privacy Act Statement below explains how DHS uses the registration information you may provide and how you may access or correct information retained by DHS, if any.

Docket: For access to the docket to read background documents or comments received by the DHS Data Privacy and Integrity Advisory Committee, go to *http://www.regulations.gov* and search for docket number DHS–2020–0039.

FOR FURTHER INFORMATION CONTACT: Nicole Sanchez, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, Department of Homeland Security, 245 Murray Lane SW, Mail Stop 0655, Washington, DC 20528, by telephone (202) 343–1717, by fax (202) 343–4010, or by email to *PrivacyCommittee@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act (FACA), Title 5, U.S.C. The DHS Data Privacy and Integrity Advisory Committee provides advice at the request of the Secretary of Homeland Security and the DHS Chief Privacy Officer on programmatic, policy, operational, administrative, and technological issues within DHS that relate to personally identifiable information, as well as data integrity and other privacy-related matters. The Committee was established by the Secretary of Homeland Security under the authority of 6 U.S.C. 451.

Proposed Agenda

During the meeting, the Committee will review the latest tasking from the DHS Chief Privacy Officer. The tasking will be posted on the Committee's website at *www.dhs.gov/dhs-data-privacy-and-integrity-advisory-committee-meeting-information* in advance of the meeting. If you wish to submit written comments, you may do so in advance of the meeting by forwarding them to the Committee at the locations listed under **ADDRESSES**. The final agenda will be posted on or before October 20, 2020, on the Committee's website at *www.dhs.gov/dhs-data-privacy-and-integrity-advisory-committee-meeting-information.*

Privacy Act Statement: DHS's Use of Your Information

Authority: DHS requests that you voluntarily submit this information under its following authorities: The Federal Records Act, 44 U.S.C. 3101; the FACA, 5 U.S.C. appendix; and the Privacy Act of 1974, 5 U.S.C. 552a.

Principal Purposes: When you register to attend a DHS Data Privacy and Integrity Advisory Committee meeting, DHS collects your name, contact information, and the organization you represent, if any. We use this information to contact you for purposes related to the meeting, such as to confirm your registration, to advise you of any changes in the meeting, or to assure that we have sufficient materials to distribute to all attendees. We may also use the information you provide for public record purposes such as posting publicly available transcripts and meeting minutes.

Routine Uses and Sharing: In general, DHS will not use the information you provide for any purpose other than the Principal Purposes, and will not share this information within or outside the agency. In certain circumstances, DHS may share this information on a case-by-case basis as required by law or as necessary for a specific purpose, as described in the DHS/ALL–002 Mailing and Other Lists System of Records Notice (November 25, 2008, 73 FR 71659).

Effects of Not Providing Information: You may choose not to provide the requested information or to provide only some of the information DHS requests. If you choose not to provide some or all of the requested information, DHS may not be able to contact you for purposes related to the meeting.

Accessing and Correcting Information: If you are unable to access or correct this information by using the method that you originally used to submit it, you may direct your request in writing to the DHS Deputy Chief FOIA Officer at *foia@hq.dhs.gov.* Additional instructions are available at *http://www.dhs.gov/foia* and in the DHS/ALL–002 Mailing and Other Lists System of Records referenced above.

Constantina Kozanas,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2020–22240 Filed 10–7–20; 8:45 am]

BILLING CODE 9110–9L–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6191–N–02]

Section 8 Housing Choice Vouchers: Implementation of the Housing Choice Voucher Mobility Demonstration, Extension of Application Due Date

AGENCY: Office of the Assistant Secretary for Public and Indian Housing (PIH), Department of Housing and Urban Development (HUD).

ACTION: Notice of extension of application due date.

SUMMARY: On July 15, 2020, HUD published a notice (''Notice'') implementing the Housing Choice Voucher (HCV) mobility demonstration (''demonstration'') authorized by the Consolidated Appropriations Act, 2019. Through this Notice, HUD is making available up to $50,000,000 to participating PHAs throughout the country to implement housing mobility programs by offering mobility-related services to increase the number of voucher families with children living in opportunity areas. The Notice established October 13, 2020 as the deadline date for submission of PHA applications. Today's **Federal Register** publication extends the deadline date for the submission of applications to December 14, 2020.

DATES: The new application deadline date for the HCV Mobility Demonstration Program is December 14, 2020.

FOR FURTHER INFORMATION CONTACT: Rebecca Primeaux, Director, Housing Voucher Management and Operations Division, Department of Housing and Urban Development, 451 Seventh Street SW, Room 4214, Washington, DC 20410, telephone number (202) 708–1112. (This is not a toll-free number.) Individuals with hearing or speech impediments

may access this number via TTY by calling the Federal Relay during working hours at 800–877–8339. (This is a toll-free number.) HUD encourages submission of questions about the demonstration be sent to *HCVmobility demonstration@hud.gov.*

SUPPLEMENTARY INFORMATION: On July 15, 2020 (85 FR 42890), HUD published its Notice implementing the HCV Mobility Demonstration, and established October 13, 2020 as the deadline date for the submission of applications. Through the Notice, HUD is making available approximately $50 million for grants to Public Housing Authorities (PHAs) under a demonstration program authorized by statute.

Today's **Federal Register** publication extends the deadline date for the submission of applications for the HCV Mobility Demonstration program to December 14, 2020. HUD is extending the application submission deadline date to ensure that delays or complications due to the COVID–19 Coronavirus do not cause undue hardship or otherwise prevent applicants from submitting complete applications.

Deadline for Applications

The lead agency shall be responsible for submitting the application to HUD, no later than December 14, 2020. Applications that are submitted after midnight on December 14, 2020, or which fail to include the required elements, will be ineligible for consideration by HUD.

HUD may extend the application deadline for any program if *HUD.gov* systems are offline or not available to applicants for at least 24 hours immediately prior to the deadline date, or if the system is down for 24 hours or longer and that impacts the ability of applicants to cure a submission deficiency within the grace period. HUD may also extend the application deadline upon request if there is a presidentially-declared disaster in the applicant's area. If these events occur, HUD will post a notice on its website establishing the new, extended deadline for the affected applicants.

R. Hunter Kurtz,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2020–22130 Filed 10–7–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–42]

30-Day Notice of Proposed Information Collection: HUD Multifamily Rental Project Closing Documents; OMB Control No.: 2502–0598

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* November 9, 2020.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/Start* Printed Page 15501PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on May 18, 2020 at 85 FR 29736.

A. Overview of Information Collection

Title of Information Collection: HUD Multifamily Rental Project Closing Documents.

OMB Approval Number: 2502–0598.

OMB Expiration Date: 09/30/2021.

Type of Request: Revision of currently approved collection.

Form Number Being Revised: HUD–92420M.

Description of the need for the information and proposed use: The form, Subordination Agreement, HUD–92420M, is used in FHA-insured multifamily rental project loan closings with secured, publicly financed secondary debt, often to promote affordable housing. The document is used to subordinate such secured, secondary financing to the lien of the FHA-insured mortgage, which must be in a first lien position as required by the National Housing Act (12 U.S.C. 1701 et. seq.), on terms and conditions that are legally and administratively acceptable to HUD.

The Subordination Agreement is part of a larger information collection (OMB Control No. 2502–0598) that consists of numerous other closing forms (Closing Documents) used in FHA-insured multifamily transactions. The Closing Documents, including the Subordination Agreement, were last updated pursuant to the Paperwork Reduction Act (PRA) in 2018. However, HUD was not able to complete its review of public comments received in connection with the 30-day **Federal Register** notice (83 FR 29815; 30-day notice) published for the previous PRA renewal for the Closing Documents prior to the OMB deadline. Therefore, when HUD initiates a new PRA process for the Closing Documents later this year, it will include, as a starting point, changes HUD anticipated making in response to the public comments received with the 30-day notice.

Notwithstanding, due to concerns that state and local housing finance agencies (HFAs) have expressed concerning certain terms and conditions in the 2018 Subordination Agreement, HUD is initiating this separate PRA renewal effort in order to allow HFAs and other interested members of the public an opportunity to comment on the form and HUD to make agreed upon changes on a more immediate timeline. It is HUD's goal that the PRA process for the Subordination Agreement will result in a form that is widely accepted by HFAs to promote greater efficiency and consistency in the FHA multifamily closing process, while also allowing flexibility for HFA requested changes necessary for state or local law, as discussed immediately below.

Revisions to the Subordination Agreement

HUD added the following instruction at the request of OMB given HUD's policy of considering requested Subordination Agreement changes to accommodate state or local law: ''HUD will consider requested changes to this form that are necessary to comply with

state or local law. All such requests must be accompanied by a substantive explanation prepared by counsel to the Subordinate Lender. HUD's written acceptance of any changes for state or local law will result in a template Subordination Agreement–Public, for a given jurisdiction and program. Consistent with the PRA, permission to use any such HUD-approved template will expire upon implementation of the next OMB-approved version of this form. When a new OMB form is issued, public lenders may request HUD consideration of changes to the new form in accordance with the level of flexibility the new form provides.'' HUD notes that the underlying PRA burden estimate for the Subordination Agreement now accounts for any legal opinions that may be required to justify state or local law changes.

Similarly, HUD added an instruction in section 3(b) to ensure the Subordination Agreement is consistent with existing HUD policy allowing an exception (on a case-by-case basis) to the requirement that the subordinate loan mature no earlier than the FHA-insured senior loan for deal-specific situations where the resulting risk is appropriately underwritten. Outside of this allowance to permit maturity of the subordinate loan before the FHA-insured senior loan and other existing instructions allowing flexibility for certain other terms (*e.g.,* section 3(c)(4) exception to prohibition against compounding interest for LIHTC transactions), HUD does not anticipate accommodating deal-specific requests for additional changes to the form. HFAs and other interested parties are encouraged to request, and provide a rationale for, any changes deemed necessary during this PRA process.

In response to the 30-day notice, one commenter objected to section 3(c) that requires HUD language be inserted into the subordinate note because many subordinate lenders use pre-approved template documents. HUD rejects this comment because FHA-insured multifamily financing is a national program that requires uniformity to ensure fairness and efficiency in closings. Thus, it is critical that every subordinate loan contain the HUD required language in order to accomplish this goal. HUD is, however, sympathetic to the fact that various HFAs have templates that must go through an approval process; therefore, HUD will permit the HUD-required subordinate note language to be incorporated by reference into the subordinate note.

HUD also rejects a comment objecting to section 3(c)(3) that restricts a transfer of the subordinate note without HUD consent. Section 3(c)(3) reflects HUD's longstanding policy that Surplus Cash Notes are not negotiable instruments or transferable without HUD consent. This policy has been in existence since at least 2011, and since 2002 with the then applicable Secondary Financing Rider that was included in the 2002 MAP Guide The rationale behind this policy is that HUD needs to be able to assess whether such transfers will cause unacceptable risk to the project.

A commenter objected to the language in section 3(c)(6) that the terms and provisions of the subordinate lender's note are enforceable by HUD and cannot be amended without HUD's consent. HUD rejects this comment. This is standard language in several of the Closing Documents. Changing the terms of the subordinate loan without HUD consent could negatively impact HUD.

In response to an informal comment received from an outside party concerning the policy change previously made in in section 6(b) to allow subordinate lenders to exercise their remedies for subordinate loan defaults after a 180-day standstill, HUD proposes to explicitly clarify that such exercise of remedies is only available for covenant events of default, and not monetary events of default. This clarification is consistent with the rationale discussed in the 60-day **Federal Register** notice published on September 5, 2017 (82 FR 41977).

One commenter took issue with the section 7(b) prohibition against a cross-default provision in the subordinate loan documents. HUD rejects this comment as a cross-default prohibition has been in the form since its adoption in 2011. Numerous transactions with public secondary debt have closed without any objection to the prohibition, which can also be found in the MAP Guide. The FHA lender and HUD must control what happens to the property in the event of a default under the FHA-insured loan and whether to remove the borrower through a foreclosure, not the subordinate lender.

One commenter objected to the requirement in section 10(c) that the maturity on the subordinate loan automatically be extended if the FHA loan is extended due to a deferment of amortization or forbearance. HUD rejects this comment as the language in question reflects current MAP Guide policy to reserve this protection as insurer of the first mortgage loan to allow maximum flexibility in distressed project situations.

HUD agrees with an HFA's request to remove language in section 10(e) that would force a subordinate lender to allow an ownership change and assumption of its loan upon HUD approval. Further, HUD also agrees with an HFA's request to remove the requirement in section 10(f) that limits the funds the subordinate lender can receive upon transfer or sale of the property to 75% of net proceeds; HUD will be making a corresponding change to remove this requirement from the MAP Guide.

Respondents (i.e., affected public): FHA lenders, borrowers, housing finance agencies and other government agencies that support affordable housing, and HFA counsel.

Estimated Number of Respondents: 17,468.

Estimated Number of Responses: 17,468.

Frequency of Response: Once per annum.

Average Hours per Response: 1.5 hours.

Total Estimated Burden: 14,286.85.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected.

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are respond, including the use of automated collection techniques or other forms of information technology.

HUD requests that commenters provide comments and proposed changes in narrative and/or bulleted form, accompanied by a detailed explanation and rationale for each requested change. Commenters may include in their detailed explanation and rationale the relevant excerpt(s) from the Subordination Agreement with redlines/strikeouts.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 3507.

Department Reports Management Officer for the Office of the Chief Information Officer,

Colette Pollard, having reviewed and approved this document, is delegating the authority to electronically sign this document to submitter, Nacheshia Foxx, who is the Federal Register Liaison for HUD, for purposes of publication in the **Federal Register**.

Dated: October 5, 2020.

Nacheshia Foxx,

Federal Register Liaison for the Department of Housing and Urban Development.

[FR Doc. 2020–22338 Filed 10–7–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–D–COS–POL–30832; PPWODIREP0; PPMPSAS1Y.YP0000]

Notice of the December 10, 2020, Teleconference Meeting of the National Park System Advisory Board

AGENCY: National Park Service, Interior.

ACTION: Notice of teleconference meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, the National Park Service (NPS) is hereby giving notice that the National Park System Advisory Board (Board) will meet as noted below. The agenda may include the review of proposed actions regarding the National Historic Landmarks (NHL) Program and National Natural Landmarks (NNL) Program. Interested parties are encouraged to submit written comments and recommendations that will be presented to the Board. Interested parties also may attend the board meeting and upon request may address the Board concerning an area's national significance.

DATES: The teleconference meeting will be held on Thursday, December 10, 2020, from 11:00 a.m., until 5:00 p.m., Eastern Standard Time. For instructions on registering to attend, submitting written material, or giving an oral presentation at the meeting, please see guidance under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held virtually at the date and time noted above.

FOR FURTHER INFORMATION CONTACT: (a) For information concerning attending the Board meeting or to request to address the Board, contact Joshua Winchell, Staff Director for the National Park System Advisory Board, Office of Policy, National Park Service, telephone (202) 641–4467, or email *joshua_winchell@nps.gov.* (b) To submit a written statement specific to, or request information about, any NHL matter listed below, or for information about the NHL Program or NHL designation process and the effects of designation, contact Sherry A. Frear, RLA, Chief, National Register of Historic Places and National Historic Landmarks Program, National Park Service, email *sherry_frear@nps.gov.* Written comments specific to any NHL matter listed below must be submitted by no later than December 8, 2020. (c) To submit a written statement specific to, or request information about, the NNL matter listed below, or for information about the Program or NNL designation process and the effects of designation, contact Heather Eggleston, Manager, National Natural Landmarks Program, National Park Service, email *heather_eggleston@nps.gov.* Written comments specific to any NNL matter listed below must be submitted by no later than December 8, 2020.

SUPPLEMENTARY INFORMATION: The Board has been established by authority of the Secretary of the Interior (Secretary) under 54 U.S.C. 100906 and is regulated by the Federal Advisory Committee Act.

The Board will receive briefings and discuss topics related to improving the visitor experience in NPS managed units and workforce planning for the next century and may consider proposed NHL and NNL actions. The final agenda and briefing materials will be posted to the Board's website prior to the meeting at *https://www.nps.gov/advisoryboard.htm.*

A. National Historic Landmarks (NHL) Program

NHL Program matters will be considered, during which the Board may consider the following:

Nominations for NHL Designation

Alabama

- Monroe County Courthouse, Monroeville, AL

Arizona

- Klagetoh *(Leegito)* Chapter House, Klagetoh, AZ

Colorado

- Colorado Fuel & Iron Co. Administrative Complex, Pueblo CO

Florida

- Dudley Farm, Newberry, Alachua County, FL

Indiana

- Fort Ouiatenon Archeological District, Tippecanoe County, IN

Iowa

- Surf Ballroom, Clear Lake, IA

Maryland

- Frieda Fromm-Reichmann Cottage, Rockville, MD
- Tolson's Chapel and School, Sharpsburg, MD

Massachusetts

- Mary Baker Eddy House, Lynn MA

Texas

- Hueco Tanks, El Paso County, TX

Wisconsin

- University of Wisconsin Arboretum, Madison, WI

B. National Natural Landmarks (NNL) Program

NNL Program matters will be considered, during which the Board may consider the following:

Nomination for NNL Designation

California

- Lanphere and Ma-le'l Dunes, Humboldt County, CA

The meeting is open to the public. Interested persons may choose to make oral comments at the meeting during the designated time for this purpose. Depending on the number of people wishing to comment and the time available, the amount of time for oral comments may be limited. Interested parties should contact the Staff Director for the Board (see **FOR FURTHER INFORMATION CONTACT**) for advance placement on the public speaker list for this meeting. Members of the public may also choose to submit written comments by emailing them to *joshua_winchell@nps.gov.*

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. Appendix 2.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2020–22116 Filed 10–7–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[Docket ID BSEE–2020–0005; EEEE500000 21XE1700DX EX1SF0000.EAQ000; OMB Control Number 1014–0022]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; General

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Bureau of Safety and Environmental Enforcement (BSEE) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before November 9, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Kye Mason, BSEE ICCO, 45600 Woodland Road, Sterling, VA 20166; or by email to *kye.mason@bsee.gov.* Please reference OMB Control Number 1014–0022 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Kye Mason by email at *kye.mason@bsee.gov,* or by telephone at (703) 787–1607. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on July 7, 2020 (85 FR 40678). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether 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. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The BSEE uses the information collected under the Subpart A regulations to ensure that operations on the OCS are carried out in a safe and pollution-free manner, do not interfere with the rights of other users on the OCS, and balance the protection and development of OCS resources. Specifically, we use the information collected to:

- Review records of formal crane operator and rigger training, crane operator qualifications, crane inspections, testing, and maintenance to ensure that lessees/operators perform operations in a safe and workmanlike manner and that equipment is maintained in a safe condition. The BSEE also uses the information to make certain that all new and existing cranes installed on OCS fixed platforms must be equipped with anti-two block safety devices, and to assure that uniform methods are employed by lessees for load testing of cranes.
- Review welding plans, procedures, and records to ensure that welding is conducted in a safe and workmanlike manner by trained and experienced personnel.
- Provide lessees/operators greater flexibility to comply with regulatory requirements through approval of alternative equipment or procedures and departures to regulations if they demonstrate equal or better compliance with the appropriate performance standards.
- Ensure that injection of gas promotes conservation of natural resources and prevents waste.
- Record the agent and local agent empowered to receive notices and comply with regulatory orders issued.
- Provide for orderly development of leases through the use of information to determine the appropriateness of lessee/operator requests for suspension of operations, including production.
- Improve safety and environmental protection on the OCS through collection and analysis of accident reports to ascertain the cause of the accidents and to determine ways to prevent recurrences.
- Ascertain when the lease ceases production or when the last well ceases production in order to determine the 180th day after the date of completion of the last production. The BSEE will use this information to efficiently maintain the lessee/operator lease status.
- Allow lessees/operators who exhibit unacceptable performance an incremental approach to improving their overall performance prior to a final decision to disqualify a lessee/operator or to pursue debarment proceedings through the execution of a performance improvement plan (PIP). The Subpart A regulations do not address the actual process that we will follow in pursuing the disqualification of operators under §§ 250.135 and 250.136; however, our internal enforcement procedures include allowing such operators to demonstrate a commitment to acceptable performance by the submission of a PIP.

The BSEE forms use and information consists of the following:

Form BSEE–0132, Hurricane and Tropical Storm Evacuation and Production Curtailment Statistics (GOMR)

- Be informed when there could be a major disruption in the availability and supply of natural gas and oil due to natural occurrences/hurricanes, to advise the U.S. Coast Guard (USCG) in

case of the need to rescue offshore workers in distress, to monitor damage to offshore platforms and drilling rigs, and to advise the news media and interested public entities when production is shut-in and when resumed. The Gulf of Mexico OCS Region (GOMR) uses Form BSEE–0132, Hurricane and Tropical Storm Evacuation and Production Curtailment Statistics, for respondents to report evacuation statistics when necessary. This form requires the respondent to submit general information such as company name, contact, date, time, telephone number, as well as number of platforms and drilling rigs evacuated and not evacuated. We also require production shut-in statistics for oil (BOPD) and gas (MMSCFD).

Form BSEE–0143, Facility/Equipment Damage Report

• Assists lessees, lease operators, and pipeline right-of-way holders when reporting damage by a hurricane, earthquake, or other natural phenomenon. They are required to submit an initial damage report to the Regional Supervisor within 48 hours after completing the initial evaluation of the damage and then, subsequent reports, monthly and immediately, whenever information changes until the damaged structure or equipment is returned to service. Information on the form includes—instructions, general information, a description of the damage, an initial damage assessment, production rate at time of shut-in (BPD and/or MMCFPD), cumulative production shut-in (BPD and/or MMCFPD), and estimated time to return to service (in days).

Form BSEE–1832, Notification of Incident(s) of Noncompliance

• Determine that respondents have corrected all Incident(s) of Noncompliance (INCs), identified during inspections. Everything on the INC form is filled out by a BSEE inspector/representative. The only thing industry does with this form is sign the document upon receipt and respond to BSEE when each INC has been corrected, no later than 14 days from the date of issuance.

Title of Collection: 30 CFR part 250, subpart A, *General.*

OMB Control Number: 1014–0022.

Form Numbers: BSEE–0132, BSEE–0143, BSEE–1832.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Potential respondents include Federal OCS oil, gas, and sulfur lessees and/or operators and holders of pipeline rights-of-way.

Total Estimated Number of Annual Respondents: Currently, there are approximately 60 Oil and Gas Drilling and Production Operators in the OCS. Not all the potential respondents will submit information in any given year, and some may submit multiple times.

Total Estimated Number of Annual Responses: 22,294.

Estimated Completion Time per Response: .5 hour to 106 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 102,221.

Respondent's Obligation: Most responses are mandatory, while others are required to obtain or retain benefits, or voluntary.

Frequency of Collection: Submissions are generally on occasion, daily, monthly, and vary by section.

Total Estimated Annual Nonhour Burden Cost: $246,268.

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.*).

Kirk Malstrom,

Acting Chief, Regulations and Standards Branch.

[FR Doc. 2020–22343 Filed 10–7–20; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[Docket ID BSEE–2020–0006; EEEE500000 21XE1700DX EX1SF0000.EAQ000; OMB Control Number 1014–0018]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Oil and Gas Drilling Operations

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Bureau of Safety and Environmental Enforcement (BSEE) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before November 9, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Kye Mason, BSEE ICCO, 45600 Woodland Road, Sterling, VA 20166; or by email to *kye.mason@bsee.gov.* Please reference OMB Control Number 1014–0018 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Kye Mason by email at *kye.mason@bsee.gov,* or by telephone at (703) 787–1607. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on June 2, 2020 (85 FR 33704). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the 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. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The BSEE uses the information to ensure safe drilling operations and to protect the human, marine, and coastal environment. Among other things, BSEE specifically uses the information to ensure: the drilling unit is fit for the intended purpose; the lessee or operator will not encounter geologic conditions that present a hazard to operations; equipment is maintained in a state of readiness and meets safety standards; each drilling crew is properly trained and able to promptly perform well-control activities at any time during well operations; compliance with safety standards; and the current regulations will provide for safe and proper field or reservoir development, resource evaluation, conservation, protection of correlative rights, safety, and environmental protection. We also review well records to ascertain whether drilling operations have encountered hydrocarbons or H2S and to ensure that H2S detection equipment, personnel protective equipment, and training of the crew are adequate for safe operations in zones known to contain H2S and zones where the presence of H2S is unknown.

This ICR includes three forms. The forms use and information consist of the following:

End of Operations Report, BSEE–0125

This information is used to ensure that industry has accurate and up-to-date data and information on wells and leasehold activities under their jurisdiction and to ensure compliance with approved plans and any conditions placed upon a suspension or temporary probation. It is also used to evaluate the remedial action in the event of well equipment failure or well control loss. The Form BSEE–0125 is updated and resubmitted in the event the well status changes. In addition, except for proprietary data, BSEE is required by the Outer Continental Shelf (OCS) Lands Act to make available to the public certain information submitted on BSEE–0125.

Well Activity Report, BSEE–0133 and –0133S

The BSEE uses this information to monitor the conditions of a well and status of drilling operations. We review the information to be aware of the well conditions and current drilling activity (*i.e.,* well depth, drilling fluid weight, casing types and setting depths, completed well logs, and recent safety equipment tests and drills). The engineer uses this information to determine how accurately the lessee anticipated well conditions and if the lessee or operator is following the other approved forms that were submitted. With the information collected on BSEE–0133 available, the reviewers can analyze the proposed revisions (*e.g.,* revised grade of casing or deeper casing setting depth) and make a quick and informed decision on the request.

In addition, except for proprietary data, BSEE is required by the OCS Lands Act to make available to the public certain information submitted on Forms BSEE–0133 and –0133S.

Title of Collection: 30 CFR 250, Subpart D, Oil and Gas Drilling Operations.

OMB Control Number: 1014–0018.

Form Number: BSEE–0125, BSEE–0133, and BSEE–0133S.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Potential respondents include Federal OCS oil, gas, and sulfur lessees and/or operators and holders of pipeline rights-of-way.

Total Estimated Number of Annual Respondents: Currently there are approximately 60 Oil and Gas Drilling and Production Operators in the OCS. Not all the potential respondents will submit information in any given year, and some may submit multiple times.

Total Estimated Number of Annual Responses: 63,744.

Estimated Completion Time per Response: 15 minutes to 40 hours, depending on the activity.

Total Estimated Number of Annual Burden Hours: 83,993.

Respondent's Obligation: Responses are mandatory.

Frequency of Collection: Submissions are generally on occasion.

Total Estimated Annual Nonhour Burden Cost: $16,000.

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.*).

Kirk Malstrom,

Acting Chief, Regulations and Standards Branch.

[FR Doc. 2020–22346 Filed 10–7–20; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[Docket ID BSEE–2020–0004; EEEE500000 21XE1700DX EX1SF0000.EAQ000; OMB Control Number 1014–0015]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Unitization

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Bureau of Safety and Environmental Enforcement (BSEE) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before November 9, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Kye Mason, BSEE ICCO, 45600 Woodland Road, Sterling, VA 20166; or by email to *kye.mason@bsee.gov.* Please reference OMB Control Number 1014–0015 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Kye Mason by email at *kye.mason@bsee.gov,* or by telephone at (703) 787–1607. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information

collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on July 7, 2020 (85 FR 40679). We received one comment in response to the **Federal Register** notice; however, it was not germane to the information collection.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether 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. 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: BSEE must approve any lessee's proposal to enter an agreement to unitize operations under two or more leases and for modifications when warranted. We use the information to ensure that operations under the proposed unit agreement will result in preventing waste, conserving natural resources, and protecting correlative rights including the government's interests.

Title of Collection: 30 CFR 250, Subpart M, Unitization.

OMB Control Number: 1014–0015.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Potential respondents include Federal OCS oil, gas, and sulfur lessees and/or operators and holders of pipeline rights-of-way.

Total Estimated Number of Annual Respondents: Currently there are approximately 60 Oil and Gas Drilling and Production Operators in the OCS. Not all the potential respondents will submit information in any given year, and some may submit multiple times.

Total Estimated Number of Annual Responses: 79.

Estimated Completion Time per Response: 1 hour to 520 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 5,998.

Respondent's Obligation: Voluntary and some are required to obtain or retain a benefit.

Frequency of Collection: Submissions are generally on occasion.

Total Estimated Annual Nonhour Burden Cost: $149,836.

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.*).

Kirk Malstrom,

Acting Chief, Regulations and Standards Branch.

[FR Doc. 2020–22344 Filed 10–7–20; 8:45 am]

BILLING CODE 4310–VH–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–646 and 731–TA–1502–1516 (Final)]

Prestressed Concrete Steel Wire Strand (PC Strand) From Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, Turkey, Ukraine, and United Arab Emirates; Scheduling of the Final Phase of Countervailing Duty and Antidumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping and countervailing duty investigation Nos. 701–TA–646 and 731–TA–1502–1516 (Final) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of prestressed concrete steel wire strand (pc strand) from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, Turkey, Ukraine, and United Arab Emirates, provided for in subheading 7312.10.30 of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce (''Commerce'') to be subsidized and sold at less-than-fair-value.

DATES: September 23, 2020.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones, ((202) 205–3358), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Scope.—For purposes of these investigations, Commerce has defined the subject merchandise covered by these investigations as prestressed concrete steel wire strand (''PC strand''), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM–A–475.

The PC strand subject to this order is currently classifiable under subheadings

7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Background.—The final phase of these investigations is being scheduled pursuant to sections 705(b) and 731(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)), as a result of affirmative preliminary determinations by Commerce that prestressed concrete steel wire strand (pc strand), and that such products are being sold in the United States at less than fair value within the meaning of § 733 of the Act (19 U.S.C. 1673b) from Argentina, Colombia, Egypt, Netherlands, Saudi Arabia, and United Arab Emirates. The investigations were requested in petitions filed on April 16, 2020, by Insteel Wire Products Company, Mount Airy, North Carolina, Sumiden Wire Products Corporation, Dickson, Tennessee, and Wire Mesh Corp., Houston Texas.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on November 23, 2020, and a public version will be issued thereafter, pursuant to § 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on Thursday, December 10, 2020. Information about the place and form of the hearing, including about how to participate in and/or view the hearing, will be posted on the Commission's website at *https://www.usitc.gov/calendarpad/calendar.html.* Interested parties should check the Commission's website periodically for updates. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before Thursday, December 3, 2020. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on Friday, December 4, 2020. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.23 of the Commission's rules; the deadline for filing is December 1, 2020. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.25 of the Commission's rules. The deadline for filing posthearing briefs is December 16, 2020. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before December 16, 2020. On January 4, 2021, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before January 6, 2021, but such final comments must not contain new factual information and must otherwise comply with § 207.30 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to § 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.21 of the Commission's rules.

By order of the Commission.

Issued: October 2, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–22308 Filed 10–7–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Furniture Products Finished with Decorative Wood Grain Paper and Components Thereof, DN 3499;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information 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 United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.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 has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Toppan Interamerica, Inc. on October 2, 2020. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain furniture products finished with decorative wood grain paper and components thereof. The complaint names as a respondent: Walker Edison Furniture Company, LLC of Salt Lake City, UT. The complainant requests that the Commission issue a limited exclusion order, a cease and desist order, and impose a bond to upon respondent alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3499'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

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,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

Issued: October 5, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–22321 Filed 10–7–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1188]

Certain Pick-Up Truck Folding Bed Cover Systems and Components Thereof; Commission Determination Not To Review an Initial Determination Terminating the Investigation Based Upon Withdrawal of the Complaint; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (the ''Commission'') has determined not to review an initial determination (''ID'') (Order No. 18) granting complainants' motion to terminate the present investigation in its entirety based on withdrawal of the complaint. The investigation is terminated.

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 (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

SUPPLEMENTARY INFORMATION: On December 30, 2019, the Commission instituted the present investigation on a complaint, as supplemented, filed by Extang Corporation and Laurmark Enterprises, Inc. (d/b/a Bak Industries) (collectively, ''Complainants''), both of Ann Arbor, Michigan. 84 FR 71975–76 (Dec. 30, 2019). 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, and sale in the United States after importation of certain pick-up truck folding bed cover systems and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 7,484,788 and 8,061,758 (''the 758 patent''). *Id.* The complaint further alleges that an industry exists in the United States. *Id.*

The notice of investigation names the following parties as respondents: Tyger Auto Inc. of Rialto, California; Cixi City Liyuan Auto Parts Co. of Zhejiang Province, China; and Hong Kong Car Start Industries Co., of Zhijian Province, China (collectively, ''Respondents''). *Id.* The notice of investigation also names the Office of Unfair Import Investigations (''OUII'') as a party. *Id.*

On March 18, 2020, the presiding administrative law judge (''ALJ'') issued an ID (Order No. 6), granting Complainants' unopposed motion to amend the complaint and notice of investigation in order to supplement and clarify the allegations of the original complaint and notice of investigation regarding the 758 patent. The Commission determined not to review the ID. Comm'n Notice (April 17, 2020).

On September 22, 2020, the ALJ issued the subject ID (Order No. 18) granting Complainants' unopposed motion to terminate the investigation in its entirety based upon the withdrawal of the complaint. The ALJ finds no extraordinary circumstances that would prevent termination of this investigation, and no agreements, written or oral, express or implied, between the parties concerning the subject matter of the investigation. The ALJ also granted Complainants' request to stay the procedural schedule pending final resolution of this ID.

No party filed a petition for review of Order No. 18.

The Commission has determined not to review the subject ID. The investigation is terminated in its entirety.

The Commission voted to approve this determination on October 2, 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: October 2, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–22230 Filed 10–7–20; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Committee on Rules of Practice and Procedure; Meeting of the Judicial Conference

AGENCY: Committee on Rules of Practice and Procedure, Judicial Conference of the United States.

ACTION: Notice of open meeting.

SUMMARY: The Committee on Rules of Practice and Procedure will hold a virtual meeting on January 5, 2021. The meeting is open to the public. When a meeting is held virtually, members of the public may join by telephone conference to listen but not participate. An agenda and supporting materials will be posted at least 7 days in advance of the meeting at: *http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.*

DATES: January 5, 2021, TIME: 10 a.m.–5 p.m. (Eastern).

FOR FURTHER INFORMATION CONTACT: Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE, Suite 7–300, Washington, DC 20544, Telephone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

Authority: 28 U.S.C. 2073.

Dated: October 5, 2020.

Shelly L. Cox,

Management Analyst, Rules Committee Staff.

[FR Doc. 2020–22326 Filed 10–7–20; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Wayne Pharmacy; Decision and Order

On March 30, 2018, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause (hereinafter, OSC) to Wayne Pharmacy (hereinafter, Registrant), which proposed the revocation of its DEA Certificate of Registration BW8625785. Government's Request for Final Agency Action Exhibit (hereinafter, RFAAX) 2 (OSC). The OSC alleged that Registrant's ''continued registration is inconsistent with the public interest.'' OSC, at 1 (citing 21 U.S.C. 824(a)(4) and 823(f)). The OSC also proposed to deny any pending application by Registrant for renewal as

well as applications for new DEA registrations. *Id.*

In response to the OSC, Registrant issued a timely request for an administrative hearing, RFAAX 14 (Order Terminating Proceedings), and a hearing was scheduled for July 17, 2018. *Id.* On July 6, 2018, DEA and Registrant reached an administrative settlement, which required, among other things, for Registrant to admit to Paragraphs 2 through 8 of the OSC and to withdraw its request for a hearing. RFAAX 12 (Memorandum of Agreement), at 2–3. On July 9, 2018, pursuant to the settlement, Registrant withdrew its request for an administrative hearing. RFAAX 14.

On September 21, 2018, the Government forwarded a Request for Final Agency Action, along with the evidentiary record for this matter, to my office. Having considered the record in its entirety, I find that the record establishes, by substantial evidence, that Registrant committed acts rendering its continued registration inconsistent with the public interest. Accordingly, I conclude that the appropriate sanction is for Registrant's DEA registration to be revoked.

I. Findings of Fact

A. DEA Registration

Registrant is registered with DEA as a retail pharmacy authorized to handle controlled substances in schedules II–V under DEA Registration No. BW8625785, with a registered location of 1055 Hamburg Turnpike, Wayne, New Jersey, 07470. RFAAX 1 (DEA Certificate of Registration). Registrant is owned by Barbara Kleiber (hereinafter, the Owner). *Id.;* RFAAX 13 (May 31, 2018 Prehearing Ruling), at Stipulation No. 2.

B. Administrative Settlement and Registrant's Admissions

In lieu of an administrative hearing on this matter, Registrant and the Government came to an administrative settlement, the terms of which were memorialized in a Memorandum of Agreement (hereinafter, MOA). RFAAX 12. As part of the settlement, Registrant, and its Owner, both ''accepted responsibility for their misconduct and for their failure to comply with federal laws pertaining to controlled substances as alleged in the [OSC].'' *Id.* at 2. Specifically, the Owner, both in her individual capacity and in her capacity as the owner of Registrant, admitted to the following factual allegations made in paragraphs 2 through 8 of the OSC against Registrant:

(1) Registrant is owned by Barbara Kleiber. M.B.[1] is a former employee of Registrant and the son of the Owner;

(2) In May 2017, Registrant's Pharmacist-in-Charge (''PIC'') Deborah Clark reported to the Wayne Police Department that in the course of investigating the loss of a bottle of oxycodone 30mg, she had conducted an audit and discovered that approximately 47,000 tablets of oxycodone 30mg were missing.

(3) Although Registrant became aware of the loss of 47,000 tablets of oxycodone 30mg in May 2017, Registrant did not file a DEA 106 notice of theft or loss until June 14, 2017, after DEA conducted its own inspection of Registrant, and in violation of 21 CFR 1301.76(b).

(4) On June 1, 2017, DEA inspected Registrant's records pursuant to a Notice of Inspection. During this inspection, an audit was conducted covering the May 1, 2015 to June 1, 2017 time period. DEA's audit of Registrant's records found that Registrant committed systematic violations of the Controlled Substances Act (hereinafter, CSA), 21 U.S.C. 801 *et seq.,* and DEA regulations, including the following:

a. Registrant's inventories resulted in inaccurate inventories in violation of 21 CFR 1304.22(c).

i. For the audit period, Registrant was accountable for 543,575 tablets of oxycodone 30 mg, but could only account for 510,994 tablets, a shortfall of 32,581 tablets.

ii. For the audit period, Registrant was accountable for 120,102 tablets of oxycodone/acetaminophen 10/325 mg, but could only account for 96,102, a shortfall of 24,000 tablets.

iii. For the audit period, Registrant was accountable for 41,004 tablets of Morphine IR 30 mg, but could only account for 34,487 tablets, a shortfall of 6,517 tablets.

(5) On September 18, 2017, DEA conducted an additional review of Registrant's records pursuant to an Administrative Inspection Warrant. DEA's audit of Registrant's records found that Registrant continued to commit systematic violations of the CSA and DEA regulations.

a. The five controlled substances that were audited on June 1, 2017, were again audited with an audit period of June 1, 2017 to September 18, 2017. Registrant's inventory continued to be inaccurate in violation of 21 CFR 1304.22(c).

i. For the audit period, Registrant was accountable for 44,954 tablets of oxycodone 30 mg, but could only account for 44,626 tablets, a shortfall of 328 tablets.

ii. For the audit period, Registrant was accountable for 12,389 tablets of oxycodone/acetaminophen 10/325 mg, but could only account for 12,193 a shortfall of 196 tablets.

iii. For the audit period, Registrant was accountable for 2,557 tablets of Morphine IR 30 mg, but could only account for 2,354 tablets, a shortfall of 203 tablets.

b. In addition to auditing the same controlled substances that were audited on June 1, 2017, DEA conducted an audit of additional controlled substances. For these additional controlled substances, the audit period was May 1, 2017 to September 18, 2017. Registrant's inventory was inaccurate with respect to these controlled substances in violation of 21 CFR 1304.22(c).

i. For the audit period, Registrant was accountable for 4,428 tablets of alprazolam 2 mg, but could only account for 3,318 tablets, a shortfall of 573 tablets.

ii. For the audit period, Registrant was accountable for 880 tablets of Tylenol with codeine #4, but could only account for 812 tablets, a shortfall of 68 tablets.

iii. For the audit period, Registrant was accountable for 2,487 tablets of Adderall IR 30 mg, but could only account for 2,292 tablets, a shortfall of 195 tablets.

(6) In December 2017, Registrant hired its own auditor to inspect its records. Using the audit period of January 1, 2017, to December 19, 2017, Registrant's own auditor found significant shortages. Specifically, Registrant's auditor found that during this time period, Registrant could not account for 15,264 tablets of oxycodone 30 mg, 13,966 tablets of oxycodone 15 mg, 4,140 tablets of alprazolam 2 mg, and 1,192 tablets of Adderall (generic) 30 mg.

(7) When the DEA conducted its audit on June 1, 2017, the Owner told DEA that Registrant was in the process of improving its practices since discovering the massive shortages that caused Registrant to report missing oxycodone to the Wayne Police Department. Specifically, the Owner advised DEA that Registrant was in the process of taking additional security measures; namely (1) ordering of a safe to store controlled substances (as opposed to the locked glass cabinet currently in use); and (2) tallying daily inventories of controlled substances. Neither of these alleged additional safeguards were effective, as the controlled substances continued to be stored in such a way that all employees

[1] I have used initials to refer to all of Registrant's employees except for the Pharmacist in Charge.

had access to them, and the daily inventories were conducted in such a way that any employee could alter the inventory. As such Registrant, on an ongoing basis, failed to adequately secure its controlled substances in violation of 21 CFR 1301.71.

The Owner and Registrant also both admitted that ''[the Owner] was given notice by DEA that there was reasonable basis to believe that [M.B.] was diverting controlled substances, but [the Owner] did not terminate [M.B.]'s employment for at least four months.'' RFAAX 12, at 2–3.

C. Government's Allegations

In addition to the factual allegations the Registrant admitted in the MOA, the Government has also alleged that M.B., the son of Registrant's owner and a former employee of Registrant, was involved in the theft of controlled substances from Registrant and that Registrant failed to terminate M.B. in the face of evidence that he was diverting controlled substances. OSC, at 4–5; RFAA, at 9–10. To support this allegation, the Government submitted recordings and transcripts of interviews the Wayne Police Department conducted with one of Registrant's Pharmacists and its PIC (which were also attended by DEA officers and investigators), RFAAX 5–9; text messages between Registrant's PIC and a DEA Task Force Officer (hereinafter, TFO One), RFAAX 11, 16; and the declaration of a DEA Diversion Investigator (hereinafter, DI One), who recounted conversations he had with Registrant's employees, owner, and representatives. RFAAX 15.

On June 1, 2017, DEA conducted an inspection at Registrant. DI One stated that he interviewed one of Registrant's pharmacy technicians, who recounted to him an incident from 2016, in which she discovered a trail of oxycodone tablets leading toward the restroom immediately after M.B. was involved in counting oxycodone tablets and then left for the restroom. GX 15, at 2.

On June 2, 2017, the Wayne Police Department interviewed a former pharmacist at Registrant, C.R. RFAAX 6 (Recording of C.R. Interview) and 7 (Transcript of C.R. Interview); *see also* RFAAX 16 (Declaration of TFO One). TFO One attended and participated in the interview. RFAAX 16. During the interview, C.R. described an incident he had with M.B. when C.R. was working as a pharmacist at Registrant and M.B. was working as a pharmacy technician. RFAAAX 7, at 12–13. C.R. stated that he caught M.B. putting a bottle of morphine sulfate 30 mg in his pocket. *Id.* C.R. said he confronted M.B., and M.B. produced the bottle from his pocket. *Id.* C.R. stated that after the pharmacy closed that night, he told the Owner about the incident. *Id.*

The Wayne Police Department interviewed Registrant's PIC, Deborah Clark, on June 9, 2017 and June 14, 2017. RFAAX 5 (Recordings of PIC interviews), 8 (Transcript of June 9 PIC Interview), 9 (Transcript of June 14 PIC Interview); *see also* RFAAX 15, at 2. DI One attended the June 9 interview. RFAAX 15, at 2. During the June 9 interview, PIC Clark reported an incident from May 4, 2017, where M.B. was involved in putting away an order at the pharmacy, which included six bottles of oxycodone. RFAAX 8, at 12. According to PIC Clark, M.B. abruptly left the pharmacy, and, after he left the pharmacy, a bottle of oxycodone was found to be missing. *Id.* When M.B. returned to the pharmacy, he appeared, in PIC Clark's opinion, to be ''spacey.'' *Id.* PIC Clark reported the missing bottle to the Owner. *Id.*

DI One also declared that DEA repeatedly told Registrant that there was a reasonable basis to believe that M.B. was diverting controlled substances. RFAAX 15, at 4. DI One stated that he told the Owner during the September 2017 audit that DEA believed her son, M.B., was diverting controlled substances. *Id.* DI One also said he was present ''at a meeting between representatives of the Department of Justice, DEA and [Registrant] which took place on January 8, 2018 and February 7, 2018,'' and ''[a]t both of those meetings [Registrant]'s representatives were told that [M.B.] was involved in diversion of controlled substances'' and at both of those meetings ''[Registrant]'s representatives indicated that [M.B.] still worked at Wayne Pharmacy.'' *Id.*

II. Discussion

A. Registrant's Registration Is Inconsistent With the Public Interest

Under the Controlled Substances Act, ''[a] registration . . . to . . . distribute[ ] or dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). In the case of a ''practitioner,'' which is defined in 21 U.S.C. 802(21) to include a ''physician,'' Congress directed the Attorney General to consider the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The [registrant]'s experience in dispensing . . . controlled substances.

(3) The [registrant]'s conviction record under Federal or State laws relating to the . . . distribution[ ] or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f). These factors are considered in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003).

According to Agency decisions, I ''may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether'' to revoke a registration. *Id.; see also Jones Total Health Care Pharm., LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018) (citing *Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir. 2016); *MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011); *Volkman* v. *Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I ''need not make explicit findings as to each one.'' *MacKay,* 664 F.3d at 816 (quoting *Volkman,* 567 F.3d at 222); *see also Hoxie,* 419 F.3d at 482. ''In short, . . . the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). Accordingly, findings under a single factor can support the revocation of a registration. *MacKay,* 664 F.3d at 821.

The Government has the burden of proving that the requirements for revocation of a DEA registration in 21 U.S.C. 824(a) are satisfied. 21 CFR 1301.44(e). When the Government has met its *prima facie* case, the burden then shifts to the registrant to show that revoking registration would not be appropriate, given the totality of the facts and circumstances on the record. *Med. Shoppe-Jonesborough,* 73 FR 364, 387 (2008).

In this matter, while I have considered all of the Factors, the Government's evidence in support of its *prima facie* case is confined to Factors Two, Four, and Five. I find the

Government has satisfied its *prima facie* burden of showing that Registrant's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4).

1. Factors Two and/or Four—The Registrant's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

As already discussed, pursuant to section 304 of the CSA, in conjunction with section 303 of the CSA, I am to consider evidence of Registrant's compliance (or non-compliance) with laws related to controlled substances and experience dispensing controlled substances in determining whether Registrant's continued registration is ''consistent with the public interest.'' 21 U.S.C. 824(a)(4). ''[A] registrant's 'ignorance of the law is no excuse' for actions that are inconsistent with responsibilities attendant upon a registration.'' *Daniel A. Glick, D.D.S.,* 80 FR 74,800, 74,809 (2015) (quoting *Sigrid Sanchez, M.D.,* 78 FR 39,331, 39,336 (2013)). Instead, ''[a]ll registrants are charged with knowledge of the CSA, its implementing regulations, as well as applicable state laws and rules.'' *Id.* at 74,809 (internal citations omitted). Further, the Agency has consistently concluded that a pharmacy's registration is subject to revocation due to the unlawful activity of the pharmacy's owners, majority shareholders, officers, managing pharmacist, or other key employee. *EZRX, LLC,* 69 FR 63,178, 63,181 (2004); *Plaza Pharmacy,* 53 FR 36,910, 36,911 (1988).

In support of its contention that Registrant's continued registration is inconsistent with the public interest, the Government has alleged that Registrant violated several federal laws related to controlled substances. Specifically, the Government has alleged that Registrant violated its recordkeeping obligations under the CSA, as implemented in 21 CFR 1304.22(c), to maintain accurate inventories of its controlled substances. The Government also alleged that Registrant violated 21 CFR 1301.71 and 1301.76 by failing to adequately secure its controlled substances and failing to timely notify DEA after Registrant discovered it was missing controlled substances.

A. Recordkeeping Allegations

Recordkeeping is one of the CSA's principal tools for preventing the diversion of controlled substances. *Grider Drug 1 & Grider Drug 2,* 77 FR 44,070, 44,100 (citing *Paul H. Volkman,* 73 FR 30,630, 30,644 (2008)). DEA decisions have explained that ''a registrant's accurate and diligent adherence to [its recordkeeping] obligations is absolutely essential to protect against the diversion of controlled substances.'' *Volkman,* 73 FR at 30,644. Under the Act, ''every registrant . . . dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each such substance . . . received, sold, delivered, or otherwise disposed of by him.'' 21 U.S.C. 827(a). The CSA's implementing regulations specify at 21 CFR 1304.22(c) the records that a dispenser, such as Registrant, is required to maintain regarding the controlled substances it receives and dispenses.

Registrant's records were audited twice by DEA—on June 1, 2017 and September 18, 2017—and once by an auditor hired by Registrant in December 2017. As Registrant admitted in its MOA with the Government, each audit found significant shortages in Registrant's inventories of controlled substances. A shortage in an inventory audit of controlled substances occurs when a pharmacy is unable to account for all of the controlled substances it should have in its inventory.

It is clear from the shortages that Registrant was not maintaining required records. Accordingly, I find the unrefuted evidence supports a finding that Registrant violated its recordkeeping obligations under the CSA. This finding weighs against entrusting Registrant with a registration.

B. Security Controls Allegations

The Government alleged that Registrant violated 21 CFR 1301.71 and 1301.76(b) by failing to promptly report the loss of 47,000 tablets of oxycodone 30mg to DEA. 21 1301.76(b) requires registrants to notify its area DEA Field Division Office of ''the theft or significant loss of any controlled substances within one business day of discovery of such loss or theft'' and to submit a DEA Form 106 regarding the loss or theft. The regulation provides factors to determine whether a loss is ''significant,'' which include ''the actual quantity of controlled substances lost in relation to the type of business,'' and ''[w]hether the loss of the controlled substances can be associated with access to those controlled substances by specific individuals.'' 21 CFR 1301.76(b).

Registrant admitted that it became aware of the loss of 47,000 tablets of oxycodone 30mg in May 2017. The loss of such a large number of tablets of oxycodone, a schedule II controlled substance, is clearly significant under the factors listed in 21 CFR 1301.76(a). Registrant was required to report this significant loss of controlled substances within one business day of discovering the loss. Registrant, however, did not file a DEA 106 notice of theft or loss until June 14, 2017, after DEA conducted its own inspection of Registrant. Registrant's failure to notify DEA of the significant loss of controlled substances within one business day of discovering the loss was a violation of 21 CFR 1301.76(b) and a violation of 21 CFR 1301.71, which requires all registrants to provide ''effective controls and procedures to guard against theft and diversion of controlled substances'' as set forth in 1301.72–76.

2. Factor Five—Such Other Conduct Which May Threaten Public Health and Safety

Under Factor Five, the Administrator is authorized to consider ''[s]uch other conduct which may threaten the public health and safety.'' 5 U.S.C. 823(f)(5). Although Factor Five is broad, DEA decisions have qualified its breadth by limiting the considerations made under that factor to those where there is ''a substantial relationship between the conduct and the CSA's purpose of preventing drug abuse and diversion.'' *Zvi H. Perper, M.D.,* 77 FR 64,131, 64,141 (2012) (citing *Tony T. Bui,* 75 FR 49,979, 49,988 (2010)). As the Agency has previously stated, '''[c]areless or negligent handling of controlled substances creates the opportunity for diversion and [can] justify' the revocation of an existing registration or the denial of an application for a registration.'' *Lon F. Alexander, M.D.,* 82 FR 49,704, 49,725 n.43 (2017) (quoting *Paul J. Caragine, Jr.* 63 FR 51,592, 51,601 (1998)).

The uncontested evidence in this case shows that Registrant was losing large quantities of controlled substances from its inventory and that these losses continued even when Registrant knew about the losses and therefore could have taken measures to stop them. After the DEA's June 2017 audit, Registrant was unquestionably aware that it was losing large quantities of controlled substances, but the DEA's September 2017 audit and the December 2017 audit conducted by Registrant's auditor show that Registrant continued to lose significant quantities of controlled substances throughout 2017. Furthermore, Registrant's employees had reported at least three incidents to Registrant's owner where it appeared to the employee that M.B. had stolen controlled substances from Registrant or where the employee had thwarted M.B.'s attempt to steal controlled

substances from the pharmacy. DEA also told Registrant on three separate occasions that there was a reasonable basis to believe that M.B. was diverting controlled substances. Despite these reports, Registrant continued to employ M.B. until at least February 2018.

There is also no evidence on the record that Registrant took any real measures to increase security at the pharmacy or otherwise stop the losses. Registrant's owner told DEA on June 1, 2017, that Registrant was in the process of taking additional security measures—namely ordering a safe to store controlled substances and taking daily inventories of controlled substances—and that M.B. no longer worked at Registrant. RFAAX 15, at 2. Registrant's PIC, however, told DEA on July 27, 2017, that Registrant's narcotics were being stored in an unlocked case and that any pharmacy employee could change the inventory quantities in Registrant's computer. RFAAX 11 (text messages between PIC and DEA TFO). Registrant also admitted that ''[n]either of these alleged additional safeguards were effective, as the controlled substances continued to be stored in such a way that all employees have access to them, and the daily inventories were conducted in such a way that any employee could alter the inventory.'' RFAAX 12, at 2 (admitting to the factual allegations in paragraphs 2–8 of the OSC); OSC, at 4. Furthermore, PIC Clark told the DEA that, as of July 27, 2017, M.B. was working as a pharmacy tech at Registrant. RFAA 11. Registrant confirmed that M.B. was still employed by Registrant in meetings with DEA on January 8, 2018 and February 7, 2018. RFAAX 15, at 4.

''[A] DEA registrant is obligated at all times to act in the public interest.'' *Peter F. Kelly, D.P.M.,* 82 FR 28,676, 28,688 (2017). Registrant's failure to take action to stop the illicit flow of controlled substances out of the pharmacy was a breach of its duty as a registrant to act in the public interest. Moreover, it likely permitted the additional diversion of hundreds (if not thousands) of units of controlled substances. I, therefore, find that Registrant's failure to stem the known diversion of controlled substances from its inventory constitutes ''conduct which may threaten the public health and safety.'' 21 U.S.C. 823(f)(5).

Having considered all of the factors, I conclude that the evidence pertinent to factors two, four, and five demonstrate a *prima facie* showing that Registrant ''has committed such acts as would render [its] registration . . . inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). I further conclude that Registrant has not rebutted the Government's *prima facie* case.

III. Sanction

Where, as here, the Government has met its *prima facie* burden of showing that Registrant's continued registration is inconsistent with the public interest, the burden shifts to the Registrant to show why it can be entrusted with a registration. *Garrett Howard Smith, M.D.,* 83 FR 18,882, 18,910 (2018) (collecting cases).

The CSA authorizes the Attorney General to ''promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter.'' 21 U.S.C. 871(b). This authority specifically relates ''to 'registration' and 'control,' and 'for the efficient execution of his functions' under the statute.'' *Gonzales,* 546 U.S. at 259. ''Because 'past performance is the best predictor of future performance, *ALRA Labs, Inc.* v. *Drug Enf't Admin.,* 54 F.3d 450, 452 (7th Cir. 1995), [the Agency] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [the registrant's] actions and demonstrate that [registrant] will not engage in future misconduct.' '' *Jayam Krishna-Iyer,* 74 FR at 463 (quoting *Medicine Shoppe,* 73 FR 364, 387 (2008)); *see also Jackson,* 72 FR at 23,853; *John H. Kennnedy, M.D.,* 71 FR 35,705, 35,709 (2006); *Prince George Daniels, D.D.S.,* 60 FR 62,884, 62,887 (1995). The issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual registrant; therefore, the Agency looks at factors, such as the acceptance of responsibility, and the credibility of that acceptance as it relates to the probability of repeat violations or behavior, and the nature of the misconduct that forms the basis for sanction, while also considering the Agency's interest in deterring similar acts. *See Arvinder Singh, M.D.,* 81 FR 8247, 8248 (2016).

Registrant accepted responsibility for most of its misconduct in the MOA, in which it admitted to many of the factual allegations in the OSC in exchange for certain agreements from the Government. Registrant, however, did not present any evidence of remorse for its past misconduct and did not provide any assurances that it would not engage in such conduct in the future. Further, it provided no evidence of rehabilitative actions taken to correct its past unlawful behavior, except an agreement from the Owner, in her individual capacity, that ''she will not serve as an officer, partner, stockholder, proprietor, owner, partial owner, or pharmacist in charge of any entity that either possesses or is seeing a DEA Certificate of Registration'' for so long as the MOA between the Government and Registrant remains in effect. Absent such evidence and such assurances in this matter, I find that continued registration of Registrant is inconsistent with the public interest. Registrant's silence weighs against its continued registration. *Zvi H. Perper, M.D.,* 77 FR 64,131, 64,142 (2012) (citing *Med. Shoppe-Jonesborough,* 73 FR at 387); *see also Samuel S. Jackson,* 72 FR 23,848, 23,853 (2007).

Accordingly, I find that the factors weigh in favor of sanction and I shall order the sanction the Government requested, as contained in the Order below.

IV. Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration BW8625785 issued to Wayne Pharmacy. This Order is effective November 9, 2020.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–22216 Filed 10–7–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–642]

Importer of Controlled Substances Application: MMJ Biopharma Cultivation, Inc.

ACTION: Notice of application.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before November 9, 2020. Such persons may also file a written request for a hearing on the application on or before November 9, 2020.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn:

Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on February 13, 2020, MMJ Biopharma Cultivation, Inc., 71 Margaret Terrance Memorial Way, Akwesasne, New York, 13655, applied to be registered as an importer of the following basic class(es) of controlled substances:

Controlled substance	Drug code	Schedule
Marihuana Extract.	7350	I
Marihuana	7360	I
Tetrahydrocannabinols.	7370	I

The company plans to import the listed controlled substances as mature plants to support the manufacturing of dosage forms for use in clinical trials. This notice does not constitute an evaluation or determination of the merits of the company's application.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2020–22070 Filed 10–7–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–0058]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Currently-Approved Collection; National Incident-Based Reporting System (NIBRS)

AGENCY: Federal Bureau of Investigation (FBI), Department of Justice (DOJ).

ACTION: 30-Day Notice and request for comments.

SUMMARY: The DOJ, FBI, Criminal Justice Information Services (CJIS) Division, will be submitting the following information collection request to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act (PRA) of 1995.

DATES: Comments are encouraged and will be accepted for 30 days until December 7, 2020.

FOR FURTHER INFORMATION CONTACT: 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: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the FBI, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether, and if so, how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently-approved collection.

2. *The Title of the Form/Collection:* National Incident-Based Reporting System.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is 1110–0058. The applicable component within the DOJ is the CJIS Division of the FBI.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Federal, state, local, and tribal law enforcement agencies (LEAs).

Abstract: Under Title 28, United States Code (U.S.C.), Section (§) 534, subsections (a) and (c); the Uniform Federal Crime Reporting Act of 1988, 34 U.S.C. 41303; the Hate Crime Statistics Act, 34 U.S.C. 41305, modified by the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (2009), Public Law (Pub. L.) § 4708; the Anti-Arson Act of 1982, 18 U.S.C. 841 note; the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 34 U.S.C. 41309; the USA Patriot Improvement and Reauthorization Act of 2005, Public Law 109–177, 307, subsection (e) Reporting of Cargo Theft, 120 Statutes at Large 193, 240 (2006); and 34 U.S.C. 12532, this collection requests incident data from federal, state, local, and tribal LEAs in order for the FBI Uniform Crime Reporting (UCR) Program to serve as the national clearinghouse for the collection and dissemination of incident data and to release these statistics in the following publications: *Crime in the United States, Hate Crime Statistics, Law Enforcement Officers Killed and Assaulted,* and *National Incident-Based Reporting System.* The NIBRS is a data collection which allows LEAs to collect information on each crime occurrence. The FBI designed NIBRS to generate data as a byproduct of federal, state, and local automated records management systems (RMS). Currently, the NIBRS collects data on each incident and arrest within 28 crime categories comprised of 71 specific crimes called Group A offenses. For each of the offenses coming to the attention of law enforcement, various details about the crime are collected. In addition to the Group A offenses, arrest data only are reported for 13 Group B offense categories. When reporting data via the traditional Summary Reporting System (SRS), LEAs tally the occurrences of 10 Part I crimes.

The most significant difference between NIBRS and the traditional SRS is the degree of detail in reporting. The NIBRS is capable of producing more detailed, accurate, and meaningful information because data are collected about when and where crime takes place, what form it takes, and the characteristics of its victims and perpetrators. Although most of the general concepts for collecting, scoring, and reporting UCR data in SRS apply in NIBRS (*e.g.,* jurisdictional rules), there are some important differences between the two data collection systems. The SRS employs the Hierarchy Rule, *i.e.,* in a multiple-offense incident, only the most serious offense is reported, and only 10 Part I offenses can be reported. The many advantages NIBRS has over SRS include, but are not limited to, reports up to 10 offenses occurring during the incident; revised, expanded, and new offense definitions; more specificity in reporting and using offense and arrest data for 28 Group A offense categories encompassing 71 crimes; distinguishes between

attempted and completed Group A crimes; provides crimes against society; includes victim-to-offender data, circumstance, drug-related offenses, offenders suspected use of drugs, and expanded computer crime; and provides updated reports tied directly to the original incident. The Group A offense categories include animal cruelty; arson; assault offenses; bribery; burglary/breaking and entering; commerce violations;* counterfeiting/forgery; destruction/damage/vandalism of property; drug/narcotic offenses; embezzlement; espionage;* extortion/blackmail; fraud offenses; fugitive offenses;* gambling offenses; homicide offenses; human trafficking; immigration violations;* kidnapping/abduction; larceny/theft offenses; motor vehicle theft; pornography/obscene material; prostitution offenses; robbery; sex offenses; stolen property offenses; treason;* and weapon law violations. The 13 Group B offense categories, for which only arrest data are collected, include bad checks; bond default;* curfew/loitering/vagrancy violations; disorderly conduct; driving under the influence; drunkenness; family offenses, nonviolent; federal resource violation;* liquor law violations; peeping tom; perjury;* trespass of real property; and all other offenses. (Offense categories followed by an asterisk (*) denote those reported by federal and tribal LEAs only.) In 2019, the NIBRS began collecting additional data values to capture information on domestic violence, cargo theft, and negligent manslaughter.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated number of LEAs submitting data to the FBI UCR Program via NIBRS is 8,656. The FBI designed NIBRS to generate data as a byproduct of federal, state, and local automated RMS. Many LEAs have RMS capable of producing a myriad of statistics to meet their particular needs. LEAs forward only the data required by NIBRS to participate in the FBI UCR Program. Each month, it takes approximately two hours for an average respondent to respond, which is an annual burden of 24 hours. Two hours is the time required for a law enforcement agency's RMS to download the NIBRS data and send the information to the state UCR program (if applicable). The state UCR program then forwards the data to the FBI.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with the NIBRS data collection is 207,744 hours (8,656 LEAs × 24 hours annually = 207,744 total annual hours).

If additional information is required, contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: October 5, 2020.

Melody Braswell,

Department Clearance Officer for the PRA, U.S. Department of Justice.

[FR Doc. 2020–22281 Filed 10–7–20; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of an Extended Benefit (EB) Program for Utah and Alabama

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

This notice announces a change in benefit period eligibility under the EB program for Utah and Alabama.

The following change has occurred since the publication of the last notice regarding the States' EB status:

- Utah's 13-week insured unemployment rate (IUR) for the week ending August 22, 2020, was 4.10 percent, falling below the 5.00 percent threshold necessary to remain ''on'' EB. However, Utah was in a mandatory 13-week ''on'' period until September 26, 2020. Therefore, the EB period for Utah will end on September 26, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.
- Alabama's 13-week IUR for the week ending September 5, 2020, was 4.55 percent, falling below the 5.00 percent threshold necessary to remain ''on'' EB. Therefore, the EB period for Alabama will end on September 26, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.

Information for Claimants

The duration of benefits payable in the EB Program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state ending an EB period, the State Workforce Agency will furnish a written notice to each individual who is currently filing claims for EB of the forthcoming termination of the EB period and its effect on the individual's right to EB (20 CFR 615.13 (c)).

FOR FURTHER INFORMATION CONTACT: U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance Room S–4524, Attn: Thomas Stengle, 200 Constitution Avenue NW, Washington, DC 20210, telephone number (202)–693–2991 (this is not a toll-free number) or by email: *Stengle.Thomas@dol.gov*.

Signed in Washington, DC.

John Pallasch,

Assistant Secretary for Employment and Training.

[FR Doc. 2020–22219 Filed 10–7–20; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of an Extended Benefit (EB) Program for North Dakota

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

This notice announces a change in benefit period eligibility under the EB program for North Dakota.

The following change has occurred since the publication of the last notice regarding the State's EB status:

- North Dakota's 13-week insured unemployment rate (IUR) for the week ending September 12, 2020, was 4.95 percent, falling below the 5.00 percent threshold necessary to remain ''on'' EB. Therefore, the EB period for North Dakota will end on October 3, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.

Information for Claimants

The duration of benefits payable in the EB Program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state ending an EB period, the State Workforce Agency will furnish a written notice to each individual who is currently filing claims for EB of the forthcoming termination of the EB period and its effect on the individual's right to EB (20 CFR 615.13 (c)).

FOR FURTHER INFORMATION CONTACT: U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance Room S–4524, Attn: Thomas Stengle, 200 Constitution Avenue NW, Washington, DC 20210, telephone number (202)-693–2991 (this is not a toll-free number) or by email: *Stengle.Thomas@dol.gov.*

Signed in Washington, DC.

John Pallasch,

Assistant Secretary for Employment and Training.

[FR Doc. 2020–22220 Filed 10–7–20; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Advisory Board on Toxic Substances and Worker Health

AGENCY: Office of Workers' Compensation Programs.

ACTION: Announcement of meeting of the Advisory Board on Toxic Substances and Worker Health (Advisory Board) for the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

SUMMARY: The Advisory Board will meet November 5–6, 2020, via teleconference, from 11:00 a.m. to 5:00 p.m. Eastern time on November 5 and from 11:00 a.m. to 3:00 p.m. Eastern time on November 6.

DATES: Submission of comments, requests to speak, and materials for the record: You must submit comments, materials, and requests to speak at the Advisory Board meeting by October 29, 2020, identified by the Advisory Board name and the meeting date of November 5–6, 2020, by any of the following methods:

- *Electronically:* Send to: *EnergyAdvisoryBoard@dol.gov* (specify in the email subject line, for example ''Request to Speak: Advisory Board on Toxic Substances and Worker Health'').
- *Mail, express delivery, hand delivery, messenger, or courier service:* Submit one copy to the following address: U.S. Department of Labor, Office of Workers' Compensation Programs, Advisory Board on Toxic Substances and Worker Health, Room S–3522, 200 Constitution Ave. NW, Washington, DC 20210.

Instructions: Your submissions must include the Agency name (OWCP), the committee name (the Advisory Board), and the meeting date (November 5–6, 2020). Due to security-related procedures, receipt of submissions by regular mail may experience significant delays. For additional information about submissions, see the **SUPPLEMENTARY INFORMATION** section of this notice.

OWCP will make available publicly, without change, any comments, requests to speak, and speaker presentations, including any personal information that you provide. Therefore, OWCP cautions interested parties against submitting personal information such as Social Security numbers and birthdates.

FOR FURTHER INFORMATION CONTACT: For press inquiries: Ms. Laura McGinnis, Office of Public Affairs, U.S. Department of Labor, Room S–1028, 200 Constitution Ave. NW, Washington, DC 20210; telephone (202) 693–4672; email *Mcginnis.Laura@DOL.GOV.*

SUPPLEMENTARY INFORMATION: The Advisory Board will meet via teleconference: Thursday, November 5, 2020, from 11:00 a.m. to 5:00 p.m. Eastern time; and Friday, November 6, 2020, from 11:00 a.m. to 3:00 p.m. Eastern time. The teleconference number and other details for participating remotely will be posted on the Advisory Board's website, *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm,* 72 hours prior to the commencement of the first meeting date. Advisory Board meetings are open to the public.

Public comment session: Thursday, November 5, 2020, from 3:30 p.m. to 5:00 p.m. Eastern time. Please note that the public comment session ends at the time indicated or following the last call for comments, whichever is earlier. Members of the public who wish to provide public comments should plan to call in to the public comment session at the start time listed.

The Advisory Board is mandated by Section 3687 of EEOICPA. The Secretary of Labor established the Board under this authority and Executive Order 13699 (June 26, 2015). The purpose of the Advisory Board is to advise the Secretary with respect to: (1) The Site Exposure Matrices (SEM) of the Department of Labor; (2) medical guidance for claims examiners for claims with the EEOICPA program, with respect to the weighing of the medical evidence of claimants; (3) evidentiary requirements for claims under Part B of EEOICPA related to lung disease; (4) the work of industrial hygienists and staff physicians and consulting physicians of the Department of Labor and reports of such hygienists and physicians to ensure quality, objectivity, and consistency; (5) the claims adjudication process generally, including review of procedure manual changes prior to incorporation into the manual and claims for medical benefits; and (6) such other matters as the Secretary considers appropriate. The Advisory Board sunsets on December 19, 2024.

The Advisory Board operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and its implementing regulations (41 CFR part 102–3).

Agenda: The tentative agenda for the Advisory Board meeting includes:

- New member training on FACA, EEOICPA, and ethics, and administrative sessions;
- Review and follow-up on Advisory Board's previous recommendations, data requests, and action items;
- Discussions on Advisory Board working groups;
- Review of claims;
- Review of public comments;
- Review of Board tasks, structure and work agenda;
- Consideration of any new issues; and
- Public comments.

OWCP transcribes and prepares detailed minutes of Advisory Board meetings. OWCP posts the transcripts and minutes on the Advisory Board web page, *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm,* along with written comments, speaker presentations, and other materials submitted to the Advisory Board or presented at Advisory Board meetings.

Public Participation, Submissions and Access to Public Record

Advisory Board meetings: All Advisory Board meetings are open to the public. Information on how to participate in the meeting remotely will be posted on the Advisory Board's website.

Submission of comments: You may submit comments using one of the methods listed in the **SUMMARY** section. Your submission must include the Agency name (OWCP) and date for this Advisory Board meeting (November 5–6, 2020). OWCP will post your comments on the Advisory Board website and provide your submissions to Advisory Board members.

Because of security-related procedures, receipt of submissions by regular mail may experience significant delays.

Requests to speak and speaker presentations: If you want to address the Advisory Board at the meeting you must submit a request to speak, as well as any written or electronic presentation, by October 29, 2020, using one of the methods listed in the **SUMMARY** section. Your request may include:

- The amount of time requested to speak;

• The interest you represent (*e.g.,* business, organization, affiliation), if any; and

• A brief outline of the presentation.

PowerPoint presentations and other electronic materials must be compatible with PowerPoint 2010 and other Microsoft Office 2010 formats. The Advisory Board Chair may grant requests to address the Board as time and circumstances permit.

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, are also available on the Advisory Board's web page at *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm.*

For further information regarding this meeting, you may contact Michael Chance, Designated Federal Officer, at *chance.michael@dol.gov,* or Carrie Rhoads, Alternate Designated Federal Officer, at *rhoads.carrie@dol.gov,* U.S. Department of Labor, 200 Constitution Avenue NW, Suite S–3524, Washington, DC 20210, telephone (202) 343–5580.

This is not a toll-free number.

Signed at Washington, DC.

Julia K. Hearthway,

Director, Office of Workers' Compensation Programs.

[FR Doc. 2020–22215 Filed 10–7–20; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Modification Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit modification request received and permit issued.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of requests to modify permits issued to conduct activities regulated and permits issued under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act in the Code of Federal Regulations. This is the required notice of a requested permit modification and permit issued.

DATES: Activities permitted from September 15, 2020–March 30, 2022.

FOR FURTHER INFORMATION CONTACT: Nature McGinn, ACA Permit Officer, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; 703–292–8224; email: *ACApermits@nsf.gov.*

SUPPLEMENTARY INFORMATION: The National Science Foundation (NSF), as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541, 45 CFR 671), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection.

NSF issued a permit (ACA 2019–012) to Conrad Combrink, Senior Vice President, Strategic Development Expeditions and Experiences, Silversea Cruises, Ltd., for waste management activities associated with operating remotely piloted aircraft systems (RPAS). Silversea Cruises engages experienced pilots to fly small, battery-operated, remotely controlled quadcopter equipped with cameras to capture aerial footage for commercial and educational uses.

On November 20, 2019, NSF issued a non-material modification (#1) to permit ACA 2019–012 based on an update regarding activities planned for Silversea Cruises' 2019–2020 field season.

On September 15, 2020, Stanislav Kozhuharov, on behalf of Conrad Combrink, Senior Vice President, Strategic Development Expeditions and Experiences, Silversea Cruises, Ltd., provided NSF an update based on activities planned for the 2020–2021 field season. Silversea's activities are the same or similar as those detailed in the original permit. The Environmental Officer has reviewed the modification request and has determined that the amendment is not a material change to the permit, and it will have a less than a minor or transitory impact.

The permit modification was issued on September 15, 2020.

Erika N. Davis,

Program Specialist, Office of Polar Programs.

[FR Doc. 2020–21074 Filed 10–7–20; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request; Grantee Reporting Requirements for the NSF Accelerating Research Through International Network-to-Network Collaboration (AccelNet) Program

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to establish this collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting Office of Management and Budget (OMB) clearance of this collection for no longer than 3 years.

DATES: Written comments on this notice must be received by December 7, 2020 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite W18200, Alexandria, Virginia 22314; telephone (703) 292–7556; or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

SUPPLEMENTARY INFORMATION: *Title of Collection:* Grantee Reporting Requirements for the NSF Accelerating Research through International Network-to-Network Collaboration (AccelNet) Program.

OMB Number: 3145–NEW.

Expiration Date of Approval: Not applicable.

Type of Request: Intent to seek approval to establish an information collection.

Proposed Project: The NSF's Office of International Science and Engineering (OISE), within the Office of the Director, serves a wide range of grantees across 3 major programs. The AccelNet (Accelerating Research through International Network-to-Network Collaboration) program is designed to link U.S. research networks with complementary networks abroad to coordinate approaches to address grand research challenges. The goals of the program are to accelerate the process of discovery and to prepare the next generation of U.S. researchers to conduct and lead international collaborations.

The NSF AccelNet program has two award types: Design and Implementation. AccelNet Design projects are up to a 24 month planning opportunity, and allows the grantees to determine the research and professional development needs, priorities, and goals to link networks as well as to develop partnerships and collaboration strategies. Implementation track projects support more established networks of networks to implement coordination across networks. As such, AccelNet

Implementation awards have an expected period of performance of 36 to 60 months.

Reporting Requirements in addition to the standard reporting requirements include information on:

- International collaborators (country, affiliation, title, career stage);
- International location(s) visited, duration of stay, and research activity undertaken by all participants, noting the career stage of each participant; and
- Metrics of success demonstrating progress towards achieving the specific project goals, and the goals of the AccelNet program overall.''

Awardees will be required to participate in program-level evaluation by which NSF can assess implementation processes and progress toward program level outcomes. NSF, an NSF contractor, or a grantee on behalf of NSF, may periodically conduct program evaluations or special projects that necessitate access to project level staff and data. This activity may occur at any time during the grant period and could occur after the grant has ended. Project-level participation includes responding to inquiries, interviews and other methods of common data collection and/or aggregation across individual grants. In addition, PIs and project-level evaluators will be asked to assist in developing a program evaluation that will mutually benefit the agency and program participants.

Annual reports are required for the duration of the project. We will use this report to collect information on the technical progress of the funded NSF work, which will allow the managing Program Director to monitor the project and ensure that the award is in good standing. This report will also be used to ensure awardee compliance with both AccelNet-wide and NSF-wide compliance requirements. Finally, it will be used to collect data by the Office of International Science and Engineering for program evaluation.

All the information collected is for internal use by the Office of International Science and Engineering, and will not be made publicly available.

Burden on the Public: Estimated at 5 hours per award for 10 to 14 awards for a total of 70 hours (per year).

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: October 5, 2020.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2020–22318 Filed 10–7–20; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–10; NRC–2020–0169]

Prairie Island Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering the amendment of Special Nuclear Materials (SNM) License SNM–2506 for the Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation (PI ISFSI) located in Goodhue County, Minnesota. The NRC has prepared an environmental assessment (EA) for this proposed license amendment in accordance with its regulations. Based on the EA, the NRC has concluded that a finding of no significant impact (FONSI) is appropriate. The NRC also is conducting a safety evaluation of the proposed license renewal.

DATES: The EA and FONSI referenced in this document are available on October 8, 2020.

ADDRESSES: Please refer to Docket ID NRC–2020–0169 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov/* and search for Docket ID NRC–2020–0169. Address questions about Docket IDs to Jennifer Borges; telephone: 301–287–9127, or by email to *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT SECTION** of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.

FOR FURTHER INFORMATION CONTACT: Jean Trefethen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–0867, or by email to: *Jean.Trefethen@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering a license amendment request (LAR) for license SNM–2506 for the PI specifically licensed ISFSI located in Goodhue County, Minnesota (ADAMS Accession No. ML19217A312). The licensee, Northern States Power Company, a Minnesota corporation (NSPM), is requesting to increase the amount of spent fuel stored at the PI ISFSI by adding Transnuclear, Inc. (TN) TN–40/TN–40HT storage casks, adding a new storage pad within the existing ISFSI footprint. If approved, NSPM would be able to increase the maximum amount of spent fuel allowed under renewed license SNM–2506 for the PI ISFSI to 1,049.60 tons of equivalent uranium of spent fuel assemblies, an equivalent capacity of 64 TN–40HT casks.

The NRC staff has prepared a final EA as part of its review of this license renewal request in accordance with the requirements of part 51 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.'' Based on the final EA, the NRC has determined that an environmental impact statement (EIS) is not required for this proposed action and a FONSI is appropriate. The NRC is also conducting a safety evaluation of the proposed license amendment pursuant to 10 CFR part 72, and the results will be documented in a separate Safety Evaluation Report (SER). If NSPM's request is approved, the NRC will issue the license amendment following publication of

this final EA and FONSI and the SER in the **Federal Register**.

II. Final Environmental Assessment Summary

NSPM is requesting to amend license SNM–2506 for the PI specifically licensed ISFSI to increase the amount of spent fuel allowed. The NRC has assessed the potential environmental impacts of the proposed action and alternatives to the proposed action, shipment of spent fuel to an offsite facility, and the no-action alternative. The results of the NRC's environmental review can be found in the final EA (ADAMS Accession No. ML20275A342). The NRC staff performed its environmental review in accordance with the requirements in 10 CFR part 51. In conducting the environmental review, the NRC considered information in the LAR to expand the ISFSI (ADAMS Accession No. ML19217A313); communications and consultation with the Minnesota State Historic Preservation Office (SHPO); as well as information provided by the Prairie Island Indian Community (PIIC) and 26 additional Native American Tribes; the Minnesota-Wisconsin Ecological Services Field Office of Fish and Wildlife; the Minnesota State Department of Health; the Minnesota Environmental Quality Board, the Minnesota Department of Commerce, the Minnesota Pollution Control Agency, the Minnesota Department of Natural Resources, and the Environmental Protection Agency Region 5.

Approval of NSPM's proposed LAR would allow NSPM to increase the amount of spent fuel stored at the PI ISFSI, allowing up to 64 storage casks and adding a new storage pad within the existing ISFSI footprint. The estimated annual dose to the nearest permanent resident from ISFSI activities is 0.0434 mSv/yr (4.34 mrem/yr) (ADAMS Accession No. ML19217A313), which is below the 0.25 mSv/yr (25 mrem/yr) limit specified in 10 CFR 72.104(a) and the 1 mSv/yr (100 mrem/yr) limit specified in 10 CFR 20.1301(a)(1). Furthermore, NSPM maintains a radiation protection program for the ISFSI in accordance with 10 CFR part 20 to ensure that radiation doses are as low as is reasonably achievable (ALARA). Accordingly, no significant radiological or non-radiological impacts are expected to result from approval of the ISFSI expansion request, and the proposed action would not significantly contribute to cumulative impacts at the PI site. Additionally, there would be no disproportionately high and adverse impacts on minority and low-income populations.

In its LAR, NSPM is proposing no changes in how it handles, and stores spent fuel at the PI ISFSI. In its LAR, NSPM commits to following their Cultural Resource Management Plan during all ground-disturbing expansion activities. Approval of the proposed action is not expected to result in new construction or expansion beyond the existing ISFSI footprint. The ISFSI is a largely passive facility that produces no liquid or gaseous effluents. No significant radiological or non-radiological impacts are expected from the expansion or continued normal operations. Occupational dose estimates associated with the expansion and continued normal operation and maintenance of the ISFSI are expected to be at ALARA levels and within the limits of 10 CFR 20.1201. Therefore, the NRC staff has determined that pursuant to 10 CFR 51.31, preparation of an EIS is not required for the proposed action, and pursuant to 10 CFR 51.32, a FONSI is appropriate.

Furthermore, the NRC staff determined that this LAR does not have the potential to cause effects on historic properties, assuming those were present; therefore, in accordance with 36 CFR 800.3(a)(1), no consultation is required under Section 106 of the National Historic Preservation Act.'' The NRC staff consulted with the Minnesota SHPO via letter dated December 17, 2019, (ADAMS Package Accession No. ML19311C631) and May 28, 2020 (ADAMS Package Accession No. ML20140A115). The Minnesota SHPO responded via letter dated August 10, 2020, indicating they concurred on the finding of no effect (ADAMS Accession No. ML20223A064). Additionally, the NRC staff contacted the PIIC and 26 additional Native American Tribes and provided its determination via letters dated December 19, 2019 (ADAMS Package Accession No. ML19312A048). The PIIC responded on January 17, 2020 (ADAMS Accession No. ML20066G473), and the Shakopee Mdewakanton Sioux Community responded via letter dated January 28, 2020 (ADAMS Accession No. ML20035D132); both indicated that they concurred with the determination of no effect. The NRC staff, with the assistance of the U.S. Fish and Wildlife Service Information for Planning and Consultation project planning tool, determined that the listed species and/or critical habitat will not be adversely affected by the proposed action.

III. Finding of No Significant Impact

Based on its review of the proposed action in the EA, in accordance with the requirements in 10 CFR part 51, the NRC has concluded that the proposed action, amendment of NRC license SNM–2506 for the PI ISFSI located in Goodhue County, Minnesota, will not significantly affect the quality of the human environment. Therefore, the NRC has determined, pursuant to 10 CFR 51.31, that preparation of an EIS is not required for the proposed action and a FONSI is appropriate.

Dated: October 5, 2020.

For the Nuclear Regulatory Commission.

Jessie M. Quintero,

Acting Chief, Environmental Review Materials Branch, Division of Rulemaking, Environment, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2020–22350 Filed 10–7–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 11004455 and 11005966; NRC–2020–0222]

MP Mine Operations, LLC

AGENCY: Nuclear Regulatory Commission.

ACTION: Order; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) issued an Order approving a request, submitted by MP Mine Operations LLC, seeking NRC's consent to the indirect transfers of control of Export License Nos. XSOU8707 and XSOU8827 and requesting approval of a conforming license amendment to reflect the new point-of-contact on Export License Nos. XSOU8707 and XSOU8827.

DATES: The Order was issued on September 21, 2020.

ADDRESSES: Please refer to Docket ID NRC–2020–0222 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0222. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at

https://www.nrc.gov/reading-rm/adams.html. To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS Accession No. for the issued Order is ML20262H160.

FOR FURTHER INFORMATION CONTACT: Andrea R. Jones, Office of International Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 404–997–4443, email: *Andrea.Jones2@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the Order is attached.

Dated October 5, 2020.

For the Nuclear Regulatory Commission.

Nader L. Mamish,

Director, Office of Internal Programs.

Attachment—Order

In the Matter of MP Mine Operations LLC; Docket Nos. 11004455 and 11005966, License Nos. XSOU8707 and XSOU8827, Order Approving Indirect Transfer of Two Export Licenses

I.

MP Mine Operations LLC (MPMO or the Licensee) currently holds export licenses XSOU8707 and XSOU8827. The address included on these export licenses is the Mountain Pass rare earth mine and processing facility. On July 15, 2020, MPMO announced a proposed business combination of MPMO Merger LLC and Fortress Value Acquisition Corporation (''FVAC''), (a/k/a ''FVAC'' Merger LLC III), a publicly traded special purpose acquisition company. Through a series of transactional actions, MPMO will become a direct subsidiary of FVAC Merger LLC III and an indirect subsidiary of MP Materials Corporation, the ultimate parent company. After the proposed business merger is concluded, FVAC's name will change to MP Materials Corporation and MPMO's current majority direct shareholders will become indirect majority shareholders.

II.

The current majority equity holders of MPMO are JHL Capital Group Holdings Two LLC (''JHL''), and QVT Financial LP (''QVT''). JHL and QVT hold membership interests representing 65% and 25%, respectively, of MPMO's outstanding units. After the transaction, JHL and QVT will become indirect majority equity holders of MPMO and equity holders in MP Materials Corp. Additionally, JHL and QVT will hold equity interests of at least 41% and 14%, respectively, in MP Materials Corporation. This combined ownership interest will indirectly represent a majority interest in MPMO. No other single shareholder will hold an interest in MP Materials Corporation of greater than 8%. JHL and QVT will jointly and indirectly own a majority interest in MPMO.

III.

By letter dated August 17, 2020 (ADAMS Accession No. ML20233A654) (ADAMS Accession Nos. ML20233A60 and ML20233A643), respectively, MPMO requested approval from the U.S. Nuclear Regulatory Commission (NRC) for the indirect transfer of control of export licenses XSOU8707 and XSOU8827, resulting in the creation of a new parent company MP Materials Corporation. This request was made pursuant to Section 184 of the Atomic Energy Act of 1954, as amended (AEA) (42 U.S.C. 2234) and part 110, section 50, paragraph d of Title 10 of the *Code of Federal Regulations* (10 CFR 110.50(d)). In association with the proposed indirect transfer, MPMO has requested a minor amendment to the export licenses to update to the licensee contact (in license applications dated August 19, 2020 ((ADAMS Accession Nos. ML20233A60 and ML20233A643, respectively).

The letter dated August 17, 2020 was made publicly available in ADAMS on August 19, 2020. The NRC received one comment. The commenter requested that the matter be held in abeyance pending a Federal government-wide review, including a review by the Committee on Foreign Investment in the United States (CFIUS), of the national security impacts of the proposed transaction. The commenter claims that the transaction will result in a Chinese company, Shenghe Resources Holding Co., Ltd. (Shenghe Resources), having a minority interest in the ultimate parent company through a subsidiary. The commenter does not mention, however, that Leshan Shenghe Rare Earth Co., Ltd. (Leshan Shenghe), the subsidiary of Shenghe Resources currently already holds a minority interest in the existing licensee, and that post-transaction Leshan Shenghe would continue to be a minority owner of the licensee. To the extent Leshan Shenghe's ownership interest changes, the change would be *de minimis,* based upon the information provided by the licensee to support the transfer of control. Because Leshan Shenghe would continue to be a minority owner of the licensee and any change in its ownership interest will be negligible, the indirect transfer would not alter Leshan Shenghe's existing corporate status as a minority owner of the licensee or its corporate control or influence over the licensee vis a vis the remaining owners, including the majority owners.

IV.

Pursuant to Section 184 of the AEA (42 U.S.C. 2234), no license granted by the Commission shall be transferred, assigned, or in any manner disposed of, directly or indirectly, through transfer of control of any license to any person unless the Commission, after securing full information, finds that the transfer is in accordance with the provisions of the AEA, and gives its consent in writing. Pursuant to 10 CFR 110.50(d), a specific export license may be transferred, disposed of, or assigned to another person only with the approval of the Commission by license amendment. And pursuant to 10 CFR 110.51(a)(1), an application requesting amendment of an export license shall be filed on NRC Form 7, ''*Application for NRC Export or Import License, Amendment, Renewal or Consent Request(s),*'' in accordance with 10 CFR 110.31 and 110.32 and must specify the grounds for the requested amendment.

After review of MPMO's supplemental information dated August 11, 2020 (ADAMS Accession No. ML20238B854), export applications XSOU8707 and XSOU8827 dated August 19, 2020 (ADAMS Accession Nos. ML20233A60 and ML20233A643; respectively), and MPMO's ''Expedited Review and Any Necessary Consent for Indirect Change of Control of MP Mine Operations LLC, Export License Nos. XSOU8707 and XSOU8827'', dated August 17, 2020 (ADAMS Accession No. ML20233A654), the NRC staff has determined that the transfer of control is consistent with the applicable provisions of the AEA, regulations, and orders issued by the Commission. The NRC staff has further determined that the request for the proposed conforming license amendment complies with the standards and requirements of the AEA, and the NRC's regulations set forth in 10 CFR part 110. The transfer of control of the license and issuance of the conforming license amendment will not be inimical to the common defense and security, or to the health and safety of the public, or the environment, and all applicable requirements have been satisfied.

For further details with respect to this Order, see MPMO's supplemental information dated August 11, 2020 (ADAMS Accession No. ML20238B854), export applications XSOU8707 and XSOU8827 dated August 19, 2020 (ADAMS Accession No. ML20233A60 and ML20233A643, respectively),

MPMO's ''Expedited Review and Any Necessary Consent for Indirect Change of Control of MP Mine Operations LLC, Export License Nos. XSOU8707 and XSOU8827,'' dated August 17, 2020 (ADAMS Accession No. ML20233A654), ''Response to September 3, 2020 NRC Questions,'' ADAMS Accession No. ML20262H088) and ''MPMO Response to Comments—Export Licenses XSOU8707 and XSOU8827,'' ADAMS Accession No. ML20259A009. These documents are available for public inspection at the Commission Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, MD 20852, and available online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by email to *pdr@nrc.gov.*

VI.

Accordingly, pursuant to Section 184 of the AEA, 10 CFR 110.50(d), and 10 CFR 110.51(c), *it is hereby ordered* that MPMO's request for indirect transfer of control and license amendment application, as described herein, be consented to and approved, respectively.

It is further ordered, that MPMO inform the NRC of the date of the indirect transfer, within 30-days of the transaction closing.

This Order is effective upon issuance. Issuance of this Order does not preclude or foreclose any future NRC enforcement action, if warranted, to address any previous violations of NRC requirements.

Dated at Rockville, Maryland, this 21st day of September 2020.

For the Nuclear Regulatory Commission.

Nader L. Mamish,

Director, Office of International Programs.

[FR Doc. 2020–22314 Filed 10–7–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0221]

Information Collection: NRC Form 483, "Registration Certificate—In Vitro Testing With Byproduct Material Under General License"

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comments.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, NRC Form 483, ''Registration Certificate—In Vitro Testing with Byproduct Material Under General License.''

DATES: Submit comments by December 7, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

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

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0221. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* David Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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: David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0221 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–2020–0221. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2020–0221 on this website.
- *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 ''ADAMS Public Documents'' and then 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.* A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML20205L413. The supporting statement is available in ADAMS under Accession No. ML20205L506.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

Please include Docket ID NRC–2020–0221 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS, and 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. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* NRC Form 483, ''Registration Certificate—In Vitro Testing with Byproduct Material Under General License.''

2. *OMB approval number:* 3150–0038.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* NRC Form 483.

5. *How often the collection is required or requested:* There is a one-time submittal of information to receive a validated copy of the NRC Form 483 with an assigned registration number. In addition, any changes in the information reported on the NRC Form 483 must be reported in writing to the NRC within 30 days after the effective date of the change.

6. *Who will be required or asked to respond:* Any physician, veterinarian in the practice of veterinary medicine, clinical laboratory, or hospital which desires a general license to receive, acquire, possess, transfer, or use specified units of byproduct material in certain *in vitro* clinical or laboratory tests.

7. *The estimated number of annual responses:* 6 responses.

8. *The estimated number of annual respondents:* 6 respondents.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 1.12 hours.

10. *Abstract:* Section 31.11 of Title 10 of the *Code of Federal Regulations* (10 CFR), established a general license authorizing any physician, clinical laboratory, veterinarian in the practice of veterinary medicine, or hospital to possess certain small quantities of byproduct material for *in vitro* clinical or laboratory tests not involving the internal or external administration of the byproduct material or the radiation therefrom to human beings or animals. Possession of byproduct material under 10 CFR 31.11 is not authorized until the physician, clinical laboratory, veterinarian in the practice of veterinary medicine, or hospital has filed the NRC Form 483 and received from the Commission a validated copy of the NRC Form 483 with a registration number. The licensee can use the validated copy of the NRC Form 483 to obtain byproduct material from a specifically licensed supplier. The NRC incorporates this information into a database which is used to verify that a general licensee is authorized to receive the byproduct material.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the estimate of the burden of the information collection accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: October 2, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–22226 Filed 10–7–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0049]

Information Collection: Standard Specifications for the Granting of Patent Licenses

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''Standard Specifications for the Granting of Patent Licenses.''

DATES: Submit comments by November 9, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0049 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–2020–0049. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2020–0049 on this website.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement is available in ADAMS under Accession No. ML20240A151.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

Please include Docket ID NRC–2020–0049 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment

submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''Standard Specifications for the Granting of Patent Licenses.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on May 27, 2020 (85 FR 31821).

1. *The title of the information collection:* Standard Specifications for the Granting of Patent Licenses.
2. *OMB approval number:* 3150–0121.
3. *Type of submission:* Extension.
4. *The form number if applicable:* N/A.
5. *How often the collection is required or requested:* Applications for licenses are submitted once. Other reports are submitted annually, or as other events require.
6. *Who will be required or asked to respond:* Applicants for and holders of NRC licenses to NRC inventions.
7. *The estimated number of annual responses:* 1.
8. *The estimated number of annual respondents:* 1.
9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 10; however, no applications are anticipated during the next three years.
10. *Abstract:* As specified in part 81 of title 10 of the *Code of Federal Regulations,* the NRC may grant nonexclusive licenses or limited exclusive licenses to its patented inventions to responsible applicants. Applicants for licenses to NRC inventions are required to provide information which may provide the basis for granting the requested license. In addition, all license holders must submit periodic reports on efforts to bring the invention to a point of practical application and the extent to which they are making the benefits of the invention reasonably accessible to the public. Exclusive license holders must submit additional information if they seek to extend their licenses, issue sublicenses, or transfer the licenses. In addition, if requested, exclusive license holders must promptly supply to the United States Government copies of all pleadings and other papers filed in any patent infringement lawsuit, as well as evidence from proceedings relating to the licensed patent.

Dated October 2, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–22224 Filed 10–7–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0102]

Information Collection: Domestic Licensing of Special Nuclear Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Domestic Licensing of Special Nuclear Material.''

DATES: Submit comments by December 7, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

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

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0102. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* David Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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: David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0102 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–2020–0102. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2020–0102 on this website.
- *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 ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement and burden spreadsheet are available in ADAMS under Accession Nos. ML20192A093 and ML20192A094, respectively.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

Please include Docket ID NRC–2020–0102 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS, and 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. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* Part 70 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Special Nuclear Material.''

2. *OMB approval number:* OMB approval number 3150–0009.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* Required reports are collected and evaluated on a continuing basis as events occur. Applications for new licenses and amendments may be submitted at any time. Generally, renewal applications are submitted every 10 years, although the Commission has allowed longer periods for major fuel cycle facilities; updates of the Integrated Safety Analysis are submitted annually.

6. *Who will be required or asked to respond:* Applicants for and holders of specific and general licenses to receive title to, own, acquire, deliver, receive, possess, use, or initially transfer special nuclear material.

7. *The estimated number of annual responses:* 1,214.

8. *The estimated number of annual respondents:* 200.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 37,050 hours (31,557 hours reporting + 5,459 hours recordkeeping + 34 hours third-party disclosure).

10. *Abstract:* 10 CFR part 70, establishes requirements for licensees to own, acquire, receive, possess, use, and transfer special nuclear material. The information in the applications, reports, and records is used by the NRC to make licensing and or regulatory determinations concerning the use of special nuclear material.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the estimate of the burden of the information collection accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated October 2, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–22222 Filed 10–7–20; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2021–3 and CP2021–3]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 14, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

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

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2021–3 and CP2021–3; *Filing Title:* USPS Request to Add Priority Mail Express Contract 83 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 2, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* October 14, 2020.

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2020–22336 Filed 10–7–20; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90082; File No. SR–CboeBZX–2020–060]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

October 2, 2020.

I. Introduction

On July 30, 2020, Cboe BZX Exchange, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (the ''Parent''). The proposed rule change was published for comment in the **Federal Register** on August 19, 2020.[3] The Commission received no comment letters regarding the proposed rule change. On September 24, 2020, the Exchange filed Amendment No. 1 to the proposal.[4] The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description

The Exchange proposed certain amendments to the Parent Bylaws that, according to the Exchange, would ''improve the governance processes'' of the Parent and ''make certain provisions more consistent with the Delaware General Corporation Law (''DGCL'').'' [5] According to the Exchange, many of the proposed changes reflect corporate governance best practices and, in some instances, provide clarity and flexibility to the Parent Bylaws.[6]

Proposed Changes to Article 2—Stockholders [7]

The majority of the proposed changes amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings). According to the Exchange, the changes are designed to reflect the most up-to-date practices under the DGCL and provide the Board with additional information and advance notice in connection with nominations and the conduct of business at annual and special meetings. In particular, the Exchange combines current Section 2.12 into Section 2.11 and amends provisions that govern notice requirements for annual and special meetings, as well as provisions that provide general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

Additionally, as detailed further in the Notice, the proposed rule change relocates and expands text concerning nominees for directors and elections of directors, as well as amends provisions concerning the place of annual and special meetings and the adjournment of meetings.[8]

Further, the Exchange proposes to update provisions that govern the preparing of the voting list, the ability of the Board to appoint a director to preside over meetings in the absence of the Chairman of the Board, and provisions concerning the procedural authority of the presiding officer at any stockholder meeting.[9]

Proposed Changes to Article 3—Directors [10]

The proposed rule change amends provisions concerning director vacancies, notice for special meetings of the Board, and the routine filing of consents following an action by the Board.[11]

The proposed change also adds new Section 3.15 (Emergency Bylaws). In particular, that new section provides certain temporary emergency provisions that would apply at the outset of an emergency, disaster, or catastrophe, notwithstanding anything to the contrary in the Certificate of Incorporation or the Bylaws, only for so long as a quorum of the Board cannot readily be convened for action. The Exchange notes that proposed Section 3.15 is meant to provide the Parent with short-term flexibility to continue operations during an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so.[12]

Proposed Changes to Article 4—Committees [13]

The proposed rule change to Section 4.1 (Designation of Committees) adds language to reflect that the Board may designate one or more committees of the Board, and also adds text to address the absence or disqualification of committee members and allow committee members

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89550 (August 13, 2020), 85 FR 51117 (''Notice'').

[4] In Amendment No. 1, the Exchange provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text. Specifically, in Amendment No. 1, the Exchange: (i) Provided additional support for its proposed restrictions on the use of audio, video, and cell phones during stockholder meetings, including information on past practice by the Exchange, underlying authority for such restrictions in the current Parent Bylaws, and comparison to the practices of other Delaware-incorporated public companies; (ii) clarified that the provisions of proposed Section 3.15 are subject to existing Section 10.2, including a representation that emergency Bylaw amendments made pursuant to proposed Section 3.15(g) may need to be filed pursuant to Section 19 of the Exchange Act; (iii) clarified that proposed Section 3.15 is meant to provide short-term flexibility to continue operations during the initial stage of an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so; and (iv) added further explanation of the provision in proposed Section 4.1 regarding the limitation of the power and authority vested in a Board committee in the management of the business and affairs of the Parent. To promote transparency of its proposed amendment, when the Exchange filed Amendment No. 1 with the Commission, it also submitted Amendment No. 1 as a comment letter to the filing, which then became publicly available on the Commission's website.

[5] *See* Notice, *supra* note 3, at 51117.

[6] *See* Notice, *supra* note 3.

[7] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 2 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[8] *See* Notice, *supra* note 3, at 51119–51120. *See also* Section 2.10 (Action at Meeting), 2.11 (Notice of Business and Nomination of Directors at Meetings of Stockholders), 2.1 (Place of Meetings), 2.2 (Annual Meeting), 2.3 (Special Meeting), and 2.7 (Adjournments).

[9] *See also* Amendment No. 1 (concerning restrictions on the use of audio, video, and cell phones during stockholder meetings).

[10] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 3 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[11] *See* Section 3.5 (Vacancies), Section 3.10 (Special Meetings), and Section 3.13 (Action by Consent). *See also* Notice, *supra* note 3, at 51121.

[12] *See* Amendment No. 1.

[13] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 4 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

to unanimously appoint another Director to act at the meeting in place of any such absent or disqualified member. In addition, the Exchange proposes to add text to reflect the power and authority of Board committees.[14]

The proposed rule change to Section 4.2 (The Executive Committee) replaces a list of specific actions and matters that are not to be handled by the Executive Committee and replaces it with a reference to matters under the DGCL that are to be submitted to stockholders for approval.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of that committee from five members to three members.

Proposed Changes to Article 8—Notices [15]

The proposed rule changes in Section 8.1 (Notices) allow notices sent by messenger or overnight courier to be left at the recipient's address and also updates language concerning delivery by electronic mail and when electronic mail delivery is not allowed. The Exchange also proposes to amend Section 8.2 (Electronic Notice) to allow for electronic delivery of materials to stockholders unless the stockholder has opted-out of electronic transmission (currently, electronic transmission is permitted only when a stockholder has opted-in to electronic delivery).

Proposed Rule Changes to Article 11—Forum for Adjudication of Disputes [16]

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum for adjudication of disputes.

Finally, the proposed rule change makes non-substantive edits to the Parent Bylaws, including updating paragraph lettering and numbering and ensuring consistent use of defined terms.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[17] In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act,[18] which requires, that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

The proposed rule change reflects the Exchange's stated goals to improve the governance process of the Parent and update the Parent Bylaws to reflect and track the DGCL and current best practices.[19] The Exchange has represented that it does not believe the proposed rule changes are controversial and that the proposed provisions are common among comparable public companies.[20]

The Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act, including Section 6(b)(1) thereunder, in that the Exchange, and its Parent on the Exchange's behalf as applicable, will remain so organized and have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and enforce compliance by its members and persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

While proposed Section 3.15 will provide the Parent with special limited powers to ensure continued operations at the onset of an emergency situation that otherwise prevents the Board from obtaining the necessary quorum to convene and exercise its power, that section is intended only to provide limited short-term flexibility to ensuring continue operations of the Parent during the initial stage of the emergency situation. Pursuant to proposed paragraph (f), a majority of the elected directors are expected to reconvene as soon as it is possible to do so. In addition, the provisions in new Section 3.15 concerning amendments to the Parent Bylaws remain subject to existing Section 10.2 and, as applicable, the rule filing requirements of Section 19 of the Act.[21]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 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–CboeBZX–2020–060 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–CboeBZX–2020–060. 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–CboeBZX–2020–060 and should be submitted on or before October 29, 2020.

[14] *See* Amendment No. 1 (noting that any Board committee may act only insofar as the resolution of the Board of Directors permits, which is consistent with how Article 4 currently operates).

[15] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 8 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[16] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 11 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[17] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78f(b)(1).

[19] *See* Notice, *supra* note 3, at 51122.

[20] The Exchange represents that other public companies have provisions similar to what it is proposing, and that some of its proposed rule changes have been adopted by other securities and commodities exchanges, including Nasdaq, Inc., Intercontinental Exchange, and the CME Group, Inc. *Id.*

[21] 15 U.S.C. 78s. *See also* Amendment No. 1.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause for approving the proposed rule change, as amended by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**. Amendment No. 1 provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text.[22] The Commission notes that Amendment No. 1 does not change the substance of the proposed rule change as it was initially filed, but merely adds detail to a few select items of the proposal regarding their intended scope. These points of clarification add helpful detail to support the proposal without materially altering it. Accordingly, the Commission finds good cause for approving the proposed rule change, as amended, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.[23]

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change, as modified by Amendment No. 1 (SR–CboeBZX–2020–060), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22254 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

[22] *See supra* note 4 for a description of Amendment No. 1.

[23] 15 U.S.C. 78s(b)(2).

[24] *Id.*

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90075; File No. SR–NYSEArca–2020–56]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend NYSE Arca Rules 5.2–E(j)(3), 5.2–E(j)(8), 5.5–E(g)(2), 8.600–E, and 8.900–E

October 2, 2020.

On June 18, 2020, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend certain listing requirements relating to maintaining a minimum number of beneficial holders and minimum number of shares outstanding. The proposed rule change was published for comment in the **Federal Register** on July 7, 2020.[3]

On August 17, 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 has received no comment letters on the proposed rule change. The Commission is issuing this order 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.

I. Description of the Proposal

The Exchange proposes to amend NYSE Arca Rules 5.2–E(j)(3) and 5.5–E(g)(2) (Investment Company Units), 5.2–E(j)(8) (Exchange-Traded Fund Shares), 8.600–E (Managed Fund Shares), and 8.900–E (Managed Portfolio Shares) (collectively, ''Fund Shares'') to (1) remove the listing requirement that, following the initial twelve-month period after commencement of trading of a series of Investment Company Units, Exchange-Traded Fund Shares, Managed Fund Shares or Managed Portfolio Shares, respectively, on the Exchange, such series have at least 50 beneficial holders, and (2) replace the existing minimum number of shares requirements[7] with a requirement that a series of Fund Shares have at least one creation unit outstanding on an initial and continued listing basis.[8]

The Exchange believes that the requirement that a series of Fund Shares listed on the Exchange must have at least 50 beneficial shareholders is no longer necessary. The Exchange believes that the requirements of Rule 6c–11 under the 1940 Act and, in particular, the website disclosure requirements of Rule 6c–11(c), together with the existing creation and redemption process, serve to mitigate the risks of manipulation and lack of liquidity that the shareholders requirement was intended to address. The Exchange further believes that requiring at least one creation unit to be outstanding at all times, together with the enhanced disclosure requirements of Rule 6c–11, will facilitate an effective arbitrage mechanism that, for Investment Company Units, Managed Fund Shares, and Exchange-Traded Fund Shares, will provide investors with sufficient transparency into the holdings of the underlying portfolio and help ensure that the trading price in the secondary market remains in line with the value per share of a fund's portfolio. As an example, the Exchange notes that Rule 6c–11(c)(1)(vi) requires additional disclosure if the premium or discount is in excess of 2% for more than seven consecutive days, so that there would be transparency to investors in the event there are indications of an inefficient arbitrage mechanism.

With respect to Managed Portfolio Shares, while these securities do not publicly disclose their portfolio holdings daily and are not eligible to rely on Rule 6c–11, the Exchange believes that the applicable Verified Intraday Indicative Value and other information required to be disseminated in connection with the listing and trading of Managed Portfolio Shares ensures transparency of key values and information, and that such information is sufficient to support an effective arbitrage process, independent of any minimum shareholders requirement.

The Exchange states that the arbitrage mechanism generally causes the market price and the net asset value per share to align, and the functioning of the arbitrage mechanism helps to ensure that the trading price in the secondary market is at fair value. The Exchange further states that the existence of the creation and redemption process, as well as the proposed requirement that at least one creation unit is always

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89197 (June 30, 2020), 85 FR 40720 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89584, 85 FR 51817 (August 21, 2020). The Commission designated October 5, 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] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Commentary .01(d) to NYSE Arca Rule 5.2–E(j)(3) (requiring a minimum of 100,000 shares of a series of Investment Company Units to be outstanding at commencement of trading); NYSE Arca Rule 5.2–E(j)(8)(e)(1)(A) (requiring the Exchange to establish a minimum number of Exchange-Traded Fund Shares to be outstanding at the time of commencement of trading); NYSE Arca Rule 8.600–E(d)(1)(A) (requiring the Exchange to establish a minimum number of Managed Fund Shares to be outstanding at the time of commencement of trading); and NYSE Arca Rule 8.900–E(d)(1)(A) (requiring the Exchange to establish a minimum number of Managed Portfolio Shares to be outstanding at the time of commencement of trading).

[8] The Exchange represents that the term ''creation unit'' would have the same meaning as defined in Rule 6c–11(a)(1) under the Investment Company Act of 1940 (''1940 Act'').

outstanding, would ensure that market participants are able to redeem Fund Shares and, thereby, allow the arbitrage mechanism to function properly. The Exchange believes, therefore, that such arbitrage mechanism would obviate the need for a minimum shareholders requirement to support a fair and orderly market in Fund Shares. In addition, the Exchange states that its surveillance procedures for Fund Shares and its ability to halt trading in Fund Shares in specified circumstances provide for additional investor protections by further mitigating any abnormal trading that would affect the Fund Shares' prices.

II. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEArca–2020–56 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [9] 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.

Pursuant to Section 19(b)(2)(B) of the Act,[10] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of and input concerning the proposed rule change's consistency with the Act and, in particular, 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 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.'' [11]

The Commission has consistently recognized the importance of the minimum number of holders and other similar requirements in exchange listing standards. Among other things, such listing standards help ensure that exchange listed securities have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.[12]

As discussed above, the Exchange is proposing to (1) remove the listing requirement that, following the initial twelve-month period after commencement of trading of a series of Fund Shares on the Exchange, such series have at least 50 beneficial holders, and (2) replace the existing minimum number of shares requirements with a requirement that a series of Fund Shares have at least one creation unit outstanding on an initial and continued listing basis. In support of its proposal, the Exchange asserts that, for Investment Company Units, Exchange-Traded Fund Shares and Managed Fund Shares, the portfolio and other disclosure requirements of Rule 6c–11 under the 1940 Act, together with the requirement that there be at least one creation unit outstanding, would facilitate efficient arbitrage and mitigate the manipulation and liquidity risks that the minimum number of beneficial holders requirement was intended to address. With respect to Managed Portfolio Shares, the Exchange asserts that the existing requirement to disseminate the Verified Intraday Indicative Value and related information supports an effective arbitrage process and achieves those goals. The Exchange also believes its surveillance procedures and trading halt authority would further mitigate regulatory concerns. The Exchange does not specifically address the proposed elimination of its existing minimum number of shares requirements.

While the Exchange takes the position that existing disclosure requirements, together with the creation and redemption process, sufficiently mitigate the risks of manipulation and lack of liquidity that the minimum shareholders requirement was intended to address, the Exchange does not explain in any detail the basis for this view, particularly if a series of Fund Shares is permitted to have a very small number of beneficial holders. For example, the Exchange does not address how the arbitrage mechanism will assure Fund Shares with very few holders are sufficiently liquid to support fair and orderly markets. The Exchange also does not discuss potential inefficiencies in the arbitrage mechanism that might occur with illiquid Fund Shares that have very few holders, and the impact that would have on the ability of the arbitrage mechanism to effectively mitigate the risks of manipulation. Further, the Exchange does not address the impact of creation unit size on the efficiency of the arbitrage mechanism (*e.g.,* illiquid Fund Shares with very few holders and a large creation unit size). The Exchange provides no data or analysis to support its position, other than noting the number and size of the creation units for existing series of Fund Shares.

The Exchange provides no specific arguments to support the proposed elimination of its existing minimum number of shares requirements. While the Exchange proposes to replace those requirements with a requirement that a series of Fund Shares have a number of shares outstanding equal to at least one creation unit, the Exchange does not explain why this is an appropriate substitute for its existing standards. Creation unit sizes could be highly variable, since they are determined at the discretion of the issuer of Fund Shares, and the Exchange has not articulated how this new standard would effectively support fair and orderly markets, address the risks of manipulation, and otherwise be consistent with Section 6(b)(5) and other relevant provisions of the Act.

Finally, the Exchange takes the position that its surveillance procedures and trading halt authority for Fund Shares would further mitigate regulatory concerns. The Exchange, however, does not explain in any detail the basis for this view, or how specifically these existing procedures would effectively mitigate the risks addressed by the minimum number of beneficial holders and minimum number of shares requirements the Exchange is proposing to eliminate.

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 self-regulatory organization ['SRO'] that proposed the rule change.'' [13] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable

[9] 15 U.S.C. 78s(b)(2)(B).

[10] *Id.*

[11] 15 U.S.C. 78f(b)(5).

[12] *See, e.g.,* Securities Exchange Act Release No. 57785 (May 6, 2008), 73 FR 27597 (May 13, 2008) (SR–NYSE–2008–17) (stating that the distribution standards, which includes exchange holder requirements ''. . . should help to ensure that the [Special Purpose Acquisition Company's] securities have sufficient public float, investor base, and liquidity to promote fair and orderly markets''); Securities Exchange Act Release No. 86117 (June 14, 2019), 84 FR 28879 (June 20, 2018) (SR–NYSE–2018–46) (disapproving a proposal to reduce the minimum number of public holders continued listing requirement applicable to Special Purpose Acquisition Companies from 300 to 100).

[13] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, 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 Exchange Act and the applicable rules and regulations.[14]

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposal should be approved or disapproved.

IV. Commission's Solicitation of 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) 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, any request for an opportunity to make an oral presentation.[15]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by October 29, 2020. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by November 12, 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,[16] 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–NYSEArca–2020–56 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–2020–56. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–56 and should be submitted by October 29, 2020. Rebuttal comments should be submitted by November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

J. Matthew DeLesDernier,

Assistant Secretary.

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[14] *See id.*

[15] 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).

[16] *See supra* note 3.

[17] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90080; File No. SR–CboeEDGA–2020–021]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

October 2, 2020.

I. Introduction

On July 30, 2020, Cboe EDGA Exchange, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (the ''Parent''). The proposed rule change was published for comment in the **Federal Register** on August 19, 2020.[3] The Commission received no comment letters regarding the proposed rule change. On September 24, 2020, the Exchange filed Amendment No. 1 to the proposal.[4] The Commission is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89541 (August 13, 2020), 85 FR 51125 (''Notice'').

[4] In Amendment No. 1, the Exchange provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text. Specifically, in Amendment No. 1, the Exchange: (i) Provided additional support for its proposed restrictions on the use of audio, video, and cell phones during stockholder meetings, including information on past practice by the Exchange, underlying authority for such restrictions in the current Parent Bylaws, and comparison to the practices of other Delaware-incorporated public companies; (ii) clarified that the provisions of proposed Section 3.15 are subject to existing Section 10.2, including a representation that emergency Bylaw amendments made pursuant to proposed Section 3.15(g) may need to be filed pursuant to Section 19 of the Exchange Act; (iii) clarified that proposed Section 3.15 is meant to provide short-term flexibility to continue operations during the initial stage of an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so; and (iv) added further explanation of the provision in proposed Section 4.1 regarding the limitation of the power and authority vested in a Board committee in the management of the business and affairs of the Parent. To promote transparency of its proposed amendment, when the Exchange filed Amendment No. 1 with the Commission, it also submitted Amendment No. 1 as a comment letter to the filing, which then became publicly available on the Commission's website.

publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description

The Exchange proposed certain amendments to the Parent Bylaws that, according to the Exchange, would ''improve the governance processes'' of the Parent and ''make certain provisions more consistent with the Delaware General Corporation Law (''DGCL'').'' [5] According to the Exchange, many of the proposed changes reflect corporate governance best practices and, in some instances, provide clarity and flexibility to the Parent Bylaws.[6]

Proposed Changes to Article 2—Stockholders [7]

The majority of the proposed changes amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings). According to the Exchange, the changes are designed to reflect the most up-to-date practices under the DGCL and provide the Board with additional information and advance notice in connection with nominations and the conduct of business at annual and special meetings. In particular, the Exchange combines current Section 2.12 into Section 2.11 and amends provisions that govern notice requirements for annual and special meetings, as well as provisions that provide general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

Additionally, as detailed further in the Notice, the proposed rule change relocates and expands text concerning nominees for directors and elections of directors, as well as amends provisions concerning the place of annual and special meetings and the adjournment of meetings.[8]

Further, the Exchange proposes to update provisions that govern the preparing of the voting list, the ability of the Board to appoint a director to preside over meetings in the absence of the Chairman of the Board, and provisions concerning the procedural authority of the presiding officer at any stockholder meeting.[9]

Proposed Changes to Article 3—Directors [10]

The proposed rule change amends provisions concerning director vacancies, notice for special meetings of the Board, and the routine filing of consents following an action by the Board.[11]

The proposed change also adds new Section 3.15 (Emergency Bylaws). In particular, that new section provides certain temporary emergency provisions that would apply at the outset of an emergency, disaster, or catastrophe, notwithstanding anything to the contrary in the Certificate of Incorporation or the Bylaws, only for so long as a quorum of the Board cannot readily be convened for action. The Exchange notes that proposed Section 3.15 is meant to provide the Parent with short-term flexibility to continue operations during an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so.[12]

Proposed Changes to Article 4—Committees [13]

The proposed rule change to Section 4.1 (Designation of Committees) adds language to reflect that the Board may designate one or more committees of the Board, and also adds text to address the absence or disqualification of committee members and allow committee members to unanimously appoint another Director to act at the meeting in place of any such absent or disqualified member. In addition, the Exchange proposes to add text to reflect the power and authority of Board committees.[14]

The proposed rule change to Section 4.2 (The Executive Committee) replaces a list of specific actions and matters that are not to be handled by the Executive Committee and replaces it with a reference to matters under the DGCL that are to be submitted to stockholders for approval.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of that committee from five members to three members.

Proposed Changes to Article 8—Notices [15]

The proposed rule changes in Section 8.1 (Notices) allow notices sent by messenger or overnight courier to be left at the recipient's address and also updates language concerning delivery by electronic mail and when electronic mail delivery is not allowed. The Exchange also proposes to amend Section 8.2 (Electronic Notice) to allow for electronic delivery of materials to stockholders unless the stockholder has opted-out of electronic transmission (currently, electronic transmission is permitted only when a stockholder has opted-in to electronic delivery).

Proposed Rule Changes to Article 11—Forum for Adjudication of Disputes [16]

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum for adjudication of disputes.

Finally, the proposed rule change makes non-substantive edits to the Parent Bylaws, including updating paragraph lettering and numbering and ensuring consistent use of defined terms.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[17] In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act,[18] which requires, that the Exchange be organized

[5] *See* Notice, *supra* note 3, at 51125.

[6] *See* Notice, *supra* note 3.

[7] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 2 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[8] *See* Notice, *supra* note 3, at 51128–29. *See also* Section 2.10 (Action at Meeting), 2.11 (Notice of Business and Nomination of Directors at Meetings of Stockholders), 2.1 (Place of Meetings), 2.2 (Annual Meeting), 2.3 (Special Meeting), and 2.7 (Adjournments).

[9] *See also* Amendment No. 1 (concerning restrictions on the use of audio, video, and cell phones during stockholder meetings).

[10] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 3 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[11] *See* Section 3.5 (Vacancies), Section 3.10 (Special Meetings), and Section 3.13 (Action by Consent). *See also* Notice, *supra* note 3, at 51129.

[12] *See* Amendment No. 1.

[13] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 4 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[14] *See* Amendment No. 1 (noting that any Board committee may act only insofar as the resolution of the Board of Directors permits, which is consistent with how Article 4 currently operates).

[15] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 8 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[16] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 11 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[17] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78f(b)(1).

and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

The proposed rule change reflects the Exchange's stated goals to improve the governance process of the Parent and update the Parent Bylaws to reflect and track the DGCL and current best practices.[19] The Exchange has represented that it does not believe the proposed rule changes are controversial and that the proposed provisions are common among comparable public companies.[20]

The Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act, including Section 6(b)(1) thereunder, in that the Exchange, and its Parent on the Exchange's behalf as applicable, will remain so organized and have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and enforce compliance by its members and persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

While proposed Section 3.15 will provide the Parent with special limited powers to ensure continued operations at the onset of an emergency situation that otherwise prevents the Board from obtaining the necessary quorum to convene and exercise its power, that section is intended only to provide limited short-term flexibility to ensuring continue operations of the Parent during the initial stage of the emergency situation. Pursuant to proposed paragraph (f), a majority of the elected directors are expected to reconvene as soon as it is possible to do so. In addition, the provisions in new Section 3.15 concerning amendments to the Parent Bylaws remain subject to existing Section 10.2 and, as applicable, the rule filing requirements of Section 19 of the Act.[21]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 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–CboeEDGA–2020–021 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–CboeEDGA–2020–021. 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–CboeEDGA–2020–021 and should be submitted on or before October 29, 2020.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause for approving the proposed rule change, as amended by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**. Amendment No. 1 provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text.[22] The Commission notes that Amendment No. 1 does not change the substance of the proposed rule change as it was initially filed, but merely adds detail to a few select items of the proposal regarding their intended scope. These points of clarification add helpful detail to support the proposal without materially altering it. Accordingly, the Commission finds good cause for approving the proposed rule change, as amended, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.[23]

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change, as modified by Amendment No. 1 (SR–CboeEDGA–2020–021), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22252 Filed 10–7–20; 8:45 am]

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[19] *See* Notice, *supra* note 3, at 51130.

[20] The Exchange represents that other public companies have provisions similar to what it is proposing, and that some of its proposed rule changes have been adopted by other securities and commodities exchanges, including Nasdaq, Inc., Intercontinental Exchange, and the CME Group, Inc. *Id.*

[21] 15 U.S.C. 78s. *See also* Amendment No. 1.

[22] *See supra* note 4 for a description of Amendment No. 1.

[23] 15 U.S.C. 78s(b)(2).

[24] *Id.*

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90074; File No. SR–NYSEAMER–2020–68]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Amend Section 220 of the NYSE American Company Guide To Eliminate a Fee Cap on Original Listing Fees for Companies Listed on Foreign Stock Exchanges and Subject All Foreign Issuers to the Original Listing Fee Schedule Applicable to All Other Newly-Listed Companies

October 2, 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 24, 2020, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 220 of the NYSE American Company Guide (the ''Company Guide'') to amend Section 220(b) to remove a limitation on original listing fees for any company listed on a foreign stock exchange. The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Section 220 of the Company Guide provides that the original listing fee for companies listed on foreign stock exchanges, including the one-time charge, is 50% of the rate for domestic companies, with a maximum fee of $32,500.[4] The Exchange proposes to amend Section 220 to eliminate this cap on original listing fees for companies listed on foreign stock exchanges and to specify instead that all foreign issuers will be subject to the original listing fee schedule applicable to all other newly-listed companies as set forth in Section 140. Over time, the Exchange has concluded that it now typically expends similar resources in relation to the initial listing of those companies as for other listing applicants and thus believes that it is appropriate for listing applicants who are listed on a foreign stock exchange to pay original listing fees pursuant to the same fee schedule as other newly-listed companies.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(4)[6] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[7] in that it is designed 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, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange operates in a highly competitive marketplace for the listing of equity securities. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets.

The Exchange believes that the ever shifting market share among the exchanges with respect to new listings and the transfer of existing listings between competitor exchanges demonstrates that issuers can choose different listing markets in response to fee changes. Accordingly, competitive forces constrain exchange listing fees. Stated otherwise, changes to exchange listing fees can have a direct effect on the ability of an exchange to compete for new listings and retain existing listings.

The Exchange believes that it does not constitute an inequitable allocation of fees and is not unfairly discriminatory to remove the cap on original listing fees for companies that are listed on a foreign stock exchange and to charge the same original listing fees to those companies as are charged to other newly-listed companies, because the Exchange expends similar resources in the listing of those companies as for the listing of domestic companies. In addition, the Exchange notes that companies listed on foreign stock exchanges will pay according to the same fee schedule as all other listed companies under the amended rule.

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

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

As amended, all newly listed companies would pay original listing fees on the same basis. The Exchange does not believe that the proposed rule change would have any meaningful effect on the competition among issuers listed on the Exchange.

Intermarket Competition

The Exchange operates in a highly competitive market in which issuers can readily choose to list new securities on other exchanges and transfer listings to other exchanges if they deem fee levels at those other venues to be more favorable. Because competitors are free to modify their own fees in response, and because issuers may change their listing venue, the Exchange does not believe its proposed fee change can 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)[8] of the Act and subparagraph (f)(2) of Rule 19b–4[9] 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

[4] Section 220(b) specifies that additional and annual fees for companies listed on a foreign stock exchange are the same as charged for domestic companies pursuant to Sections 141 and 142. As amended, Section 220(b) would clarify that all foreign issuers are subject to the applicable fee provisions of Sections 141 and 142.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

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) [10] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMER–2020–68 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAMER–2020–68. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2020–68 and should be submitted on or before October 29, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22247 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(2)(B).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90085; File No. SR–NYSEAMER–2020–69]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Harmonize Rules 9261 and 9830 With Recent Changes by the Financial Industry Regulatory Authority, Inc.

October 2, 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 23, 2020, NYSE American LLC (''NYSE American'' 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 harmonize Rules 9261 and 9830 with recent changes by the Financial Industry Regulatory Authority, Inc. (''FINRA'') that temporarily grants the Chief or Deputy Chief Hearing Officer the authority to order that hearings be conducted by video conference if warranted by public health risks posed by in-person hearings during the ongoing novel coronavirus (''COVID–19'') pandemic. As proposed, these temporary amendments would be in effect through December 31, 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to harmonize Rules 9261 (Evidence and Procedure in Hearing) and 9830 (Hearing) with recent changes by FINRA to its Rules 9261 and 9830 that temporarily grants to the Chief or Deputy Chief Hearing Officer the authority to order that hearings be conducted by video conference if warranted by public health risks posed by in-person hearings during the ongoing COVID–19 pandemic. As proposed, these temporary amendments would be in effect through December 31, 2020.[4]

Background

In 2016, NYSE American (then known as NYSE MKT LLC) adopted disciplinary rules that are, with certain exceptions, substantially the same as the Rule 8000 Series and Rule 9000 Series of FINRA and its affiliate, the New York Stock Exchange LLC (''NYSE''), and which set forth rules for conducting investigations and enforcement actions.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange may submit a separate rule filing to extend the expiration date of the proposed temporary amendments if the Exchange requires temporary relief from the rule requirements identified in this proposal beyond December 31, 2020. The amended NYSE American rules will revert back to their current state at the conclusion of the temporary relief period and any extension thereof.

[5] *See* Securities Exchange Act Release Nos. 77241 (February 26, 2016), 81 FR 11311 (March 3, 2016) (SR–NYSEMKT–2016–30) (''2016 Notice'').

The NYSE MKT disciplinary rules were implemented on April 15, 2016.[6]

In adopting disciplinary rules modeled on FINRA's rules, NYSE American adopted the hearing and evidentiary processes set forth in Rule 9261 and in Rule 9830 for hearings in matters involving temporary and permanent cease and desist orders under the Rule 9800 Series. As adopted, the text of Rule 9261 and Rule 9830 are substantially the same as the FINRA rules with certain modifications.[7]

In view of the ongoing spread of COVID–19 and its effect on FINRA's adjudicatory functions nationwide, FINRA recently filed a temporary rule change to grant FINRA's Office of Hearing Officers (''OHO'') and the National Adjudicatory Council (''NAC'') the authority to conduct certain hearings by video conference, if warranted by the current COVID–19-related public health risks posed by in-person hearings. Among the rules FINRA amended were Rules 9261 and 9830.[8]

FINRA represented in its filing that its protocol for conducting hearings by video conference would ensure that such hearings maintain fair process for the parties by, among other things, FINRA's use of a high quality, secure and user-friendly video conferencing service and provide thorough instructions, training and technical support to all hearing participants.[9] According to FINRA, the proposed changes were a reasonable interim solution to allow FINRA's critical adjudicatory processes to continue to function while protecting the health and safety of hearing participants as FINRA works towards resuming in-person hearings in a manner that is compliant with the current guidance of public health authorities.[10]

Pursuant to a regulatory services agreement (''RSA''), FINRA's OHO will administer all aspects of adjudications, including assigning hearing officers to serve as NYSE American hearing officers. A hearing officer from OHO will, among other things, preside over the disciplinary hearing, select and chair the hearing panel, and prepare and issue written decisions. The Chief or Deputy Hearing Officer for all Exchange disciplinary hearings are currently drawn from OHO and are all FINRA employees. The Exchange believes that OHO will utilize the same video conference protocol and processes for Exchange matters under the RSA as it proposes for FINRA matters.

Given that FINRA and its OHO administers disciplinary hearings on the Exchange's behalf, and given that the public health concerns addressed by FINRA's amendments apply equally to the Exchange's disciplinary hearings, the Exchange proposes to temporarily amend its disciplinary rules to allow FINRA to conduct virtual hearings on its behalf.

Proposed Rule Change

Rule 9261(b) states that if a disciplinary hearing is held, a party shall be entitled to be heard in-person, by counsel, or by the party's representative. Absent an agreement by all parties to proceed in another manner, Exchange disciplinary hearings are in-person. As noted, the Chief and Deputy Hearing Officers for all Exchange and cross-market matters are supplied by OHO and are FINRA employees. Accordingly, absent an agreement by all parties to proceed in another manner, under Rule 9261(b) the Chief or Deputy Hearing Officer conducts disciplinary hearings in-person.

Similarly, Rule 9830 outlines the requirements for hearings for temporary and permanent cease and desist orders. Rule 9830(a), however, does not specify that a party shall be entitled to be heard in-person, by counsel, or by the party's representative.

Consistent with FINRA's temporary amendment to FINRA Rules 9261 and 9830, the Exchange proposes to temporarily grant the Chief or Deputy Chief Hearing Officer temporary authority to order, upon consideration of the current COVID–19-related public health risks presented by an in-person hearing, that a hearing under those rules be conducted by video conference. The proposed rule change will permit OHO to make an assessment, based on critical COVID–19 data and criteria and the guidance of health and security consultants, whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference. As noted, FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will maintain fair process for the parties.[11] The Exchange believes that this is a reasonable procedure to follow in hearings under Rules 9261 and 9830 chaired by a FINRA employee.[12]

To effectuate these changes, the Exchange proposes to add the following sentence to Rule 9261(b):

> Upon consideration of the current public health risks presented by an in-person hearing, the Chief Hearing Officer or Deputy Chief Hearing Officer may, on a temporary basis, determine that the hearing shall be conducted, in whole or in part, by video conference.

The proposed text is identical to the language adopted by FINRA.[13]

Similarly, the Exchange proposes to add the following text to Rule 9830(a):

> Upon consideration of the current public health risks presented by an in-person hearing, the Chief Hearing Officer or Deputy Chief Hearing Officer may, on a temporary basis, determine that the hearing shall be conducted, in whole or in part, by video conference.

Once again, the proposed language is identical to the language adopted by FINRA.[14]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Section 6(b)(5),[16] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market

[6] *See* NYSE MKT Information Memorandum 16–02 (March 14, 2016).

[7] *See* 2016 Notice, 81 FR at 11327 & 11332.

[8] *See* Securities Exchange Act Release Nos. 83289 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR–FINRA–2020–027) (''FINRA Filing''). FINRA also proposed to temporarily amend FINRA Rules 1015 and 9524. FINRA Rule 1015 governs the process by which an applicant for new or continuing membership can appeal a decision rendered by FINRA's Department of Member Supervision under FINRA Rule 1014 or 1017 and request a hearing which would be conducted by a subcommittee of the NAC. *See id.* at 55714. The Exchange has not adopted FINRA Rule 1015. FINRA Rule 9524 governs the process by which a statutorily disqualified member firm or associated person can appeal the Department's recommendation to deny a firm or sponsoring firm's application to the NAC. *See id.* Under the Exchange's version of Rule 9524, if the Exchange's Chief Regulatory Officer rejects the application, the member organization, sponsoring member organization, or applicant may request a review by the Exchange Board of Directors. This differs from FINRA's process, which provides for a hearing before the NAC and further consideration by the FINRA Board of Directors.

[9] *See* FINRA Filing, 85 FR at 55713.

[10] *See id.*

[11] *See* FINRA Filing, 85 FR at 55713.

[12] The Exchange notes, as did FINRA, that SEC's Rules of Practice pertaining to temporary cease-and-desist orders provide that parties and witnesses may participate by telephone or, in the Commission's discretion, through the use of alternative technologies that allow remote access, such as a video link. *See* SEC Rule of Practice 511(d)(3); Comment (d); *see* FINRA Filing, 85 FR at 55714, n. 21.

[13] *See* FINRA Filing, 85 FR at 55712.

[14] *Id.*

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[17]

The Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between Exchange rules and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. As previously noted, the text of Rule 9261 and Rule 9830 is substantially the same as FINRA's rule. As such, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed temporary rule change will permit the Exchange to effectively conduct hearings during the COVID–19 pandemic in situations where in-person hearings present likely public health risks. The ability to conduct hearings by video conference will thereby permit the adjudicatory functions of the Exchange's disciplinary rules to continue unabated, thereby avoiding protracted delays. The Exchange believes that this is especially important in matters where temporary and permanent cease and desist orders are sought because the proposed rule change would enable those hearings to proceed without delay, thereby enabling the Exchange to take immediate action to stop significant, ongoing customer harm, to the benefit of the investing public.

Conducting hearings via video conference will give the parties and adjudicators simultaneous visual and oral communication without the risks inherent in physical proximity during a pandemic. Temporarily permitting hearings for disciplinary matters to proceed by video conference maintains fair process by providing respondents a timely opportunity to address and potentially resolve any allegations of misconduct.

As noted, FINRA will use a high quality, secure video conferencing technology with features that will allow the parties to reasonably approximate those tasks that are typically performed at an in-person hearing, such as sharing documents, marking documents, and utilizing breakout rooms. FINRA will also provide training for participants on how to use the video conferencing platform and detailed guidance on the procedures that will govern such hearings. Moreover, the Chief or Deputy Chief Hearing Officer may take into consideration, among other things, a hearing participant's access to connectivity and technology in scheduling a video conference hearing and can also, at their discretion, allow a party or witness to participate by telephone, if necessary, to address such access issues.[18]

For the same reasons, the Exchange believes that the proposed rule change is designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[19] The Exchange believes that the temporary proposed rule change strikes an appropriate balance between providing fair process and enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets while accounting for the significant health and safety risks of in-person hearings stemming from the outbreak of COVID–19.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but is rather intended solely to provide temporary relief given the impacts of the COVID–19 pandemic. In its filing, FINRA provides an abbreviated economic impact assessment maintaining that the changes are necessary to temporarily rebalance the attendant benefits and costs of the obligations under FINRA Rules 1015, 9261, 9524 and 9830 in response to the impacts of the COVID–19 pandemic that is equally applicable to the changes the Exchange proposes.[20] The Exchange accordingly incorporates FINRA's abbreviated economic impact assessment by reference.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[21] and Rule 19b–4(f)(6) thereunder.[22] Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

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)[23] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEAMER–2020–69 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAMER–2020–69. This file number should be included on the subject line if email is used. To help the Commission process and review your

[17] 15 U.S.C. 78f(b)(7) and 78f(d).

[18] *See* text accompanying notes 9–10, *supra*.

[19] 15 U.S.C. 78f(b)(7) and 78f(d).

[20] *See* FINRA Filing, 85 FR at 55716.

[21] 15 U.S.C. 78s(b)(3)(A)(iii).

[22] 17 CFR 240.19b–4(f)(6).

[23] 15 U.S.C. 78s(b)(2)(B).

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, on business days between the hours of 10:00 a.m. and 3:00 p.m., located at 100 F Street NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2020–69 and should be submitted on or before October 29, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22257 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90071; File No. SR–CTA/CQ–2020–02]

Consolidated Tape Association; Notice of Filing and Immediate Effectiveness of the Thirty-Fifth Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Sixth Substantive Amendment to the Restated CQ Plan

October 1, 2020.

Pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 608 thereunder,[2] notice is hereby given that on September 4, 2020,[3] the Participants[4] in the Second Restatement of the Consolidated Tape Association (''CTA'') Plan and the Restated Consolidated Quotation (''CQ'') Plan (''CTA/CQ Plans'' or ''Plans'') filed with the Securities and Exchange Commission (''Commission'') a proposal to amend the Plans. The amendments represent the Thirty-Fifth Substantive Amendment to the CTA Plan and Twenty-Sixth Substantive Amendment to the CQ Plan (''Amendments''). Under the Amendments, the Participants propose to add MIAX PEARL, LLC (''MIAX PEARL'') as a Participant to the Plans.

The proposed Amendments have been filed by the Participants pursuant to Rule 608(b)(3)(ii) under Regulation NMS[5] as concerned solely with the administration of the Plans and as ''Ministerial Amendments'' under both Section IV(b) of the CTA Plan and Section IV(c) of the CQ Plan. As a result, the Amendments become effective upon filing and can be submitted by the Chair of the Plan's Operating Committee. The Commission is publishing this notice to solicit comments on the Amendments from interested persons. Set forth in Sections I and II is the statement of the purpose and summary of the Amendments, along with the information required by Rules 608(a) and 601(a) under the Act, prepared and submitted by the Participants to the Commission.

I. Rule 608(a)

A. Purpose of the Amendment

The above-captioned Amendments add MIAX PEARL as a Participant to the Plans.

B. Governing or Constituent Documents

Not applicable.

C. Implementation of Amendment

Because the Amendments constitute ''Ministerial Amendments'' under both Section IV(b) of the CTA Plan and Section IV(c) under the CQ Plan, the Chairman of the Plan's Operating Committee may submit the Amendments to the Commission on behalf of the Participants in the Plans. Because the Participants designate the Amendments as concerned solely with the administration of the Plans, the Amendments become effective upon filing with the Commission.

D. Development and Implementation Phases

Not applicable.

E. Analysis of Impact on Competition

The Amendments do not impose any burden on competition because they simply add MIAX PEARL as a Participant to the Plans. MIAX PEARL has completed the required steps to be added to the Plans.

F. Written Understanding or Agreement Relating to Interpretation of, or Participation in Plan

Not applicable.

G. Approval by Sponsors in Accordance With Plan

See Item I.C. above.

H. Description of Operation of Facility Contemplated by the Proposed Amendment

Not applicable.

I. Terms and Conditions of Access

Not applicable.

J. Method of Determination and Imposition, and Amount of, Fees and Charges

Not applicable.

K. Method and Frequency of Processor Evaluation

Not applicable.

L. Dispute Resolution

Not applicable.

II. Regulation NMS Rule 601(a)

A. Equity Securities for Which Transaction Reports Shall be Required by the Plan

Not applicable.

B. Reporting Requirements

Not applicable.

C. Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information

Not applicable.

D. Manner of Consolidation

Not applicable.

[1] 15 U.S.C 78k–1(a)(3).

[2] 17 CFR 242.608.

[3] *See* Letter from Robert Books, Chairman, Operating Committee, CTA/CQ Plans, to Vanessa Countryman, Secretary, Commission, dated September 3, 2020.

[4] The Participants are: Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., The Investors' Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX, Inc., The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the ''Participants'').

[5] 17 CFR 242.608(b)(2).

E. Standards and Methods Ensuring Promptness, Accuracy and Completeness of Transaction Reports

Not applicable.

F. Rules and Procedures Addressed to Fraudulent or Manipulative Dissemination

Not applicable.

G. Terms of Access to Transaction Reports

Not applicable.

H. Identification of Marketplace of Execution

Not applicable.

III. Solicitation of Comments

The Commission seeks comments on the Amendments. Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed Amendments are 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–CTA/CQ–2020–02 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–CTA/CQ–2020–02. 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 website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all written statements with respect to the proposed Amendments that are filed with the Commission, and all written communications relating to the proposed Amendments 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 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Plan. 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–CTA/CQ–2020–02 and should be submitted on or before October 29, 2020.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22341 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90084; File No. SR–NSCC–2020–016]

Self-Regulatory Organizations; National Securities Clearing Corporation; Designation of Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To Introduce the Margin Liquidity Adjustment Charge and Include a Bid-Ask Risk Charge in the VaR Charge

October 2, 2020.

On July 30, 2020, National Securities Clearing Corporation (''NSCC'') 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] proposed rule change SR–NSCC–2020–016 to add two new charges to NSCC's margin methodology.[3] On August 13, 2020, NSCC filed Amendment No. 1 to the proposed rule change, to make clarifications and corrections to the proposed rule change.[4] The proposed rule change, as modified by Amendment No. 1, was published for public comment in the **Federal Register** on August 20, 2020.[5] The Commission has received two comment letters on the proposed rule change, as modified by Amendment No. 1.[6]

Section 19(b)(2) of the Act [7] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for the proposed rule change is October 4, 2020.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider and take action on the proposed rule change.

Accordingly, pursuant to Section 19(b)(2) of the Act [8] and for the reasons stated above, the Commission designates November 18, 2020 as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove proposed rule change SR–NSCC–2020–016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22256 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NSCC also filed the proposals contained in the proposed rule change as advance notice SR–NSCC–2020–804 with the Commission pursuant to Section 806(e)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act''), 12 U.S.C. 5465(e)(1), and Rule 19b–4(n)(1)(i) of the Act, 17 CFR 240.19b–4(n)(1)(i).

[4] Amendment No. 1 made clarifications and corrections to the description of the proposed rule change and Exhibits 3 and 5 of the filing. On August 13, 2020, NSCC filed Amendment No. 1 to the advance notice to make similar clarifications and corrections to the advance notice.

[5] Securities Exchange Act Release No. 89558 (August 14, 2020), 85 FR 51521 (August 20, 2020) (''Notice''). The advance notice, as modified by Amendment No. 1, was published for public comment in the **Federal Register** on September 4, 2020. Securities Exchange Act Release No. 89719 (September 1, 2020), 85 FR 55332 (September 4, 2020) (File No. SR–NSCC–2020–804). The comment period for the advance notice, as modified by Amendment No. 1 closed on September 21, 2020, and the Commission received no comments.

[6] Letter from Cass Sanford, Associated General Counsel, OTC Markets Group (September 11, 2020) (''OTC Letter''); Letter from James C. Snow, President/CCO, Wilson-Davis & Co., Inc. (received September 30, 2020) (''Wilson-Davis Letter''), all *available at https://www.sec.gov/comments/sr-nscc-2020-016/srnscc2020016.htm.*

[7] 15 U.S.C. 78s(b)(2).

[8] *Id.*

[9] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90077; File No. SR–C2–2020–011]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

October 2, 2020.

I. Introduction

On July 30, 2020, Cboe C2 Exchange, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (the ''Parent''). The proposed rule change was published for comment in the **Federal Register** on August 19, 2020.[3] The Commission received no comment letters regarding the proposed rule change. On September 24, 2020, the Exchange filed Amendment No. 1 to the proposal.[4] The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description

The Exchange proposed certain amendments to the Parent Bylaws that, according to the Exchange, would ''improve the governance processes'' of the Parent and ''make certain provisions more consistent with the Delaware General Corporation Law (''DGCL'').'' [5] According to the Exchange, many of the proposed changes reflect corporate governance best practices and, in some instances, provide clarity and flexibility to the Parent Bylaws.[6]

Proposed Changes to Article 2—Stockholders [7]

The majority of the proposed changes amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings). According to the Exchange, the changes are designed to reflect the most up-to-date practices under the DGCL and provide the Board with additional information and advance notice in connection with nominations and the conduct of business at annual and special meetings. In particular, the Exchange combines current Section 2.12 into Section 2.11 and amends provisions that govern notice requirements for annual and special meetings, as well as provisions that provide general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

Additionally, as detailed further in the Notice, the proposed rule change relocates and expands text concerning nominees for directors and elections of directors, as well as amends provisions concerning the place of annual and special meetings and the adjournment of meetings.[8]

Further, the Exchange proposes to update provisions that govern the preparing of the voting list, the ability of the Board to appoint a director to preside over meetings in the absence of the Chairman of the Board, and provisions concerning the procedural authority of the presiding officer at any stockholder meeting.[9]

Proposed Changes to Article 3—Directors [10]

The proposed rule change amends provisions concerning director vacancies, notice for special meetings of the Board, and the routine filing of consents following an action by the Board.[11]

The proposed change also adds new Section 3.15 (Emergency Bylaws). In particular, that new section provides certain temporary emergency provisions that would apply at the outset of an emergency, disaster, or catastrophe, notwithstanding anything to the contrary in the Certificate of Incorporation or the Bylaws, only for so long as a quorum of the Board cannot readily be convened for action. The Exchange notes that proposed Section 3.15 is meant to provide the Parent with short-term flexibility to continue operations during an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so.[12]

Proposed Changes to Article 4—Committees [13]

The proposed rule change to Section 4.1 (Designation of Committees) adds language to reflect that the Board may designate one or more committees of the Board, and also adds text to address the absence or disqualification of committee members and allow committee members to unanimously appoint another Director to act at the meeting in place of any such absent or disqualified member. In addition, the Exchange proposes to add text to reflect the power and authority of Board committees.[14]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89547 (August 13, 2020), 85 FR 51100 (''Notice'').

[4] In Amendment No. 1, the Exchange provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text. Specifically, in Amendment No. 1, the Exchange: (i) Provided additional support for its proposed restrictions on the use of audio, video, and cell phones during stockholder meetings, including information on past practice by the Exchange, underlying authority for such restrictions in the current Parent Bylaws, and comparison to the practices of other Delaware-incorporated public companies; (ii) clarified that the provisions of proposed Section 3.15 are subject to existing Section 10.2, including a representation that emergency Bylaw amendments made pursuant to proposed Section 3.15(g) may need to be filed pursuant to Section 19 of the Exchange Act; (iii) clarified that proposed Section 3.15 is meant to provide short-term flexibility to continue operations during the initial stage of an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so; and (iv) added further explanation of the provision in proposed Section 4.1 regarding the limitation of the power and authority vested in a Board committee in the management of the business and affairs of the Parent. To promote transparency of its proposed amendment, when the Exchange filed Amendment No. 1 with the Commission, it also submitted Amendment No. 1 as a comment letter to the filing, which then became publicly available on the Commission's website.

[5] *See* Notice, *supra* note 3, at 51100.

[6] *See* Notice, *supra* note 3.

[7] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 2 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[8] *See* Notice, *supra* note 3, at 51103. *See also* Section 2.10 (Action at Meeting), 2.11 (Notice of Business and Nomination of Directors at Meetings of Stockholders), 2.1 (Place of Meetings), 2.2 (Annual Meeting), 2.3 (Special Meeting), and 2.7 (Adjournments).

[9] *See also* Amendment No. 1 (concerning restrictions on the use of audio, video, and cell phones during stockholder meetings).

[10] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 3 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[11] *See* Section 3.5 (Vacancies), Section 3.10 (Special Meetings), and Section 3.13 (Action by Consent). *See also* Notice, *supra* note 3, at 51103–04.

[12] *See* Amendment No. 1.

[13] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 4 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[14] *See* Amendment No. 1 (noting that any Board committee may act only insofar as the resolution of the Board of Directors permits, which is consistent with how Article 4 currently operates).

The proposed rule change to Section 4.2 (The Executive Committee) replaces a list of specific actions and matters that are not to be handled by the Executive Committee and replaces it with a reference to matters under the DGCL that are to be submitted to stockholders for approval.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of that committee from five members to three members.

Proposed Changes to Article 8—Notices [15]

The proposed rule changes in Section 8.1 (Notices) allow notices sent by messenger or overnight courier to be left at the recipient's address and also updates language concerning delivery by electronic mail and when electronic mail delivery is not allowed. The Exchange also proposes to amend Section 8.2 (Electronic Notice) to allow for electronic delivery of materials to stockholders unless the stockholder has opted-out of electronic transmission (currently, electronic transmission is permitted only when a stockholder has opted-in to electronic delivery).

Proposed Rule Changes to Article 11—Forum for Adjudication of Disputes [16]

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum for adjudication of disputes.

Finally, the proposed rule change makes non-substantive edits to the Parent Bylaws, including updating paragraph lettering and numbering and ensuring consistent use of defined terms.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[17] In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act,[18] which requires, that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

The proposed rule change reflects the Exchange's stated goals to improve the governance process of the Parent and update the Parent Bylaws to reflect and track the DGCL and current best practices.[19] The Exchange has represented that it does not believe the proposed rule changes are controversial and that the proposed provisions are common among comparable public companies.[20]

The Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act, including Section 6(b)(1) thereunder, in that the Exchange, and its Parent on the Exchange's behalf as applicable, will remain so organized and have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and enforce compliance by its members and persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

While proposed Section 3.15 will provide the Parent with special limited powers to ensure continued operations at the onset of an emergency situation that otherwise prevents the Board from obtaining the necessary quorum to convene and exercise its power, that section is intended only to provide limited short-term flexibility to ensuring continue operations of the Parent during the initial stage of the emergency situation. Pursuant to proposed paragraph (f), a majority of the elected directors are expected to reconvene as soon as it is possible to do so. In addition, the provisions in new Section 3.15 concerning amendments to the Parent Bylaws remain subject to existing Section 10.2 and, as applicable, the rule filing requirements of Section 19 of the Act.[21]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 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–C2–2020–011 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–C2–2020–011. 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–C2–2020–011 and should be submitted on or before October 29, 2020.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause for approving the proposed rule change, as amended by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**. Amendment No. 1 provided

[15] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 8 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[16] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 11 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[17] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78f(b)(1).

[19] *See* Notice, *supra* note 3, at 51105.

[20] The Exchange represents that other public companies have provisions similar to what it is proposing, and that some of its proposed rule changes have been adopted by other securities and commodities exchanges, including Nasdaq, Inc., Intercontinental Exchange, and the CME Group, Inc. *Id.*

[21] 15 U.S.C. 78s. *See also* Amendment No. 1.

additional detail and clarity on a few points without materially changing the proposal or the proposed rule text.[22] The Commission notes that Amendment No. 1 does not change the substance of the proposed rule change as it was initially filed, but merely adds detail to a few select items of the proposal regarding their intended scope. These points of clarification add helpful detail to support the proposal without materially altering it. Accordingly, the Commission finds good cause for approving the proposed rule change, as amended, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.[23]

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change, as modified by Amendment No. 1 (SR–C2–2020–011), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22250 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

[22] *See supra* note 4 for a description of Amendment No. 1.

[23] 15 U.S.C. 78s(b)(2).

[24] *Id.*

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90083; File No. SR–FICC–2020–009]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Designation of Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To Introduce the Margin Liquidity Adjustment Charge and Include a Bid-Ask Charge in the VaR Charges

October 2, 2020.

On July 30, 2020, Fixed Income Clearing Corporation (''FICC'') 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] proposed rule change SR–FICC–2020–009 to add two new charges to FICC's margin methodology.[3] On August 13, 2020, FICC filed Amendment No. 1 to the proposed rule change, to make clarifications and corrections to the proposed rule change.[4] The proposed rule change, as modified by Amendment No. 1, was published for public comment in the **Federal Register** on August 20, 2020,[5] and the Commission received no comments.

Section 19(b)(2) of the Act [6] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for the proposed rule change is October 4, 2020.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider and take action on the proposed rule change.

Accordingly, pursuant to Section 19(b)(2) of the Act [7] and for the reasons stated above, the Commission designates November 18, 2020 as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove proposed rule change SR–FICC–2020–009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22255 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] FICC also filed the proposals contained in the proposed rule change as advance notice SR–FICC–2020–802 with the Commission pursuant to Section 806(e)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act''), 12 U.S.C. 5465(e)(1), and Rule 19b–4(n)(1)(i) of the Act, 17 CFR 240.19b–4(n)(1)(i).

[4] Amendment No. 1 made clarifications and corrections to the description of the proposed rule change and Exhibits 3 and 5 of the filing. On August 13, 2020, FICC filed Amendment No. 1 to the advance notice to make similar clarifications and corrections to the advance notice.

[5] Securities Exchange Act Release No. 89560 (August 14, 2020), 85 FR 51503 (August 20, 2020) (''Notice''). The advance notice, as modified by Amendment No. 1, was published for public comment in the **Federal Register** on September 4, 2020. Securities Exchange Act Release No. 89718 (September 1, 2020), 85 FR 55341 (September 4, 2020) (File No. SR–FICC–2020–802). The comment period for the advance notice, as modified by Amendment No. 1 closed on September 21, 2020, and the Commission received no comments.

[6] 15 U.S.C. 78s(b)(2).

[7] *Id.*

[8] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90086; File No. SR–CboeBYX–2020–022]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

October 2, 2020.

I. Introduction

On July 30, 2020, Cboe BYX Exchange, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (the ''Parent''). The proposed rule change was published for comment in the **Federal Register** on August 19, 2020.[3] The Commission received no comment letters regarding the proposed rule change. On September 24, 2020, the Exchange filed Amendment No. 1 to the proposal.[4] The Commission is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89549 (August 13, 2020), 85 FR 51107 (''Notice'').

[4] In Amendment No. 1, the Exchange provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text. Specifically, in Amendment No. 1, the Exchange: (i) Provided additional support for its proposed restrictions on the use of audio, video, and cell phones during stockholder meetings, including information on past practice by the Exchange, underlying authority for such restrictions in the current Parent Bylaws, and comparison to the practices of other Delaware-incorporated public companies; (ii) clarified that the provisions of proposed Section 3.15 are subject to existing Section 10.2, including a representation that emergency Bylaw amendments made pursuant to proposed Section 3.15(g) may need to be filed pursuant to Section 19 of the Exchange Act; (iii) clarified that proposed Section 3.15 is meant to provide short-term flexibility to continue operations during the initial stage of an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the

publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description

The Exchange proposed certain amendments to the Parent Bylaws that, according to the Exchange, would ''improve the governance processes'' of the Parent and ''make certain provisions more consistent with the Delaware General Corporation Law (''DGCL'').'' [5] According to the Exchange, many of the proposed changes reflect corporate governance best practices and, in some instances, provide clarity and flexibility to the Parent Bylaws.[6]

Proposed Changes to Article 2—Stockholders [7]

The majority of the proposed changes amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings). According to the Exchange, the changes are designed to reflect the most up-to-date practices under the DGCL and provide the Board with additional information and advance notice in connection with nominations and the conduct of business at annual and special meetings. In particular, the Exchange combines current Section 2.12 into Section 2.11 and amends provisions that govern notice requirements for annual and special meetings, as well as provisions that provide general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

Additionally, as detailed further in the Notice, the proposed rule change relocates and expands text concerning nominees for directors and elections of directors, as well as amends provisions concerning the place of annual and special meetings and the adjournment of meetings.[8]

Further, the Exchange proposes to update provisions that govern the preparing of the voting list, the ability of the Board to appoint a director to preside over meetings in the absence of the Chairman of the Board, and provisions concerning the procedural authority of the presiding officer at any stockholder meeting.[9]

Proposed Changes to Article 3—Directors [10]

The proposed rule change amends provisions concerning director vacancies, notice for special meetings of the Board, and the routine filing of consents following an action by the Board.[11]

The proposed change also adds new Section 3.15 (Emergency Bylaws). In particular, that new section provides certain temporary emergency provisions that would apply at the outset of an emergency, disaster, or catastrophe, notwithstanding anything to the contrary in the Certificate of Incorporation or the Bylaws, only for so long as a quorum of the Board cannot readily be convened for action. The Exchange notes that proposed Section 3.15 is meant to provide the Parent with short-term flexibility to continue operations during an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so.[12]

Proposed Changes to Article 4—Committees [13]

The proposed rule change to Section 4.1 (Designation of Committees) adds language to reflect that the Board may designate one or more committees of the Board, and also adds text to address the absence or disqualification of committee members and allow committee members to unanimously appoint another Director to act at the meeting in place of any such absent or disqualified member. In addition, the Exchange proposes to add text to reflect the power and authority of Board committees.[14]

The proposed rule change to Section 4.2 (The Executive Committee) replaces a list of specific actions and matters that are not to be handled by the Executive Committee and replaces it with a reference to matters under the DGCL that are to be submitted to stockholders for approval.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of that committee from five members to three members.

Proposed Changes to Article 8—Notices [15]

The proposed rule changes in Section 8.1 (Notices) allow notices sent by messenger or overnight courier to be left at the recipient's address and also updates language concerning delivery by electronic mail and when electronic mail delivery is not allowed. The Exchange also proposes to amend Section 8.2 (Electronic Notice) to allow for electronic delivery of materials to stockholders unless the stockholder has opted-out of electronic transmission (currently, electronic transmission is permitted only when a stockholder has opted-in to electronic delivery).

Proposed Rule Changes to Article 11—Forum for Adjudication of Disputes [16]

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum for adjudication of disputes.

Finally, the proposed rule change makes non-substantive edits to the Parent Bylaws, including updating paragraph lettering and numbering and ensuring consistent use of defined terms.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations

elected directors to reconvene, they would be expected to do so; and (iv) added further explanation of the provision in proposed Section 4.1 regarding the limitation of the power and authority vested in a Board committee in the management of the business and affairs of the Parent. To promote transparency of its proposed amendment, when the Exchange filed Amendment No. 1 with the Commission, it also submitted Amendment No. 1 as a comment letter to the filing, which then became publicly available on the Commission's website.

[5] *See* Notice, *supra* note 3, at 51107.

[6] *See* Notice, *supra* note 3.

[7] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 2 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[8] *See* Notice, *supra* note 3, at 51110. *See also* Section 2.10 (Action at Meeting), 2.11 (Notice of Business and Nomination of Directors at Meetings of Stockholders), 2.1 (Place of Meetings), 2.2 (Annual Meeting), 2.3 (Special Meeting), and 2.7 (Adjournments).

[9] *See also* Amendment No. 1 (concerning restrictions on the use of audio, video, and cell phones during stockholder meetings).

[10] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 3 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[11] *See* Section 3.5 (Vacancies), Section 3.10 (Special Meetings), and Section 3.13 (Action by Consent). *See also* Notice, *supra* note 3, at 51110–51111.

[12] *See* Amendment No. 1.

[13] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 4 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[14] *See* Amendment No. 1 (noting that any Board committee may act only insofar as the resolution of the Board of Directors permits, which is consistent with how Article 4 currently operates).

[15] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 8 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[16] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 11 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

thereunder applicable to a national securities exchange.[17] In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act,[18] which requires, that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

The proposed rule change reflects the Exchange's stated goals to improve the governance process of the Parent and update the Parent Bylaws to reflect and track the DGCL and current best practices.[19] The Exchange has represented that it does not believe the proposed rule changes are controversial and that the proposed provisions are common among comparable public companies.[20]

The Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act, including Section 6(b)(1) thereunder, in that the Exchange, and its Parent on the Exchange's behalf as applicable, will remain so organized and have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and enforce compliance by its members and persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

While proposed Section 3.15 will provide the Parent with special limited powers to ensure continued operations at the onset of an emergency situation that otherwise prevents the Board from obtaining the necessary quorum to convene and exercise its power, that section is intended only to provide limited short-term flexibility to ensuring continue operations of the Parent during the initial stage of the emergency situation. Pursuant to proposed paragraph (f), a majority of the elected directors are expected to reconvene as soon as it is possible to do so. In addition, the provisions in new Section 3.15 concerning amendments to the Parent Bylaws remain subject to existing Section 10.2 and, as applicable, the rule filing requirements of Section 19 of the Act.[21]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 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-CboeBYX–2020–022 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-CboeBYX–2020–022. 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-CboeBYX–2020–022 and should be submitted on or before October 29, 2020.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause for approving the proposed rule change, as amended by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**. Amendment No. 1 provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text.[22] The Commission notes that Amendment No. 1 does not change the substance of the proposed rule change as it was initially filed, but merely adds detail to a few select items of the proposal regarding their intended scope. These points of clarification add helpful detail to support the proposal without materially altering it. Accordingly, the Commission finds good cause for approving the proposed rule change, as amended, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.[23]

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change, as modified by Amendment No. 1 (SR–CboeBYX–2020–022), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22258 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

[17] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78f(b)(1).

[19] *See* Notice, *supra* note 3, at 51112.

[20] The Exchange represents that other public companies have provisions similar to what it is proposing, and that some of its proposed rule changes have been adopted by other securities and commodities exchanges, including Nasdaq, Inc., Intercontinental Exchange, and the CME Group, Inc. *Id.*

[21] 15 U.S.C. 78s. *See also* Amendment No. 1.

[22] *See supra* note 4 for a description of Amendment No. 1.

[23] 15 U.S.C. 78s(b)(2).

[24] *Id.*

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90072; File No. S7–24–89]

Joint Industry Plan; Notice of Filing and Immediate Effectiveness of the Forty-Ninth Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis

October 1, 2020.

Pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 608 thereunder,[2] notice is hereby given that on September 4, 2020,[3] the Participants [4] in the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (''UTP Plan'' or ''Plan'') filed with the Securities and Exchange Commission (''Commission'') a proposal to amend the UTP Plan. The amendment represents the Forty-Ninth Amendment to the Plan (''Amendment''). Under the Amendment, the Participants propose to add MIAX PEARL, LLC (''MIAX PEARL'') as a Participant to the Plan.

The proposed Amendment has been filed by the Participants pursuant to Rule 608(b)(3)(ii) under Regulation NMS [5] as concerned solely with the administration of the Plan and as a ''Ministerial Amendment'' under Section XVI of the Plan. As a result, the Amendment becomes effective upon filing and was submitted by the Chair of the Plan's Operating Committee. The Commission is publishing this notice to solicit comments on the Amendment from interested persons. Set forth in Sections I and II is the statement of the purpose and summary of the Amendment, along with the information required by Rules 608(a) and 601(a) under the Act, prepared and submitted by the Participants to the Commission.

I. Rule 608(a)

A. Purpose of the Amendment

The above-captioned Amendment adds MIAX PEARL as a Participant to the UTP Plan.

B. Governing or Constituent Documents

Not applicable.

C. Implementation of Amendment

Because the Amendment constitutes a ''Ministerial Amendment'' under Section XVI of the UTP Plan, the Chair of the UTP Plan's Operating Committee may submit the Amendment to the Commission on behalf of the Participants in the UTP Plan. Because the Participants designate the Amendment as concerned solely with the administration of the UTP Plan, the Amendment becomes effective upon filing with the Commission.

D. Development and Implementation Phases

Not applicable.

E. Analysis of Impact on Competition

The Amendment does not impose any burden on competition because it simply adds MIAX PEARL as a Participant to the UTP Plan. MIAX PEARL has completed the required steps to be added to the UTP Plan.

F. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan

Not applicable.

G. Approval by Sponsors in Accordance With Plan

See Item I.C. above.

H. Description of Operation of Facility Contemplated by the Proposed Amendment

Not applicable.

I. Terms and Conditions of Access

Not applicable.

J. Method of Determination and Imposition, and Amount of, Fees and Charges

Not applicable.

K. Method and Frequency of Processor Evaluation

Not applicable.

L. Dispute Resolution

Not applicable.

II. Regulation NMS Rule 601(a)

A. Equity Securities for Which Transaction Reports Shall Be Required by the Plan

Not applicable.

B. Reporting Requirements

Not applicable.

C. Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information

Not applicable.

D. Manner of Consolidation

Not applicable.

E. Standards and Methods Ensuring Promptness, Accuracy and Completeness of Transaction Reports

Not applicable.

F. Rules and Procedures Addressed to Fraudulent or Manipulative Dissemination

Not applicable.

G. Terms of Access to Transaction Reports

Not applicable.

H. Identification of Marketplace of Execution

Not applicable.

III. Solicitation of Comments

The Commission seeks comments on the Amendment. Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed Amendment 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 S7–24–89 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 S7–24–89. 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 website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all written statements with respect to the

[1] 15 U.S.C 78k–1(a)(3).

[2] 17 CFR 242.608.

[3] *See* Letter from Robert Books, Chairman, Operating Committee, UTP Plan, to Vanessa Countryman, Secretary, Commission, dated September 3, 2020.

[4] The Participants are: Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., The Investors' Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX, Inc., The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the ''Participants'').

[5] 17 CFR 242.608(b)(2).

proposed Amendment that are filed with the Commission, and all written communications relating to the proposed Amendment 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 20549–1090, 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 Plan. 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 S7–24–89 and should be submitted on or before October 29, 2020.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22342 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90079; File No. SR–CBOE–2020–071]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

October 2, 2020.

I. Introduction

On July 30, 2020, Cboe Exchange, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (the ''Parent''). The proposed rule change was published for comment in the **Federal Register** on August 19, 2020.[3] The Commission received no comment letters regarding the proposed rule change. On September 24, 2020, the Exchange filed Amendment No. 1 to the proposal.[4] The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description

The Exchange proposed certain amendments to the Parent Bylaws that, according to the Exchange, would ''improve the governance processes'' of the Parent and ''make certain provisions more consistent with the Delaware General Corporation Law (''DGCL'').'' [5] According to the Exchange, many of the proposed changes reflect corporate governance best practices and, in some instances, provide clarity and flexibility to the Parent Bylaws.[6]

Proposed Changes to Article 2—Stockholders [7]

The majority of the proposed changes amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings). According to the Exchange, the changes are designed to reflect the most up-to-date practices under the DGCL and provide the Board with additional information and advance notice in connection with nominations and the conduct of business at annual and special meetings. In particular, the Exchange combines current Section 2.12 into Section 2.11 and amends provisions that govern notice requirements for annual and special meetings, as well as provisions that provide general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

Additionally, as detailed further in the Notice, the proposed rule change relocates and expands text concerning nominees for directors and elections of directors, as well as amends provisions concerning the place of annual and special meetings and the adjournment of meetings.[8]

Further, the Exchange proposes to update provisions that govern the preparing of the voting list, the ability of the Board to appoint a director to preside over meetings in the absence of the Chairman of the Board, and provisions concerning the procedural authority of the presiding officer at any stockholder meeting.[9]

Proposed Changes to Article 3—Directors [10]

The proposed rule change amends provisions concerning director vacancies, notice for special meetings of the Board, and the routine filing of consents following an action by the Board.[11]

The proposed change also adds new Section 3.15 (Emergency Bylaws). In particular, that new section provides certain temporary emergency provisions that would apply at the outset of an emergency, disaster, or catastrophe, notwithstanding anything to the contrary in the Certificate of Incorporation or the Bylaws, only for so long as a quorum of the Board cannot

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89543 (August 13, 2020), 85 FR 51093 (''Notice'').

[4] In Amendment No. 1, the Exchange provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text. Specifically, in Amendment No. 1, the Exchange: (i) Provided additional support for its proposed restrictions on the use of audio, video, and cell phones during stockholder meetings, including information on past practice by the Exchange, underlying authority for such restrictions in the current Parent Bylaws, and comparison to the practices of other Delaware-incorporated public companies; (ii) clarified that the provisions of proposed Section 3.15 are subject to existing Section 10.2, including a representation that emergency Bylaw amendments made pursuant to proposed Section 3.15(g) may need to be filed pursuant to Section 19 of the Exchange Act; (iii) clarified that proposed Section 3.15 is meant to provide short-term flexibility to continue operations during the initial stage of an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so; and (iv) added further explanation of the provision in proposed Section 4.1 regarding the limitation of the power and authority vested in a Board committee in the management of the business and affairs of the Parent. To promote transparency of its proposed amendment, when the Exchange filed Amendment No. 1 with the Commission, it also submitted Amendment No. 1 as a comment letter to the filing, which then became publicly available on the Commission's website.

[5] *See* Notice, *supra* note 3, at 51093.

[6] *See* Notice, *supra* note 3.

[7] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 2 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[8] *See* Notice, *supra* note 3, at 51096–97. *See also* Section 2.10 (Action at Meeting), 2.11 (Notice of Business and Nomination of Directors at Meetings of Stockholders), 2.1 (Place of Meetings), 2.2 (Annual Meeting), 2.3 (Special Meeting), and 2.7 (Adjournments).

[9] *See also* Amendment No. 1 (concerning restrictions on the use of audio, video, and cell phones during stockholder meetings).

[10] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 3 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[11] *See* Section 3.5 (Vacancies), Section 3.10 (Special Meetings), and Section 3.13 (Action by Consent). *See also* Notice, *supra* note 3, at 51097.

readily be convened for action. The Exchange notes that proposed Section 3.15 is meant to provide the Parent with short-term flexibility to continue operations during an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so.[12]

Proposed Changes to Article 4—Committees [13]

The proposed rule change to Section 4.1 (Designation of Committees) adds language to reflect that the Board may designate one or more committees of the Board, and also adds text to address the absence or disqualification of committee members and allow committee members to unanimously appoint another Director to act at the meeting in place of any such absent or disqualified member. In addition, the Exchange proposes to add text to reflect the power and authority of Board committees.[14]

The proposed rule change to Section 4.2 (The Executive Committee) replaces a list of specific actions and matters that are not to be handled by the Executive Committee and replaces it with a reference to matters under the DGCL that are to be submitted to stockholders for approval.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of that committee from five members to three members.

Proposed Changes to Article 8—Notices [15]

The proposed rule changes in Section 8.1 (Notices) allow notices sent by messenger or overnight courier to be left at the recipient's address and also updates language concerning delivery by electronic mail and when electronic mail delivery is not allowed. The Exchange also proposes to amend Section 8.2 (Electronic Notice) to allow for electronic delivery of materials to stockholders unless the stockholder has opted-out of electronic transmission (currently, electronic transmission is permitted only when a stockholder has opted-in to electronic delivery).

Proposed Rule Changes to Article 11—Forum for Adjudication of Disputes [16]

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum for adjudication of disputes.

Finally, the proposed rule change makes non-substantive edits to the Parent Bylaws, including updating paragraph lettering and numbering and ensuring consistent use of defined terms.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[17] In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act,[18] which requires, that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

The proposed rule change reflects the Exchange's stated goals to improve the governance process of the Parent and update the Parent Bylaws to reflect and track the DGCL and current best practices.[19] The Exchange has represented that it does not believe the proposed rule changes are controversial and that the proposed provisions are common among comparable public companies.[20]

The Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act, including Section 6(b)(1) thereunder, in that the Exchange, and its Parent on the Exchange's behalf as applicable, will remain so organized and have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and enforce compliance by its members and persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

While proposed Section 3.15 will provide the Parent with special limited powers to ensure continued operations at the onset of an emergency situation that otherwise prevents the Board from obtaining the necessary quorum to convene and exercise its power, that section is intended only to provide limited short-term flexibility to ensuring continue operations of the Parent during the initial stage of the emergency situation. Pursuant to proposed paragraph (f), a majority of the elected directors are expected to reconvene as soon as it is possible to do so. In addition, the provisions in new Section 3.15 concerning amendments to the Parent Bylaws remain subject to existing Section 10.2 and, as applicable, the rule filing requirements of Section 19 of the Act.[21]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2020–071 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2020–071. 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

[12] *See* Amendment No. 1.

[13] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 4 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[14] *See* Amendment No. 1 (noting that any Board committee may act only insofar as the resolution of the Board of Directors permits, which is consistent with how Article 4 currently operates).

[15] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 8 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[16] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 11 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[17] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78f(b)(1).

[19] *See* Notice, *supra* note 3, at 51098.

[20] The Exchange represents that other public companies have provisions similar to what it is proposing, and that some of its proposed rule changes have been adopted by other securities and commodities exchanges, including Nasdaq, Inc., Intercontinental Exchange, and the CME Group, Inc. *Id.*

[21] 15 U.S.C. 78s. *See also* Amendment No. 1.

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–CBOE–2020–071 and should be submitted on or before October 29, 2020.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause for approving the proposed rule change, as amended by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**. Amendment No. 1 provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text.[22] The Commission notes that Amendment No. 1 does not change the substance of the proposed rule change as it was initially filed, but merely adds detail to a few select items of the proposal regarding their intended scope. These points of clarification add helpful detail to support the proposal without materially altering it. Accordingly, the Commission finds good cause for approving the proposed rule change, as amended, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.[23]

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change, as modified by Amendment No. 1 (SR–CBOE–2020–071), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22251 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

[22] *See supra* note 4 for a description of Amendment No. 1.

[23] 15 U.S.C. 78s(b)(2).

[24] *Id.*

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89967; File No. SR–IEX–2020–14]

Self-Regulatory Organizations: Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Transaction Fees Pursuant to IEX Rule 15.110 Concerning D-Limit Orders

September 23, 2020.

Editorial Note: Notice document 2020–21403, which published Tuesday, September 29, 2020, was incorrect. We are republishing it here in its entirety.

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 11, 2020, the Investors Exchange LLC (''IEX'' or the ''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

Pursuant to the provisions of Section 19(b)(1) under the Act,[3] and Rule 19b–4 thereunder,[4] IEX is filing with the Commission a proposed rule change to modify its Fee Schedule, pursuant to IEX Rule 15.110(a) and (c), to establish fees for the execution of Discretionary Limit (''D-Limit'') orders, including pricing incentives for certain D-Limit, Discretionary Peg (''D-Peg''), and Midpoint Peg (''M-Peg'') order executions. Changes to the Fee Schedule pursuant to this proposal are effective upon filing,[5] and will be implemented in conjunction with the full launch of D-Limit trading on October 1, 2020.[6]

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 statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its Fee Schedule, pursuant to IEX Rule 15.110(a) and (c), to establish fees for the execution of Discretionary Limit (''D-Limit'') orders, including pricing incentives for certain D-Limit, Discretionary Peg (''D-Peg'') and Midpoint Peg (''M-Peg'') order executions. Changes to the Fee Schedule, as proposed, will be implemented in conjunction with the full launch of D-Limit trading on October 1, 2020.[7]

D-Limit Overview

The D-Limit order type was approved by the Commission on August 26, 2020,[8] and is designed to protect liquidity providers from potential adverse selection by latency arbitrage trading strategies in a fair and nondiscriminatory manner.[9] A D-Limit order may be a displayed or non-displayed limit order that upon entry

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

[5] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] *See* IEX Trading Alert #2020–024 (Discretionary Limit (D-Limit) Order Type Launch) issued on August 28, 2020, available at *https://iextrading.com/alerts/#/121.* All D-Limit, D-Peg, and M-Peg executions that occur prior to October 1, 2020 will be subject to the fee schedule in effect prior to October 1, 2020.

[7] *See* supra note 6.

[8] *See* Securities Exchange Act Release No. 89686 (August 26, 2020), 85 FR 54438 (September 1, 2020) (SR–IEX–2019–15) (''D-Limit Approval Order'').

[9] *See* Securities Exchange Act Release No. 87814 (December 20, 2019), 84 FR 71997, 71998 (December 30, 2019) (SR–IEX–2019–15) (''D-Limit Proposal'').

and when posting to the Order Book[10] is priced to be equal to and ranked at the order's limit price, but will be adjusted to a less-aggressive price during periods of quote instability, as defined in IEX Rule 11.190(g).[11] Otherwise, a D-Limit order operates in the same manner as either a displayed or non-displayed limit order, as applicable.[12]

Proposed D-Limit Fees

As proposed, liquidity taking D-Limit orders will be subject to the same transaction fees as other displayed or non-displayed orders.[13] However, in order to incentivize the entry of liquidity providing D-Limit orders, IEX proposes to establish pricing incentives, including free executions of certain liquidity providing D-Limit orders and discounted execution fees for certain liquidity providing D-Peg and M-Peg orders.

Specifically, as proposed, any Member[14] that enters a D-Limit order that provides liquidity, with the exception of executions of such orders at a price below $1.00 per share, will be entitled to free executions and certain reduced transaction fees (in lieu of the fees otherwise specified and unless a lower fee applies)[15] as described below:

- A D-Limit order that provides liquidity and is executed at a price at or above $1.00 per share results in a free execution.
- D-Peg and M-Peg orders that provide liquidity and execute at a price at or above $1.00 per share will be subject to a discount of $0.0002 per share from the fee that would otherwise be charged for the number of shares of such orders executed up to the number of shares of D-Limit orders that provided liquidity and executed at a price at or above $1.00 per share during such time period by the same Member, measured on a monthly basis.
- IEX will aggregate all of a Member's MPIDs to calculate each Member's D-Peg, M-Peg, and D-Limit liquidity providing orders on a monthly basis. In addition, a Member may request that the Exchange aggregate its activity with activity of such Member's affiliated Members. A Member requesting aggregation of affiliate activity is required to certify to the Exchange the affiliate status of Members whose activity it seeks to aggregate prior to receiving approval for aggregation and inform the Exchange immediately of any event that causes an entity to cease being an affiliate. The Exchange shall review available information regarding the entities and reserves the right to request additional information to verify the affiliate status of an entity.[16] The Exchange shall approve a request unless it determines that the certification is not accurate.[17]

The proposed fees are designed to provide a narrowly tailored incentive for Members to utilize a new and innovative order type. IEX understands that Members seeking to utilize the new D-Limit order type may need to modify and test their trading strategies and order entry systems in order to do so, and the proposed fees are designed to provide a meaningful economic incentive for such efforts.

IEX believes that offering free executions for specified D-Limit orders, as well as a discount for qualifying D-Peg and M-Peg orders, will provide a meaningful incentive to Members to adopt the use of D-Limit orders. IEX operates in a highly competitive environment in which a large number of national securities exchanges and other venues offer markets for the execution of equities transactions, and in which market participants can readily direct order flow to other venues. Accordingly, IEX believes that it is important to provide meaningful incentives for the adoption of D-Limit orders to demonstrate the value of the order type in protecting against certain types of latency arbitrage and thereby result in increasing use of the order type.

D-Peg and M-Peg order types are widely used and have achieved significant adoption by a diverse group of IEX Members. Consequently, IEX believes that combining free executions for certain liquidity providing D-Limit orders with discounted executions for certain liquidity providing D-Peg and M-Peg orders, as described above, will effectively augment the incentive value provision of free D-Limit liquidity providing executions for orders executed at or above $1.00.

IEX believes that providing pricing incentives to liquidity providing orders will best incentivize the adoption of D-Limit orders. While a D-Limit order can take liquidity upon entry, IEX believes that its commercial success will be based on Members having favorable experiences as liquidity adders, particularly for displayed liquidity providing D-Limit orders. As the Commission noted in the D-Limit Approval Order:

> [E]xchange functionality that protects resting displayed orders against adverse selection resulting from latency arbitrage will improve the execution quality experienced by market participants that post displayed liquidity and are affected by such adverse selection. This improved execution quality could encourage more displayed liquidity, which in turn, would contribute to fair and orderly markets and support the public price discovery process. Specifically, if sufficiently protected against being ''picked off'' when the conditions for latency arbitrage are present, long term investors will no longer experience those relatively poor executions and thus will have less incentive to avoid posting displayed orders on exchanges.[18]

IEX believes that targeting fee incentives to liquidity adders will enable Members to see for themselves the benefits of using the innovative D-Limit order type, while adding to the pool of displayed (as well as non-displayed) liquidity from which all market participants will benefit.

Specifically, IEX believes that the proposed fees are a narrowly tailored approach that is designed to increase liquidity on IEX, which would benefit investors in securities traded on IEX. Specifically, to the extent Members post more displayed D-Limit orders on IEX, price discovery would be enhanced drawing more natural trading interest to the public markets, which would deepen liquidity and dampen the impact of shocks from liquidity demand. The Exchange notes that other exchanges offer a diverse range of fee-based incentives to their members for trading activity that they believe incentivizes liquidity adding orders, and thereby improves market quality.[19]

[10] *See* IEX Rule 1.160(p).

[11] *See* IEX Rules 11.190(b)(7) and 11.190(g).

[12] *See* IEX Rule 11.190(b)(7).

[13] Generally, IEX currently charges $.0003 per share for any displayed orders that execute (whether they add or remove liquidity) and $.0009 per share for any non-displayed orders that execute (whether they add or remove liquidity). If the shares execute for less than $1.00 per share, the Exchange charges 0.30% of the total dollar value of the transaction. *See* IEX Fee Schedule, *https://iextrading.com/trading/fees/*.

[14] *See* IEX Rule 1.160(s).

[15] *See* IEX Fee Schedule, *https://iextrading.com/trading/fees/*.

[16] For example, the Exchange would review a Member's Form BD in FINRA's Central Registration Depository (''CRD'') to verify that the Member(s) for which it seeks aggregation pursuant to the proposed rule is under 75% common ownership or control of the requesting Member.

[17] If two or more Members become affiliated on or prior to the sixteenth day of a month and submit the required request for aggregation on or prior to the twenty-second day of the month, an approval of the request by the Exchange shall be deemed to be effective as of the first day of that month. If two or more Members become affiliated after the sixteenth day of a month or submit a request for aggregation after the twenty-second day of the month, an approval of the request by the Exchange shall be deemed to be effective as of the first day of the next calendar month. For purposes of applying the fees and discounts proposed herein, references to Member shall include the Member and any of its affiliates that have been approved for aggregation, and the term ''affiliate'' shall mean any Member under 75% common ownership or control of that Member.

[18] *See* D-Limit Approval Order, *supra* note 8, 54443.

[19] Notably, several exchanges pay rebates to Members for liquidity adding orders, which means the exchanges actually pay Members to add liquidity. *See, e.g.,* New York Stock Exchange Price List as of August 20, 2020 (offering free execution for liquidity adding orders, with rebates ranging from $0.0000 to $0.0030 per share executed),

Continued

Importantly, the Exchange is not proposing to offer a rebate, in that the proposed fee reduction will not be greater than the fee charged for executions on the Exchange. The Exchange will offer a discount to the fees charged for qualifying orders, but such discounts will not result in any net payments to Members for the execution of such orders. The proposed fees are designed to provide an alternative fee-based incentive to Members to utilize a new order type on IEX.

Finally, IEX notes that the affiliate aggregation for purposes of applying D-Limit fees and discounts is similar to pricing structures in place at other exchanges. For example, the New York Stock Exchange, Inc. (''NYSE'') pricing rules provide that ''[f]or purposes of applying any provision of the Price List where the charge assessed, or credit provided, by the Exchange depends upon the volume of a member organization's activity, a member organization may request that the Exchange aggregate its eligible activity with the eligible activity of its affiliates.'' The NYSE Price List also includes provisions regarding aggregation requests, and the timing thereof, that are substantially similar to those proposed in this rule change. Nasdaq Stock Market (''Nasdaq'') pricing rules contain virtually identical provisions.[20]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[21] in general, and furthers the objectives of Section 6(b)(4)[22] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable fees among IEX members and persons using its facilities. Additionally, IEX believes that the proposed fees are consistent with the investor protection objectives of Section 6(b)(5)[23] of the Act, in particular, in that they are designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, brokers, or dealers.

The Exchange believes that the proposed fees are consistent with the Act because they would be available to all Members on a fair, equal and nondiscriminatory basis. All Members, regardless of their technological sophistication, can enter D-Limit liquidity providing orders priced to execute at or above $1.00.[24] Similarly, all Members, regardless of their technological sophistication, can enter liquidity providing D-Peg and M-Peg orders priced to execute at or above $1.00. Thus, all Members are able to benefit from the proposed fees on a fair, equal and nondiscriminatory basis.

The proposed fees take a narrowly tailored approach, designed to maximize participation for the launch of D-Limit by incentivizing the entry of certain displayed and non-displayed liquidity adding D-Limit orders. As noted in the Purpose section, IEX understands that Members seeking to utilize the D-Limit order type may need to modify and test their trading strategies and order entry systems in order to do so, and the proposed fees are designed to provide a meaningful economic incentive for such efforts.

As discussed in the Purpose section, IEX believes that the proposed fees are narrowly tailored to incentivize Members to enter liquidity providing D-Limit, D-Peg and M-Peg orders on IEX that execute at or above $1.00, which would have several benefits to investors in securities traded on IEX. First, to the extent Members post more displayed D-Limit orders on IEX, price discovery would be enhanced potentially drawing more natural trading interest to the public markets, which would deepen liquidity and dampen the impact of shocks from liquidity demand. Second, incentivizing the entry of both displayed and non-displayed liquidity adding orders should deepen the Exchange's liquidity pool and contribute to public price discovery, consistent with the goal of enhancing market quality. Third, to the extent that the proposed fees incentivize additional liquidity providing D-Peg and M-Peg orders that execute at the Midpoint Price[25] and at or above $1.00, such orders will result in benefits to counterparties, offering price improvement over the prevailing national best bid and offer prices.[26] Finally, to the extent price discovery is enhanced and more orders are drawn to the public markets, orders executed on IEX will have the benefit of exchange transparency, regulation, and oversight. These benefits would generally apply to all Members, even if a Member elects to not use the D-Limit order type.

Additionally, IEX notes that it operates in an increasingly competitive and fragmented marketplace consisting of a large number of national securities exchanges and non-exchange venues that trade equity securities. As a relatively small market, IEX believes that meaningful pricing incentives are necessary to encourage market participants to utilize the new D-Limit order type and address the significant competitive challenges of attracting liquidity to the Exchange. While the Exchange believes that adding liquidity with a D-Limit order with less risk of adverse selection should provide an incentive for Members to use D-Limit, the Exchange also believes that offering Members the proposed fees will enhance such incentive.

The Exchange notes that other exchanges offer a diverse range of pricing incentives to their members for providing certain order flow. For example, Cboe BZX Exchange, Inc. offers free executions for orders that participate in its new Cboe Market Close, which it describes as a ''competitive pricing structure designed to incentivize market participants to direct their [Market-On-Close] orders to the Cboe Market Close, which the Exchange believes would facilitate the execution of those orders . . . .''[27] And several exchanges offer rebate tiers for liquidity adding orders, which increase in value as the member increases its volume of liquidity adding orders.[28]

https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf; and Nasdaq Equity 7 Pricing Schedule (offering free execution for liquidity adding orders, with rebates ranging from $0.00005 to $0.0033 per share executed). *See https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-equity-7.*

[20] *See* NYSE's Price List, available at: *https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf; see also* Nasdaq Equities 7 Pricing Schedule, Section 127.

[21] 15 U.S.C. 78f(b).

[22] 15 U.S.C. 78f(b)(4).

[23] 15 U.S.C. 78f(b)(5).

[24] *See* D-Limit Approval Order, *supra* note 8, 54450 (''Because IEX will reprice all D-Limit orders without further action from the user, all users will benefit equally regardless of their technological capabilities and ability to take action within a prescribed period.'')

[25] *See* IEX Rule 1.160(t).

[26] *See* IEX Rule 1.160(u).

[27] *See* Securities Exchange Act Release No. 88487 (March 26, 2020), 85 FR 18290 (April 1, 2020) (SR–CboeBZX–2020–027).

[28] *See e.g.,* ''Nasdaq Growth Program,'' Nasdaq Equity 7 Section 114 (paying a $0.0025 per share rebate to a member that adds a daily average of 750,000 or more shares and also increases its volume of shares traded on Nasdaq in prior months by 20%; and paying a larger $0.0027 per share rebate if that member increases its share of liquidity adding volume by at least 50% versus its August 2016 share of liquidity adding volume); *see also* NYSE Arca Equities Fee Schedule, Retail Order Step-Up Tiers 1–3 (paying rebates ranging from $0.0035 to $0.0037 per share for retail orders that provide displayed liquidity with the rebates increasing as the member submits more retail orders (both adding and taking) in any given month when compared to a prior period).

Furthermore, several exchanges use ''cross-asset'' incentives, which offer pricing incentives to members that submit different order types to the exchange.[29] Similarly, other exchanges have fee structures that use trading in one order type to incentivize trading either in another order type or more generally, as well as coupling requirements of displayed and non-displayed volume to qualify for preferential pricing, that are analogous to IEX's proposal to provide discounts to certain D-Peg and M-Peg executions to incentive the use of D-Limit orders.[30] Additionally, other exchanges have fee structures that incentivize the posting of non-displayed liquidity adding orders, which is analogous to how the proposed fees incentivize non-displayed liquidity adding M-Peg and D-Peg orders, in addition to incentivizing liquidity adding D-Limit orders.[31] Finally, maker-taker exchanges pay rebates to members that add liquidity,[32] while taker-maker exchanges pay rebates to members that take liquidity, in each case to incentivize such order flow.[33]

The proposed fees are designed to provide a simple, non-rebate incentive to market participants to enter certain liquidity providing D-Limit orders on IEX, through free executions and discounts on certain D-Peg and M-Peg orders.

The Exchange further believes that the proposed fees are consistent with the Act's requirement that the Exchange provide for an equitable allocation of fees because all Members are eligible for incentive pricing on the same terms and conditions, and there are no restrictions on the use of impacted order types. Additionally, IEX believes that it is reasonable to incentivize Members to use certain D-Limit liquidity providing orders in view of the potential burdens on those Members that choose to adopt this new order type and the highly competitive market in which IEX operates, which provides myriad alternatives to Members. Furthermore, the Exchange believes that the proposed fees are an equitable allocation of fees because to the extent the incentive pricing results in increased liquidity on IEX, all market participants will benefit, irrespective of if the market participant is an IEX Member that submits certain liquidity adding D-Limit, D-Peg, and M-Peg orders. Accordingly, IEX believes that the proposed fees constitute an equitable allocation of fees.

Moreover, the Exchange believes that the proposal to cap the $0.0002 discount on certain D-Peg and M-Peg orders executed by a Member (including any aggregated affiliates) at the number of D-Limit liquidity adding shares executed by that Member in the same month is reasonable, because the cap is designed to further incentivize Members to submit certain liquidity-adding D-Limit orders. Further, all Members will benefit from the discount in the same manner based on the number of qualifying D-Limit liquidity adding shares they execute.

Finally, the Exchange believes that the proposed aggregation provision is consistent with the protection of investors and the public interest because it establishes a clear policy with respect to affiliate aggregation for fee purposes that is common among other exchanges, thereby promoting Members' understanding of the parameters of the D-Limit fee and discount structure and the efficiency of its administration. The proposed rule is equitable because all similarly situated members are subject to the proposed rules equally, and access to the Exchange is offered on fair and nondiscriminatory terms.

All Members seeking to aggregate their activity are subject to the same reasonable parameters, in accordance with a standard that recognizes an affiliation as of the month's beginning, or close in time to when the affiliation occurs, provided the Member submits a timely request. Moreover, the proposed billing aggregation language is reasonable because it establishes a standard for implementation of aggregation requests that is easy to administer and that reflects the need for the Exchange to review and approve aggregation requests while avoiding the complexities associated with proration of the bills of Members that become affiliated during the course of a month. The Exchange believes that this approach will thus simplify the process of billing for the Exchange and its Members and is substantially similar to aggregation standards adopted by other exchanges.[34]

The Exchange also believes that the proposed rule change avoids disparate treatment of Members that have divided their various business activities between separate legal entities as compared to Members that operate those business activities within a single legal entity. The Exchange further notes that the aggregation provisions are reasonable and designed to remove impediments to and perfect the mechanism of a free and open market by harmonizing with the rules across exchanges that govern the aggregation of certain activity for purposes of billing. In particular, as noted above, both Nasdaq and NYSE have substantially similar rules governing aggregation of activity for fee purposes.[35] Thus, the Exchange believes the proposed change does not present any unique or novel issues under the Act that have not already been considered by the Commission.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not

[29] *See, e.g.,* NYSE Arca Equities Fee Schedule, Cross-Asset Tiers 1–2 (paying rebates of $0.0031 per share and $0.0030 per share, respectively, for adding more than 0.30% of consolidated average daily volume concurrent with an affiliate meeting certain volume thresholds on the NYSE Arca Options exchange). *See https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf. See also,* Cboe BZX Exchange, Inc. Cross-Asset Tape B Tier (paying a rebate of $0.0031 per share for adding volume since February 2015 equal to or greater than 0.06% of total consolidated volume if the member also has an options market maker that added options customer volume equal to or greater than 1.00%), available at *http://markets.cboe.com/us/equities/membership/fee_schedule/bzx/.*

[30] *See* Nasdaq Equities 7 Pricing Schedule, Section 118 (providing lower fees or higher rebates/credits for specified levels of volume, either generally or through the use of a particular order type if coupled with specified volume in other specified order types, including several examples of rebates tied to adding displayed liquidity and non-displayed liquidity at specified levels of volume). For example, Nasdaq pays a rebate of $0.00295 per share for adding more than 0.70% of total consolidated volume (''TCV''), provided that at least 0.20% of the added TCV was done with midpoint and midpoint extended life orders, and the member also removed at least 1.10% of TCV). Similarly, Nasdaq pays a rebate of $0.0027 per share for displayed quotes/orders that provide liquidity if the member also takes and provides specified levels of consolidated volume and provides a daily average of at least 800,000 shares of non-displayed liquidity during the month in question; *see also* NYSE Arca Equities Fee Schedule, Limit Non-Displayed Order Step Up Tier (paying rebates ranging from $0.0004 to $0.0020 per share for meeting certain thresholds of adding limit non-displayed liquidity and adding midpoint (non-displayed) liquidity). Similarly, NYSE Arca pays rebates ranging from $0.0029 to $0.0031 per share for orders that meet certain thresholds for adding displayed liquidity, removing liquidity, and participating in the exchange's closing auctions, including additional rebates of between $0.0010 to $0.0020 per share for adding liquidity with non-displayed midpoint orders.

[31] *See* Nasdaq Equities 7 Pricing Schedule, Section 118 (providing rebates of between $0.0005 to $0.0075 per share for adding non-displayed liquidity at specified levels of volume, provided that some of the added non-displayed liquidity was done with various combinations of midpoint and midpoint extended life orders).

[32] *See supra* note 19.

[33] Cboe EDGA pays a $0.018 per share rebate for liquidity taking orders, *see https://markets.cboe.com/us/equities/membership/fee_schedule/edga/*; Cboe BYX pays a $0.005 per share rebate for liquidity taking orders, *see https://markets.cboe.com/us/equities/membership/fee_schedule/byx/*; and Nasdaq BX pays between $0.0000 and $0.0030 per share for liquidity taking orders, *see* Nasdaq BX Equity 7, *https://listingcenter.nasdaq.com/rulebook/bx/rules/bx-equity-7.*

[34] *See supra* note 20.

[35] *Id.*

necessary or appropriate in furtherance of the purposes of the Act. To the contrary, IEX believes that the proposed fees would enhance competition and execution quality by increasing the Exchange's pool of both displayed and non-displayed liquidity, and to the extent that displayed liquidity increases, would contribute to the public price discovery process.

The Exchange does not believe that the proposed fees will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act since competing venues use various pricing structures to incentivize market participants to add liquidity to their markets, including but not limited to paying rebates to liquidity providers.[36] The proposed fees are a means of providing such incentives without the use of rebates, as described in the Purpose and Statutory Basis sections. And, as noted in the Statutory Basis section, other exchanges have adopted similar pricing incentives for their current offerings. Moreover, subject to the SEC rule filing process, other exchanges could adopt a similar order type and fee incentive. Further, the Exchange operates in a highly competitive market in which market participants can easily direct their orders to competing venues, including off-exchange venues, if its fees are viewed as non-competitive.

The Exchange also does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. While Members that add liquidity using certain D-Limit orders (as well as certain D-Peg and M-Peg orders) will be subject to different fees based on this usage, those differences are not based on the type of Member entering orders but on whether the Member chose to submit certain liquidity providing D-Limit orders. As noted above, not only can any Member submit certain liquidity adding D-Limit orders, but every Member would benefit from the availability of more liquidity on the Exchange that the proposed fees are designed to incentivize

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.

[36] *See supra* note 19.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) [37] of the Act.

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) [38] 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–IEX–2020–14 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–2020–14. 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–IEX–2020–14, and should be submitted on or before October 20, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. R1–2020–21403 Filed 10–7–20; 8:45 am]

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[37] 15 U.S.C. 78s(b)(3)(A)(ii).

[38] 15 U.S.C. 78s(b)(2)(B).

[39] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90076; File No. SR–MEMX–2020–10]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt the Initial Fee Schedule and Other Fees for MEMX LLC

October 2, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 21, 2020, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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 is filing with the Commission a proposed rule change to adopt (i) the initial fees and rebates applicable to Members [3] of the Exchange

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 1.5(p).

pursuant to Exchange Rule 15.1(a) and (c), and (ii) regulatory fees related to the Central Registration Depository (''CRD system''), which will be collected by the Financial Industry Regulatory Authority, Inc. (''FINRA'') as set forth in proposed Rule 15.1(e). The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to implement a fee schedule (the ''Fee Schedule'') applicable to use of the Exchange. The Exchange will commence operations as a national securities exchange on September 21, 2020, and thus, proposes the fees to be effective as of the date of this filing.

The Exchange first notes that upon launch it will operate in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange will be only one of several equities venues to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 18% of total market share.[4] Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and as it commences operations the Exchange anticipates representing a small percentage of the overall market.

Transaction Fees

Below is a description of the fees and rebates that the Exchange intends to impose under the initial proposed Fee Schedule, which will be applicable to transactions executed in all trading sessions. Under the proposed Fee Schedule, the Exchange will operate a ''Maker-Taker'' model whereby it provides rebates to Members that provide liquidity and charges fees to those that remove liquidity, as further described below. The Exchange does not initially propose to charge different fees or provide different rebates depending on the amount of orders submitted to, and/or transactions executed on or through, the Exchange. Accordingly, all fees and rebates described below are applicable to all Members, regardless of the overall volume of a Member's trading activities on the Exchange.

(A) Standard Fee for Removed Volume

The Exchange proposes to charge a standard fee of $0.0025 per share for executions of orders that remove liquidity from the MEMX Book[5] (''Removed Volume'') in all securities traded on the Exchange priced at or above $1.00 per share.[6]

(B) Standard Rebate for Added Displayed Volume

The Exchange proposes to provide a standard rebate of $0.0029 per share for executions of orders that: (i) Are displayed on the MEMX Book and (ii) add liquidity to the Exchange (''Added Displayed Volume''), in all securities traded on the Exchange priced at or above $1.00 per share.[7] The proposed standard rebate for Added Displayed Volume would apply to the Reserve Quantity[8] of an order such that any replenishment amount of the Reserve Quantity of an order that is executed against would be treated as Added Displayed Volume even though such portion of the order was not displayed on the MEMX Book prior to the order being replenished in accordance with the Member's instructions and the Exchange's rules. The entire portion of the Reserve Quantity of an order would be eligible for this rebate, however, a Member would only receive such rebate for any portion(s) of the Reserve Quantity that is (are) executed against.

(C) Rebates for Added Displayed Volume That Establishes or Matches the National Best Bid or Offer (''NBBO'')

The Exchange proposes to provide an identical rebate of $0.0029 per share for executions of Added Displayed Volume orders that either: (i) establish the NBBO (''Setter Volume'') or (ii) establish a new best bid or offer (''BBO'') on MEMX that matches the NBBO first established on an away market (''Joiner Volume,'' and together with Setter Volume, ''NBBO Setter/Joiner Volume''), in all securities traded on the Exchange priced at or above $1.00 per share. Because pricing will be the same for all Added Displayed Volume, the Exchange does not propose to add separate rebates on the Fee Schedule at this time for Setter Volume or Joiner Volume or to define these categories on the Fee Schedule. However, the Exchange proposes to provide separate Fee Codes to Members for Setter Volume and Joiner Volume; thus, in addition to the standard Fee Code applicable to Added Displayed Volume, or ''D'', the Exchange proposes including Fee Codes of ''B'' for Setter Volume and ''J'' for Joiner Volume on the same row as ''D'' in the transaction fees table of the Fee Schedule.

The purpose of including three separate Fee Codes for Added Displayed Volume is to reflect the fact that the Exchange will provide distinct Fee Codes on the execution reports provided to Members. The Exchange believes this information will be useful for Members and the Exchange to track executions of Added Displayed Volume that qualifies as either Setter Volume or Joiner Volume and may also be useful for the Exchange in considering potential pricing modifications to such orders as it continues to evaluate its pricing structure on an ongoing basis after its exchange launch. In the meantime, these Fee Codes will be provided to Members on execution reports prior to the introduction of any pricing incentives for such liquidity, even though the rebates to be provided are the same as those provided as the standard rebate for Added Displayed Volume. The Exchange notes that its technical specifications make clear the different types of liquidity codes passed back to Members on execution reports.

[4] Market share percentage calculated as of September 17, 2020. The Exchange receives and processes data made available through consolidated data feeds (*i.e.,* CTS and UTDF).

[5] ''MEMX Book'' refers to the Exchange system's electronic file of orders. *See* Exchange Rule 1.5(q).

[6] This pricing is referred to by the Exchange as ''Removed volume from MEMX Book'' on the proposed Fee Schedule with a Fee Code of ''R'' to be provided by the Exchange on execution reports. The Exchange's Fee Codes will assist both the Exchange and Members with financial planning, tracking, and reconciliation of invoices generated by the Exchange. The Exchange notes that it will also use a second character, either ''A'' or ''B'' to indicate whether an execution occurred: (A) In a security priced at or above $1.00 per share or (B) below $1.00 per share.

[7] This pricing is referred to by the Exchange as ''Added displayed volume'' on the proposed Fee Schedule with a Fee Code of ''B'', ''D'' or ''J'' to be provided by the Exchange on execution reports.

[8] ''Reserve Quantity'' refers to the portion of an order that includes a Non-Displayed instruction in which a portion of that order is also displayed on the MEMX Book. *See* Exchange Rule 11.6(k).

(D) Standard Rebate for Added Non-Displayed Volume

The Exchange proposes to provide a standard rebate of $0.0020 per share for executions of orders that: (i) Are not displayed on the MEMX Book and (ii) add liquidity to the Exchange (''Added Non-Displayed Volume''), in all securities traded on the Exchange priced at or above $1.00 per share.[9] Similar to the proposal to add separate Fee Codes for Setter Volume and Joiner Volume, as described above, the proposed Fee Schedule reflects two different Fee Codes for Added Non-Displayed Volume, specifically ''H'' and ''M''. The Exchange will provide Fee Code ''M'' for the execution of an order that adds non-displayed liquidity to the extent the order that provides liquidity includes a Midpoint Peg instruction and Fee Code ''H'' for the execution of an order that adds non-displayed liquidity but does not include a Midpoint Peg instruction.[10] The proposed standard rebate for Added Non-Displayed Volume would apply to each of these the same. The purpose of including both Fee Codes on the Fee Schedule is to reflect the fact that the Exchange will separately record these transactions under distinct Fee Codes on the execution reports provided to Members. The Exchange believes this information will be useful for Members and the Exchange to track executions of Added Non-Displayed Volume and may also be useful for the Exchange in considering potential pricing modifications to such orders as it continues to evaluate its pricing structure on an ongoing basis after its exchange launch. The Exchange again notes that its technical specifications make clear the different types of liquidity codes passed back to Members on execution reports.

The Exchange proposes to provide a higher rebate for executions of Added Displayed Volume than for executions of Added Non-Displayed Volume to incentivize displayed liquidity over non-displayed liquidity on the Exchange, including orders with a displayed component and a non-displayed component (*i.e.,* orders with a Reserve Quantity), in order to encourage and facilitate price discovery and price formation, which the Exchange believes benefits all Members and investors.

[9] This pricing is referred to by the Exchange on the proposed Fee Schedule as ''Added non-displayed volume.''

[10] The term ''Midpoint Peg'' refers to a Pegged Order with an instruction to peg to the midpoint of the NBBO. *See* Exchange Rule 11.6(h)(2). The term ''Pegged Order'' refers to an order with instructions to peg to the NBB, for a buy order, or the NBO, for a sell order. *See* Exchange Rule 11.6(h).

(E) Standard Fee for Routed Removed Volume

The Exchange proposes to charge a standard fee of $0.0030 per share for all orders routed to another market that (i) are executed on an away market and (ii) remove liquidity from the market to which it was routed (''Routed Removed Volume''), in all securities traded on the Exchange priced at or above $1.00 per share.[11] All charges by the Exchange for routing are applicable only in the event that an order is executed; there is no charge for orders that are routed away from the Exchange but are not filled. The Exchange notes that the fees for routing relate to orders routed through the Exchange's affiliated broker-dealer, MEMX Execution Services LLC. Routing services offered by the Exchange and its affiliated broker-dealer are completely optional and market participants can readily select between various providers of routing services, including other exchanges and broker-dealers.

(F) Securities Priced Below $1.00 per Share

The Exchange does not propose to charge any fee or provide any rebate for executions of orders in securities priced below $1.00 per share, including where an execution takes place on the Exchange or at another market center if the order was routed away from the Exchange.

(G) Other Fees

Under the initial proposed Fee Schedule, the Exchange proposes to make clear that it does not charge any fees for membership, market data products, physical connectivity or application sessions (*e.g.,* trading ports, market data ports, and/or drop copies). In addition, because, as described below, the Exchange is proposing to include certain fees in Rule 15.1 rather than on the Fee Schedule, the Exchange proposes to state on the Fee Schedule that additional fees are set forth in Rule 15.1 of the MEMX Rulebook, and further, that such fees include Regulatory Transaction Fees collected to fund MEMX's Section 31 obligations (as set forth in MEMX Rule 15.1(b)) and fees collected through the CRD registration system for registration of associated persons of Members that are not also FINRA members (as proposed to be added as MEMX Rule 15.1(e)).

[11] This pricing is referred to by the Exchange as ''Routed to another market, removed liquidity'' on the proposed Fee Schedule with a Fee Code of ''Z'' to be provided by the Exchange on execution reports.

Regulatory Fees

The Exchange proposes to adopt certain regulatory fees as new paragraph (e) to Exchange Rule 15.1 related to the CRD system, which are collected by FINRA.[12] As proposed, FINRA will collect and retain certain regulatory fees via the CRD system for the registration of persons associated with a Member that is not also a FINRA member. The CRD system fees are use-based and there is no distinction in the cost incurred by FINRA if the user is a FINRA member or a member of an exchange but not a FINRA member. Accordingly, the Exchange proposes to adopt the regulatory fees set forth in proposed Rule 15.1(e) to mirror those assessed by FINRA pursuant to Section 4 (Fees) of Schedule A to the FINRA By-Laws. As proposed, these fees are as follows:[13]

(1) $100 for each initial Form U4 filed for the registration of a representative or principal;

(2) $110 for the additional processing of each initial or amended Form U4, Form U5 or Form BD that includes the initial reporting, amendment, or certification of one or more disclosure events or proceedings;

(3) $45 annually for each of the Member's registered representatives and principals for system processing;

(4) $15 for processing and posting to the CRD system each set of fingerprints submitted electronically by the Member, plus a pass-through of any other charge imposed by the United States Department of Justice for processing each set of fingerprints;

(5) $30 for processing and posting to the CRD system each set of fingerprint cards submitted in non-electronic format by the Member, plus a pass-through of any other charge imposed by the United States Department of Justice for processing each set of fingerprints; and

(6) $30 for processing and posting to the CRD system each set of fingerprint results and identifying information that has been processed through a self-

[12] The CRD system is the central licensing and registration system for the U.S. securities industry. The CRD system enables individuals and firms seeking registration with multiple states and self-regulatory organizations to do so by submitting a single form, fingerprint card and a combined payment of fees to FINRA. Through the CRD system, FINRA maintains the qualification, employment and disciplinary histories of registered associated persons of broker-dealers.

[13] The Exchange has only adopted the CRD system fees charged by FINRA to non-FINRA members when such fees are applicable. In this regard, certain FINRA CRD system fees and requirements are specific to FINRA members, but do not apply to Members that are not also FINRA members. Members that are also FINRA members are charged CRD system fees according to Section 4 (Fees) of Schedule A to the FINRA By-Laws.

regulatory organization other than FINRA.

2. Statutory Basis

Transaction Fees

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) [14] of the Act in general, and furthers the objectives of Sections 6(b)(4) [15] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. Additionally, the Exchange believes that the proposed fees and rebates are consistent with the objectives of Section 6(b)(5) [16] of the Act in that they are designed 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 a free and open market and national market system, and, in general, to protect investors and the public interest, and, particularly, are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Upon its launch, the Exchange will operate in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange believes that the proposed Fee Schedule reflects a simple and competitive pricing structure designed to incentivize market participants to add aggressively priced displayed liquidity and direct their order flow to the Exchange, which the Exchange believes would promote price discovery and price formation and deepen liquidity that is subject to the Exchange's transparency, regulation, and oversight as an exchange, thereby enhancing market quality to the benefit of all Members and investors.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, 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.'' [17]

The Exchange believes that it is appropriate, reasonable, and consistent with the Act to charge a standard fee of $0.0025 per share for Removed Volume from the MEMX Book because it is comparable to the transaction fee charged by other exchanges to remove liquidity.[18] The Exchange further believes that this fee is equitably allocated and not unfairly discriminatory because it applies equally to all Members and, when coupled with higher rebates for adding displayed liquidity, as described below, is designed to facilitate increased activity on the Exchange to the benefit of all Members by providing more trading opportunities and promoting price discovery.

The Exchange believes that it is appropriate, reasonable, and consistent with the Act to provide a standard rebate of $0.0029 per share for Added Displayed Volume in all securities traded on the Exchange priced at or above $1.00 per share because this rebate is consistent with transaction rebates provided by other exchanges.[19] The Exchange further believes that this rebate structure is equitably allocated and not unfairly discriminatory because it applies equally to all Members.

The Exchange believes that charging a fee to the liquidity remover, and providing a rebate to the liquidity adder, is reasonable, equitable and not unfairly discriminatory because it incentivizes liquidity provision on the Exchange. The Exchange also notes that several other exchanges charge fees for removing liquidity and provide rebates for adding liquidity, and that this aspect of the Exchange's proposed Fee Schedule does not raise any new or novel issues that have not previously been considered by the Commission in connection with the fees and rebates of other exchanges.[20]

The Exchange also believes that it is reasonable, equitable and not unfairly discriminatory to provide a higher rebate for executions of Added Displayed Volume (including NBBO Setter/Joiner Volume) than for executions of Added Non-Displayed Volume as this rebate structure is designed to incentivize Members to send the Exchange displayable orders, thereby contributing to price discovery and price formation, consistent with the overall goal of enhancing market quality. Moreover, the Exchange notes that there are precedents for exchanges to provide rebates that distinguish between displayed and non-displayed volume to incentivize displayed orders and facilitate price discovery.[21]

The Exchange notes that under the initial proposed Fee Schedule it will pay a higher rebate for Added Displayed Volume than the fee it charges for removing such volume, and as such the Exchange will have a negative net capture (*i.e.,* will lose money) with respect to such transactions. The Exchange notes that it will only utilize a pricing structure whereby it maintains a negative net capture with respect to such transactions initially upon its launch and for a limited time thereafter in an effort to encourage market participants to join, connect to, and participate on the Exchange. As noted above, the Exchange will operate in a highly competitive market, and the Exchange believes this initial pricing structure will enable it to effectively compete with other exchanges by attracting Members and order flow to the Exchange, which will help the Exchange to gain market share for executions. The Exchange expects to modify its pricing structure after it has gained sufficient participation from

[14] 15 U.S.C. 78f.

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

[16] 15 U.S.C. 78f(b)(5).

[17] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[18] For example, the New York Stock Exchange trading fee schedule on its public website reflects fees to ''take'' liquidity ranging from $0.0024–$0.00275 depending on the type of market participant, order and execution; *see https://www.nyse.com/markets/nyse/trading-info/fees.* The Nasdaq Stock Market trading fee schedule on its public website reflects standard fees to ''remove'' liquidity of $0.0030 per share for shares executed at or above $1.00 or 0.30% of total dollar volume for shares executed below $1.00; *see http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2.* The Cboe BZX trading fee schedule on its public website reflects standard fees for ''removing'' liquidity of $0.0030 for shares executed at or above $1.00 or 0.30% of total dollar volume for shares executed below $1.00; *see https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/.*

[19] For example, the New York Stock Exchange trading fee schedule on its public website reflects a standard rebate for ''adding'' liquidity of $0.0012 for shares executed at or above $1.00, with various tiers that provide the ability of a firm to receive a rebate of $0.0029 per share or higher; *see https://www.nyse.com/markets/nyse/trading-info/fees.* The Nasdaq Stock Market trading fee schedule on its public website reflects a standard rebate for ''adding'' liquidity for shares executed at or above $1.00 of $0.0020 in Tape A and B securities and $0.0015 in Tape C securities, with various tiers that provide the ability of a firm to receive a rebate of $0.0029 per share or higher; *see http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2.* The Cboe BZX trading fee schedule on its public website reflects a standard rebate for ''adding'' liquidity of $0.0020 for shares executed at or above $1.00, with various tiers that provide the ability of a firm to receive a rebate of $0.0029 per share or higher; *see https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/.*

[20] *See supra* notes 18 and 19.

[21] *Id.*

market participants to eliminate the negative net capture and instead be profitable with respect to such transactions. The Exchange believes the initial pricing structure, including the negative net capture for Added Displayed Volume transactions, is designed to incentivize market participants to add aggressively priced displayed liquidity and direct their order flow to the Exchange, which the Exchange believes would promote price discovery and price formation and deepen liquidity that is subject to the Exchange's transparency, regulation, and oversight as an exchange, thereby enhancing market quality to the benefit of all Members and investors. The Exchange does not believe that the negative net capture with respect to Added Displayed Volume transactions will materially impact the capitalization of the Exchange or otherwise impair the Exchange's ability to operate or regulate itself. The Exchange is well-capitalized and able to absorb losses resulting from a negative net capture, particularly given the Exchange's intention to operate in this fashion on a temporary basis. Moreover, the Exchange's parent company, MEMX Holdings LLC, has agreed to provide adequate funding for the Exchange's operations, including the regulation of the Exchange, and to reimburse the Exchange for its costs and expenses to the extent the Exchange's assets are insufficient to meets its costs and expenses.

With respect to orders routed to other markets, the Exchange also believes that it is appropriate, reasonable, and consistent with the Act to charge a standard fee of $0.0030 for Routed Removed Volume because this fee is similar to the fees charged by other exchanges for routed orders that remove liquidity from the destination market.[22] The Exchange's initial fee for routing is intended to be a simple and transparent fee for Members that wish to use routing services provided by the Exchange. The Exchange reiterates that the routing services offered by the Exchange and its affiliated broker-dealer are completely optional and that the Exchange operates in a highly competitive market in which market participants can readily select between various providers of routing services with different product offerings and different pricing. The Exchange believes that its flat fee structure for orders routed to all away venues is a fair and equitable approach to pricing, as it will provide certainty with respect to execution fees. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services and to make some additional profit in exchange for the services it provides. The Exchange also believes the standard fee for Routed Removed Volume is an equitable and not an unfairly discriminatory allocation of fees because it applies equally to all Members.

The Exchange also believes that not charging a fee for membership, market data products, physical connectivity and application sessions is appropriate, reasonable, and consistent with the Act because it may incentivize broker-dealers to become Members of the Exchange and to therefore direct order flow to the Exchange, and such orders will have the benefit of exchange transparency, regulation, and oversight. One of the primary objectives of MEMX is to provide competition and to reduce fixed costs imposed upon the industry. As such, while MEMX does intend to adopt fees other than transaction fees and such other fees as set forth in Rule 15.1 in the future, MEMX is not doing so at this time and, when it does, it intends to do so in a fair and transparent manner. As noted above, MEMX will operate in a highly competitive environment, and not charging fees for such services and access is designed to enable it to compete effectively and to encourage market participants to connect to the Exchange.

In conclusion, the Exchange also submits that its proposed fee structure satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act for the reasons discussed above in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities, does not permit unfair discrimination between customers, issuers, brokers, or dealers, and is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and in general to protect investors and the public interest, particularly as the proposal neither targets nor will it have a disparate impact on any particular category of market participant. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that it is subject to significant competitive forces, and that its proposed fee and rebate structure is an appropriate effort to address such forces.

Regulatory Fees

The Exchange believes that proposed Rule 15.1(e) is consistent with the provisions of Section 6(b)[23] of the Act in general, and furthers the objectives of Section 6(b)(4)[24] of the Act, in particular, in that it provides for the equitable allocation of reasonable fees and other charges among its Members, and does not unfairly discriminate between customers, issuers, brokers and dealers. All similarly situated Members are subject to the same fee structure, and every Member firm must use the CRD system for registration and disclosure.

The proposed fees are reasonable because they are identical to those adopted by FINRA for use of the CRD system for disclosure and the registration of associated persons of FINRA members.[25] As FINRA noted in its filing adopting its existing fees, it believes the fees are reasonable based on the increased costs associated with operating and maintaining the CRD system, and listed a number of enhancements made to the CRD system since the last fee increase, including: (1) Incorporation of various uniform registration form changes; (2) electronic fingerprint processing; (3) Web EFT™, which allows subscribing firms to submit batch filings to the CRD system; (4) increases in the number and types of reports available through the CRD system; and (5) significant changes to BrokerCheck, including making BrokerCheck easier to use and expanding the amount of information made available through the system.[26] These increased costs are similarly borne by FINRA when a Member that is not a member of FINRA uses the CRD system, so the fees collected for such use should mirror the fees assessed on FINRA members, as is proposed by the Exchange. FINRA further noted its belief that the proposed fees are reasonable because they help to ensure the integrity of the information in the CRD system, which is important because the Commission, FINRA, other self-regulatory organizations and state securities regulators use the CRD system

[22] For example, the New York Stock Exchange trading fee schedule on its public website reflects a standard fee for routing of $0.0035, with a tier that provides a firm the ability to pay a reduced routing fee of $0.0030; *see https://www.nyse.com/markets/nyse/trading-info/fees.* The Nasdaq Stock Market trading fee schedule on its public website reflects a standard routing fee of $0.0030; *see http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2.* The Cboe BZX trading fee schedule on its public website reflects a standard fee for routing of $0.0030; *see https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/.*

[23] 15 U.S.C. 78f.

[24] 15 U.S.C. 78f(b)(4).

[25] *See* Securities Exchange Act Release No. 67247 (June 25, 2012), 77 FR 38866 (June 29, 2012) (SR–FINRA–2012–30).

[26] *See id.* at 77 FR 38866, 38868.

to make licensing and registration decisions, among other things.[27]

The Exchange also believes that the proposed fees, like FINRA's fees, are consistent with an equitable allocation of fees because the fees will apply equally to all individuals and Members required to report information to the CRD system. Thus, those members that register more individuals or submit more filings through the CRD system will generally pay more in fees than those members that use the CRD system to a lesser extent. In addition, the proposed fees, like FINRA's fees, are equitable and not unfairly discriminatory because they will result in the same regulatory fees being charged to all Members required to report information to the CRD system and for services performed by FINRA, regardless of whether or not such Member is a FINRA member.

B. Self-Regulatory Organization's Statement on Burden on Competition

Transaction Fees

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [28]

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposed pricing structure will increase competition and is intended to draw volume to the Exchange as it commences operations. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. As a new exchange, the Exchange expects to face intense competition from existing exchanges and other non-exchange venues that provide markets for equities trading. With respect to the Exchange's initial pricing whereby it will operate with a negative net capture with respect to transactions involving Added Displayed Volume, the Exchange is proposing this pricing initially upon its launch and for a limited time thereafter in an effort to encourage market participants to join, connect to, and participate on the Exchange. The Exchange expects to modify its pricing structure after it has gained sufficient participation from market participants to eliminate the negative net capture and instead be profitable with respect to such transactions. Although this pricing incentive is intended to attract liquidity to the Exchange, most other exchanges in operation today already offer multiple incentives to their participants, including tiered pricing that provides higher rebates or discounted executions, and other exchanges will be able to modify such incentives in order to compete with the Exchange. With respect to the specific pricing resulting in the negative net capture, the Exchange also notes that the proposed fee for Removed Volume is neither the lowest fee in the market today [29] nor is the proposed rebate provided to Added Displayed Volume the highest rebate in the market today.[30] Accordingly, with respect to a participant deciding to either submit an order to add liquidity or seeking to remove liquidity, there are multiple exchanges that will continue to be competitively priced for such orders when compared to the Exchange's pricing. Further, while pricing incentives do cause shifts of liquidity between trading centers, market participants make determinations on where to provide liquidity or route orders to take liquidity based on factors other than pricing, including technology, functionality, and other considerations. Consequently, the Exchange believes that the degree to which its fees and rebates could impose any burden on competition is extremely limited, and does not believe that such fees would burden competition of Members or competing venues in a manner that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees and rebates apply equally to all Members. The proposed pricing structure is intended to encourage market participants to add displayed and non-displayed liquidity to the Exchange by providing rebates that are comparable to those offered by other exchanges as well as to provide a competitive rate charged for removing liquidity, which the Exchange believes will help to encourage Members to send orders to the Exchange to the benefit of all Exchange participants. As the proposed rates are equally applicable to all market participants, the Exchange does not believe there is any burden on intramarket competition.

Regulatory Fees

The Exchange does not believe that proposed Rule 15.1(e) will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that the proposed fees in this Rule will result in the same regulatory fees being charged to all Members required to report information to the CRD system and for services performed by FINRA, regardless of whether or not such Members are FINRA members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [31] and Rule 19b–4(f)(2) [32] thereunder.

[27] *See id.*

[28] *See supra* note 17, at 70 FR 37496, 37499.

[29] For example, the Investors Exchange fee schedule on its public website reflects standard fees for matched liquidity of $0.0009 for shares executed at or above $1.00, which would apply to all orders removing liquidity; *see https://iextrading.com/trading/fees/*. Other markets offering ''taker/maker'' pricing provide rebates to provide liquidity; *see, e.g.,* Nasdaq BX fee schedule, at *http://www.nasdaqtrader.com/Trader.aspx?id=bx_pricing;* Cboe BYX fee schedule at *https://markets.cboe.com/us/equities/membership/fee_schedule/byx/*.

[30] *See supra* note 19.

[31] 15 U.S.C. 78s(b)(3)(A)(ii).

[32] 17 CFR 240.19b–4(f)(2).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MEMX–2020–10 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–MEMX–2020–10. 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–MEMX–2020–10 and should be submitted on or before October 29, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22249 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

[33] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90081; File No. SR–CboeEDGX–2020–037]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

October 2, 2020.

I. Introduction

On July 30, 2020, Cboe EDGX Exchange, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Fifth Amended and Restated Bylaws (the ''Parent Bylaws'') of its parent corporation, Cboe Global Markets, Inc. (the ''Parent''). The proposed rule change was published for comment in the **Federal Register** on August 19, 2020.[3] The Commission received no comment letters regarding the proposed rule change. On September 24, 2020, the Exchange filed Amendment No. 1 to the proposal.[4] The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description

The Exchange proposed certain amendments to the Parent Bylaws that, according to the Exchange, would ''improve the governance processes'' of the Parent and ''make certain provisions more consistent with the Delaware General Corporation Law (''DGCL'').''[5] According to the Exchange, many of the proposed changes reflect corporate governance best practices and, in some instances, provide clarity and flexibility to the Parent Bylaws.[6]

Proposed Changes to Article 2—Stockholders[7]

The majority of the proposed changes amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings). According to the Exchange, the changes are designed to reflect the most up-to-date practices under the DGCL and provide the Board with additional information and advance notice in connection with nominations and the conduct of business at annual and special meetings. In particular, the Exchange combines current Section 2.12 into Section 2.11 and amends provisions that govern notice requirements for annual and special meetings, as well as provisions that provide general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89542 (August 13, 2020), 85 FR 51132 (''Notice'').

[4] In Amendment No. 1, the Exchange provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text. Specifically, in Amendment No. 1, the Exchange: (i) Provided additional support for its proposed restrictions on the use of audio, video, and cell phones during stockholder meetings, including information on past practice by the Exchange, underlying authority for such restrictions in the current Parent Bylaws, and comparison to the practices of other Delaware-incorporated public companies; (ii) clarified that the provisions of proposed Section 3.15 are subject to existing Section 10.2, including a representation that emergency Bylaw amendments made pursuant to proposed Section 3.15(g) may need to be filed pursuant to Section 19 of the Exchange Act; (iii) clarified that proposed Section 3.15 is meant to provide short-term flexibility to continue operations during the initial stage of an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so; and (iv) added further explanation of the provision in proposed Section 4.1 regarding the limitation of the power and authority vested in a Board committee in the management of the business and affairs of the Parent. To promote transparency of its proposed amendment, when the Exchange filed Amendment No. 1 with the Commission, it also submitted Amendment No. 1 as a comment letter to the filing, which then became publicly available on the Commission's website.

[5] *See* Notice, *supra* note 3, at 51132.

[6] *See* Notice, *supra* note 3.

[7] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 2 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

Additionally, as detailed further in the Notice, the proposed rule change relocates and expands text concerning nominees for directors and elections of directors, as well as amends provisions concerning the place of annual and special meetings and the adjournment of meetings.[8]

Further, the Exchange proposes to update provisions that govern the preparing of the voting list, the ability of the Board to appoint a director to preside over meetings in the absence of the Chairman of the Board, and provisions concerning the procedural authority of the presiding officer at any stockholder meeting.[9]

Proposed Changes to Article 3—Directors [10]

The proposed rule change amends provisions concerning director vacancies, notice for special meetings of the Board, and the routine filing of consents following an action by the Board.[11]

The proposed change also adds new Section 3.15 (Emergency Bylaws). In particular, that new section provides certain temporary emergency provisions that would apply at the outset of an emergency, disaster, or catastrophe, notwithstanding anything to the contrary in the Certificate of Incorporation or the Bylaws, only for so long as a quorum of the Board cannot readily be convened for action. The Exchange notes that proposed Section 3.15 is meant to provide the Parent with short-term flexibility to continue operations during an emergency situation, and that proposed paragraph (f) makes clear that, as soon as it is practicable for a majority of the elected directors to reconvene, they would be expected to do so.[12]

Proposed Changes to Article 4—Committees [13]

The proposed rule change to Section 4.1 (Designation of Committees) adds language to reflect that the Board may designate one or more committees of the Board, and also adds text to address the absence or disqualification of committee members and allow committee members to unanimously appoint another Director to act at the meeting in place of any such absent or disqualified member. In addition, the Exchange proposes to add text to reflect the power and authority of Board committees.[14]

The proposed rule change to Section 4.2 (The Executive Committee) replaces a list of specific actions and matters that are not to be handled by the Executive Committee and replaces it with a reference to matters under the DGCL that are to be submitted to stockholders for approval.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of that committee from five members to three members.

Proposed Changes to Article 8—Notices [15]

The proposed rule changes in Section 8.1 (Notices) allow notices sent by messenger or overnight courier to be left at the recipient's address and also updates language concerning delivery by electronic mail and when electronic mail delivery is not allowed. The Exchange also proposes to amend Section 8.2 (Electronic Notice) to allow for electronic delivery of materials to stockholders unless the stockholder has opted-out of electronic transmission (currently, electronic transmission is permitted only when a stockholder has opted-in to electronic delivery).

Proposed Rule Changes to Article 11—Forum for Adjudication of Disputes [16]

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum for adjudication of disputes.

Finally, the proposed rule change makes non-substantive edits to the Parent Bylaws, including updating paragraph lettering and numbering and ensuring consistent use of defined terms.

III. Discussion

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[17] In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act,[18] which requires, that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

The proposed rule change reflects the Exchange's stated goals to improve the governance process of the Parent and update the Parent Bylaws to reflect and track the DGCL and current best practices.[19] The Exchange has represented that it does not believe the proposed rule changes are controversial and that the proposed provisions are common among comparable public companies.[20]

The Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act, including Section 6(b)(1) thereunder, in that the Exchange, and its Parent on the Exchange's behalf as applicable, will remain so organized and have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and enforce compliance by its members and persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

While proposed Section 3.15 will provide the Parent with special limited powers to ensure continued operations at the onset of an emergency situation that otherwise prevents the Board from obtaining the necessary quorum to

[8] *See* Notice, *supra* note 3, at 51135. *See also* Section 2.10 (Action at Meeting), 2.11 (Notice of Business and Nomination of Directors at Meetings of Stockholders), 2.1 (Place of Meetings), 2.2 (Annual Meeting), 2.3 (Special Meeting), and 2.7 (Adjournments).

[9] *See also* Amendment No. 1 (concerning restrictions on the use of audio, video, and cell phones during stockholder meetings).

[10] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 3 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[11] *See* Section 3.5 (Vacancies), Section 3.10 (Special Meetings), and Section 3.13 (Action by Consent). *See also* Notice, *supra* note 3, at 51135–36.

[12] *See* Amendment No. 1.

[13] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 4 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[14] *See* Amendment No. 1 (noting that any Board committee may act only insofar as the resolution of the Board of Directors permits, which is consistent with how Article 4 currently operates).

[15] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 8 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[16] *See* Notice, *supra* note 3, for a discussion of the detailed proposed changes to Article 11 and the DGCL provisions and/or rules of other exchanges on which they are modeled.

[17] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78f(b)(1).

[19] *See* Notice, *supra* note 3, at 51137.

[20] The Exchange represents that other public companies have provisions similar to what it is proposing, and that some of its proposed rule changes have been adopted by other securities and commodities exchanges, including Nasdaq, Inc., Intercontinental Exchange, and the CME Group, Inc. *Id.*

convene and exercise its power, that section is intended only to provide limited short-term flexibility to ensuring continue operations of the Parent during the initial stage of the emergency situation. Pursuant to proposed paragraph (f), a majority of the elected directors are expected to reconvene as soon as it is possible to do so. In addition, the provisions in new Section 3.15 concerning amendments to the Parent Bylaws remain subject to existing Section 10.2 and, as applicable, the rule filing requirements of Section 19 of the Act.[21]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 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–CboeEDGX–2020–037 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–CboeEDGX–2020–037. 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–CboeEDGX–2020–037 and should be submitted on or before October 29, 2020.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause for approving the proposed rule change, as amended by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**. Amendment No. 1 provided additional detail and clarity on a few points without materially changing the proposal or the proposed rule text.[22] The Commission notes that Amendment No. 1 does not change the substance of the proposed rule change as it was initially filed, but merely adds detail to a few select items of the proposal regarding their intended scope. These points of clarification add helpful detail to support the proposal without materially altering it. Accordingly, the Commission finds good cause for approving the proposed rule change, as amended, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.[23]

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change, as modified by Amendment No. 1 (SR–CboeEDGX–2020–037), be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–22253 Filed 10–7–20; 8:45 am]

BILLING CODE 8011–01–P

[21] 15 U.S.C. 78s. *See also* Amendment No. 1.

[22] *See supra* note 4 for a description of Amendment No. 1.

[23] 15 U.S.C. 78s(b)(2).

[24] *Id.*

[25] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16662 and #16663; California Disaster Number CA–00327]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of CALIFORNIA (FEMA–4558–DR), dated 08/22/2020.

Incident: Wildfires.

Incident Period: 08/14/2020 through 09/26/2020.

DATES: Issued on 09/30/2020.

Physical Loan Application Deadline Date: 10/21/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 05/24/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of CALIFORNIA, dated 08/22/2020, is hereby amended to establish the incident period for this disaster as beginning 08/14/2020 and continuing through 09/26/2020, with the exception of additional damage resulting from the North Complex Fire.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–22285 Filed 10–7–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16685 and #16686; Florida Disaster Number FL–00158]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Florida

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of FLORIDA (FEMA–4564–DR), dated 09/23/2020.

Incident: Hurricane Sally.

Incident Period: 09/14/2020 and continuing.

DATES: Issued on 09/30/2020.

Physical Loan Application Deadline Date: 11/23/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 06/23/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Florida, dated 09/23/2020, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Santa Rosa.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–22283 Filed 10–7–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16253 and #16254; Puerto Rico Disaster Number PR–00034]

Presidential Declaration Amendment of a Major Disaster for the Commonwealth of Puerto Rico

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 10.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the Commonwealth of Puerto Rico (FEMA–4473–DR), dated 01/16/2020. Incident: Earthquakes. Incident Period: 12/28/2019 through 07/03/2020.

DATES: Issued on 09/10/2020.

Physical Loan Application Deadline Date: 07/02/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 10/16/2020.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the Commonwealth of Puerto Rico, dated 01/16/2020, is hereby amended to establish the incident period for this disaster as beginning 12/28/2019 and continuing through 07/03/2020.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–22287 Filed 10–7–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16603 and #16604; California Disaster Number CA–00325]

Presidential Declaration Amendment of a Major Disaster for the State of California

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 4.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of California (FEMA–4558–DR), dated 08/22/2020.

Incident: Wildfires.

Incident Period: 08/14/2020 through 09/26/2020.

DATES: Issued on 09/30/2020.

Physical Loan Application Deadline Date: 10/21/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 05/24/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of CALIFORNIA, dated 08/22/2020, is hereby amended to establish the incident period for this disaster as beginning 08/14/2020 and continuing through 09/26/2020, with the exception of additional damage resulting from the North Complex Fire.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–22289 Filed 10–7–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #16328 and #16329; Puerto Rico Disaster Number PR–00035]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the Commonwealth of Puerto Rico

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the Commonwealth of Puerto Rico (FEMA–4473–DR), dated 03/11/2020.

Incident: Earthquakes.

Incident Period: 12/28/2019 through 07/03/2020.

DATES: Issued on 09/10/2020.

Physical Loan Application Deadline Date: 05/11/2020.

Economic Injury (EIDL) Loan Application Deadline Date: 12/11/2020.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the Commonwealth of Puerto Rico, dated 03/11/2020, is hereby amended to establish the incident period for this disaster as beginning 12/28/2019 and continuing through 07/03/2020.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Cynthia Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2020–22288 Filed 10–7–20; 8:45 am]

BILLING CODE 8026–03–P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2020–0053]

Agency Information Collection Activities: Proposed Request and 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 revisions and one extension of OMB-approved information collections.

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–2020–0053].

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than December 7, 2020. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Disability Report-Appeal—20 CFR 404.1512, 416.912, 404.916(c), 416.1416(c), 422.140, 404.1713, 416.1513, 404.1740(b)(4), and 416.1540(b)(4)—0960–0144. SSA requires disability applicants who wish to appeal an unfavorable determination to complete Form SSA–3441–BK; the associated Electronic Disability Collect System (EDCS) interview; or the internet application, i3441. This allows claimants to disclose any changes to their disability, or resources, which might influence SSA's unfavorable determination. SSA may use the information to: (1) Reconsider and review an initial disability determination; (2) review a continuing disability; and (3) evaluate a request for a hearing. This information assists the State Disability Determination Services (DDS) and administrative law judges (ALJ) in preparing for the appeals and hearings, and in issuing a determination or decision on an individual's entitlement (initial or continuing) to disability benefits. In addition, the information we collect on the SSA–3441–BK, or related modalities, facilitates SSA's collection of medical information to support the applicant's request for reconsideration; request for benefits cessation appeal; and request for a hearing before an ALJ. Respondents are individuals who appeal denial, reduction, or cessation of Social Security disability benefits and Supplemental Security Income (SSI) payments; individuals who wish to request a hearing before an ALJ; or their representatives.

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–3441–BK (Paper Form)	22,556	1	45	16,917	* $18.22	** 24	*** $472,609
Electronic Disability Collect System (EDCS)—Individuals	208,831	1	45	156,623	* 10.73	** 24	*** 2,576,863
Electronic Disability Collect System (EDCS)—Representatives	71,652	1	45	53,739	* 25.72		*** 1,382,167
i3441 (Internet Application)—Individuals	109,598	1	28	51,146	* 10.73		*** 548,797
i3441 (Internet Application)—Representatives	656,424	1	28	306,331	* 25.72		*** 7,878,833
Totals	1,069,061			584,756			*** 12,859,269

* We based these figures on average DI hourly wages for single students based on SSA's current FY 2020 data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*), and on average U.S. citizen's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes231011.htm*), as well as a combination of those two figures (for the paper form, as we do not collect data on whether the paper forms are filled out by individuals or representatives or both).

** We based this figure on the average FY 2020 wait times for field offices, based on our current management information data.

*** This figure does not represent actual costs that we are 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.*

2. Annual Earnings Test Direct Mail Follow-Up Program Notices—20 CFR 404.452–404.455—0960–0369. SSA developed the Annual Earnings Test Direct Mail Follow-up Program to improve beneficiary reporting on work and earnings during the year and earnings information at the end of the year. SSA may reduce benefits payable under the Social Security Act (Act) when an individual has wages or self-employment income exceeding the annual exempt amount. SSA identifies beneficiaries likely to receive more than the annual exempt amount, and requests more frequent estimates of earnings from them. When applicable, SSA also requests a future year estimate to reduce overpayments due to earnings. SSA sends letters (SSA–L9778, SSA–L9779, SSA–L9781, SSA–L9784, SSA–L9785, and SSA–L9790) to beneficiaries requesting earnings information the month prior to their attainment of full retirement age. We send each beneficiary a tailored letter that includes relevant earnings data from SSA records. The Annual Earnings Test Direct Mail Follow-up Program helps to ensure Social Security payments are correct, and enables us to prevent earnings-related overpayments, and avoid erroneous withholding. The

respondents are working Social Security beneficiaries with earnings over the exempt amount.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
SSA–L9778	42,630	1	10	7,105	$25.72	** $182,741
SSA–L9779	158,865	1	10	26,478	25.72	** 681,014
SSA–L9781	472,437	1	10	78,740	25.72	** 2,025,193
SSA–L9784	1,270	1	10	212	25.72	** 5,453
SSA–L9785	15,870	1	10	2,645	25.72	** 68,029
SSA–L9790	45,000	1	10	7,500	25.72	** 192,900
Totals	736,072			122,680		** 3,155,330

* We based these figures on the average U.S. citizen's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes231011.htm*).

** This figure does not represent actual costs that we are 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.*

3. Request for Social Security Earnings Information—20 CFR 401.100 and 404.810—0960–0525. The Act permits wage earners, or their authorized representatives, to request Social Security earnings information from SSA using Form SSA–7050–F4. SSA uses the information the respondent provides on Form SSA–7050–F4 to verify the wage earner has: (1) Earnings; (2) the right to access the correct Social Security Record; and (3) the right to request the earnings statement. If we verify all three items, SSA produces an Itemized Statement of Earnings (Form SSA–1826) and sends it to the requestor. The agency charges respondents for sending them an Itemized Statement of Earnings. Respondents are wage earners and their authorized representatives who are requesting Itemized Statement of Earnings records.

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) *	Total annual opportunity cost (dollars) **
SSA–7050–F4	66,800	1	11	12,247	* $25.72	** $314,993

* We based this on the average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).

** 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.*

Cost Burden to Respondents: The agency charges respondents to send them an Itemized Statement of Earnings for purposes unrelated to the administration of our programs. The chart below shows the costs to the respondents for this request:

Type of respondent	Number of requests	Cost per request	Total annual cost to respondent
Non-Certified Copy Respondent	33,400	$92.00	$3,072,800
Certified Copy Respondent	33,400	122.00	4,074,800
Total			7,147,600

4. Disability Case Development Information Collections By State Disability Determination Services On Behalf of SSA—20 CFR 404.1503a, 404.1512, 404.1513, 404.1514, 404.1517, 404.1519; 20 CFR 404.1613, 404.1614, 404.1624; 20 CFR 416.903a, 416.912, 416.913, 416.914, 416.917, 416.919 and 20 CFR 416.1013, 416.1014, 416.1024—0960–0555. DDSs collect the information necessary to administer the Social Security Disability Insurance and SSI programs. They collect medical evidence from consultative examination (CE) sources; credential information from CE source applicants; and medical evidence of record (MER) from claimants' medical sources. In addition, the DDSs collect information from claimants regarding medical appointments, pain, symptoms, and impairments. The respondents are medical providers, other sources of MER, and disability claimants.

Type of Request: Revision of an OMB-approved information collection.

CE Collections

There are four CE information collections: (a) Medical evidence about

claimants' medical condition(s) that DDS's use to make disability determinations when the claimant's own medical sources cannot or will not provide the required information, and proof of credentials from CE providers; (b) CE appointment letters; (c) CE claimant reports sent to claimants' doctors; and (d) One-time CE claimant telehealth call script/letter.

(a) Medical Evidence and Credentials From CE Providers

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) *	Total annual opportunity cost (dollars) **
CE Paper Submissions	1,400,000	1	30	700,000	* $40.21	** $28,147,000
CE Electronic Submissions	296,000	1	10	49,333	* 40.21	** 1,983,680
CE Credentials	4,000	1	15	1,000	* 40.21	** 40,210
Totals	1,700,000			750,333		** 30,170,890

* We based this figure on average Healthcare Practitioners and Technical Occupations hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes290000.htm*).

(b) CE Appointment Letters and (c) CE Claimants' Report to Medical Providers

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) *	Total annual opportunity cost (dollars) **
(b) CE Appointment Letters	880,000	1	5	73,333	* $10.73	** $786,863
(c) CE Claimants' Report to Medical Providers	450,000	1	5	37,500	* 10.73	** 402,375
Totals	1,330,000			110,833		** 1,189,238

* We based this figure on average DI payments based on SSA's current FY 2020 data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*).

(d) CE Claimant Telehealth CE Call Script/Letter

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) *	Total annual opportunity cost (dollars) **
CE Claimant Telehealth Call Script/Letter	10,000	1	5	833	* $10.73	** $8,938

* We based this figure on average DI payments based on SSA's current FY 2020 data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*).

MER Collections

The DDS's collect MER information from the claimant's medical sources to determine a claimant's physical or mental status prior to making a disability determination.

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) *	Total annual opportunity cost (dollars) **
Paper Submissions	3,150,000	1	20	1,050,000	* $40.21	** $42,220,500
Electronic Submissions	9,450,000	1	12	1,890,000	* 40.21	** 75,996,900
Totals	12,600,000			2,940,000		** 118,217,400

* We based this figure on average Healthcare Practitioners and Technical Occupations hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes290000.htm*).

Pain/Other Symptoms/Impairment Information From Claimants

The DDS's use information about pain/symptoms to determine how pain/symptoms affect the claimant's ability to do work-related activities prior to making a disability determination.

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) *	Total annual opportunity cost (dollars) **
Pain/Other Symptoms/Impairment Information	2,100,000	1	20	700,000	* $18.23	** $12,761,000

* We based this figure on averaging both the average DI payments based on SSA's current FY 2020 data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*), and the average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).

Grand Total

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) *	Total annual opportunity cost (dollars) **
Totals	17,740,000			4,501,999		$162,347,466

** 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.*

5. Work History Report—20 CFR 404.1512, 416.912, 404.1560, 404.1565, 416.960 and 416.965—0960–0578. Under certain circumstances, SSA asks individuals applying for disability about work they have performed in the past. Applicants use Form SSA–3369, Work History Report, to provide detailed information about jobs held prior to becoming unable to work. State Disability Determination Services (DDS) evaluate the information, together with medical evidence, to determine eligibility for disability payments. Respondents are disability applicants and third parties assisting applicants.

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–3369 (Paper form)	1,553,900	1	60	1,553,900	* $18.23	** 24	*** $39,658,636
SSA–3369 (EDCS)	38,049	1	60	38,049	* 18.23	** 24	*** 971,094
Totals	1,591,949			1,591,949			*** 40,629,730

* We based this figure by averaging both the average DI payments based on SSA's current FY 2020 data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*), and the average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).

** 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.*

6. Teacher Questionnaire and Request for Administrative Information—20 CFR 404.1513, 416.913, and 416.924a(a)—0960–0646. When determining the effects of a child's impairment(s), SSA obtains information about the child's functioning from teachers; parents; and others who observe the child on a daily basis. SSA obtains results of formal testing, teacher reports, therapy progress notes, individualized education programs, and other records of a child's educational aptitude and achievements using Forms SSA–5665–BK and SSA–5666. The respondents are parents, teachers, and other education personnel.

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) *	Total annual opportunity cost (dollars) **
SSA–5665–BK (electronic)	246,539	1	40	164,359	* $26.14	** $4,296,344
SSA–5666 (electronic)	91,186	1	30	45,593	* 26.14	** 1,191,801
Totals	337,725			209,952		** 5,488,145

* We based this figure on average Elementary and Secondary School worker's hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes250000.htm*).

** 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.*

7. Electronic Records Express—20 CFR 404.1512 and 416.912—0960–0753. Electronic Records Express (ERE) is a Web-based SSA program which allows medical and educational providers to electronically submit disability claimant data to SSA. Both medical providers and other third parties with connections to disability applicants or recipients (*e.g.,* teachers and school administrators for child disability applicants) use this system once they complete the registration process. SSA employees and State agency employees request the medical and educational records collected through the ERE website. The agency uses the information collected through ERE to make a determination on an Application for Benefits. We also use the ERE website to order and receive consultative examinations when we are unable to collect enough medical records to determine disability findings. The respondents are medical providers who evaluate or treat disability claimants or recipients, and other third parties with connections to disability applicants or recipients (*e.g.,* Teachers and school administrators for child disability applicants), who voluntarily choose to use ERE for submitting information.

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) *	Total annual opportunity cost (dollars) **
ERE	6,183,548	1	10	1,030,591	* $33.18	** $34,195,009

* We based this figure by averaging both the average Healthcare Practitioners and Technical Occupations (*https://www.bls.gov/oes/current/oes290000.htm*), and Elementary and Secondary School worker's hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes250000.htm*).

** 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.*

8. Medicare Part D Subsidies Regulations—20 CFR 418.3625(c), 418.3645, 418.3665(a), and 418.3670—0960–0702. The Medicare Prescription Drug Improvement and Modernization Act (MMA) of 2003 established the Medicare Part D program for voluntary prescription drug coverage of premium, deductible, and co-payment costs for certain low-income individuals. The MMA also mandated the provision of subsidies for those individuals who qualify for the program and who meet eligibility criteria for help with premium, deductible, or co-payment costs. This law requires SSA to make eligibility determinations, and to provide a process for appealing SSA's determinations. Regulation sections 418.3625(c), 418.3645, 418.3665(a), and 418.3670 contain public reporting requirements pertaining to administrative review hearings. Respondents are applicants for the Medicare Part D subsidies who request an administrative review hearing.

Type of Request: Revision of an existing 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) **	Total annual opportunity cost (dollars) ***
418.3625(c)	110	1	5	9	** $10.73	*** $97
418.3645	10	1	5	1	** 10.73	*** 11
418.3665(a)	215	1	5	18	** 10.73	*** 193
418.3670 *	0	1	10	0	.....	.....
Total	335	.....	.....	28	.....	*** 301

* Regulation section 418.3670 could be used at any time; however, we currently have no data showing usage over the past three years.

** We based this figure on average DI payments (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*).

*** 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.*

9. Request for Medical Treatment in an SSA Employee Health Facility: Patient Self-Administered or Staff Administered Care—0960–0772. SSA operates onsite Employee Health Clinics (EHC) in eight different States. These clinics provide health care for all SSA employees including treatments of personal medical conditions when authorized through a physician. Form SSA–5072 is the employee's personal physician's order form. The information we collect on Form SSA–5072 gives the nurses the guidance they need by law to perform certain medical procedures and to administer prescription medications such as allergy immunotherapy. In addition, the information allows the SSA medical officer to determine whether the treatment can be administered safely and appropriately in the SSA EHCs. Respondents are physicians of SSA employees who need to have medical treatment in an SSA EHC.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Number of responses	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) ***
SSA–5072 Annually	25	1	25	5	2	* $96.85	** $194
SSA–5072 Bi-Annually	75	2	150	5	13	* 96.85	** 1,259
Totals	100				15		** 1,453

* We based this figure on average physician's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes291216.htm*).
** 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.*

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding these information collections 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 November 9, 2020. Individuals can obtain copies of these OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. Online Request for Correction of Earnings Record—0960–NEW. We are offering an alternative to the paper process of requesting a correction to an earnings record, and launching a new service that enables our users to make these same requests electronically via the online *my* Social Security portal. Information collected from the public will not exceed that which SSA requests through the paper Form SSA–7008, OMB No. 0960–0029, Request for Correction of Earnings Record. The information we collect includes items which support an earnings correction action, such as employer names, addresses, wage amounts, and pertinent details about the nature of employment. The respondents are authorized, authenticated individuals accessing the earnings correction process from their personal account using the *my* Social Security portal.

Type of Request: Request for a new 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) **	Total annual opportunity cost (dollars) ***
Online Request for Correction of Earnings Record	76,047	1	15	19,012	* $25.72	** $488,989

* We based this figure on average U.S. worker's hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).
** 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.*

2. Statement of Death by Funeral Director—20 CFR 404.715 and 404.720—0960–0142. When an SSA-insured worker dies, the funeral director or funeral home responsible for the worker's burial or cremation completes Form SSA–721 and sends it to SSA. SSA uses this information for three purposes: (1) To establish proof of death for the insured worker; (2) to determine if the insured individual was receiving any pre-death benefits SSA needs to terminate; and (3) to ascertain which surviving family member is eligible for the lump-sum death payment or for other death benefits. The respondents are funeral directors who handled death arrangements for the insured individuals.

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) *	Total annual opportunity cost (dollars) **
SSA–721	544,233	1	4	36,282	* $28.06	** $1,018,073

* We based this figure on average funeral arranger's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).
*** 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.*

3. Medicaid Use Report—20 CFR 416.268—0960–0267. Section 20 CFR 416.268 of the Code of Federal Regulations requires SSA to determine eligibility for: (1) Special SSI cash payments and, (2) special SSI eligibility status for a person who works despite a disabling condition. Section 20 CFR 416.268 also provides that, to qualify for special SSI eligibility status, an individual must establish that termination of eligibility for benefits under Title XIX of the Act would seriously inhibit the ability to continue employment. SSA employees collect the information this regulation requires from respondents during a personal interview. We then use this information to determine if an individual is entitled to special Title XVI SSI payments and, consequently, to Medicaid. The respondents are SSI recipients for whom SSA has stopped payments based on earnings.

Type of Request: Extension 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) ***
20 CFR 416.268	60.000	1	3	3,000	* $10.73	** 24	*** $289,710

* 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.*

4. Public Information Campaign—0960–0544. Periodically, SSA sends various public information materials, including public service announcements; news releases; and educational tapes, to public broadcasting systems so they can inform the public about various programs and activities SSA conducts. SSA frequently sends follow-up business reply cards for these public information materials to obtain suggestions for improving them. The respondents are broadcast sources.

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) *	Total annual opportunity cost (dollars) **
Radio	5,000	2	1	167	* $25.76	** $4,302

* We based this figures on average Broadcast Announcers and Radio Disc Jockey's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).
** 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: October 5, 2020.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2020–22297 Filed 10–7–20; 8:45 am]

BILLING CODE 4191–02–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36436]

Central Railroad Company of Indianapolis—Lease and Operation Exemption—Norfolk Southern Railway Company

Central Railroad Company of Indianapolis (CERA), a Class III railroad, has filed a verified notice of exemption pursuant to 49 CFR 1150.41 to continue to lease and operate approximately 15.7 miles of rail line between milepost RK–154.5, a point just east of the grade crossing at 38th Street in Gas City, Grant County, Ind., and milepost RK–138.8, at the end of the leased line at Harford City, Blackford County, Ind. (the Line). CERA states that it has entered into an amended lease (Amended Agreement) with Norfolk Southern Railway Company (NSR), the owner of the Line, amending the existing lease (Current Agreement) between those parties.[1] Both the Amended Agreement and the Current Agreement include operating rights into Goodman Yard and any sidings or sidetracks owned by NSR that are accessed via the Line.

CERA states that it is the present operator of the Line under the Current Agreement. CERA states that the Amended Agreement extends the term of the lease until December 31, 2024 (or until the Amended Agreement is otherwise terminated in accordance with its terms), and revises other commercial provisions.[2]

CERA certifies that the Amended Agreement does not include an interchange commitment.

CERA certifies that its projected revenues as a result of this transaction will not exceed those that would qualify it as a Class III carrier. CERA also certifies that its revenues currently exceed $5 million. Pursuant to 49 CFR 1150.42(e), if a carrier's projected annual revenues will exceed $5 million, it must, at least 60 days before the exemption becomes effective, post a notice of its intent to undertake the proposed transaction at the workplace of the employees on the affected lines, serve a copy of the notice on the national offices of the labor unions with employees on the affected lines, and certify to the Board that it has done so. However, CERA's verified notice includes a request for waiver of the 60-day advance labor notice requirements. CERA's waiver request will be addressed in a separate decision. The Board will establish the effective date of the exemption in its separate decision on the waiver request.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than October 15, 2020.

All pleadings, referring to Docket No. FD 36436, must be filed with the Surface Transportation Board either via e-filing or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on CERA's representative, Eric M. Hocky, Clark Hill PLC, Two Commerce Square, 2001

[1] *See Cent. R.R. of Indianapolis—Lease & Operation Exemption—Norfolk S. Ry.,* FD 35300 (STB served Oct. 21, 2009) (authorizing CERA to lease and operate 15.9 miles of line).

[2] Under the Amended Agreement, the Line will end at milepost RK–138.8, making it 0.2 mile shorter than the leased track under the Current Agreement, which ends at milepost RK–138.6. Although this notice reflects the modified mileage, CERA retains a common carrier obligation to operate between milepost RK–138.8 and milepost RK–138.6 until it receives authority to discontinue service over that section of track and consummates that authority. *See Thompson* v. *Tex. Mexican Ry.,* 328 U.S. 134 (1946).

Market St., Suite 2620, Philadelphia, PA 19103.

According to CERA, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: October 2, 2020.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Brendetta Jones,

Clearance Clerk.

[FR Doc. 2020–22286 Filed 10–7–20; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 33 (Sub-No. 346X)]

Union Pacific Railroad Company—Abandonment Exemption—in Kootenai County, Idaho

On September 18, 2020, Union Pacific Railroad Company (UP) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to abandon an approximately 1 .16-mile portion of the Coeur D'Alene Industrial Lead, between milepost 1.09 and milepost 2.25, in Coeur D'Alene, Kootenai County, Idaho (the Line). The Line traverses U.S. Postal Service Zip Code 83854.

According to UP, there is one shipper, AmeriGas Propane (AmeriGas), on the Line. UP states that AmeriGas has reached an agreement with the Idaho Department of Transportation (IDOT) to relocate its facility off of the Line. (Pet. 2.) UP states that the abandonment will facilitate an IDOT project to expand Highway 41 and that it intends to convey the property to IDOT for use as a trail, subject to the issuance of a notice of interim trail use or abandonment (NITU).[1] (*Id.*)

UP states that, based on the information in its possession, the Line does not contain any federally granted rights-of-way. (*Id.* at 3.) Any documentation in UP's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by January 6, 2021.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 120 days after the filing of the petition for exemption, or 10 days after service of a decision granting the petition for exemption, whichever occurs sooner. Persons interested in submitting an OFA must first file a formal expression of intent to file an offer by October 18, 2020, indicating the type of financial assistance they wish to provide (*i.e.,* subsidy or purchase) and demonstrating that they are preliminarily financially responsible. *See* 49 CFR 1152.27(c)(1)(i).

Following authorization for abandonment, the Line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for interim trail use/rail banking under 49 CFR 1152.29 will be due no later than October 28, 2020.[2]

All pleadings, referring to Docket No. AB 33 (Sub-No. 346X), should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on UP's representative, Jeremy M. Berman, Union Pacific Railroad Company, 1400 Douglas Street, Stop 1580, Omaha, NE 68179. Replies to the petition are due on or before October 28, 2020.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any agencies or other persons who comment during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). EAs in abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA generally will be within 30 days of its service.

Board decisions and notices are available at *www.stb.gov.*

Decided: October 2, 2020.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Tammy Lowery,

Clearance Clerk.

[FR Doc. 2020–22335 Filed 10–7–20; 8:45 am]

BILLING CODE 4915–01–P

[1] Although UP states that IDOT's use of the right-of-way as a trail would be subject to a certificate of interim trail use or abandonment (CITU), the Board issues CITUs in abandonment application proceedings and NITUs in abandonment exemption proceedings.

[2] Filing fees for OFAs and trail use requests can be found at 49 CFR 1002.2(f)(25) and (27), respectively.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket Number USTR–2020–0037]

Initiation of Section 301 Investigation: Vietnam's Acts, Policies, and Practices Related to Currency Valuation

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for comments.

SUMMARY: The U.S. Trade Representative is initiating an investigation regarding Vietnam's acts, policies, and practices related to the valuation of its currency. The Office of the United States Trade Representative (USTR) seeks comments regarding the investigation.

DATES: To be assured of consideration, you must submit written comments by November 12, 2020.

ADDRESSES: You should submit written comments through the Federal eRulemaking Portal: *http://www.regulations.gov* (*Regulations.gov*). Follow the instructions for submitting comments in section IV. The docket number is USTR–2020–0037. For issues with on-line submissions, please contact the Section 301 line at 202–395–5725.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning the submission of written comments, contact the Section 301 line at 202–395–5725. For other questions concerning the investigation, contact Michael Gagain, Assistant General Counsel, 202–395–9529, or Marta Prado, Deputy Assistant U.S. Trade Representative for Southeast Asia and the Pacific, 202–395–6216.

SUPPLEMENTARY INFORMATION:

I. Background

The Government of Vietnam, through the State Bank of Vietnam (SBV), tightly manages the value of its currency—the dong. The SBV's management of

Vietnam's currency is closely tied to the U.S. dollar. Available analysis indicates that Vietnam's currency has been undervalued over the past three years. Specifically, analysis indicates that the dong was undervalued on a real effective basis by approximately 7 percent in 2017 and by approximately 8.4 percent in 2018. Furthermore, analysis indicates that the dong's real effective exchange rate was undervalued in 2019 as well.

Available evidence also indicates that the Government of Vietnam, through the SBV, actively intervened in the exchange market, which contributed to the dong's undervaluation in 2019. Specifically, the evidence indicates that in 2019, the SBV undertook net purchases of foreign exchange totaling approximately $22 billion, which had the effect of undervaluing the dong's exchange rate with the U.S. dollar during that year. Analysis suggests that Vietnam's action on the exchange rate in 2019 caused the average nominal bilateral exchange rate against the dollar over the year, 23,224 dong per dollar, to be undervalued by approximately 1,090 dong per dollar relative to the level consistent the equilibrium real effective exchange rate.

II. Initiation of Section 301 Investigation

Section 302(b)(1)(A) of the Trade Act of 1974, as amended (Trade Act), authorizes the U.S. Trade Representative to initiate an investigation to determine whether an act, policy, or practice of a foreign country is actionable under section 301 of the Trade Act. Actionable matters under section 301 include acts, policies, and practices of a foreign country that are unreasonable or discriminatory and burden or restrict U.S. commerce. An act, policy, or practice is unreasonable if, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, it is otherwise unfair and inequitable.

On October 2, 2020, in light of the evidence regarding actions taken by Vietnam that contribute to the undervaluation of its currency, the U.S. Trade Representative initiated a section 301 investigation regarding Vietnam's acts, policies, and practices related to currency valuation. The investigation will focus on whether Vietnam's interventions—through the SBV—in exchange markets and other related actions that contribute to the undervaluation of Vietnam's currency are unreasonable or discriminatory and burden or restrict U.S. commerce. In conducting its investigation, USTR will consult with the Department of the Treasury as to matters of currency valuation and Vietnam's exchange rate policy.

Pursuant to section 302(b)(1)(B) of the Trade Act, USTR has consulted with appropriate advisory committees. USTR also has consulted with the interagency Section 301 Committee. Pursuant to section 303(a) of the Trade Act, USTR has requested consultations with the Government of Vietnam.

Pursuant to section 304 of the Trade Act, USTR must determine whether the act, policy, or practice under investigation is actionable under section 301. If that determination is affirmative, the U.S. Trade Representative must determine what action to take.

III. Request for Public Comments

You may submit written comments on any issue covered by the investigation. In particular, USTR invites comments regarding:

- Whether Vietnam's currency is undervalued, and the level of the undervaluation.
- Vietnam's acts, policies, or practices that contribute to undervaluation of its currency.
- The extent to which Vietnam's acts, policies, or practices contribute to the undervaluation.
- Whether Vietnam's acts, policies and practices are unreasonable or discriminatory.
- The nature and level of burden or restriction on U.S. commerce caused by the undervaluation of Vietnam's currency.
- The determinations required under section 304 of the Trade Act, including what action, if any, should be taken.

In light of the uncertainties arising from COVID–19 restrictions, USTR is not at this time scheduling a public hearing in this investigation. USTR will provide further information in a subsequent notice if it will hold a hearing in this investigation.

IV. Procedures for Written Submissions

All submissions must be in English and sent electronically via *Regulations.gov*. To submit comments via *Regulations.gov*, enter docket number USTR–2020–0037. Find a reference to this notice and click on the link entitled 'comment now!'. For further information on using *Regulations.gov*, please consult the resources provided on the website by clicking on 'how to use *regulations.gov*' on the bottom of *Regulations.gov* home page. USTR will not accept hand-delivered submissions.

Regulations.gov allows users to submit comments by filling in a 'type comment' field or by attaching a document using an 'upload file' field. USTR prefers that you submit comments in an attached document. If you attach a document, it is sufficient to type 'see attached' in the 'type comment' field. USTR strongly prefers submissions in Adobe Acrobat (.pdf). If you use an application other than Adobe Acrobat or Word (.doc), please indicate the name of the application in the 'type comment' field.

File names should reflect the name of the person or entity submitting the comment. Please do not attach separate cover letters to electronic submissions; rather, include any information that would be in a cover letter in the comment itself. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the comment itself, rather than submitting them as separate files.

For any comments submitted electronically that contain business confidential information (BCI), the file name of the business confidential version should begin with the characters 'BCI.' You must clearly mark any page containing BCI by including 'BUSINESS CONFIDENTIAL' on the top of that page and clearly indicating, via brackets, highlighting, or other means, the specific information that is BCI. If you request business confidential treatment, you must certify in writing that disclosure of the information would endanger trade secrets or profitability, and that you would not customarily release the information to the public. Filers of submissions containing BCI also must submit a public version of their comments. The file name of the public version should begin with the character 'P.' Follow the 'BCI' and 'P' with the name of the person or entity submitting the comments. If these procedures are not sufficient to protect BCI or otherwise protect business interests, please contact the Section 301 line at 202–395–5725 to discuss whether alternative arrangements are possible.

USTR will post submissions in the docket for public inspection, except properly designated BCI. You can view submissions on *Regulations.gov* by entering docket number USTR–2020–0037 in the search field on the home page.

Joseph Barloon,

General Counsel, Office of the United States Trade Representative.

[FR Doc. 2020–22271 Filed 10–7–20; 8:45 am]

BILLING CODE 3290–F1–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket Number USTR–2020–0036]

Initiation of Section 301 Investigation: Vietnam's Acts, Policies, and Practices Related to the Import and Use of Illegal Timber

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for comments.

SUMMARY: The U.S. Trade Representative is initiating an investigation of Vietnam's acts, policies, and practices related to the import and use of timber that is illegally harvested or traded. The Office of the United States Trade Representative (USTR) seeks comments regarding the investigation.

DATES: To be assured of consideration, you must submit written comments by November 12, 2020.

ADDRESSES: You should submit written comments through the Federal eRulemaking Portal: *http://www.regulations.gov* (*Regulations.gov*). Follow the instructions for submitting comments in section IV. The docket number is USTR–2020–0036. For issues with on-line submissions, contact the Section 301 line at 202–395–5725.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning the submission of written comments, contact the Section 301 line at 202–395–5725. For other questions concerning the investigation, contact David Lyons, Assistant General Counsel, 202–395–9446, Marta Prado, Deputy Assistant U.S. Trade Representative for Southeast Asia and the Pacific, 202–395–6216, or Joseph Johnson, Senior Director for Environment and Natural Resources, 202–395–2464.

SUPPLEMENTARY INFORMATION:

I. Background

Vietnam is one of the world's largest exporters of wood products, including to the United States. In 2019, Vietnam exported to the United States more than $3.7 billion of wooden furniture. To supply the timber inputs needed for its wood products manufacturing sector, Vietnam relies on imports of timber harvested in other countries. Available evidence suggests that a significant portion of that imported timber was illegally harvested or traded (illegal timber). Some of that timber may be from species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Evidence indicates that much of the timber imported by Vietnam was harvested against the laws of the source country. Reports indicate that a significant amount of the timber exported from Cambodia to Vietnam was harvested on protected lands, such as wildlife sanctuaries, or outside of and therefore in violation of legal timber concessions. Cambodia nevertheless remains a significant source of Vietnam's timber imports. Similarly, timber sourced from other countries, such as Cameroon and the Democratic Republic of the Congo (DRC), may have been harvested against those countries' laws.

In addition, Vietnamese timber imports may be traded illegally. For example, it appears that most timber exported from Cambodia to Vietnam crosses the border in violation of Cambodia's log export ban. In addition, aspects of the importation and processing of this timber also may violate Vietnam's domestic law and be inconsistent with CITES.

II. Initiation of Section 301 Investigation

Section 302(b)(1)(A) of the Trade Act of 1974, as amended (Trade Act), authorizes the U.S. Trade Representative to initiate an investigation to determine whether an act, policy, or practice of a foreign country is actionable under section 301 of the Trade Act. Actionable matters under section 301 include acts, policies, and practices of a foreign country that are unreasonable or discriminatory and burden or restrict U.S. commerce. An act, policy, or practice is unreasonable if, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, it is otherwise unfair and inequitable.

On October 2, 2020, the U.S. Trade Representative initiated a Section 301 investigation to examine whether Vietnam's acts, policies, and practices related to the import and use of illegal timber are unreasonable or discriminatory and burden or restrict U.S. commerce.

Pursuant to section 302(b)(1)(B) of the Trade Act, USTR has consulted with appropriate advisory committees. USTR also has consulted with the interagency Section 301 Committee. Pursuant to section 303(a) of the Trade Act, the U.S. Trade Representative has requested consultations with the Government of Vietnam.

Pursuant to section 304 of the Trade Act, the U.S. Trade Representative must determine whether the act, policy, or practice under investigation is actionable under section 301. If that determination is affirmative, the U.S. Trade Representative must determine what action to take.

The investigation initially will focus on the following issues:

- Vietnamese imports of illegal timber may be inconsistent with Vietnam's domestic laws, the laws of exporting countries, or international rules. The import of illegal timber may indicate that Vietnam is not enforcing its own laws concerning the import and processing of timber, such as laws requiring that wood processors ensure the lawful origins of the timber they use. For species listed under the CITES that are imported from Cambodia or the DRC, there is evidence that Vietnamese authorities are not requiring the permits or certificates that should be needed to enter or re-export from Vietnam.
- Evidence indicates that Vietnam at least tacitly may support the import and use of illegal timber. For example, reports indicate that Vietnamese officials do not record the origin of timber crossing the Cambodia-Vietnam border. This practice would enable Vietnamese exporters to disclaim knowledge of illegal timber inputs when exporting wood products to third countries. Vietnam may have allowed the importation of CITES-listed species based on invalid CITES permits. At the provincial government level, there are reports of Vietnamese officials accepting payments in return for facilitating illegal timber imports.
- Other acts, policies, and practices of Vietnam relating to the import and use of illegal timber.

III. Request for Public Comments

You may submit written comments on any issue covered by the investigation. In particular, USTR invites comments regarding:

- The extent to which illegal timber is imported into Vietnam.
- The extent to which Vietnamese producers, including producers of wooden furniture, use illegal timber.
- The extent to which products of Vietnam made from illegal timber, including wooden furniture, are imported into the United States.
- Vietnam's acts, policies, or practices relating to the import and use of illegal timber.
- The nature and level of the burden or restriction on U.S. commerce caused by Vietnam's import and use of illegal timber.
- The determinations required under section 304 of the Trade Act, including what action, if any, should be taken.

In light of the uncertainties arising from COVID–19 restrictions, USTR is not at this time scheduling a public

hearing in this investigation. USTR will provide further information in a subsequent notice if it will hold a hearing in this investigation.

IV. Procedures for Written Submissions

All submissions must be in English and sent electronically via *Regulations.gov*. To submit comments via *Regulations.gov*, enter docket number USTR–2020–0036. Find a reference to this notice and click on the link entitled 'comment now!'. For further information on using *Regulations.gov*, please consult the resources provided on the website by clicking on 'how to use *Regulations.gov*' on the bottom of the *Regulations.gov* home page. USTR will not accept hand-delivered submissions.

Regulations.gov allows users to submit comments by filling in a 'type comment' field or by attaching a document using an 'upload file' field. USTR prefers that you submit comments in an attached document. If you attach a document, it is sufficient to type 'see attached in the 'type comment' field. USTR strongly prefers submissions in Adobe Acrobat (.pdf). If you use an application other than Adobe Acrobat or Word (.doc), please indicate the name of the application in the 'type comment' field.

File names should reflect the name of the person or entity submitting the comment. Please do not attach separate cover letters to electronic submissions; rather, include any information that would be in a cover letter in the comment itself. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the comment itself, rather than submitting them as separate files.

For any comments that contain business confidential information (BCI), the file name of the business confidential version should begin with the characters 'BCI.' You must clearly mark any page containing BCI by including 'BUSINESS CONFIDENTIAL' on the top of that page and clearly indicating, via brackets, highlighting, or other means, the specific information that is BCI. If you request business confidential treatment, you must certify in writing that disclosure of the information would endanger trade secrets or profitability, and that you would not customarily release the information to the public. Filers of submissions containing BCI also must submit a public version of their comments. The file name of the public version should begin with the character 'P.' Follow the 'BCI' and 'P' with the name of the person or entity submitting the comments. If these procedures are not sufficient to protect BCI or otherwise protect business interests, please contact the Section 301 line at 202–395–5725 to discuss whether alternative arrangements are possible.

USTR will post submissions in the docket for public inspection, except properly designated BCI. You can view submissions on *Regulations.gov* by entering docket number USTR–2020–0036 in the search field on the home page.

Joseph Barloon,

General Counsel, Office of the United States Trade Representative.

[FR Doc. 2020–22270 Filed 10–7–20; 8:45 am]

BILLING CODE 3290–F1–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2019–0836]

Agency Information Collection Activities: Requests for Comments; Clearance of a New Approval of Information Collection: Airman Knowledge Test Registration Collection

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 October 22, 2019. The information collected is necessary to ensure compliance and proper registration of an individual for the necessary knowledge test for the certification or rating pursued by the individual.

DATES: Written comments should be submitted by November 9, 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: Ryan C. Smith by email at: *Ryan.C.Smith@faa.gov*; *Phone:* 405–954–6742.

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.

OMB Control Number: 2120–XXXX.

Title: Airman Knowledge Test Registration Collection.

Form Numbers: There are no forms associated with this collection.

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 October 22, 2019 (84 FR 56520). Individuals pursuing an FAA certificate or rating to operate in the National Airspace System (NAS) must meet the standards established in the FAA regulations specific to the certificate sought by the individual. FAA certification requires that an individual must successfully pass an Airman Knowledge Test as part of the requirements to obtain an FAA certificate or rating. The FAA develops and administers 90 different knowledge tests in many different areas that are required as part of the overall airman certification process.

Airman Knowledge Tests are administered at approved Knowledge Testing Centers by an approved test proctor who is required to administer the appropriate Airman Knowledge Test to the individual pursuing FAA certification. Individuals taking an FAA Airman Knowledge Test must provide the following information to be collected in order to complete the registration process before the administration of the Airman Knowledge Test: Name, FAA Tracking Number (FTN), physical address, Date of Birth, email address, photo identification, phone number, test authorization (credentials of the individual such as an instructor endorsement), and previous number of test attempts.

The information provided by the individual is collected and stored electronically in the application used for test registration and delivery. This information is used to determine the identify and eligibility of the individual for compliance of FAA certification requirements.

Respondents: 200,000 annually.

Frequency: n/a.

Estimated Average Burden per Response: 2 minutes.

Estimated Total Annual Burden: 5,000 hours annually.

200,000 respondents × 2 minutes each = 400,000 minutes.

400,000 minutes/60 minutes in an hour = 6,666 hours annually.

Issued in Oklahoma City, OK on September 24, 2020.

Ryan C. Smith,

Airman Knowledge Testing Program Manager, Airman Testing Standards Branch (AFS–630).

[FR Doc. 2020–22292 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0936]

Agency Information Collection Activities: Requests for Comments; Clearance of a New Approval of Information Collection: Survey of Industry's Response to Safety Alert for Operators (SAFO) 17007

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 for a new information collection. The collection involves survey responses from U.S. operator (Part 121 and Part 135) employees who lead departments responsible for Operations and Standards, Training, and Safety to understand how industry has addressed recommendations from SAFO 17007 and to inform future guidance on manual flight skill proficiency in future en-route and terminal environments. This information collection is necessary, as no other information sources have been identified that would provide the required information. Operator policies and procedures are not publicly shared; therefore, this is the only reliable method to gather anonymous information from a representative industry sample.

DATES: Written comments should be submitted by December 7, 2020.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

FOR FURTHER INFORMATION CONTACT: Victor Quach by email at: *victor.k.quach@faa.gov;* phone: 202–267–3585.

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–XXXX.

Title: Survey of Industry's Response to Safety Alert for Operators (SAFO) 17007.

Form Numbers: Not applicable.

Type of Review: New information collection.

Background: The Federal Aviation Administration (FAA) is developing guidance materials on maintaining manual flight skill proficiency in future en-route and terminal environments where pilots will have less opportunities to practice manual flight knowledge, skills, and abilities (KSAs) in a highly automated environment. The FAA is conducting this survey of U.S. operators (Part 121 and Part 135) to determine how the organizations have incorporated the recommendations in SAFO 17007 into line operations and training. SAFO 17007 (linked below) encourages the development of training and line-operations policies to ensure that proficiency in manual flight operations is developed and maintained for pilots. *https://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safos/media/2017/SAFO17007.pdf.*

An invitation to complete a one-time electronic survey will be sent to U.S operators (Part 121 and Part 135) employees who lead departments responsible for Operations and Standards, Training, and Safety. These personnel are responsible for implementing the SAFO's recommendations into line operations and training. All data provided will be kept private to the extent possible by law. To preclude the identification of individual responses, all respondents will be given a participant code that does not identify them or their organization. Only the project leaders will have access to the coding key, which will be destroyed after data analyses are complete. Only analyses and reports of aggregate data will be produced and released.

Failure to collect data on industry incorporation of SAFO 17007 recommendations will impact the quality of future FAA guidance provided to address manual flight operations. As such, it may also jeopardize future manual flight operations in an increasingly automated environment. SAFO 17007 encourages operators to practice manual flight in an operational environment; however, increased use of flight deck automation from NextGen National Airspace improvements will limit practice opportunities resulting in an increased need to make other improvement, which may be addressed through future FAA guidance.

Respondents: 1,224 U.S. Part 121 and Part 135 operator employees who lead departments responsible for Operations and Standards, Training, and Safety.

Frequency: One time.

Estimated Average Burden per Response: 30 minutes.

Estimated Total Annual Burden: 30 minutes per respondent, 612 total burden hours.

Victor K. Quach,

Scientific and Technical Advisor.

[FR Doc. 2020–22352 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0928]

Proposed Flight Standardization Board Report, The Boeing Company 737, Revision 17 and The Boeing Company 737 Airplane Flight Manual Airspeed Unreliable Non-Normal Checklist

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

ACTION: Notice of availability; request for comments.

SUMMARY: The FAA announces the availability of the draft Flight Standardization Board (FSB) Report, The Boeing Company 737, Revision 17 including an addendum describing potential refinements to The Boeing Company 737 Airplane Flight Manual (AFM) Airspeed Unreliable Non-Normal Checklist, which applies to The Boeing Company Model 737–8 and 737– 9 (737 MAX) airplanes. The FAA invites public comment.

DATES: The FAA must receive comments on these proposed documents by November 2, 2020.

ADDRESSES: You may send comments identified by docket number FAA–2020–0928 using any of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.

Fax: 202–493–2251.

Mail: U.S. Department of Transportation (DOT), 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.

Privacy: DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Docket: You may examine the docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0928; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The street address for Docket Operations is listed above. Comments will be available in the docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: For questions on the FSB Report, contact James F. Kline, Aircraft Evaluation Division, telephone 206–231–3950, email *9-AVS-AFS-110@faa.gov.* For questions on the AFM non-normal checklist, contact Paul Bernado, Compliance and Airworthiness Division, telephone 206–231–3500, email *9-FAA-SACO-AD-Inquiry@faa.gov.*

SUPPLEMENTARY INFORMATION:

Authority for This Action

Section 44701(a)(5) of title 49 of the U.S.C. requires the Administrator to promulgate regulations and minimum standards for other practices, methods, and procedures necessary for safety in air commerce and national security. Consistent with this authority, the Administrator publishes FSB Reports for use by FAA employees who approve training programs, FAA employees and designees who certify airmen, and aircraft operators and training providers, to assist them in developing their flightcrew member training, checking, and currency. Additionally, the Administrator publishes this notice consistent with this same authority.

Background

In September 2020, the FAA completed an operational evaluation of proposed operating procedures (checklists) and pilot training as a result of The Boeing Company Model 737–8 and 737–9 (737 MAX) design changes. The operational evaluation identified potential refinements to this Airplane Flight Manual (AFM) non-normal checklist Airspeed Unreliable. This AFM non-normal procedure was referenced in the NPRM Airworthiness Directives; The Boeing Company Airplanes (85 FR 47698). The FAA has posted the draft Boeing 737 FSB Report and an addendum to the Boeing 737 FSB Report, describing the potential refinements to the non-normal checklist at *https://www.faa.gov/aircraft/draft_docs/fsb/.*

Comments Invited

The FAA invites public comments on the draft FSB Report, The Boeing Company 737, Revision 17, including the FSB Report addendum.

Ricardo Domingo,

Executive Director, Flight Standards Service, AFX–1.

[FR Doc. 2020–22381 Filed 10–6–20; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0124]

Agency Information Collection Activities: Requests for Comments; Clearance of a New Approval of Information Collection: FAA Organization Designation Authorization (ODA) Survey

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 for 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 February 4, 2020. The collection involves a survey of Organization Designation Authorization (ODA) holders and ODA program applicants to document and assess FAA certification and oversight activities. The information to be collected is necessary because it is required of the FAA per Section 213 of the FAA Reauthorization Act of 2018.

DATES: Written comments should be submitted by November 9, 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: Robert Busto by email at: *robert.busto@faa.gov;* phone: 816–329–4143.

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.

OMB Control Number: 2120–XXXX.

Title: FAA Organization Designation Authorization (ODA) Survey.

Form Numbers: None.

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 February 4, 2020 (85 FR 6528). Section 213 of the FAA Reauthorization Act of 2018 requires FAA to establish an Expert Panel comprised of ODA holders, aviation manufacturers, safety experts, and FAA labor organizations. The Panel is instructed in the Act to conduct a survey, ''of ODA holders and ODA program applicants to document and assess FAA certification and oversight activities, including the use of the ODA program and the timeliness and efficiency of the certification process.'' The survey's purpose will be to provide information of whether ODA processes and procedures function as intended, and such information will be incorporated into the Expert Panel's report of assessment and recommendations. To accomplish this survey, the FAA will use an online survey, rather than a paper-based system, to reduce the burden on respondents and ensure centralized protection and control of the responses. Respondents taking the survey can do so anonymously.

Respondents: We anticipate an 80% participation rate from a respondent pool of approximately 82 ODA holders and applicants, estimated to about 66 respondents.

Frequency: We plan to distribute the survey one time to support the requirement described in Section 213 of the FAA Reauthorization Act of 2018.

Estimated Average Burden per Response: 2.5 hours to complete, 7.5 hours coordination, total 10 hrs.

Estimated Total Annual Burden: 660 Hours total (220 annualized for the 3-year approval window).

Issued in Washington, DC.

Joy Wolf,

Management & Program Analyst for Regulatory and Guidance Processing, Aircraft Certification Service.

[FR Doc. 2020–22274 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2020–0019]

Agency Information Collection Activities: Request for Comments for a Renewal of a Previously Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for a new information collection, which is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by December 7, 2020.

ADDRESSES: You may submit comments identified by DOT Docket ID 2020–0019 by any of the following methods:

Website: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kenneth Petty, *Kenneth.Petty@dot.gov,* 202–366–6654, Office of Planning, Environment, and Realty, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Assessment of Transportation Planning, Performance and Asset Management Agency Needs, Capabilities, and Capacity.

Background: FHWA will collect information on the current state of the practice, data, methods, and systems used by state, metropolitan, regional, local, and tribal transportation planning entities to support their required planning, performance and asset management processes in accordance with Title 23 U.S.C. 119, 134, 135, and 150. This includes, but is not limited to, information to support transportation research, capacity building, data collection, planning, travel modeling, and performance and asset management. This also includes information about how data is shared between planning agencies and how it is processed and used in the planning and programming context. Questionnaires will be sent to State DOT headquarters and districts, Metropolitan Planning, Organizations, Regional Planning Organizations, and Tribal Governments. FHWA anticipates that one representative from each agency will take approximately 30 minutes to complete up to 4 questionnaires each year. The questionnaires will be administered via the internet and invitations to participate in the questionnaire will be distributed via email.

This information, once compiled, will allow the FHWA to better understand the existing capabilities that agencies across the country have in support of the planning, performance and asset management processes and the readiness they possess to handle new and ongoing challenges. As a result of the collected information, FHWA will focus its efforts and resources on providing targeted and meaningful support for planning, performance and asset management implementation nationwide. Additionally, FHWA will ensure that excellent planning, performance and asset managementpractices are identified will be shared broadly across the country.

Respondents: Respondents are representatives of State DOT headquarters and districts, Metropolitan Planning, Organizations, Regional Planning Organizations, and Tribal Governments.

Respondents: 950 respondents annually.

Frequency: 4 per year for 3 years.

Estimated Average Burden per Response: Approximately 30 minutes.

Estimated Total Annual Burden Hours: Up to 1,900 hours annually.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burden; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of computer technology, 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.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued On: October 5, 2020.

Michael Howell,

FHWA Information Collection Officer.

[FR Doc. 2020–22284 Filed 10–7–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2019–0260]

Parts and Accessories Necessary for Safe Operation; Application for an Exemption From National Tank Truck Carriers Inc.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) announces its decision to grant National Tank Truck Carriers Inc.'s (NTTC) application for a limited 5-year exemption to allow motor carriers operating tank trailers to install a red or amber brake-activated pulsating lamp in the upper center position or in an upper dual outboard position on the rear of the trailers, in addition to the steady-burning brake lamps required by the Federal Motor Carrier Safety

Regulations (FMCSR). The Agency has determined that granting the exemption would likely achieve a level of safety equivalent to or greater than the level of safety provided by the regulation.

DATES: This exemption is applicable October 8, 2020 and ending October 8, 2025.

FOR FURTHER INFORMATION CONTACT: Mr. Luke Loy, Vehicle and Roadside Operations Division, Office of Carrier, Driver, and Vehicle Safety, MC–PSV, (202) 366–0676, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Docket: For access to the docket to read background documents or comments submitted to notice requesting public comments on the exemption application, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Docket Operations. The on-line Federal document management system is available 24 hours each day, 365 days each year. The docket number is listed at the beginning of this notice.

SUPPLEMENTARY INFORMATION:

Background

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain parts of the FMCSRs. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

NTTC's Application for Exemption

NTTC applied for an exemption from 49 CFR 393.25(e) to allow motor carriers operating tank trailers to install a red or amber brake-activated pulsating lamp in the upper center position or in an upper dual outboard position on the rear of the trailers, in addition to the steady-burning brake lamps required by the FMCSRs. A copy of the application is included in the docket referenced at the beginning of this notice.

NTTC is an association of over 200 tank truck companies that transport more than 80 percent of the volume hauled in this narrowly-defined industry. Most NTTC members are regional, family-owned tank truck businesses that specialize in bulk transportation of hazardous products, such as petroleum products, chemicals, gases, and hazardous wastes. These companies also haul non-hazardous materials such as bulk foods and dry bulk products such as cement or plastic pellets.

Section 393.25(e) of the FMCSRs requires all exterior lamps (both required lamps and any additional lamps) to be steady-burning, except turn signal lamps, hazard warning signal lamps, school bus warning lamps, amber warning lamps or flashing warning lamps on tow trucks and commercial motor vehicles (CMV) transporting oversized loads, and warning lamps on emergency and service vehicles authorized by State or local authorities. NTTC seeks an exemption to allow motor carriers operating tank trailers to install a red or amber brake-activated pulsating lamp in the upper center position or in an upper dual outboard position on the rear of the trailers, in addition to the steady-burning brake lamps required by the FMCSRs. NTTC contends that the addition of the brake-activated pulsating lamp will improve safety, and states that research shows that pulsating brake lamps installed in addition to required steady-burning red brake lamps improve visibility and prevent accidents. NTTC also noted that FMCSA has previously granted a similar, but not identical, temporary exemption to one of its member companies, Groendyke Transport, Inc. (Groendyke), based in part on Groendyke's real-world experience demonstrating that use of amber pulsating brake-activated warning lamps in addition to steady-burning red brake lamps had decreased the frequency of rear-end accidents involving its fleet of tank trailers (84 FR 17910; April 26, 2019).

NTTC cited several studies conducted by the National Highway Traffic Safety Administration (NHTSA), another agency in the U.S. Department of Transportation, on the issues of rear-end crashes, distracted driving, and braking signals. NTTC stated:

> Research indicates that there are ways to improve the attention-getting qualities of braking systems. Including a pulsating brake lamp on a lead vehicle has quantifiable effect on the drivers of following vehicles and measurably reduces rear-end collisions. Drivers are redirected and altered faster and more efficiently when a pulsating brake lamp draws their attention to the lead vehicle. As a result, rear-end collisions can be prevented or at least reduced.

Beginning in the second quarter of 2015, Groendyke began installing amber brake-activated pulsating lamps on some of its fleet without authorization from FMCSA to compare the frequency of rear-end collisions between (1) trailers equipped with both a centrally-mounted amber brake-activated pulsating lamp and the required steady-burning lamps, and (2) trailers equipped with only the steady-burning lamps required by the FMCSRs. As of July 31, 2017, Groendyke had outfitted 632 of its 1,440 trailers with an amber brake-activated pulsating lamp.

Data gathered by Groendyke between January 2015 and July 2017 show that trailers equipped with both the amber brake-activated pulsating lamp and the steady-burning brake lamps were involved in 33.7 percent fewer rear-end collisions as compared to vehicles equipped with only the steady-burning brake lamps. Groendyke also analyzed its data to determine whether the presence of the amber brake-activated pulsating lamp improved outcomes when drivers were slowing or stopping at railroad crossings.[1] Groendyke found that trailers equipped with the amber brake-activated pulsating lamp were not involved in a rear-end crash at a railroad crossing during the same time period. Groendyke stated:

> The results of the Groendyke Brake Warning Device Campaign are clear: The frequency of rear-end collisions is markedly lower when trailers are outfitted with pulsating brake lamps in addition to the steady-burning lamps required by the FMCSRs. The pulsating brake lamps draw other drivers' attention to what is happening

[1] As cargo tank operators hauling hazardous materials, Groendyke drivers are required to stop or slow significantly at railroad crossings (49 CFR 392.10–392.12). Groendyke notes that railroad crossings are a significant source of rear-end collisions at Groendyke and elsewhere because non-commercial drivers may not anticipate stops at railroad crossings.

with the vehicle in front more effectively and more quickly than steady burning lamps. In the interest of safety and productivity, Groendyke desires to implement the Groendyke Brake Warning Device Campaign on the rest of its fleet without risking violation of the FMCSRs.

The exemption requested by NTTC would apply to all motor carriers operating tank trailers, and would permit those motor carriers to install a red or amber brake-activated pulsating lamp in the upper center position or in an upper dual outboard position on the rear of the trailers, in addition to the steady-burning brake lamps required by the FMCSRs. NTTC states that the additional brake-activated warning lamp(s) will not have an adverse impact on safety, and that adherence to the terms and conditions of the exemption would likely achieve a level of safety equivalent to or greater than the level of safety achieved without the exemption.

Comments

FMCSA published a notice of the NTTC application in the **Federal Register** on April 2, 2020, and asked for public comment (85 FR 18634). The Agency received comments from the Truckload Carrier Association (TCA), the Transportation Safety Equipment Institute (TSEI), the Virginia Department of Transportation (VDOT), the Commercial Vehicle Safety Alliance (CVSA), the American Trucking Associations (ATA), and 25 individuals.

TCA, TSEI, and ATA each supported granting the application. CVSA and VDOT supported the use of amber brake-activated pulsating warning lamps, but were opposed to the use of red brake-activated pulsating warning lamps.

TCA cited its support for Groendyke's similar application for temporary exemption, and highlighted the safety benefits of a 33.7 percent reduction in rear-end collisions when using an amber brake-activated pulsating lamp.

Further, TCA stated:

All tank carriers have a high stake in ensuring their trailers are safe since they are possibly hauling flammable fuel or liquid hazardous materials. Being involved in a rear-end collision not only could result in the loss of cargo, but also could potentially threaten the lives of the truck driver, the driver of the vehicle causing the collision, and others in the surrounding area. Since NTTC is not requesting for tank truck carriers to be exempt from the regulations on required steady-burning lamps, but rather is asking to be allowed to install additional equipment with pulsating lamps, TCA believes it is in the best interest of the industry for FMCSA to grant the requested flexibility. The baseline safety of the required steady-burning lamps will continue to be in place on these tank trailers even if the additional pulsating brake lamps are installed.

ATA believes that granting the exemption will permit tank truck carriers in addition to Groendyke to similarly reduce their rear-end crashes, in furtherance of FMCSA's primary safety mission.

Specifically, ATA stated:

FMCSA and NHTSA research have demonstrated the potential benefits of alternative rear signaling systems to reduce rear-end crashes. Rear-end crashes which amount to roughly 30% of all crashes are frequently attributed to a following vehicle's failure or delay to respond to the lead vehicle's application of brakes to decelerate.

Consistent with the DOT reports and research, motor carriers like Groendyke recognize the potential of ERS [Enhanced Rear Signaling] for improving safe operations when compared with traditional standard brake lamps. For example, ERS can provide the following functions beyond what traditional CMV lighting and reflective devices offer: Attention to CMVs stopped ahead; awareness of road side breakdowns; emergency braking; and driver confidence from both vehicles. In addition to safety benefits, ERS performance is superior to steady burning brake lamps in severe weather conditions, tail light glare and around infrastructure obstacles. ERS also reduces the chances of damage to both vehicles involved in a rear-end crash, which improves commercial operation uptime, CSA scores for the CMV owner, and traffic inconvenience.

TSEI stated that ample research has demonstrated that the use of pulsating brake lamps increases visibility of equipment and vehicles and would maintain operational safety levels, but also implement more efficient and effective operations. TSEI stated that by granting NTTC's application, the Agency would further its Beyond Compliance Program.

VDOT supports the intent of the proposed exemption to promote the safety of motor carriers operating tank trailers, and states that allowing commercial tank trailers to use brake-activated pulsating lamps may improve the reaction time of other motorists when the commercial vehicle is slowing down or stopping. VDOT supports developing standard equipment, and recommends that the Agency authorize the use of only amber brake-activated flashing lights, because amber lights are typically used to denote potential unsafe conditions or to denote caution. VDOT expressed concern that red brake-activated flashing lights on tanker trucks may cause confusion and may prompt unintended and/or undesirable actions, given that flashing red lights are typically displayed by vehicles responding to emergencies.

CVSA agrees with NTTC's assessment that the collected data supports the safety benefits of amber brake-activated pulsating lamps, and supports allowing them to be installed on the rear of tank trailers. However, CVSA is opposed to the use of red brake-activated pulsating warning lamps which are typically associated with emergency vehicles. CVSA states that allowing red pulsating lamps on the rear of tank trailers may negatively impact the driving public's recognition and response to emergency vehicles. CVSA noted that many States have laws prohibiting nonemergency vehicles from having pulsating red lights. CVSA is concerned that if the exemption is granted to allow the installation and use of red pulsating lights, it would be in direct conflict with laws in several States. CVSA notes that while amber brake-activated pulsating lights have a demonstrated safety benefit, red brake-activated pulsating lamps would likely have unintended safety impacts related to emergency vehicles.

Twenty-four individuals supported, and one opposed, the exemption. Several of the commenters identified themselves as Safety Directors for motor carriers operating tank trailers, and fully supported the temporary exemption, noting that their respective carriers have experienced multiple rear-end collisions throughout years of operation. Those safety directors noted that other motorists are frequently not paying attention, and that many rear-end crashes of tanker trailers hauling hazardous material occur when stopped at railroad crossings. These individual commenters believe that any technology that has been shown to reduce rear-end crashes should be allowed, and cited various benefits of the red and amber brake-activated pulsating lamp, including (1) enhanced awareness that the vehicle is making a stop, especially at railroad crossings, and (2) increased visibility in severe weather conditions.

One individual expressed concern that depending on the brightness and speed of the pulsating brake-activated warning lamps, and their positioning close to the standard brake lights and turn signals, following drivers may be (1) distracted and (2) confused regarding the ability to determine whether the vehicle is turning or not. This individual acknowledged that his experience was with low boy trailers, and not with tanker trailers as identified in subject application.

FMCSA Decision

The FMCSA has evaluated the NTTC exemption application, and the comments received. The Agency

believes that granting the temporary exemption to allow motor carriers operating tank trailers to install a red or amber brake-activated pulsating lamp in the upper center position or in an upper dual outboard position on the rear of the trailers in addition to the steady-burning brake lamps required by the FMCSRs, will likely provide a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption.

Rear-end crashes generally account for approximately 30 percent of all crashes. These types of crashes often result from a failure to respond (or delays in responding) to a stopped or decelerating lead vehicle. Data collected between 2010 and 2016 show that large trucks are consistently three times more likely than other vehicles to be struck in the rear in two-vehicle fatal crashes.[2] [3]

Both FMCSA and NHTSA have conducted research programs regarding alternative rear signaling systems to address rear-end crashes. FMCSA has conducted research and development of an Enhanced Rear Signaling (ERS) system for CMVs.[4] The study noted that, while brake lights are activated only with the service brakes, and the visual warning is provided only during conditions when the lead vehicle is decelerating using its braking system, brake lights are not activated during other conditions wherein rear-end collisions can occur (*e.g.,* the CMV is (1) stopped along the roadway or in traffic, (2) traveling slower, or (3) decelerating using an engine retarder). Because of the limitations of the existing brake system described above, along with issues relating to visual distraction, the study examined ways for CMVs to detect rear-end crash threats and to provide drivers of following vehicles a supplemental visual warning—located on the lead vehicle, and in addition to the current brake lights—so following-vehicle drivers can quickly recognize impending collision threats.

During Phase I of this effort, researchers performed crash database analyses to determine causal factors of rear-end collisions and to identify potential countermeasures. Phase II continued through prototype development based on recommendations from Phase I. During Phase II field testing, potential benefits of using such countermeasures were realized. During Phase III, a multi-phased approach was executed to design, develop, and test multiple types of countermeasures on a controlled test track and on public highways. Phase III resulted in positive results for a rear warning prototype system comprising 12 light-emitting diode (LED) units that would flash at 5 Hz to provide a visual warning to the following-vehicle drivers indicating that, with continued closing rate and distance, a collision will occur with the lead vehicle. Finally, the prototype system was further developed and refined to include modification of the system into a unit designed for simple CMV installation, collision-warning activation refinements, and rear lighting brightness adjustments for nighttime conditions. Formal closed test track and real-world testing were then performed to determine the ERS system collision-warning activation performance.

While the efforts described above demonstrated a promising system for follow-on research, FMCSA ultimately decided not to pursue formal field operational testing of the prototype system because of concerns relating to (1) the cost to implement the ERS system as configured, and (2) fleets' willingness to invest in the technology, given the cost of the system. Nonetheless, the preliminary research showed that the ERS system performed well at detecting and signaling rear-end crash threats and drawing the gaze of following-vehicle drivers to the forward roadway which, if implemented, could potentially reduce the number and frequency of rear-end crashes into the rear of CMVs.

Separately, NHTSA has performed a series of research studies intended to develop and evaluate rear signaling applications designed to reduce the frequency and severity of rear-end crashes via enhancements to rear-brake lighting by redirecting drivers' visual attention to the forward roadway (for cases involving a distracted driver), and/or increasing the saliency or meaningfulness of the brake signal (for inattentive drivers).[5] [6]

Initially, the study quantified the attention-getting capability and discomfort glare of a set of candidate rear brake lighting configurations, using driver judgments, as well as eye-drawing metrics. This study served to narrow the set of candidate lighting configurations to those that would most likely be carried forward for additional study on-road. Both look-up (eye drawing) data and interview data supported the hypothesis that simultaneous flashing of all rear lighting combined with increased brightness would be effective in redirecting the driver's eyes to the lead vehicle when the driver is looking away with tasks that involve visual load.

Subsequently, the study quantified the attention-getting capability of a set of candidate rear brake lighting configurations, including proposed approaches from automotive companies. This study was conducted to provide data for use in a simulation model to assess the effectiveness and safety benefits of enhanced rear brake light countermeasures. Among other things, this research demonstrated that flashing all lights simultaneously or alternately flashing is a promising signal for use in enhanced brake light applications, even at levels of brightness within the current regulated limits. Specifically, the study concluded that substantial performance gains may be realized by increasing brake lamp brightness levels under flashing configurations; however, increases beyond a certain brightness threshold will not return substantive performance gains.

Both FMCSA and NHTSA have conducted extensive research and development programs to examine alternative rear signaling systems to reduce the incidence of rear-end crashes. However, while these efforts concluded that improvements could be realized through rear lighting systems that flash, neither the FMCSRs nor the Federal Motor Vehicle Safety Standards (FMVSS) currently permit the use of pulsating, brake-activated lamps on the rear of CMVs.

With respect to the use of amber lights, NHTSA has conducted research on the effectiveness of rear turn signal color on the likelihood of being involved in a rear-end crash.[7] FMVSS

[2] U.S. Department of Transportation, National Highway Traffic Safety Administration (2012), Traffic Safety Facts—2010 Data; Large Trucks, Report No. DOT HS 811 628, Washington, DC (June 2012).

[3] U.S. Department of Transportation, National Highway Traffic Safety Administration (2018), Traffic Safety Facts—2016 Data; Large Trucks, Report No. DOT HS 812 497, Washington, DC (May 2018).

[4] U.S. Department of Transportation, Federal Motor Carrier Safety Administration (2014), Expanded Research and Development of an Enhanced Rear Signaling System for Commercial Motor Vehicles, Report No. FMCSA–RRT–13–009, Washington, DC (April 2014).

[5] U.S. Department of Transportation, National Highway Traffic Safety Administration (2009), Traffic Safety Facts—Vehicle Safety Research Notes; Assessing the Attention-Gettingness of Brake Signals: Evaluation of Optimized Candidate Enhanced Braking Signals; Report No. DOT HS 811 129, Washington, DC (May 2009).

[6] U.S. Department of Transportation, National Highway Traffic Safety Administration (2010), Traffic Safety Facts—Vehicle Safety Research Notes; Assessing the Attention-Getting Capability of Brake Signals: Evaluation of Candidate Enhanced Braking Signals and Features; Report No. DOT HS 811 330, Washington, DC (June 2010).

[7] U.S. Department of Transportation, National Highway Traffic Safety Administration (2009), The Effectiveness of Amber Rear Turn Signals for

No. 108 allows rear turn signals to be either red or amber in color. The study concluded that amber signals show a 5.3 percent effectiveness in reducing involvement in two-vehicle crashes where a lead vehicle is rear-struck in the act of turning left, turning right, merging into traffic, changing lanes, or entering/leaving a parking space. The advantage of amber, compared to red, rear turn signals was shown to be statistically significant.

FMCSA acknowledges the concerns of VDOT, CVSA and other commenters that flashing, rotating, or pulsating red lamps are generally permitted only on emergency vehicles. FMCSA notes that Police and other State authorized emergency vehicles utilize high intensity, constantly flashing, rotating or pulsating red lamps visible from all directions on the vehicle and that continuously operate when activated. The amber or red brake-activated pulsating lamps requested by NTTC are visible only to the rear of the tanker trailer, and are similar in lamp intensity and flash rate of the vehicle's standard rear hazard warning lamps system currently allowed by the regulations. At the same time, however, the Agency agrees with TCA and NTTC that the 33.7 percent reduction in rear-end crashes documented by Groendyke between January 1, 2015, and July 31, 2017, for its trailers that had been equipped with the additional lights is both persuasive and compelling, given the magnitude of the rear-end crash population. FMCSA believes that this real-world experience, along with the FMCSA and NHTSA research programs that demonstrated the ability of alternative rear signaling systems to reduce the frequency and severity of rear-end crashes, is sufficient to conclude that the implementation of red or amber brake-activated pulsating lamp in the upper center position or in an upper dual outboard position on the rear of the trailers, in addition to the steady-burning brake lamps required by the regulations, is likely to provide a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption.

Terms and Conditions for the Exemption

The Agency hereby grants the exemption for a 5-year period, beginning October 8, 2020 and ending October 8, 2025. During the temporary exemption period, motor carriers operating tank trailers will be allowed to install a red or amber brake-activated pulsating lamp in the upper center position or in an upper dual outboard position on the rear of the trailers, in addition to the steady-burning brake lamps required by the FMCSRs.

The exemption will be valid for 5 years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) Motor carriers operating tank trailers fail to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Interested parties possessing information that would demonstrate that motor carriers operating tank trailers use of a red or amber brake-activated pulsating lamp in the upper center position or in an upper dual outboard position on the rear of the trailers, in addition to the steady-burning brake lamps required by the FMCSRs, is not achieving the requisite statutory level of safety should immediately notify FMCSA. The Agency will evaluate any such information and, if safety is being compromised or if the continuation of the exemption is not consistent with 49 U.S.C. 31136(e) and 31315(b), will take immediate steps to revoke the exemption.

Preemption

In accordance with 49 U.S.C. 31313(d), as implemented by 49 CFR 381.600, during the period this exemption is in effect, no State shall enforce any law or regulation applicable to interstate commerce that conflicts with or is inconsistent with this exemption. States may, but are not required to, adopt the same exemption with respect to operations in intrastate commerce.

James W. Deck,

Deputy Administrator.

[FR Doc. 2020–22233 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–EX–P

Reducing Rear Impacts; Report No. DOT HS 811 115, Washington, DC (April 2009).

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0189]

Qualification of Drivers; Exemption Applications; Implantable Cardioverter Defibrillators

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces receipt of an application from two individuals for an exemption from the prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against operation of a commercial motor vehicle (CMV) by persons with a current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope (transient loss of consciousness), dyspnea (shortness of breath), collapse, or congestive heart failure. If granted, the exemption would enable these individuals with an implantable cardioverter defibrillator (ICD) to operate a CMV in interstate commerce.

DATES: Comments must be received on or before November 9, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket ID FMCSA–2020–0189 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/docket?D=FMCSA-2020-0189.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2020–0189), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go *http://www.regulations.gov/docket?D=FMCSA-2020-0189.* Click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0189* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Docket Operations.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The individuals listed in this notice have requested an exemption from 49 CFR 391.41(b)(4). Accordingly, the Agency will evaluate the qualifications of the applicants to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard found in § 391.41(b)(4) states that a person is physically qualified to drive a CMV if that person has no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive cardiac failure.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce. The advisory criteria states that ICDs are disqualifying due to risk of syncope.

III. Qualifications of Applicant

Thomas O. Adams, Jr.

Mr. Adams, Jr. is a CMV driver in Virginia. A June 19, 2020, letter from his cardiologist reports that his ICD was implanted in March of 2020, that he has received no shocks since implantation, and his heart condition is stable with further testing scheduled.

Louis Ronquillo

Mr. Ronquillo is a CMV driver in California. A July 2020, letter from his cardiologist reports that his ICD was implanted in 2013 and that he has been asymptomatic and stable over the past seven years. He has not had any ICD shocks or arrhythmias.

[1] These criteria may be found in 49 CFR part 391, APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section D. *Cardiovascular: § 391.41(b)(4),* paragraph 4, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petition described in this notice. We will consider all comments received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–22310 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0178]

Agency Information Collection Activities; Renewal of a Currently-Approved Information Collection Request: Financial Responsibility for Motor Carriers of Passengers and Motor Carriers of Property

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. The information collected will be used to help ensure that motor carriers of passengers and property maintain appropriate levels of financial responsibility to operate on public highways.

DATES: We must receive your comments on or before December 7, 2020.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA–2020–0178 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov,* and follow the online instructions for accessing the dockets, or go to the street address listed above.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal website. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Secrist, Office of Registration and Safety Information, Chief, Registration, Licensing and Insurance Division, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202–385–2367; email: *jeff.secrist@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Secretary of Transportation is responsible for implementing regulations which establish minimum levels of financial responsibility for: (1) For-hire motor carriers of property to cover public liability, property damage, and environmental restoration, and (2) for-hire motor carriers of passengers to cover public liability and property damage. The Endorsement for Motor Carrier Policies of Insurance for Public Liability (Forms MCS–90/90B) and the Motor Carrier Public Liability Surety Bond (Forms MCS–82/82B) contain the minimum amount of information necessary to document that a motor carrier of property or passengers has obtained, and has in effect, the minimum levels of financial responsibility as set forth in applicable regulations (49 CFR 387.9 (motor carriers of property) and 49 CFR 387.33T (motor carriers of passengers)). FMCSA and the public can verify that a motor carrier of property or passengers has obtained, and has in effect, the required minimum levels of financial responsibility by reviewing the information enclosed within these documents.

Title: Financial Responsibility for Motor Carrier of Passengers and Motor Carriers of Property.

OMB Control Number: 2126–0008.

Type of Request: Renewal of a currently-approved information collection.

Respondents: Insurance underwriters for insurance companies and financial specialists for surety companies of motor carriers of property (Forms MCS–90 and MCS–82) and passengers (Forms MCS–90B and MCS–82B), and motor carrier compliance officers employed by motor carriers to store and maintain insurance and/or surety bond documentation in motor carrier vehicles.

Estimated Number of Respondents: 466,328.

Estimated Time per Response: FMCSA estimates that it takes 2 minutes to complete the Endorsement for Motor Carrier Policies of Insurance for Public Liability (Forms MCS–90 for property carriers and MCS–90B for passenger carriers) or the Motor Carrier Public Liability Surety Bond (Forms MCS–82 for property carriers and MCS–82B for passenger carriers); 1 minute to store/maintain documents at the motor carrier's principal place of business [49 CFR 387.7(d); 49 CFR 387.31(d)]; and 1 minute per vehicle to place the respective document on board the vehicle as required for non U.S.-domiciled carriers [49 CFR 387.7(f); 49 CFR 387.31(f)].

Expiration Date: March 31, 2021.

Frequency of Response: Upon creation, change, or replacement of an insurance policy or surety bond. Approximately one time per year.

Estimated Total Annual Burden: 13,214 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Thomas Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2020–22312 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7165; FMCSA–2002–12294; FMCSA–2006–23773; FMCSA–2007–29019; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2011–0365; FMCSA–2011–0366; FMCSA–2012–0104; FMCSA–2012–0160; FMCSA–2012–0161; FMCSA–2013–0028; FMCSA–2013–0169; FMCSA–2013–0170; FMCSA–2013–0174; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2015–0056; FMCSA–2015–0070; FMCSA–2015–0347; FMCSA–2016–0025; FMCSA–2016–0030; FMCSA–2016–0031; FMCSA–2016–0033; FMCSA–2017–0022; FMCSA–2017–0026; FMCSA–2018–0007; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0013; FMCSA–2018–0014]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 44 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirements in one eye.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must

be received on or before November 9, 2020.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2000–7165, Docket No. FMCSA–2002–12294, Docket No. FMCSA–2006–23773, Docket No. FMCSA–2007–29019, Docket No. FMCSA–2008–0106, Docket No. FMCSA–2008–0231, Docket No. FMCSA–2010–0082, Docket No. FMCSA–2010–0114, Docket No. FMCSA–2011–0365, Docket No. FMCSA–2011–0366, Docket No. FMCSA–2012–0104, Docket No. FMCSA–2012–0160, Docket No. FMCSA–2012–0161, Docket No. FMCSA–2013–0028, Docket No. FMCSA–2013–0169, Docket No. FMCSA–2013–0170, Docket No. FMCSA–2013–0174, Docket No. FMCSA–2014–0003, Docket No. FMCSA–2014–0004, Docket No. FMCSA–2014–0007, Docket No. FMCSA–2014–0010, Docket No. FMCSA–2015–0056, Docket No. FMCSA–2015–0070, Docket No. FMCSA–2015–0347, Docket No. FMCSA–2016–0025, Docket No. FMCSA–2016–0030, Docket No. FMCSA–2016–0031, Docket No. FMCSA–2016–0033, Docket No. FMCSA–2017–0022, Docket No. FMCSA–2017–0026, Docket No. FMCSA–2018–0007, Docket No. FMCSA–2018–0011, Docket No. FMCSA–2018–0012, Docket No. FMCSA–2018–0013, or Docket No. FMCSA–2018–0014 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2000–7165; FMCSA–2002–12294; FMCSA–2006–23773; FMCSA–2007–29019; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2011–0365; FMCSA–2011–0366; FMCSA–2012–0104; FMCSA–2012–0160; FMCSA–2012–0161; FMCSA–2013–0028; FMCSA–2013–0169; FMCSA–2013–0170; FMCSA–2013–0174; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2015–0056; FMCSA–2015–0070; FMCSA–2015–0347; FMCSA–2016–0025; FMCSA–2016–0030; FMCSA–2016–0031; FMCSA–2016–0033; FMCSA–2017–0022; FMCSA–2017–0026; FMCSA–2018–0007; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0013; FMCSA–2018–0014), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2000–7165; FMCSA–2002–12294; FMCSA–2006–23773; FMCSA–2007–29019; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2011–0365; FMCSA–2011–0366; FMCSA–2012–0104; FMCSA–2012–0160; FMCSA–2012–0161; FMCSA–2013–0028; FMCSA–2013–0169; FMCSA–2013–0170; FMCSA–2013–0174; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2015–0056; FMCSA–2015–0070; FMCSA–2015–0347; FMCSA–2016–0025; FMCSA–2016–0030; FMCSA–2016–0031; FMCSA–2016–0033; FMCSA–2017–0022; FMCSA–2017–0026; FMCSA–2018–0007; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0013; FMCSA–2018–0014, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov.* Insert the docket number, FMCSA–2000–7165; FMCSA–2002–12294; FMCSA–2006–23773; FMCSA–2007–29019; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2011–0365; FMCSA–2011–0366; FMCSA–2012–0104; FMCSA–2012–0160; FMCSA–2012–0161; FMCSA–2013–0028; FMCSA–2013–0169; FMCSA–2013–0170; FMCSA–2013–0174; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2015–0056; FMCSA–2015–0070; FMCSA–2015–0347; FMCSA–2016–0025; FMCSA–2016–0030; FMCSA–2016–0031; FMCSA–2016–0033; FMCSA–2017–0022; FMCSA–2017–0026; FMCSA–2018–0007; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0013; FMCSA–2018–0014, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Docket Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public

to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

The 44 individuals listed in this notice have requested renewal of their exemptions from the vision standard in § 391.41(b)(10), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 44 applicants has satisfied the renewal conditions for obtaining an exemption from the vision standard (see 65 FR 33406; 65 FR 57234; 67 FR 46016; 67 FR 57266; 67 FR 57267; 69 FR 51346; 69 FR 52741; 71 FR 6826; 71 FR 19602; 71 FR 50970; 71 FR 53489; 72 FR 58362; 72 FR 67344; 73 FR 11989; 73 FR 35198; 73 FR 46973; 73 FR 48270; 73 FR 48275; 73 FR 51336; 73 FR 54888; 74 FR 57553; 75 FR 13653; 75 FR 25919; 75 FR 34212; 75 FR 39729; 75 FR 44051; 75 FR 47888; 75 FR 50799; 75 FR 52062; 75 FR 52063; 76 FR 70212; 77 FR 3552; 77 FR 5874; 77 FR 13691; 77 FR 17117; 77 FR 23797; 77 FR 27847; 77 FR 38381; 77 FR 38386; 77 FR 40945; 77 FR 41879; 77 FR 46153; 77 FR 51846; 77 FR 52388; 77 FR 52389; 77 FR 52391; 78 FR 27281; 78 FR 41188; 78 FR 64274; 78 FR 67454; 78 FR 77778; 79 FR 1908; 79 FR 4803; 79 FR 13085; 79 FR 14333; 79 FR 14571; 79 FR 18392; 79 FR 23797; 79 FR 28588; 79 FR 29495; 79 FR 29498; 79 FR 38659; 79 FR 41735; 79 FR 41740; 79 FR 46153; 79 FR 46300; 79 FR 51643; 79 FR 52388; 79 FR 53514; 79 FR 64001; 80 FR 33007; 80 FR 59230; 80 FR 63839; 80 FR 67476; 81 FR 1284; 81 FR 1474; 81 FR 15401; 81 FR 15404; 81 FR 20433; 81 FR 20435; 81 FR 21647; 81 FR 28138; 81 FR 45214; 81 FR 48493; 81 FR 52514; 81 FR 59266; 81 FR 66726; 81 FR 68098; 81 FR 74494; 81 FR 81230; 81 FR 90050; 81 FR 91239; 82 FR 15277; 82 FR 37504; 82 FR 47309; 83 FR 2306; 83 FR 2311; 83 FR 6925; 83 FR 15195; 83 FR 15214; 83 FR 18648; 83 FR 24146; 83 FR 24585; 83 FR 28320; 83 FR 28325; 83 FR 28328; 83 FR 28332; 83 FR 28335; 83 FR 33292; 83 FR 34661; 83 FR 34677; 83 FR 40638; 83 FR 40648; 83 FR 45749; 83 FR 54644). They have submitted evidence showing that the vision in the better eye continues to meet the requirement specified at § 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past 2 years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of September and are discussed below. As of September 8, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 32 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (71 FR 6826; 71 FR 19602; 72 FR 58362; 72 FR 67344; 73 FR 11989; 73 FR 35198; 73 FR 48275; 74 FR 57553; 75 FR 13653; 75 FR 25919; 75 FR 39729; 75 FR 44051; 76 FR 70212; 77 FR 3552; 77 FR 5874; 77 FR 13691; 77 FR 17117; 77 FR 23797; 77 FR 38381; 77 FR 41879; 77 FR 46153; 77 FR 51846; 77 FR 52391; 78 FR 27281; 78 FR 41188; 78 FR 64274; 78 FR 67454; 78 FR 77778; 79 FR 1908; 79 FR 4803; 79 FR 13085; 79 FR 14333; 79 FR 14571; 79 FR 18392; 79 FR 23797; 79 FR 28588; 79 FR 29498; 79 FR 38659; 79 FR 41735; 79 FR 41740; 79 FR 46153; 79 FR 53514; 80 FR 33007; 80 FR 59230; 80 FR 63839; 80 FR 67476; 81 FR 1284; 81 FR 1474; 81 FR 15401; 81 FR 15404; 81 FR 20433; 81 FR 20435; 81 FR 21647; 81 FR 28138; 81 FR 45214; 81 FR 48493; 81 FR 52514; 81 FR 66726; 81 FR 68098; 81 FR 90050; 81 FR 91239; 82 FR 15277; 82 FR 37504; 82 FR 47309; 83 FR 2306; 83 FR 2311; 83 FR 6925; 83 FR 15195; 83 FR 15214; 83 FR 18648; 83 FR 24146; 83 FR 24585; 83 FR 28320; 83 FR 28325; 83 FR 28328; 83 FR 28332; 83 FR 28335; 83 FR 33292; 83 FR 34661; 83 FR 34677; 83 FR 40648; 83 FR 45749; 83 FR 54644):

Daniel C. Berry (AR)
Christopher L. Binkley (NH)
John R. Bohman (OH)
Clifford L. Burruss (CA)
Ronald H. Carey (PA)
Darrin G. Davis (WI)
Vincent DeMedici (PA)
Jeffrey D. Duncan (IN)
Paul D. Evenhouse (IL)
John W. Forgy (ID)
Grant G. Gibson (MN)
Rickey W. Goins (TN)
Jorge Gonzalez (FL)
John E. Halcomb (GA)
Nenad Harnos (NJ)
Brian D. Hoover (IA)
Alvin H. Horgdal (IA)
Elvin M. Hursh (PA)
Michael A. Kafer (KS)
Jason W. King (MT)
Allen J. Kunze (ND)
Mickey D. McCoy (TN)
Earl L. Mokma (MI)
Terrence A. Odrick (DE)
James L. Okonek (WI)
James C. Paschal, Jr. (GA)
Riland O. Richardson (GA)
Jacob H. Riggle (OK)
Michael J. Schmelzle (KS)
Gregory S. Smith (AR)
Larry L. Stewart (NC)
William B. Van Drielen (NV)

The drivers were included in docket numbers FMCSA–2006–23773;

FMCSA–2007–29019; FMCSA–2008–0106; FMCSA–2010–0082; FMCSA–2011–0365; FMCSA–2011–0366; FMCSA–2012–0160; FMCSA–2012–0161; FMCSA–2013–0028; FMCSA–2013–0169; FMCSA–2013–0170; FMCSA–2013–0174; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0007; FMCSA–2015–0056; FMCSA–2015–0070; FMCSA–2015–0347; FMCSA–2016–0025; FMCSA–2016–0030; FMCSA–2016–0031; FMCSA–2017–0022; FMCSA–2017–0026; FMCSA–2018–0007; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0013; and FMCSA–2018–0014. Their exemptions were applicable as of September 8, 2020, and will expire on September 8, 2022.

As of September 9, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following three individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (75 FR 34212; 75 FR 47888; 77 FR 27847; 77 FR 38386; 77 FR 40945; 77 FR 41879; 77 FR 52391; 79 FR 29495; 79 FR 41735; 81 FR 81230; 83 FR 40638):

Michael J. Hoffarth (WA)
Shane N. Maul (IN)
Robert Smiley (NM)

The drivers were included in docket numbers FMCSA–2010–0114; FMCSA–2012–0104; FMCSA–2012–0161. Their exemptions were applicable as of September 9, 2020, and will expire on September 9, 2022.

As of September 21, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following four individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (65 FR 33406; 65 FR 57234; 67 FR 46016; 67 FR 57266; 67 FR 57267; 69 FR 51346; 69 FR 52741; 71 FR 50970; 71 FR 53489; 73 FR 48270; 73 FR 51336; 75 FR 50799; 75 FR 52062; 77 FR 52389; 79 FR 46300; 81 FR 81230; 83 FR 40638):

Jack D. Clodfelter (NC)
Daniel K. Davis, III (MA)
Reginald I. Hall (TX)
Alfred C. Jewell, Jr. (WY)

The drivers were included in docket numbers FMCSA–2000–7165; and FMCSA–2002–12294. Their exemptions were applicable as of September 21, 2020, and will expire on September 21, 2022.

As of September 23, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following three individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (73 FR 46973; 73 FR 54888; 75 FR 52063; 77 FR 52388; 79 FR 52388; 81 FR 81230; 83 FR 40638):

Terrence L. Benning (WI)
Larry D. Curry (GA)
Thomas P. Shank (NY)

The drivers were included in docket number FMCSA–2008–0231. Their exemptions were applicable as of September 23, 2020, and will expire on September 23, 2022.

As of September 29, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (81 FR 59266; 81 FR 74494; 83 FR 40638):

Gregory M. Anderson (NY)

The driver was included in docket number FMCSA–2016–0033. The exemption is applicable as of September 29, 2020, and will expire on September 29, 2022.

As of September 30, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (79 FR 51643; 79 FR 64001; 81 FR 81230; 83 FR 40638):

Loran J. Weiler (IA)

The driver was included in docket number FMCSA–2014–0010. The exemption is applicable as of September 30, 2020, and will expire on September 30, 2022.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must undergo an annual physical examination (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a certified medical examiner (ME), as defined by § 390.5, who attests that the driver is otherwise physically qualified under § 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the ME at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file or keep a copy of his/her driver's qualification if he/her is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 44 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the vision requirement in § 391.41(b)(10), subject to the requirements cited above. In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.

Larry W. Minor,
Associate Administrator for Policy.

[FR Doc. 2020–22311 Filed 10–7–20; 8:45 am]
BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2020–0077]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on September 18, 2020, the Regional Transportation District Commuter Rail (RTDC) petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 238, Passenger Equipment Safety Standards. FRA assigned the petition Docket Number FRA–2020–0077.

Specifically, RTDC requests relief from 49 CFR 238.309, *Periodic brake equipment maintenance.* Section 238.309(b)(2) stipulates that brake equipment and brake cylinders of each MU locomotive must be cleaned, repaired, and tested at intervals of every 1,104 days if the MU locomotive is part of a fleet that is 100 percent equipped with air dryers and has a brake system using RT–5A-style valves (among others). The RTDC MU locomotives are equipped with the RT–5A+ Brake System and is 100 percent air dryer equipped. RTDC requests a waiver to extend the maintenance interval to

perform periodic brake equipment maintenance on the RT–5A+ system from 1,104 days to a total of 2,208 days (6 years) for the RTDC MU locomotive fleet.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation (DOT), 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by November 23, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2020–22298 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2020–0080]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on September 23, 2020, Colebrookdale Railroad petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 232, Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-Of-Train Devices. FRA assigned the petition Docket Number FRA–2020–0080.

Colebrookdale Railroad is the operator of a tourist train over 8.6 miles of track owned by the Eastern Berks Gateway Railroad. Colebrookdale Railroad operates four historic passenger cars with Westinghouse UC air brakes. The UC valves are required to be clean, repaired, lubricated, and tested every 15 months. *See* 49 CFR part 232, appendix B; Association of American Railroads Standard S–045. The petitioner seeks a waiver to extend this requirement to every 30 months to save costs and extend the operating seasons.

The petitioner states that the UC valves are inspected by a certified brake shop in Leetsdale, Pennsylvania. Further, the Colebrookdale Railroad has never had a brake valve failure in seven years of operation, nor experienced an Initial Terminal Test or a Class III brake test failure, in any weather conditions. Additionally, improvements in gasket material and lubrication have increased the reliability of these older valves over the years.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation (DOT), 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by November 23, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2020–22299 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Competitive Funding Opportunity: Public Transportation COVID–19 Research Demonstration Grant Program

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of funding opportunity.

SUMMARY: The Coronavirus Disease 2019 (COVID–19) public health emergency

has had a significant impact on transit operations. During a series of FTA listening sessions held over the last three months, transit agencies asked FTA to support research to identify solutions to address the operational challenges that they are facing as a result of COVID–19. In response, FTA makes available through this Notice of Funding Opportunity (NOFO) funding to support research demonstration grants to public transit agencies to develop, deploy, and demonstrate innovative solutions that improve the operational efficiency of transit agencies, as well as enhance the mobility of transit users affected by the COVID–19 public health emergency. Demonstration grants under this NOFO are authorized under FTA's Public Transportation Innovation Program (49 U.S.C. 5312). Eligible projects will demonstrate innovative solutions to improve the operational efficiencies of transit systems and enhance mobility for their communities in four major areas: (1) Vehicle, facility, equipment and infrastructure cleaning and disinfection; (2) exposure mitigation measures; (3) innovative mobility such as contactless payments; and (4) measures that strengthen public confidence in transit services. The total funding available for awards under this NOFO is $10,000,000. FTA may supplement this amount if additional funding becomes available.

DATES: Applicants must submit completed proposals for funding opportunity FTA–2020–015–TRI through the *GRANTS.GOV* ''APPLY'' function by 11:59 p.m. Eastern Time on November 2, 2020. Prospective applicants should register as soon as possible on the *GRANTS.GOV* website to ensure they can complete the application process before the submission deadline. Application instructions are available on FTA's website at *http://transit.dot.gov/howtoapply* and in the ''FIND'' module of *GRANTS.GOV*. FTA will not accept mail and fax submissions.

FOR FURTHER INFORMATION CONTACT: Please send any questions on this notice to Jamel El-Hamri email: *Jamel.El-Hamri@dot.gov* phone: 2020–366–8985. A Telecommunication Device for the Deaf (TDD) is available for individuals who are deaf or hard of hearing at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

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A. Program Description
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A. Program Description

The Public Transportation COVID–19 Research Demonstration Grant Program is funded through the Public Transportation Innovation Program (49 U.S.C. 5312), with the goal to develop, deploy, and demonstrate innovative solutions that improve the operational efficiency of transit agencies, as well as enhance the mobility of transit users affected by the COVID–19 public health emergency.

Eligible projects will propose to develop and deploy innovative solutions in four major areas: (1) Vehicle, facility, equipment and infrastructure cleaning and disinfection; (2) exposure mitigation measures; (3) innovative mobility such as contactless payments; and (4) measures that strengthen public confidence in transit.

As required by 49 U.S.C. 5312(e)(4), projects funded under this NOFO must participate in an evaluation by an independent outside entity that will conduct a comprehensive evaluation of the success or failure of the projects funded under this subsection and any plan for broad-based implementation of the innovation promoted by successful projects.

B. Federal Award Information

FTA makes available $10,000,000 in fiscal year (FY) 2020 funds under the Public Transportation Innovation Program (49 U.S.C. 5312) to finance the Public Transportation COVID–19 Research Demonstration Grant Program. FTA may supplement the total funds available if additional funding becomes available at the time project selections are made.

FTA will grant pre-award authority starting on the date of the project award announcement for selected projects and should be completed within 24 months from the date of award. Funds are available only for eligible expenses incurred after the announcement of project selections.

C. Eligibility Information

(1) Eligible Applicants

Eligible applicants include State and local governmental authorities, direct recipients of Urbanized Area (49 U.S.C. 5307) and Rural Area (49 U.S.C. 5311) formula funds, and Indian tribes. Eligible applicants are limited to FTA grantees or subrecipients who would be the primary beneficiaries of the innovative products and services that are developed—typically public transit agencies. Except for projects proposed by Indian tribes, proposals for projects in rural (non-urbanized) areas must be submitted as part of a consolidated State proposal. States and other eligible applicants also may submit consolidated proposals for projects in urbanized areas. The submission of the Statewide application will not preclude the submission and consideration of any application from other eligible recipients in an urbanized area in a State. Proposals may contain projects to be implemented by the recipient or its subrecipients. Eligible subrecipients include public agencies, private nonprofit organizations, and private providers engaged in public transportation. Eligible applicants may submit consolidated proposals for projects.

(2) Cost Sharing or Matching

The maximum Federal share of project costs is 100 percent. FTA may give additional consideration to applicants that propose a local share and may view these applicants as more competitive. The applicant must document the source(s) of the local match, if any, in the grant application. For any applicants proposing match, eligible local match sources include the following:

- Cash from non-Government sources other than revenues from providing public transportation services;
- revenues derived from the sale of advertising and concessions;
- revenues generated from value capture financing mechanisms;
- funds from an undistributed cash surplus;
- replacement or depreciation cash fund or reserve;
- new capital; or
- in-kind contributions.

(3) Eligible Projects

Eligible projects will propose innovative solutions to improve operational efficiencies of transit agencies and enhance the mobility of transit users, through projects that demonstrate innovative solutions for:

- Vehicle, facility, equipment and infrastructure cleaning and disinfection;
- exposure mitigation measures such a real-time notification of rail and bus passenger loads;
- new multi-modal payment innovative mobility systems such as contactless payments; and
- measures that strengthen public confidence in transit.

Each applicant may only submit one proposal.

D. Application and Submission Information

(1) Address and Form of Application Submission

Applications must be submitted through *GRANTS.GOV*. Applicants can find general information for submitting applications through *GRANTS.GOV* at *www.fta.dot.gov/howtoapply,* along with specific instructions for the forms and attachments required for submission. Mail and fax submissions will not be accepted.

(2) Content and Form of Application Submission

a. Proposal Submission

A complete proposal submission consists of at least two forms:

1. The SF–424 Mandatory Form (downloadable from *GRANTS.GOV*) and
2. the supplemental form for the FY 2020 COVID–19 Demonstration Program (downloadable from *GRANTS.GOV*), which is available on FTA's website at (placeholder for FTA COVID–19 Demonstration Program).

The application must include responses to all sections of the SF–424 mandatory form and the supplemental form unless a section is indicated as optional. FTA will use the information on the supplemental form to determine applicant and project eligibility for the program and to evaluate the proposal against the selection criteria described in part E of this notice. FTA will accept only one supplemental form per SF–424 submission. FTA encourages applicants to consider submitting a single supplemental form that includes multiple activities to be evaluated as a consolidated proposal.

Applicants may attach additional supporting information to the SF–424 submission, including but not limited to letters of support, project budgets, or excerpts from relevant planning documents. Supporting documentation must be described and referenced by file name in the appropriate response section of the supplemental form, or it may not be reviewed.

Information such as applicant name, Federal amount requested, local match amount, description of areas served, etc., may be requested in varying degrees of detail on both the SF–424 form and supplemental form. Applicants must fill in all fields unless stated otherwise on the forms. If applicants copy information into the supplemental form from another source, they should verify that the supplemental form has fully captured pasted text and that it has not truncated the text due to character limits built into the form. Applicants should use both the ''Check Package for Errors'' and the ''Validate Form'' validation buttons on both forms to check all required fields. Applicants should also ensure that the Federal and local amounts specified are consistent.

Addressing the deteriorating conditions and disproportionately high fatality rates on our rural transportation infrastructure is of critical interest to the Department, as rural transportation networks face unique challenges in safety, infrastructure condition, and passenger and freight usage. Consistent with the R.O.U.T.E.S. Initiative, the Department encourages applicants to consider how the project will address the challenges faced by rural areas.

b. Application Content

The SF–424 Mandatory Form and the supplemental form will prompt applicants for the required information, including:

i. Applicant Name
ii. Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number
iii. Key contact information (contact name, address, email address, and phone number)
iv. Congressional district(s) where project will take place
v. Project Information (title, executive summary, and type)
vi. A detailed description of the need for the project
vii. A detailed description of how the project will support the Program objectives
viii. Evidence that the applicant can provide the local cost shares
ix. A description of the technical, legal, and financial capacity of the applicant
x. A detailed project budget
xi. Details on the local matching funds
xii. A detailed project timeline
xiii. Whether the project impacts an Opportunity Zone

(3) Unique Entity Identifier and System for Award Management (SAM)

Each applicant is required to: (1) Be registered in SAM before submitting an application; (2) provide a valid unique entity identifier in its application; and (3) continue to maintain an active SAM registration with current information at all times during which the applicant has an active Federal award or an application or plan under consideration by FTA. These requirements do not apply if the applicant: (1) Is excepted from the requirements under 2 CFR 25.110(b) or (c); or (2) has an exception approved by FTA under 2 CFR 25.110(d). FTA may not make an award until the applicant has complied with all applicable unique entity identifier and SAM requirements. If an applicant has not fully complied with the requirements by the time FTA is ready to make an award, FTA may determine that the applicant is not qualified to receive an award and use that determination as a basis for making a Federal award to another applicant. All applicants must provide a unique entity identifier provided by SAM. Registration in SAM may take as little as 3–5 business days, but there can be unexpected steps or delays. For example, the applicant may need to obtain an Employer Identification Number. FTA recommends allowing ample time, up to several weeks, to complete all steps. For additional information on obtaining a unique entity identifier, please visit *www.sam.gov.*

(4) Submission Dates and Times

Project proposals must be submitted electronically through *GRANTS.GOV* by 11:59 p.m. Eastern on November 2, 2020. Mail and fax submissions will not be accepted.

FTA urges applicants to submit applications at least 72 hours prior to the due date to allow time to correct any problems that may have caused either *GRANTS.GOV* or FTA systems to reject the submission. Proposals submitted after the deadline will only be considered under extraordinary circumstances not within the applicant's control.

Deadlines will not be extended due to scheduled website maintenance. *GRANTS.GOV* scheduled maintenance and outage times are announced on the *GRANTS.GOV* website.

Within 48 hours after submitting an electronic application, the applicant should receive two email messages from *GRANTS.GOV*: (1) Confirmation of successful transmission to *GRANTS.GOV*; and (2) confirmation of successful validation by *GRANTS.GOV*. If the applicant does not receive confirmation of successful validation or receives a notice of failed validation or incomplete materials, the applicant must address the reason for the failed validation, as described in the email notice, and resubmit before the submission deadline. If making a resubmission for any reason, applicants must include all original attachments regardless of which attachments were updated and check the box on the supplemental form indicating this is a resubmission.

Applicants are encouraged to begin the process of registration on the *GRANTS.GOV* site well in advance of the submission deadline. Registration is

a multi-step process, which may take several weeks to complete before an application can be submitted. Registered applicants may still be required to update their registration before submitting an application. Registration in SAM is renewed annually and persons making submissions on behalf of the Authorized Organization Representative (AOR) must be authorized in *GRANTS.GOV* by the AOR to make submissions.

(5) Funding Restrictions

Funds may be used for post-award expenditures only. Funds under this NOFO cannot be used to reimburse projects for otherwise eligible expenses incurred prior to the date of project award announcements.

(6) Other Submission Requirements

FTA encourages applicants to identify scaled funding options in case insufficient funding is available to fund a project at the full requested amount. If an applicant indicates that a project is scalable, the applicant must provide an appropriate minimum funding amount that will fund an eligible project that achieves the objectives of the program and meets all relevant program requirements. The applicant must provide a clear explanation of how a reduced award would affect the project budget and scope. FTA may award a lesser amount whether or not the applicant provides a scalable option.

E. Application Review Information

(1) Project Evaluation Criteria

Addressing the deteriorating conditions and disproportionately high fatality rates on our rural transportation infrastructure is of critical interest to the Department, as rural transportation networks face unique challenges in safety, infrastructure condition, and passenger and freight usage. Consistent with the R.O.U.T.E.S. Initiative, the Department will consider how the project will address the challenges faced by rural areas. In addition, the Department will review and consider applications for funding pursuant to this Notice in accordance with the President's September 2, 2020 memorandum, entitled *Memorandum on Reviewing Funding to State and Local Government Recipients of Federal Funds that Are Permitting Anarchy, Violence, and Destruction in American Cities,* consistent with guidance from the Office of Management and Budget and the Attorney General and with all applicable laws.

FTA will evaluate proposals submitted according to the following criteria: (a) Project Innovation and Impact; (b) Project Approach; (c) National Applicability; (d) Commercialization and/or Knowledge Transfer; and (e) Technical, Legal and Financial Capacity. FTA encourages each applicant to demonstrate how a project supports all criteria with the most relevant information the applicant can provide, regardless of whether such information has been specifically requested or identified in this notice.

a. Project Innovation and Impact

i. Effectiveness of the project in achieving and demonstrating the specific objectives of this program.

ii. Demonstration of benefits in addressing the needs of the transit agency and industry and impacts to infrastructure, equipment, transit workforce, and riders.

iii. Degree of improvement over current and existing technologies, designs, and/or practices applicable to the transit industry.

b. Project Approach

i. Quality of the project approach such as existing partnerships, collaboration strategies and level of commitment of the project partners.

ii. Proposal is realistic in its approach to fulfill the milestones/deliverables, schedule and goals.

c. National Applicability

i. Degree to which the project could be replicated by other transit agencies regionally or nationally.

ii. Ability to evaluate technologies, designs and/or practices in a wide variety of conditions and locales.

iii. Degree to which the technology, designs and/or practices can be replicated by other transportation modes.

d. Commercialization and/or Knowledge Transfer

i. Demonstrates a realistic plan for moving the results of the project into the transit marketplace (patents, conferences, articles in trade magazines, webinar, site visits, etc.).

ii. How the project team plans to work with the industry on improving best practices, guidance and/or standards, if applicable.

iii. Demonstrate a clear understanding and robust approach to data collection, access and management.

e. Technical, Legal and Financial Capacity

Capacity of the applicant and any partners to successfully execute the project effort. There should be no outstanding legal, technical, or financial issues with the applicant that would make this a high-risk project.

(2) Review and Selection Process

An FTA technical evaluation committee will evaluate proposals based on the published project evaluation criteria. Members of the technical evaluation committee will rate the applications and may seek clarification about any statement in an application. The FTA Administrator will determine the final selection and amount of funding for each project after consideration of the findings of the technical evaluation committee. Geographic diversity, diversity of the project type, the amount of local match to be provided, and the applicant's receipt and management of other Federal transit funds may be considered in FTA's award decisions. Prior fare payment innovation efforts may receive priority consideration. The FTA Administrator will consider the following key DOT objectives:

a. Utilizing alternative funding sources and innovative financing models to attract non-Federal sources of investment;

b. Whether the project is located in or supports public transportation service in a qualified opportunity zone designated pursuant to 26.U.S.C. 1400Z–1; and

c. The extent to which the project addresses challenges specific to the provision of rural public transportation.

(3) FAPIIS Review

Prior to making a grant award, FTA is required to review and consider any information about the applicant that is in the Federal Awardee Performance and Integrity Information System (FAPIIS) accessible through SAM. An applicant may review and comment on information about itself that a Federal awarding agency previously entered.

FTA will consider any comments by the applicant, in addition to the other information in FAPIIS, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants as described in 2 CFR 200.205 Federal Awarding Agency Review of Risk Posed by Applicants.

F. Federal Award Administration Information

(1) Federal Award Notices

FTA will announce the final project selections on the FTA website. Project recipients should contact their FTA Regional Office for additional information regarding allocations for

projects. At the time project selections are announced, FTA will extend pre-award authority for the selected projects. There is no blanket pre-award authority for these projects before announcement.

There is no minimum or maximum grant award amount, but FTA intends to fund as many meritorious projects as possible. FTA only will consider proposals from eligible recipients for eligible activities. Due to funding limitations, projects selected for funding may receive less than the amount originally requested. In those cases, applicants must be able to demonstrate that the proposed projects are still viable and can be completed with the amount awarded.

(2) Administrative and National Policy Requirements

a. Pre-Award Authority

FTA will issue specific guidance to recipients regarding pre-award authority at the time of selection. FTA does not provide pre-award authority for competitive funds until projects are selected, and there are Federal requirements that must be met before costs are incurred. For more information about FTA's policy on pre-award authority, *see* the FY 2020 Apportionments Notice published on June 3, 2020, at *https://www.govinfo.gov/content/pkg/FR-2020-06-03/pdf/2020-11946.pdf.*

b. Grant Requirements

Selected applicants will submit a grant application through FTA's electronic grant management system and adhere to the customary FTA grant requirements for research project (insert Circular name). All competitive grants, regardless of award amount, will be subject to the Congressional notification and release process. FTA emphasizes that third-party procurement applies to all funding awards, as described in FTA Circular 4220.1F, ''Third Party Contracting Guidance.'' However, FTA may approve applications that include a specifically identified partnering organization(s) (2 CFR 200.302(f)). When included, the application, budget, and budget narrative should provide a clear understanding of how the selection of these organizations is critical for the project and give sufficient detail about the costs involved.

c. Planning

FTA encourages applicants to engage the appropriate State Departments of Transportation, Regional Transportation Planning Organizations, or Metropolitan Planning Organizations in areas to be served by the project funds available under this program.

d. Standard Assurances

The applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and may affect the implementation of the project. The applicant agrees that the most recent Federal requirements will apply to the project unless FTA issues a written determination otherwise. The applicant must submit the Certifications and Assurances before receiving a grant if it does not have current certifications on file.

e. Free Speech and Religious Liberty

In connection with any program or activity conducted with or benefiting from funds awarded under this notice, recipients of funds must comply with all applicable requirements of Federal law, including, without limitation, the Constitution of the United States; statutory, regulatory, and public policy requirements, including without limitation, those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination; the conditions of performance, non-discrimination requirements, and other assurances made applicable to the award of funds in accordance with regulations of the Department of Transportation; and applicable Federal financial assistance and contracting principles promulgated by the Office of Management and Budget. In complying with these requirements, recipients must ensure that no concession agreements are denied or other contracting decisions made on the basis of speech or other activities protected by the First Amendment. If the Department determines that a recipient has failed to comply with applicable Federal requirements, the Department may terminate the award of funds and disallow previously incurred costs, requiring the recipient to reimburse any expended award funds.

(3) Reporting

The post-award reporting requirements include submission of the Federal Financial Report (FFR) and Milestone Progress Report in TrAMS. An evaluation of the grant will occur at various points in the demonstration process and at the end of the project. In addition, FTA is responsible for producing an Annual Report to Congress that compiles evaluation of selected projects, including an evaluation of the performance measures identified by the applicants. All applicants must develop an evaluation plan to measure the success or failure of their projects and describe any plans for broad-based implementation of successful projects. FTA may request data and reports to support the evaluation and Annual Report.

a. Independent Evaluation

To achieve a comprehensive understanding of the impacts and implications of each proposed COVID–19 Research Demonstration Program, projects funded under this announcement will require the recipient to conduct a third party independent evaluation of their project. Recipients will be required to contract with a third party independent evaluator to assist in developing an evaluation plan, and collecting, storing and managing data required to fulfill the evaluation requirement. No more than 10 percent of the Federal share of the project may be used to hire the third-party independent evaluator and the inclusion of a third-party independent evaluation should be described in the grant application. If the project duration is more than two years, an interim evaluation report would need to be submitted to FTA, otherwise the evaluation report should be included as part of the final project report.

b. COVID–19 Research Demonstration Grant Program Evaluation

Projects funded under this announcement will be required to establish a set of performance metrics set by the third-party independent evaluator and shared with FTA.

G. Federal Awarding Agency Contacts Information

For questions about applying, please contact Jamel El-Hamri email: *Jamel.El-Hamri@dot.gov* phone: 202–366–8985. A TDD is available at 1–800–877–8339 (TDDFIRS). To ensure that applicants receive accurate information about eligibility or the program, applicants are encouraged to contact FTA directly with questions, rather than through intermediaries or third parties.

FTA staff also may conduct briefings on the competitive grants selection and award process upon request.

K. Jane Williams,

Deputy Administrator.

[FR Doc. 2020–22316 Filed 10–7–20; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Joint Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Joint Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, November 19, 2020.

FOR FURTHER INFORMATION CONTACT: Gilbert Martinez at 1–888–912–1227 or (737) 800–4060.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Joint Committee will be held Thursday, November 19, 2020, at 1:30 p.m. Eastern Time via teleconference. The public is invited to make oral comments or submit written statements for consideration. For more information please contact Gilbert Martinez at 1–888–912–1227 or (737–800–4060), or write TAP Office 3651 S. IH–35, STOP 1005 AUSC, Austin, TX 78741, or post comments to the website: *http://www.improveirs.org.*

The agenda will include various committee issues for submission to the IRS and other TAP related topics. Public input is welcomed.

Dated: October 2, 2020.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2020–22246 Filed 10–7–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Special Projects Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Special Projects Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, November 12, 2020.

FOR FURTHER INFORMATION CONTACT: Antoinette Ross at 1–888–912–1227 or 202–317–4110.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel's Special Projects Committee will be held Thursday, November 12, 2020, at 11:00 a.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Antoinette Ross. For more information please contact Antoinette Ross at 1–888–912–1227 or 202–317–4110, or write TAP Office, 1111 Constitution Ave. NW, Room 1509, Washington, DC 20224 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: October 2, 2020.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2020–22245 Filed 10–7–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Taxpayer Communications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, November 10, 2020.

FOR FURTHER INFORMATION CONTACT: Cedric Jeans at 1–888–912–1227 or 901–707–3935.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee will be held Tuesday, November 10, 2020, at 12:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Cedric Jeans. For more information please contact Cedric Jeans at 1–888–912–1227 or 901–707–3935, or write TAP Office, 5333 Getwell Road, Memphis, TN 38118 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: October 2, 2020.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2020–22242 Filed 10–7–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Taxpayer Assistance Center Improvements Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Taxpayer Assistance Center Improvements Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, November 10, 2020.

FOR FURTHER INFORMATION CONTACT: Matthew O'Sullivan at 1–888–912–1227 or (510) 907–5274.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer

Advocacy Panel's Taxpayer Assistance Center Improvements Project Committee will be held Tuesday, November 10, 2020, at 1:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Matthew O'Sullivan. For more information please contact Matthew O'Sullivan at 1–888–912–1227 or (510) 907–5274, or write TAP Office, 1301 Clay Street, Oakland, CA 94612–5217 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: October 2, 2020.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2020–22244 Filed 10–7–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Senior Executive Service; Legal Division Performance Review Board

AGENCY: Department of the Treasury.

ACTION: Notice of members of the Legal Division Performance Review Board (PRB).

SUMMARY: This notice announces the appointment of members of the Legal Division PRB. The purpose of this Board is to review and make recommendations concerning proposed performance appraisals, ratings, bonuses, and other appropriate personnel actions for incumbents of SES positions in the Legal Division.

DATES: October 8, 2020.

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, Department of the Treasury, 1500 Pennsylvania Avenue NW, Room 3000, Washington, DC 20220, Telephone: (202) 622–0283 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Composition of Legal Division PRB

The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half the members shall consist of career appointees. Composition of the specific PRBs will be determined on an ad hoc basis from among the individuals listed in this notice.

The names and titles of the PRB members are as follows:

Heather Book, Chief Counsel, Bureau of Engraving and Printing;
Ryan Brady, Deputy General Counsel,
Michael Briskin, Deputy Assistant General Counsel (General Law and Regulation)
Michelle Dickerman, Deputy Assistant General Counsel (Litigation, Oversight, and Financial Stability)
Eric Froman, Assistant General Counsel (Banking and Finance);
Anthony Gledhill, Chief Counsel, Alcohol Tobacco, Tax, and Trade Bureau;
Jimmy Kirby, Chief Counsel, Financial Crimes Enforcement Network;
Jeffrey Klein, Deputy Assistant General Counsel (International Affairs);
Stephen Milligan, Deputy Assistant General Counsel (Banking and Finance);
Helen Morrison, Deputy Benefits Tax Counsel;
Brian Morrissey, Principal Deputy General Counsel;
Kevin Nichols, Deputy International Tax Counsel;
John Schorn, Chief Counsel, U.S. Mint;
James Stern, Deputy General Counsel;
Brian Sonfield, Assistant General Counsel (General Law, Ethics and Regulation);
Drita Tonuzi, Deputy Chief Counsel (Operations), Internal Revenue Service;
Heather Trew, Assistant General Counsel (Enforcement & Intelligence);
Krishna Vallabhaneni, Tax Legislative Counsel;
Hanoi Veras, Deputy Assistant General Counsel (Ethics)
Carol Weiser, Benefits Tax Counsel;
Paul Wolfteich, Deputy Assistant General Counsel (Banking and Finance) and;
Brett York, Deputy Tax Legislative Counsel.

(Authority: 5 U.S.C. 4314(c)(4))

Brian J. Sonfield,

Assistant General Counsel (General Law, Ethics & Regulation).

[FR Doc. 2020–22237 Filed 10–7–20; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

United States Mint

Establish Price Increases for 2020 United States Mint Silver Numismatic Products

AGENCY: United States Mint, Department of the Treasury.

ACTION: Notice.

SUMMARY: The United States Mint is announcing pricing for United States Mint numismatic products in accordance with the table below:

Product	2020 Retail price
Presidential Silver Medals	$65.00
America the Beautiful Quarters Silver Proof Set	60.00
American Eagle One Ounce Silver Proof Coin	73.00
American Eagle One Ounce Silver Uncirculated Coin	67.00
American Eagle One Ounce Silver Proof Coins—Bulk Pack	2,920.00
American Eagle One Ounce Silver Uncirculated Coin—Bulk Pack	2,680.00
Limited Edition Silver Proof Set	201.00
Silver Proof Set	105.00
America the Beautiful Five Ounce Silver Uncirculated Coin	229.00
End of World War II 75th Anniversary American Eagle Silver Proof Coin	83.00
End of World War II 75th Anniversary One Ounce Silver Medal	75.00
2019 America the Beautiful Quarters Silver Proof Set	60.00
2019 American Liberty High Relief Silver Medal	175.00
2019 Congratulations Set	75.00
2019 Silver Proof Set	105.00

FOR FURTHER INFORMATION CONTACT: Derrick Griffin, Marketing Specialist, Sales and Marketing; United States Mint; 801 9th Street NW, Washington, DC 20220; or call 202–354–7579.

Authority: 31 U.S.C. 5111, 5112, 5132, & 9701

Eric Anderson,

Executive Secretary, United States Mint.

[FR Doc. 2020–22458 Filed 10–7–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0110]

Agency Information Collection Activity: Application for Assumption Approval and/or Release From Personal Liability to the Government on a Home Loan

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 7, 2020.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0110'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Danny S. Green, (202) 421–1354 or email *Danny.Green2@va.gov.* Please refer to ''OMB Control No. 2900–0110'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 3713(a) and 3714 and 3702(b)(2).

Title: Application for Assumption Approval and/or Release From Personal Liability to the Government on a Home Loan.

OMB Control Number: 2900–0110.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–6381 is completed by Veterans who are selling their homes by assumption rather than requiring purchasers to obtain their own financing to pay off the loan. The data furnished on the form is essential to determinations for assumption approval, release of liability, and substitution of entitlement in accordance with 38 U.S.C. 3713(a) and 3714 and 3702(b)(2).

Affected Public: Individuals and households.

Estimated Annual Burden: 42 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 250 per year.

By direction of the Secretary.

Danny S. Green,

VA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2020–22227 Filed 10–7–20; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Cemeteries and Memorials, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that a virtual meeting of the Advisory Committee on Cemeteries and Memorials will be held on October 21, 2020–October 22, 2020. The meeting sessions will begin and ends as follows:

Date:	Time:
Tuesday, October 21, 2020.	1:00 p.m. to 5:00 p.m. EDT.
Wednesday, October 22, 2020.	1:00 p.m. to 5:00 p.m. EDT.

The meeting sessions are open to the public. If you are interested in attending the meeting virtually, the dial-in number for both days is 1–404–397–1596, Access Code: 1998939772#.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of national cemeteries, soldiers' lots and plots, the selection of new national cemetery sites, the erection of appropriate memorials, and the adequacy of Federal burial benefits. The Committee will make recommendations to the Secretary regarding such activities.

On Wednesday, October 21, 2020, the agenda will include remarks by VA Leadership; appointment of new member, Mr. Donn Weaver; report on the Missing in America Program; discussion on COVID 19: Restrictions, lessons learned, and its impact on families; update on the Veterans Legacy Program, Veterans Legacy Memorial, Outreach, Cemetery Dedications, Social Media, and other initiatives to inform the public about benefits and to memorialize Veterans; public comments; and open discussion.

On Thursday, October 22, 2020, the agenda will include a remarks and recap from committee chair; update on the Transfer of the Eleven Army Cemeteries and the Veterans Cemetery Grants Program; update on the Rural and Urban burial Initiative; report on the Hardest Five Percent of Veterans Requiring Access to Burial Options; public comments; and open discussion.

Any member of the public wishing to attend the meeting should contact Ms. Christine Hamilton, Designated Federal Officer, at (202) 461–5681. Please leave a voice message. The Committee will also accept written comments. Comments may be transmitted electronically to the Committee at *christine.hamilton1@va.gov.* In the public's communications with the Committee, the writers must identify themselves and state the organizations, associations, or persons they represent.

Dated: October 5, 2020.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2020–22340 Filed 10–7–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0556]

Agency Information Collection Activity: VA Advance Directive: Durable Power of Attorney for Health Care and Living Will

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Health Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 7, 2020.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Brian McCarthy, Office of Regulatory and Administrative Affairs (10B4), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *Brian.McCarthy4@va.gov.* Please refer to ''OMB Control No. 2900–0556'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Brian McCarthy at (202) 615–9241.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Advance Directive: Durable Power of Attorney for Health Care and Living Will, VA Form 10–0137.

OMB Control Number: 2900–0556.

Type of Review: Extension of a currently approved collection.

Abstract: Section 7331 of title 38, United States Code (U.S.C.), requires, in relevant part, that the Secretary of Veterans Affairs, upon the recommendation of the Under Secretary for Health, prescribe regulations to ensure, to the maximum extent practicable, that all Department of Veterans Affairs (VA) patient care be carried out only with the full and informed consent of the patient, or in appropriate cases, a representative thereof. Based on VA's interpretation of this statute and our mandate in 38 U.S.C. 7301(b) to provide a complete medical and hospital service, we recognize that patients with decision-making capacity have the right to state their treatment preferences in a VA or other valid advance directive.

VA Form 10–0137, *VA Advance Directive: Durable Power of Attorney for Health Care and Living Will,* is the VA recognized legal document that permits VA patients to designate a health care agent and/or specify preferences for future health care. The VA Advance Directive is invoked if a patient becomes unable to make health care decisions for himself or herself. Use of the VA Advance Directive is specified in VHA Handbook 1004.02, Advance Care Planning and Management of Advance Directives. Veterans' rights to designate a health care agent and specify health care preferences in advance are codified in 38 CFR 17.32. This regulation also obligates VA to recognize advance directives and to use the information contained therein when health care decisions must be made for a patient that has lost decision making capacity.

VA Form 10–0137 (both English and Spanish-English language versions) has a current OMB Paperwork Reduction Act (PRA) clearance under OMB Control Number 2900–0556. In addition, 2900–0556 now includes the collection of a ''Close Personal Friend Statement'' for incapacitated Veterans who have not completed an Advance Directive and are in need of health care. When a Veteran is incapacitated and does not have an Advance Directive, the VA regulations allow a statement to be submitted from a ''Close Personal Friend'' who will be responsible for making health care decisions on behalf of the Veteran. It is estimated that 300 such statements will be collected annually. VA seeks to renew the PRA clearance for the information collection under OMB Control Number 2900–0556.

VA Form 10–0137

Affected Public: Individuals and households.

Estimated Annual Burden: 171,811 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 343,622.

Close Personal Friend Statement

Affected Public: Individuals and households.

Estimated Annual Burden: 50 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 300.

By direction of the Secretary.

Danny S. Green,

Interim VA Clearance Officer, Office of Quality, Performance and Risk (OQPR), Department of Veterans Affairs.

[FR Doc. 2020–22260 Filed 10–7–20; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0500]

Agency Information Collection Activity: Mandatory Verification of Dependents

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register**

concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 7, 2020.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0500'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Danny S. Green at (202) 421–1354.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 501.

Title: Mandatory Verification of Dependents (VA Form 21–0538).

OMB Control Number: 2900–0500.

Type of Review: Revision of a currently approved collection.

Abstract: VA Form 21–0538 is used to request verification of the status of dependents for whom additional compensation is being paid to veterans. Without this information, continued entitlement to the benefits for dependents could not be determined.

VA Form 21–0538 has been revised; (1) letter template removed as it was a duplicate of a VA cover letter already in use, (2) the title has been changed from 'Mandatory Status of Dependents' to *Mandatory Verification of Dependents,* (3) Section II: Status Certification, was added to help delineate whether the veteran is needed to provide additional information on the status of their dependents, or not, (4) the form was changed to include *removals only* as these are dependents that have already been previously added to the veteran's benefits, as another collection is used to add dependents, and (5) an e-signature has been added to provide a digital format for online signatures. The burden estimate has also been decreased.

Affected Public: Individuals and households.

Estimated Annual Burden: 29,233 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Once.

Estimated Number of Respondents: 175,400.

By direction of the Secretary.

Danny S. Green,

VA PRA Clearance Officer, Office of Quality, Performance and Risk (OQPR), Department of Veterans Affairs.

[FR Doc. 2020–22282 Filed 10–7–20; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0875]

Agency Information Collection Activity: VA-Guaranteed Home Loan Cash-Out Refinance Loan Comparison Disclosure

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: 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. Refer to ''OMB Control No. 2900–0875''.

FOR FURTHER INFORMATION CONTACT: Danny S. Green, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 421–1354 or email *danny.green2@va.gov* . Please refer to ''OMB Control No. 2900–0875'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: Public Law 115–174; 38 CFR 36.4306.

Title: VA-Guaranteed Home Loan Cash-out Refinance Loan Comparison Disclosure

OMB Control Number: 2900–0875.

Type of Review: Extension of a currently approved collection.

Abstract: All-VA guaranteed cash-out refinancing loans must comply with the Act and AQ42. All refinancing loan applications taken on or after the effective date that do not meet the following requirements may be subject to indemnification or the removal of the guaranty. Failure to provide initial disclosures to the Veteran within 3 business days from the initial application date and at closing may result in indemnification of the loan up to 5 years. There are three categories of refinance loans; Interest Rate Reduction Refinancing Loans (IRRRL), TYPE I Cash-Out Refinance, and TYPE II Cash-Out Refinance.

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 **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 85 FR, 130 on July 7, 2020, pages 40737 and 40738.

Affected Public: Individuals and households.

Estimated Annual Burden: 12,480 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 158,000.

By direction of the Secretary.

Danny S. Green,

VA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2020–22221 Filed 10–7–20; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 85 Thursday,

No. 196 October 8, 2020

Part II

Department of Housing and Urban Development

24 CFR Parts 888, 982, 983 et al.

Housing Opportunity Through Modernization Act of 2016—Housing Choice Voucher (HCV) and Project-Based Voucher Implementation; Additional Streamlining Changes; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 888, 982, 983, and 985

[Docket No. FR–6092–P–01]

RIN 2577–AD06

Housing Opportunity Through Modernization Act of 2016—Housing Choice Voucher (HCV) and Project-Based Voucher Implementation; Additional Streamlining Changes

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: The Housing Opportunity Through Modernization Act of 2016 (HOTMA) was signed into law on July 29, 2016. HOTMA made numerous changes that affect either the Housing Choice Voucher (HCV) tenant-based program or the Project-Based Voucher (PBV) program, or both. Among other changes, HOTMA established alternatives to HUD's housing quality standard inspection requirements, it established a statutory definition of public housing agency (PHA)-owned housing, and it amended several elements of both the HCV and PBV programs, in the latter case ranging from owner proposal selection procedures to how participants are selected. In addition to implementing these HOTMA provisions, HUD has included regulatory changes in this proposed rule that are intended to reduce the burden on public housing agencies, by either modifying requirements or simplifying and clarifying existing regulatory language.

DATES: *Comment Due Date:* December 7, 2020.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.* To receive consideration as public comments, comments must be submitted through one of two methods, specified below. All submissions must refer to the above docket number and title.

1. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

2. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

FOR FURTHER INFORMATION CONTACT: Email *HOTMAquestions@hud.gov* with your questions about this proposed rule.

SUPPLEMENTARY INFORMATION:

I. Background

On July 29, 2016, HOTMA was signed into law (Pub. L. 114–201, 130 Stat. 782). HOTMA makes numerous changes to statutes that govern HUD programs, including section 8 of the United States Housing Act of 1937 (1937 Act) (42 U.S.C. 1437f). HUD issued a notice in the **Federal Register** on October 24, 2016, at 81 FR 73030, announcing to the public which of the statutory changes made by HOTMA could be implemented immediately and which statutory changes required further guidance from HUD before owners, PHAs, or other grantees may use the new statutory provisions.

On January 18, 2017, at 82 FR 5458, HUD published a second notice, making multiple HOTMA provisions effective and requesting comments. Several of the comments pointed out the need for technical corrections or clarifications to the January 18, 2017, implementation document. HUD published a document on July 14, 2017, at 82 FR 32461, making several technical corrections and clarifications. HUD also received comments recommending changes that were not technical corrections or clarifications, but rather suggested alternative approaches to implementing the HOTMA provisions. The January 18, 2017, FR notice, as amended by the July 14, 2017, FR notice, is referred to as the ''FR Implementation Notice'' throughout the preamble of this proposed rule.

In the fall of 2017, HUD published three notices (Notices PIH 2017–18, PIH 2017–20, and PIH 2017–21) that provide guidance on HCV provisions included in the FR Implementation Notice. Notice PIH 2017–18 provides guidance on the HOTMA provision related to the housing assistance payment calculation for manufactured home space rentals, while Notices PIH 2017–20 and 2017–21 cover the implemented HOTMA Housing Quality Standard (HQS) inspection and PBV provisions, respectively.

This proposed rule does a number of things. First, it proposes codification of the HOTMA provisions that have been implemented via notices published in the **Federal Register** as described above, taking into account public comments received in response to HUD's January 18, 2017, notice. Second, it proposes to implement several HOTMA provisions that have not yet been implemented. Third, it contains several proposed changes to regulatory provisions unrelated to HOTMA, in order to reduce the regulatory burden on PHAs and owners by clarifying, simplifying, and, in some instances, eliminating HUD-imposed requirements. Finally, the rule also proposes elimination of obsolete regulatory provisions.

II. This Proposed Rule—Summary of Changes

General Summary

The proposed rule would codify the following HOTMA provisions that have already implemented through the FR Implementation Notice. Please refer to the identified subsection for preamble discussion related to the codification of these HOTMA provisions.

- Initial inspection options—non-life-threatening deficiencies and alternative inspections (HOTMA section 101(a)(1))—subsection 5
- Definition of life-threatening deficiencies (HOTMA section 101(a)(1))—subsection 5
- PHA-owned unit definition (HOTMA section 105)—subsection 2 (and related preamble discussion sections identified in subsection 2)
- Manufactured home space rent calculation (HOTMA section 112)—subsection 10
- PBV Program Cap (HOTMA section 106(a)(2))—subsection 16
- PBV Project Cap (HOTMA section 106(a)(3))—subsection 23
- PBV units not subject to project cap or program cap (HOTMA sections 106(a)(2) and (3))—subsection 28
- PBV initial term of HAP contract and extension of term (HOTMA sections 106(4) and (5))—subsection 40
- PBV priority of assistance contracts—insufficient funding (HOTMA section 106(a)(4))—subsection 41
- PBV adding units to HAP contract without competition (HOTMA section 106(a)(4))—subsection 42
- PBV additional contract conditions/tenant-based assistance for families at termination/expiration without renewal of PBV HAP contract

(HOTMA section 106(a)(4))—subsection 41
- PBV preference for voluntary services (HOTMA section 106(a)(7))—subsection 46
- Attaching PBVs to projects where the PHA has an ownership interest (HOTMA section 106(a)(9))—subsection 20

Through the FR Implementation Notice, HUD also previously implemented the HOTMA provision at section 106(a)(9) that authorizes PHAs to project-base Veterans Affairs Supportive Housing (VASH) vouchers and Family Unification Program (FUP) vouchers without requiring additional HUD approval. HUD has determined that no modifications are needed to 24 CFR part 983 to codify these statutory changes. Any VASH vouchers and FUP vouchers project-based pursuant to this authority must comply with the requirements of 24 CFR part 983.

HOTMA further provides that no PHA is required to reduce the payment standard applied to a family as a result of a reduction in the fair market rent (FMR). This provision was implemented in HUD's Small Area FMR (SAFMR) Final Rule [1] at § 982.505(c)(3).

HUD also proposes to implement the HOTMA HCV provisions that have not yet been implemented as part of this rule. Please see the identified preamble subsection for information on the proposed implementation of the following HOTMA provisions.

- Enforcement of Housing Quality Standards (HQS) (HOTMA section 101(a)(3))—subsection 5
- Manufactured home space rental—PHA option to make single assistance payment to family instead of owner (HOTMA section 112)—subsection 10
- Entering into a PBV HAP Contract for rehabilitation and new construction projects without an Agreement to Enter a HAP Contract (HOTMA section 106(a)(4))—subsection 34
- Providing rent adjustments using an operating cost adjustment factor (OCAF) (HOTMA section 106(a)(6)—subsection 55
- Owner-maintained site-based waiting lists (HOTMA section 106(a)(7)—subsection 46
- Environmental requirements for existing housing (HOTMA section 106(a)(8)—subsection 25

In addition to the HOTMA changes, HUD is also proposing numerous non-HOTMA related changes. In some cases, these changes are to better clarify existing regulatory requirements. In other circumstances, HUD is seeking to improve the administration of the program, simplify program rules, or reduce administrative burden and cost. For example, in this rule HUD is proposing to change the current requirements to reflect a determination that PBV existing housing is not subject to Davis-Bacon wage requirements (see the discussion in subsection 44 of this preamble). In addition, in certain sections, HUD is inserting references to obligations under Section 504 and the Americans with Disabilities Act, as appropriate, as a helpful tool for entities implementing HOTMA who are also covered by those laws. Such references do not constitute all Section 504 or ADA requirements, and covered entities should consult the relevant regulations to fully understand their Section 504 and ADA obligations.

Furthermore, HUD is replacing ''disabled person'' to ''person with disabilities,'' the terms ''person with disabilities'' and ''person with a disability'' are sometimes used interchangeably in program regulations. A person with a disability is a qualified individual with a disability if the individual meets the definition of ''disability'' under the ADA Amendments Act, which is also the relevant definition for purposes of Section 504. See 42 U.S.C. 12102; 28 CFR 35.108.

A description and discussion of the proposed changes for each regulatory section of this proposed rule (including in certain sections specific questions soliciting input from the commenters) follows.

Section-by-Section Summary

1. Fair Market Rents for Existing Housing: Methodology (§ 888.113*)*

HUD proposes to clarify in the regulatory text that a PHA that wishes to voluntarily opt in to SAFMRs must request and receive HUD approval prior to adopting SAFMRs. This proposed change is unrelated to HOTMA.

2. Definitions (§ 982.4)

The proposed rule would revise part 982 definitions to define the terms *abatement, independent entity, PHA-owned units, Request for Tenancy Approval,* Section 8 Management Assessment Program (SEMAP), and *withholding,* terms that were previously used but not formally defined in the definitions section of the regulation.

The term *independent entity* would conform to current HUD guidance and would provide that the independent entity cannot be connected to the PHA legally, financially (except regarding compensation for services performed for PHA-owned units), or in any other manner that could cause the PHA to improperly influence the independent entity. However, HUD is proposing to adopt a modified definition, such that if the independent entity is a unit of general local government or an agency of such government, the unit of general local government or government agency may perform the functions of the independent entity without prior HUD approval. If the independent entity is not a unit of general local government or an agency of such government, then the independent agency would have to be approved by HUD. (Under current regulations at § 982.352(iv)(B), the independent entity must always be approved by HUD. HUD is proposing this change to reduce administrative burden and reporting requirements on PHAs.)

The proposed rule would also add the terms Section 8 Management Assessment Program (SEMAP) and *Small Area Fair Market Rents (SAFMRs), terms that are defined elsewhere and referenced in Part 982,* and define the terms *authorized voucher units* and *tenant-paid utilities,* which, though generally understood, merit specific definition.

HOTMA defined *units owned by a PHA,* which overrides the definition of a *PHA-owned unit* previously established in regulation. HUD first implemented the HOTMA definition in the FR Implementation Notice. A few commenters to that notice commented that the definition as implemented by HUD was adequate. Others commented that the definition should be revised to include situations in which the PHA is the ground lessor or participates in the owner entity in any capacity, or when the PHA provides a loan and has a security interest in the property. The HOTMA definition explicitly provides, however, that none of these three situations constitutes PHA ownership. Therefore, HUD is proposing to conform the HCV and the PBV regulations (at §§ 982.4 and 983.3, respectively) to the final FR Implementation Notice without any changes and incorporate this definition as needed throughout the regulations. In addition to these HOTMA changes, HUD is proposing to make other changes to the requirements for PHA-owned units. Please see the related preamble discussion at §§ 982.352(b), 982.451, 983.57, and 983.204.

Question 1. HUD is specifically requesting comment on the proposed definition of a PHA-owned unit. In

[1] ''Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in the Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs,'' published November 16, 2016, at 81 FR 80567.

addition, the proposed rule specifies in the definition of independent entity that the independent entity cannot be connected to the PHA legally, financially (except regarding compensation for services performed for PHA-owned units), or in any other manner that could cause the PHA to improperly influence the independent entity. Is this standard too broad, particularly as it relates to an existing financial relationship? Under what circumstances could the PHA and the independent entity be connected financially where the independent entity would still retain sufficient independence to perform its administrative responsibilities for PHA owned units?

3. Administrative Plan (§ 982.54)

This rule would update § 982.54 by adding new Administrative Plan requirements for the tenant-based program regarding PHA policymaking authority with respect to programmatic concerns such as payment standards and inspections. These changes reflect options made available to the PHA by HOTMA and as otherwise proposed in this rulemaking. (HUD proposes to add a new § 983.10, which identifies areas in which PHAs have policymaking discretion specific to the PBV program.) The list proposed in this proposed rule is not intended to be an all-inclusive list; instead, the list would highlight the major policy areas where the PHA has some administrative discretion.

Question 2. Are there areas other than those specified in the new § 983.10 where HUD could provide greater discretion to PHAs to support their efforts to operate their programs effectively?

4. Information When Family Is Selected (§ 982.301)

HUD proposes to correct the regulation at § 982.301(b) to reinstate the requirement that the briefing packet to the family include information regarding when the PHA is required to provide a program participant with the opportunity for an informal hearing, including how the participant may request a hearing. The September 1, 2015, technical correction to the streamlining portability rule, published at 80 FR 52619, inadvertently deleted this requirement.

In addition to this correction, HUD is proposing several changes related to the oral briefing the PHA gives the family to explain additional disability-related obligations that exist under other regulations. This includes: (1) Citing 28 CFR part 35 (Title II), Subpart E and 28 CFR part 36 (Title III) along with 24 CFR 8.6 as additional, relevant regulations that require the PHA to take appropriate steps to ensure effective communication with persons with disabilities; (2) adding that when briefing the family on when the PHA will consider granting exceptions to the subsidy standards, the PHA must discuss reasonable accommodations that may be required for a person with disabilities; (3) specifying that the oral briefing must include contact information for the Section 504 coordinator and information on how to request a reasonable accommodation or modification under Section 504, the Fair Housing Act, or the ADA, as applicable; and (4) specifyingthat if the family includes a person with disabilities, the PHA must provide not only notice that the family may request a current listing of accessible units known to the PHA that may be available but also, if necessary, other assistance in locating an available accessible unit in accordance with § 8.28(a)(3).

HUD is also proposing to add a new subsection (c) regarding information for persons with limited English proficiency. Specifically, PHAs would need to take reasonable steps to ensure meaningful access by persons with limited English proficiency in accordance with Title VI of the Civil Rights Act of 1964, Executive Order 13166, and HUD's LEP Guidance (see 72 FR 2732 (2007)).

5. Inspection of Dwelling Units (§§ 982.305, 982.401, 982.404, 982.405, 982.406, 983.103, 983.208)

Section 101 of HOTMA made significant changes to the unit inspection requirements for the HCV program (both tenant-based and project-based assistance). In general, a PHA may not execute a HAP contract until the PHA has inspected the unit and determined that it meets the Housing Quality Standards of the HCV program. HUD previously implemented two HQS initial inspection options provided under HOTMA in the FR Implementation Notice. The first is in the case of the non-life threatening (NLT) option, where the PHA may choose to approve an assisted tenancy, execute the HAP contract, and begin making housing assistance payments on a unit that fails the initial HQS inspection, provided the unit's failure to meet HQS is the result only of non-life-threatening conditions. The second is the alternative inspection option, where the PHA may approve the tenancy and execute the HAP contract prior to inspecting the unit if the property has in the previous 24 months passed an alternative inspection (*i.e.,* an inspection conducted for another housing program). The PHA cannot make a payment to the owner until the PHA has inspected the unit and found it to meet HQS standards, at which point the PHA makes the assistance payments retroactively back to the effective date of the HAP contract. This rule proposes changes to conform the HCV program regulations to account for these two previously implemented options.

HOTMA also contains specific requirements for (1) the withholding of assistance payments from the owner during the HQS deficiency correction period, (2) the abatement of payments and the termination of the HAP contract for units that fail to comply with HQS, and (3) the relocation of families where the HAP contract will be terminated due to the failure to comply with HQS. Under HOTMA, the family must be given 90 days or longer to lease a new unit upon termination of the HAP contract. In addition, the family must be given a preference for public housing if the family fails to find a new unit with their voucher. The PHA may also use up to two months of the assistance payments that were withheld or abated under the family's terminated HAP contract for cost directly associated with the relocation of the family, which includes security deposits and reimbursements for moving expenses. HOTMA further provides that these new HQS enforcement and family relocation requirements must be implemented by regulation, and this proposed rule initiates the rule-making process for those provisions.

In addition to the HOTMA-related changes, as an administrative streamlining measure HUD is also proposing adding a new subsection to § 982.405 on the verification methods that may be used by the PHA to confirm an HQS deficiency has been corrected.

Specifically, HUD is proposing the following changes with respect to the HOTMA inspection requirements. (HUD has included proposed definitions of *abatement* and *withholding* in § 982.4, as discussed above.)

a. Approval of Assisted Tenancy (982.305)

The existing regulations at § 982.305 contain the PHA requirements that must be met to approve an assisted tenancy. This proposed rule would update § 982.305 to reflect that a HAP contract may, in certain cases, be executed prior to a dwelling unit meeting HQS when the PHA adopts either the initial HQS inspection NLT option or the initial HQS inspection alternative inspection option (discussed in detail below at

§§ 982.405 and 982.406 respectively). The purpose of these two options would be to provide PHAs with additional flexibility to implement policies that assist families to be more competitive in the private market and increase their chances of obtaining an affordable unit.

Specifically, in § 982.305(f), HUD proposes codification in the regulations of the actions the PHA must take regarding the initial inspection of the unit to approve the assisted tenancy, revised to include the applicable requirements if the PHA has implemented and determined the unit is eligible for either the initial HQS inspection options (*i.e.,* the NLT option or the alternative inspection).

HUD is also proposing a non-HOTMA related change to § 982.305(c)(4). The paragraph would generally provide that if the HAP contract is executed later than 60 calendar days from the beginning of the lease term, the contract is void, and the PHA may not pay any housing assistance payment to the owner, as is currently the case under the current regulations. The proposed regulation provides that if there are extenuating circumstances that prevent or prevented the PHA from meeting the 60-day deadline, then the PHA may submit a request to HUD for an extension. HUD is proposing to allow PHAs to request this extension in recognition that there are situations where the PHA may need an extension and approving the request would be in the best interest of the family. The PHA request would have to include an explanation of the extenuating circumstances and any supporting documentation.

b. Establishment of Life-Threatening Conditions (§ 982.401(o))

As discussed above in § 982.305, HOTMA provided an exception to the generally applicable requirement that units must be inspected and must meet Housing Quality Standards before the PHA may make a housing assistance payment. Under the initial inspection NLT option, PHAs may choose to approve an assisted tenancy, execute the HAP contract, and begin making housing assistance payments on a unit that fails to meet HQS, provided the unit's failure to meet HQS is the result only of non-life-threatening conditions, as such conditions are defined by HUD. For the purposes of implementing the NLT option in the FR Implementation Notice, HUD defined a non-life-threatening condition as any condition that would fail to meet the Housing Quality Standards under § 982.401 and is not a life-threatening condition, and then proposed a definition of life-threatening conditions and invited comment. Some commenters supported the definition, while others suggested expansion. For example, commenters recommended that HUD include mold or conditions that could lead to mold. HUD determined that the suggested items do not meet the threshold for inclusion in the list of life-threatening conditions and made no revisions to the proposed definition. This proposed rule would codify the existing list of life-threatening deficiencies list (cited in § 982.401(o)). In addition, HUD is proposing that the proposed definition of life-threatening deficiencies would be applicable to all PHAs. (Under the FR Implementation Notice, PHAs were only required to adopt HUD's list of life-threatening deficiencies if they implemented the NLT option.) In addition, any other condition identified by the PHA as life-threatening would also be a life-threatening deficiency, provided the condition was identified as such in the PHA administrative plan. All other conditions that would cause a failure of HQS are NLT. The list of life-threatening conditions would continue to be updated by HUD through notices published in the **Federal Register**. These FR notices would provide for the opportunity for public comment before any changes to the list of life-threatening deficiencies became effective.

HUD is also proposing to add a new subparagraph (5) to § 982.401(a) to clarify in this section that all defects that are not life-threatening conditions must be remedied within 30 days of the owner's receipt of written notice of the defects or a reasonable longer period that the PHA establishes.

Question 3. Is HUD's list of life-threatening conditions appropriate? Are there conditions listed that should not be considered life-threatening? Are there conditions absent from the list that should be considered life-threatening?

c. Enforcement of HQS (§§ 982.404, 983.208)

Section 101 of HOTMA established certain requirements PHAs must follow when an owner fails to bring a unit into compliance with HQS. These requirements include specific time frames for compliance, after which a PHA must first withhold and then abate payments; ultimately, HOTMA provides that a PHA must terminate a HAP contract in response to continued noncompliance. HOTMA also includes certain protections for affected families and requirements related to the relocation of those families when the HAP contract is terminated. These same statutory provisions apply to both tenant-based units and project-based units. For the PBV program, the PHA may take an enforcement action on an individual unit that is part of a HAP contract (for example, removing the unit from the HAP contract), or it may terminate the HAP contract. These HOTMA provisions are set forth in section 8(o)(8)(G) of the United States Housing Act of 1937.

The law provides that these provisions shall apply ''to any dwelling unit for which a housing assistance payments contract is entered into or renewed after the date of the effectiveness of the regulations implementing subparagraph (G).'' For tenant-based HAP contracts, HUD is interpreting a contract that is ''renewed'' to mean a HAP contract that has continued beyond the end of the initial lease term. For PBV, HUD is interpreting a contract that is ''renewed'' to be a contract that has been extended beyond the initial term of the contract. For contracts that were not entered into or renewed after the effective date of the regulations, §§ 982.404 and 983.208 as of the date before the effective date of the final rule will remain in effect. Please see the related PBV discussion in the preamble below at § 983.208.

Specifically, § 982.404(a) would be revised to codify the HOTMA requirement that a unit is out of compliance with the Housing Quality Standards if either the PHA or an inspector authorized by the State or unit of local government (1) determines upon inspection of the unit that the unit fails to comply with HQS, (2) notifies the owner in writing of the failure, and (3) the defects are not corrected within the new statutorily mandated timeframes. These timeframes are consistent with the existing regulatory timeframes under the current regulations. If the defect is life-threatening, the owner must correct the defect within no more than 24 hours after notification. For other defects, the owner must correct the defect within no more than 30 days after notification (or any PHA-approved extension).

Under the current regulations at § 982.404(a)(4), the owner is not responsible for a breach of the HQS that is not caused by the owner and for which the family is responsible. This is not always the case under HOTMA. HOTMA provides that if a PHA determines that any damage to a unit that results in a HQS deficiency (other than damage resulting from ordinary use) was caused by the tenant, any member of the tenant's household, or any guest or other person under the tenant's control, the PHA may waive the requirement that the owner is responsible for correcting the

deficiency. If the PHA waives the owner's responsibility to correct the deficiency, then the family is responsible for making the repairs. Under HOTMA, the PHA must proactively take action to waive the owner's responsibility to correct the tenant related HQS deficiency in order for that responsibility to be placed on the family. HUD assumes that PHAs would want to waive the owner's responsibility in cases where the HQS deficiency was caused by the tenant in order not to discourage owners from participating in the program, so this change should not have much of a practical impact in terms of the responsibility for the family to make the necessary repairs. However, the proposed regulation at § 982.404(a)(4) would comply with the new HOTMA standard that the tenant is not automatically responsible for making the HQS repair for tenant caused damage, but rather such responsibility is dependent on the PHA waiving the owner's responsibility to correct the deficiency in those instances.

HUD is also proposing to add a new paragraph to § 982.404 to implement the HOTMA provisions regarding when a PHA may withhold payments and when a PHA must abate payments and terminate the HAP contract as the result of HQS deficiencies (§ 982.404(d)). If a PHA ''withholds'' payments, the PHA has stopped making payments to the owner but is holding the payments for potential retroactive adjustment depending on the action the owner takes. If the PHA ''abates'' payments, the PHA has stopped making payments to an owner and there is no potential for retroactive payment.

HOTMA provides that a PHA may choose to withhold payments once the PHA has notified the owner in writing of the deficiencies. If the PHA withholds the payments and the unit is brought into compliance during the applicable cure period (24 hours for life-threatening deficiencies and 30 days (or other reasonable period established by the PHA) for NLT deficiencies), the PHA must resume payments and provide assistance payments to cover the time period for which the assistance payment was withheld (§ 982.404(d)(1)). This is a significant change from the current requirements, where the PHA may not withhold payments from the owner during the permitted cure period.

HOTMA also provides that the PHA must abate the HAP if the owner fails to make the repairs within the applicable cure period. Furthermore, if the owner fails to make the repairs within 60 days (or a reasonable longer period established by the PHA) of the determination of noncompliance, the PHA is required to terminate the HAP contract (§ 982.404(d)(2)). The date of determination of noncompliance would be the day following the expiration of the cure period (24 hours for a life-threatening deficiency and 30 days (or other reasonable period established by the PHA) for non-life-threatening deficiencies).

Along with the new designated timeframes for abating and then terminating the HAP contract, this proposed rule would provide that in accordance with HOTMA the PHA must notify the family and the owner that the PHA is abating the payments and that if the unit does not meet HQS within 60 days after the determination of noncompliance (or a reasonable longer period established by the PHA), the PHA must terminate the HAP contract and the family will have to move if the family wishes to continue to receive assistance (§ 982.404(d)(2)(ii)). As provided in HOTMA, the rule would expressly provide that the owner may not terminate the tenancy of the family due to the withholding or abatement of the payment, and that the family may terminate the tenancy during the abatement period by notifying the owner and the PHA (§ 982.404(d)(3)).

Finally, under HOTMA, if the owner makes the repairs and the unit complies with the HQS within the required timeframe, the PHA must recommence payments to the owner. However, the PHA may not make any payments to the owner for the period of time the payments were abated. If the owner fails to make the repairs within 60 days (or the reasonable longer period established by the PHA, the PHA must terminate the HAP contract (§ 982.404(d)(4) and (5)).

The proposed rule would add a new paragraph § 982.404(e) to implement the HOTMA provisions related to the family's relocation due to HQS deficiencies. The family protections would be as follows: (1) The PHA must give the family at least 90 days following the termination of the HAP contract to lease a new unit. (2) If the family is unable to lease a unit within that period and the PHA owns or operates public housing, the PHA must offer and provide the family with a preference for the first appropriately sized public housing that become available for occupancy after the family's search time expires. (3) The PHA may choose to use up to 2 months of the withheld and abated assistance payments for costs directly associated with relocating to a new unit, including security deposits or reasonable moving costs. Use of the abated HAP for this purpose would be an eligible HAP expense under the HCV program and would be part of the HAP renewal funding eligibility calculation for the PHA.

As discussed above, HOTMA provides that new provisions under section 8(o)(8)(G) of the 1937 Act apply only to HAP contracts that are either executed or renewed after the effective date of the implementing regulation. HUD is proposing to add a new paragraph (f) on the applicability of § 982.404 in accordance with the statutory requirement. For HAP contracts not covered by these new HOTMA provision, § 982.404 as in effect the day before the Final Rule becomes effective will remain applicable.

HUD is proposing similar changes to § 983.208 to implement these same HOTMA provisions for the PBV program. Please see the related discussion at § 983.208 later in this preamble.

d. PHA Initial Unit Inspection (§ 982.405)

Section 982.405 covers the requirements for PHA initial and periodic unit inspections. As discussed previously, HOTMA provides two new alternative initial HQS inspection options for the PHA. If a PHA adopts the initial HQS inspection NLT option, the PHA may approve a tenancy after a unit has failed a housing quality inspection if the unit has failed only for non-life-threatening conditions. Allowing HAP payments to begin while the owner makes minor repairs to the unit could result in increasing the number of landlords willing to participate in the program. This proposed rule would add a new paragraph (§ 982.405(i)) to cover the initial HQS inspection non-life-threatening option. The PHA would be allowed to apply the NLT option to all of the PHA's initial inspections or may limit the use of the option to certain units. The proposed requirements under the new § 982.405(i) are consistent with the current requirements that HUD established when it implemented the initial HQS inspection NLT option in the FR Implementation Notice, including the requirement that the family may choose to decline the unit based on the identified NLT deficiencies and simply continue their housing search.

In addition to adding the new NLT option subsection, HUD is proposing non-HOTMA related changes to § 982.405, including § 982.405(g), which concerns the inspection the PHA must conduct on a unit when notified of a potential life-threatening deficiency by a family or a government official. In the

case where the reported deficiency, if confirmed, would be a life-threatening deficiency, the PHA would have to both inspect the housing unit and notify the owner (if any life-threatening deficiency is confirmed) within 24 hours of receiving the report of the potential deficiency. The owner would have to make the repairs within 24 hours of the PHA notification. If the reported deficiency (if confirmed) would be NLT, the PHA would have to both inspect the unit and notify the owner whether the deficiency is confirmed within 15 days that the family or government official reported the suspected deficiency. The current regulation provides the time frames by which the PHA must make the inspection but is silent on the timeframe by which the PHA must notify the owner if the deficiency is confirmed. In addition, § 982.405(g) is being revised to reference the proposed definition of what constitutes life-threatening conditions at § 982.401(o) of this rule.

Question 4. Are HUD's proposed deadlines by which the PHA must both inspect the unit and notify the owner if the reported deficiency is confirmed reasonable?

Finally, HUD is proposing to add a new paragraph (h) that would expressly provide that when a PHA must verify a correction of an HQS deficiency, the PHA may use verification methods other than another on-site inspection. This proposal builds on Notice PIH 2013–17,[2] where HUD provided guidance on the use of photos to document the correction of HQS deficiencies for annual inspections. This guidance was issued to provide administrative relief as well as a cost-savings measure by reducing the need for on-site reinspection. Currently, on-site verification is required for initial inspections. In codifying that alternative verification methods to on-site re-inspections are acceptable, HUD also proposes to expand the use of the alternative verification methods to include verifying that deficiencies identified in the initial inspection have been corrected.

e. Use of Alternative Inspections (§ 982.406)

Section 982.406 covers the requirements for the use of alternative inspections. This rule would add a new paragraph (e) to § 982.406 to codify the HOTMA-authorized use of alternative inspections for initial HQS inspections, in addition to the existing requirements for biennial inspections once the unit is under HAP contract. Adoption of the alternative inspection option for initial HQS inspections would enable a PHA to approve an assisted tenancy and enter into a HAP contract, provided the unit has passed an approved alternative inspection within the 24 months prior to execution of the HAP contract. The PHA may not make payments to the owner, however, until the PHA inspects the unit. The proposed § 982.406(e) for the initial HQS inspection alternative inspection option is consistent with the current requirements implemented under the FR Implementation Notice with one exception. In response to comments received, HUD is proposing to extend the amount of time available to a PHA to conduct its own inspection of the unit from 15 to 30 days from receipt of the Request for Tenancy Approval.

Please see the related discussion on the HOTMA alternative inspection requirements for PBV later in this preamble at § 983.103.

6. Eligible Housing (§ 982.352)—Compensating Independent Entity for PHA-Owned Units

HUD is taking this opportunity to propose a non-HOTMA related change regarding the wording and organization of the current regulation at § 982.352(b)(1)(iv)(C). HUD is proposing to clarify that the PHA may compensate the independent entity from PHA administrative fees (including fees credited to the administrative fee reserve). The current regulation refers to ''ongoing administrative fee income'' which includes fees in the administrative fee reserve. However, this language inadvertently created confusion as to whether the undefined term ''ongoing administrative fee income'' included funds in the administrative fee reserve. HUD is proposing to revise the language so it specifically provides that the administrative fee reserve may be used by the PHA to compensate the independent entity.

HUD further is proposing to redesignate § 982.352(b)(1)(iv)(C) to § 982.352(b)(1)(iv)(B). This is a conforming change. Since HUD would be formally defining ''independent entity'' in § 982.4 of this proposed rule, HUD proposes to eliminate the current § 983.352(b)(1)(iv)(B), which explains what that term means. Please see the related discussion on the definition of independent entity in this preamble above at § 982.4.

Question 5. Are there functions, other than those identified in the proposed rule (see §§ 982.352(b)(1)(iv)(A), 982.628(d)(3), and 983.57), that an independent entity should perform in the case of PHA-owned units?

Question 6. In contrast, are there functions identified by the proposed rule (besides rent reasonableness determinations and inspections, which are required by statute) that the PHA should be able to perform with respect to PHA-owned units instead of having an independent entity do so? If so, why should the PHA perform those functions instead of an independent entity?

7. Housing Assistance Payments Contract (§§ 982.451, 983.204)—PHA-Owned Unit Certification Option

The proposed rule would address how the PHA executes the HAP contract for a PHA-owned unit for both tenant-based units (§ 982.451(c)) and project-based units (§ 983.204(d)). As a general principle of contract law, a PHA cannot execute a HAP contract with itself (*i.e.,* signing the HAP contract as both the PHA and the owner). For some PHA-owned units, a separate legal entity already owns the PHA-owned unit (*e.g.,* an entity wholly controlled by the PHA, a limited liability corporation controlled by the PHA, or a limited partnership controlled by the PHA). However, in other cases a separate legal entity does not own the PHA-owned unit. Instead, the PHA is in fact the actual legal entity that owns the unit. In order to eliminate confusion over the execution of the HAP contract for PHA-owned units, the proposed rule would expressly provide that the PHA must execute the HAP contract for a PHA-owned unit with a separate legal entity. If the PHA is the legal entity that owns the unit, then in order to execute the HAP contract the PHA would need to create a separate legal entity. This separate legal entity would be established by the PHA to serve as the owner solely for the purpose of executing the HAP contract with the PHA. The proposed rule would provide that this separate legal entity may be one of the following: (a) A non-profit affiliate or instrumentality of the PHA; (b) a limited liability corporation, (c) a limited partnership; (d) a corporation; or (e) any other legally acceptable entity recognized under State law.

This separate legal entity would be completely different from the independent entity that is required to perform certain administrative responsibilities on behalf of the PHA for a PHA-owned unit. The proposed rule would further clarify that the independent entity may notify either the PHA, the separate legal entity created by the PHA to serve as the owner for

[2] ''Housing Choice Voucher (HCV) Program—Review of Existing HQS Requirements and the Use of Photos to Improve HQS Oversight'', published July 2, 2013, *available at https://www.hud.gov/sites/documents/PIH2013-17.PDF.*

purposes of executing the HAP contract, or both the PHA and the separate legal entity, of a determination the independent entity has made (*e.g.,* the unit passed inspections, the rent for the unit is determined to be reasonable) in carrying out its responsibilities for the PHA-owned unit.

HUD recognizes that creating a separate legal entity to serve as the owner for the sole purpose of executing the HAP contract may create complexity and administrative burden for the PHA, particularly in the case of a tenant-based voucher family that wishes to rent an individual PHA-owned unit. HUD is therefore proposing a new PHA option for a PHA-owned unit that is not already owned by a separate legal entity. Under this option, the PHA would not execute the HAP contract but instead sign a HUD-prescribed certification. The PHA would certify that it will fulfill all the program responsibilities required of the private owner under the HAP contract. In addition, the PHA would certify it will also fulfill all the PHA's responsibilities for the PHA-owned unit, including that the PHA has obtained the services of an independent entity to perform the required PHA functions. The PHA-executed certification would essentially serve as the equivalent of the HAP contract for the PHA-owned unit, under which the PHA is legally committed to and responsible for fulfilling its responsibilities as both the PHA and the owner of the PHA-owned unit.

The certification option would be available both for tenant-based PHA-owned units (§ 982.451(c)(3)) and project-based PHA-owned units (§ 983.204(d)). However, this option would not be available if the PHA-owned unit is owned by an entity wholly controlled by the PHA or owned by either a limited liability company or limited partnership in which the PHA (or an entity wholly controlled by the PHA) holds a controlling interest in the managing member or general partner. In that circumstance, the PHA would simply execute the HAP contract as the PHA, and the entity, limited liability company, or limited partnership executes the HAP contract as the owner. Additional changes to § 983.204 are discussed below.

8. Payment Standards and How To Calculate Housing Assistance Payments (§§ 982.503, 982.505)

HOTMA provides that no PHA is required to reduce the payment standard applied to a family as a result of a reduction in the fair market rent (FMR). This provision was implemented in HUD's Small Area FMR (SAFMR) Final Rule at § 982.503(c)(3),[3] and comprehensive guidance was published in Notice PIH 2018–01.[4] Besides revising § 982.505(c)(3) for greater clarity, and making other non-HOTMA related revisions to parts of § 982.505 to better convey the intent of the current requirements, HUD is also proposing several changes related to the administration of increases and decreases in the payment standard amount. These changes are not required by HOTMA, but they are proposed to improve the process by which changes in payment standard amounts are applied to impacted families.

a. Payment Standard Areas, Schedule, and Amount (§ 982.503)

This proposed rule would address the conditions and procedures that apply to the establishment of exception payment standard areas and amounts, whether or not SAFMRs are in effect in the exception payment standard area. The regulations at § 983.503 would be revised and reorganized for greater clarity. In addition, HUD is proposing to (1) establish a minimum size for an exception payment standard area, (2) increase the PHA's administrative discretion to establish higher exception payment standards without HUD approval, and (3) allow the PHA to reduce the payment standard below the basic range without HUD approval if certain conditions are met. These proposals are described in greater detail below.

b. Minimum Size of Exception Payment Standard Area (§ 982.503(a)(3)(ii))

HUD proposes to revise the regulations at § 983.503(a) to specify that HUD publishes FMRs for Small Area FMR areas, metropolitan areas and non-metro counties. In addition, HUD proposes to require that an exception payment standard area be no smaller than a census tract block group. A census tract block group is the smallest area of geography for which rental data is available. The current regulation does not address the size of a designated area.

c. Payment Standard Schedules and Basic Range Amounts (§ 982.503(b) and (c))

Sections 982.503(b) and (c) would be revised as part of the § 982.503 restructuring. The proposed § 982.503(b) would cover the payment standard schedule that the PHA must maintain (which, in the current regulation, is covered under § 982.503(a)). The proposed § 982.503(c) would cover basic range payment standard amounts (which, in the current regulation, is covered under § 982.503(b)). The basic range payment standard amount is any amount in the range from 90 percent up to and including 110 percent of the published FMR. The PHA would be permitted, as is in current regulations, to establish a payment standard in the basic range without HUD approval. Payment standards above the basic range are exception payment standards. The requirements for payment standards that fall outside the basic range—some of which are currently covered under § 982.503(b) and (c)—would all be consolidated in § 982.503(d) of this proposed rule. The proposed changes to the requirements for exception payments standards and also payment standards that are set below the basic range are discussed below.

d. Exception Payment Standards (§ 982.503(d))

Section 982.503(d) would address how a PHA may establish exception payment standard amounts. In paragraph (d)(1), the regulation would clarify that the PHA may establish an exception payment standard for all units or may limit the exception payment standard to units of a given size, as is currently permitted in the HCV program. The paragraph would also clarify that the exception area must meet the minimum size requirements (no smaller than a census tract) that is proposed at § 982.503(a)(3)(ii) in this rule.

Paragraph (d)(2) would continue the current exception payment standard policy that permits a PHA that is not in a designated SAFMR area or has not opted to voluntarily inplement SAFMRs under 24 CFR 888.113(c)(3) to establish exception payment standards for a ZIP code area above the basic range of the metropolitan FMR without prior HUD approval, provided the exception payment standard does not exceed 110 percent of the HUD published SAFMR for the ZIP code area. The proposed rule clarifies that if the PHA exception area crosses one or more FMR boundaries (*i.e.,* contains more than one ZIP Code area), then the maximum exception

[3] ''Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in the Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs,'' published November 16, 2016, at 81 FR 80567.

[4] ''Guidance on Recent Changes in Fair Market Rent (FMR), Payment Standard, and Rent Reasonableness Requirements in the Housing Choice Voucher Program,'' published January 17, 2018, available at *https://www.hud.gov/sites/dfiles/PIH/documents/PIH-2018-01.pdf.*

payment standard amount that a PHA may adopt for the exception area without HUD approval is 110 percent of the ZIP code area with the lowest SAFMR amount.

Paragraph (d)(3) would address the ability of PHAs to set exception payment standard amounts for exception areas higher than 110 percent of the applicable FMR with prior HUD approval. The PHA would need to provide rental market data demonstrating that the exception payment standard amount requested is needed to enable families to access rental units in the exception payment standard area. The data submitted by the PHA would not have to be the same level as that required to request a reevaluation of the FMR established in accordance with 24 CFR part 888. Instead, the PHA would be permitted to use local sources of information to support its request.

Question 7. For an exception payment standard request unrelated to a reasonable accommodation request, should HUD provide greater flexibility to PHAs to establish exception payment standards without HUD approval in order to reduce administrative burden and allow the PHA to respond more quickly to rapidly changing rental markets? If so, what parameters or limits should apply to that exception payment standard authority (*e.g.,* allow the PHA to establish an exception payment standard without prior HUD approval up to 120 percent of the SAFMR)? With respect to exception payment standard requests requiring HUD approval, should HUD establish a minimum standard for the type of rental market data that a PHA must provide to demonstrate the need for an exception payment standard in the requested area, and what should that standard be? For example, should HUD continue to require that the rental market data provided by PHAs include a statistically representative sample of rental housing survey data in the exception payment standard area? More specifically, should HUD require a PHA to obtain, for a sample of properties located in the exception payment standard area, a Rent Comparability Study prepared in accordance with HUD's Multifamily Accelerated Processing Guide? Should HUD require that any assessment of rental market data be prepared by a certified appraiser?

Question 8. For an exception payment standard request unrelated to a reasonable accommodation request, should HUD establish a maximum cap on exception payment standard amounts that it will consider for approval (for example, some percentage of the SAFMR)? HUD has concerns that in some high-cost markets, exception payment standards could reach unreasonably high levels.

Finally, HUD proposes consolidating all exception payment standards requirements into § 982.503(d) by moving requirements for exception payment standards that are required for a reasonable accommodation from § 982.505(d) to § 982.503(d)(4). HOTMA provides that, without HUD approval, a PHA may establish an exception payment standard of not more than 120 percent of the FMR if needed as a reasonable accommodation for a family that includes a person with a disability. A PHA may establish a payment standard greater than 120 percent of the FMR after requesting and receiving HUD approval. These flexibilities had already been implemented as part of the SAFMR Final Rule. In this proposed rule, HUD would clarify that the exception payment standard limit applies to the metropolitan area FMR or the Small Area FMR, whichever FMR is in effect in the ZIP code area in which the family resides.

e. Payment Standard Below the Basic Range (§ 982.503(e))

HUD proposes that a PHA be permitted to establish a payment standard amount that is not lower than 90 percent of the SAFMR for a ZIP code area that is subject to metropolitan area FMRs, without HUD approval. HUD approval for a payment standard below 90 percent of the applicable SAFMR would still be required. Currently, a PHA that has not implemented SAFMRs would need HUD approval to reduce the payment standard below 90 percent of the metropolitan FMR. As is the case for exception payment standards, the HUD-published SAFMRs provide the justification that the reduced payment standard would still be reasonable for the ZIP code area based on rents in that area, and consequently HUD review and approval of a payment standard that is within the basic range of the SAFMR for the ZIP code area is not necessary.

Question 9. The current regulation (at § 982.503(h)) provides that HUD will monitor PHAs' payment standards for units of a particular size if HUD finds that 40 percent or more of families occupying units of that unit size pay more than 30 percent of adjusted monthly income (AMI) as the family share. The statutory standard for HUD review is that a ''significant percentage'' of families pay more than 30 percent of adjusted income for rent.

a. Is 40 percent a reasonable ''significant percentage of families,'' or should the trigger be raised to a higher percentage of families (for example, the HUD review would be triggered if 50 percent of families pay more than 30 percent of AMI as the family share)?

b. If HUD were to replace 40 percent with a higher percentage of families, as described above, should HUD also establish an additional threshold that would trigger a review even though the number of families paying more than 30 percent of AMI had not reached the significant percentage? (For example, the HUD review would be triggered if 30 percent of families pay more than 40 percent of AMI, even though less than 50 percent of families are paying no more than 30 percent of AMI.)

Question 10. Should HUD retain success rate payment standards, or, in the interest of streamlining the regulation, is there a way to use SAFMRs to accomplish the same purpose as success rate payment standards?

f. Payment Standard Reduction (§ 982.505(c)(3))

Section 982.505(c)(3) would detail how a PHA is to address a reduction in the payment standard amount for a family that remains in their unit after the reduction. HUD is proposing changes throughout this provision to provide clarity on the obligations of and flexibilities afforded to the PHA. In addition, HUD is proposing that the family protections related to the application of decrease in the payment standard amount apply during the time the family remains assisted in the same unit, as opposed to during the term of the HAP contract. There are circumstances where the owner and the PHA may terminate the existing HAP contract and execute a new HAP contract to continue to assist the same family in the same unit. For example, tenant-based assistance may not be continued unless the PHA has approved a new tenancy in accordance with the program requirements and executed a new HAP contract with the owner if there are any changes in lease requirements governing tenant or owner responsibilities for utilities or appliances. If those circumstances occur shortly after the decrease in the payment standard, it is not fair to the family to apply the reduction in the payment standard amount at the new HAP contract effective date, since the family hasn't moved and is being continuously assisted at the same unit.

HUD is also proposing a change in the notification requirements to families when a reduction in the family's payment standard amount will result in the family paying a higher rent if they stay in their unit. Specifically, the 12-

month advance notice provided to families affected by a decrease in the payment standard would have to state the new payment standard amount, explain that the family's new payment standard amount will be the greater of the amount listed in the current written notice or the new amount (if any) on the PHA's payment standard schedule at the end of the 12-month period, and make clear where the family will find the PHA's payment standard schedule (*e.g.,* online). A notification to the family that does not include the amount of the reduced payment standard would not be sufficient for families to make an informed decision on whether or not they can afford to remain in their current unit and pay the higher rent or if they should use the 12 months to begin searching for a lower-cost unit.

The proposed rule would further provide that the initial reduction to the family's payment standard amount may not be applied any earlier than two years following the effective date of the decrease in the payment standard. This 2-year requirement would replace the current standard that the initial reduction may not be applied any earlier than the family's second regular examination following the effective date of the decrease in the payment standard. HUD believes that the 2-year standard will provide a consistent and more equitable protection to families than the current standard. Under the current policy, the length of the ''hold harmless'' protection varies significantly among individual families since it is based on when the family's regular examination is scheduled compared to when the decrease in payment standard went into effect. For example, one family might have the decrease in the payment standard applied 13 months following the effective date of the payment standard change, while another family would benefit from the protection for 23 months.

In addition to the change to a standard, consistent 2-year protection for families that remain in-place, the rule further proposes that the decrease in the payment standard could not be applied unless the family had received the required 12-month advance notice.

g. Payment Standard Increase During HAP Contract Term (§ 982.505(c)(4))

Section 982.505(c)(4) would address what a PHA is to do when a payment standard amount is increased during the term of a family's HAP contract. HUD proposes to require that the increased payment standard amount must be used to calculate the family's housing assistance payment no later than the earliest of the effective date of (1) an increase in the gross rent that will result in an increase in the family's share, (2) the family's first regular reexamination, or (3) one year following the effective date of the increase in the payment standard amount. The intent of this change is to eliminate the potential lag time between an increase in the rent to owner brought about by an increase in the payment standard, and the increase in the assistance payment made on behalf of the family as a result of the increase in the payment standard.

HUD is also proposing to move the requirements at § 982.505(d) for the PHA approval of a higher payment standard for a family that is necessary as a reasonable accommodation to § 982.503. This change would consolidate all the exception payment standard requirements into the same regulatory section.

9. Utility Allowance Schedule (§ 982.517)

HUD proposes several non-HOTMA related updates to the utility allowance regulations at § 982.517 in order to lessen administrative requirements and provide greater flexibility for PHAs in determining both area-wide schedules and site-based schedules for the PBV program. HUD is also proposing to reorganize § 982.517 for better clarity.

In § 982.517(e), HUD is proposing to revise the text to provide greater detail on additional fair housing requirements that a PHA may be subject to in determining if a higher utility allowance is needed as a reasonable accommodation under Section 504 or the ADA for a family that includes a person with disabilities.

This rule would also eliminate the requirement that a PHA submit its utility allowance schedule to the field office in order to reduce PHA reporting requirements and administrative burden. While each PHA must still maintain a utility allowance schedule and provide the schedule to HUD upon request, a PHA would no longer be required to routinely submit the schedule to the field office under this proposed rule.

HUD also proposes to allow a PHA to adopt additional options for setting its utility allowance schedule. Currently, each PHA must maintain one area-wide utility allowance schedule based on energy-conservative households.

Through this rulemaking, HUD proposes the following changes:

a. Area-Wide Energy-Efficient Utility Allowance Schedule (§ 982.517(b)(2)(ii))

The proposed changes to § 982.517 would provide each PHA with the option to adopt an area-wide utility allowance schedule for energy-efficient units in addition to the traditional utility allowance schedule. The PHA would be able to use its energy-efficient utility allowance schedule only for units in projects that meet certain energy-efficiency standards. This change would allow the utility allowance schedule to reflect utility allowance amounts that more accurately reflect what the family's actual utility costs will be in cases where the family is leasing an energy efficient unit. This change is intended to expand the number of energy efficient units that are available to the family. Since the restriction on the maximum amount that the family may pay at initial occupancy of a unit is based on the gross rent (rent to owner plus the utility allowance for tenant-supplied utilities), a utility allowance that reflects the lower utility costs of the energy efficient units will allow energy efficient units with correspondingly higher rents to now be an option for the family to consider leasing on the program.

Question 11. Should HUD authorize PHAs to use energy-efficient utility allowance schedules for a broader range of projects than are defined at § 982.517(b)(2)(ii)?

b. Utility Allowance Based on Flat Fees (§ 982.517(b)(2)(iii))

Under the proposed regulation, PHAs would have the option of substituting flat fees charged for certain utilities in the lease for the area-wide utility allowance for that utility, but only if the flat fees are lower than those in the area-wide utility allowance. Sometimes the flat fee charged by the owner reflects actual utility costs and is considerably lower than the utility allowance amounts. In effect, if the PHA uses the utility allowance rather than the actual utility costs, the gross rent would be higher. In competitive housing markets, this can make the unit exceed the maximum family share at initial occupancy even though the rent to owner and the actual utility charges do not exceed 40 percent of the family's adjusted monthly income. In other cases, the PHA could provide a smaller subsidy if the gross rent were based on the flat fee rather than the utility allowance schedule.

If a PHA adopts an area-wide energy-efficient utility allowance schedule or utility allowances based on flat fees, the policies would have to be applied consistently for all families and stated in the PHA's Administrative Plan.

10. Manufactured Home Space Rental (§ 982.623)

Section 112 of HOTMA amended section 8(o)(12) of the 1937 Act with respect to the use of voucher assistance provided to families that are owners of manufactured housing and are paying rent on the space on which the manufactured home is located (the manufactured home space). The manufactured home space rental is a special housing type under Subpart M of the 982 HCV regulations.

Prior to the HOTMA amendment, voucher assistance payments on behalf of owners of manufactured housing under section 8(o)(12) could only be made to assist the family with the rent for the manufactured home space. Section 112 expanded this definition of the ''rent'' to include other housing expenses, specifically the monthly payments made by the family to amortize the cost of purchasing the manufactured home (including any required insurance and property taxes). This change in the rental subsidy calculation for families renting manufactured home spaces was implemented by the FR Implementation Notice. The practical effect of this change was to increase the amount of housing assistance payment that may be paid on the behalf of the family by taking into account family housing expenses related to the manufactured home they own beyond the space rent and tenant-paid utilities. This proposed rule would codify the new subsidy calculation by revising § 983.623. Section 112 effectuated the change in the subsidy calculation by redefining ''rent'' to include the family's monthly debt payments. While section 112 achieves the statutory intent to allow housing assistance payments to assist with the family's monthly debt payments for the purchase of the home as well as the space rent, characterizing the debt payments to be part of the ''rent'' creates confusion in the administration of this provision, since these monthly debt payments in reality are independent of the space rent, and have no relation to the normally understood concept and definition of ''gross rent'' (the sum of the rent to owner plus any utility allowance) that applies to other rent calculations in the HCV program. In order to simplify program administration and more clearly convey the actual intent of the statutory language, HUD is proposing in this rule to use the term ''eligible housing expenses'' instead of ''rent'' in the HAP calculation. ''Eligible housing expenses'' under this proposed rule includes the same expenses and results in the same amount of HAP for the family in accordance with the HOTMA amendment, but does so using terminology that better explains and distinguishes between what the subsidy calculation takes into account as opposed to what the term ''rent'' normally suggests for PHAs, participating families, and the owners either leasing the space or considering doing so under the HCV program.

In addition to revising the monthly housing assistance calculation, the proposed change would also remove an obsolete reference to a separate fair market rent for a manufactured home space. Since the housing assistance payment now takes the family's housing costs besides the space rent into consideration in determining the subsidy, it no longer makes sense to publish a separate ''manufactured home space rent'' FMR for this special housing type. Instead, the PHA uses its regular payment standard for the HCV program in the housing assistance payment calculation. This change was previously implemented by the FR Implementation Notice.

Section 112 further provided that the PHA may choose to make a single payment to the family for the entire monthly assistance amount, rather than making the assistance payment directly to the owner of the manufactured home space the family is renting. HUD has not yet implemented this option. In addition to the changes in § 982.623 for the revised subsidy calculation, HUD is proposing a new paragraph to implement this single housing assistance payment to the family option. Under this proposed rule, if the owner of the manufactured home space agrees, the PHA may make the entire housing assistance payment to the family, rather than making the payment to the owner. Because the assistance payment now covers family housing costs beyond the space rent, in many instances the PHA would be paying an assistance payment to both the owner of the space rent and the family under this special housing type. Under the single payment to the family option, the family would be responsible for paying the owner directly for the full amount of the rent of the manufactured home space. The PHA and the owner must still execute a HAP contract and the owner is still responsible for fulfilling all the owner obligations under the HAP contract.

The HOTMA provisions related to the exclusion of the family's manufactured home from the prohibition of the family having a present ownership interest in real property that is suitable for occupancy by the family, and the exclusion of the equity in the family's manufactured home from the net family assets, is being implemented through a proposed rule published September 17, 2019, at 84 FR 48820.

11. HCV Homeownership Option (§§ 982.625, 982.628, 982.630, 983.635, 982.641)

HUD is proposing several non-HOTMA related changes to the HCV homeownership special housing type under Subpart M. The HOTMA provisions related to the exclusion of the family's HCV homeownership unit from the prohibition of the family having a present ownership interest in real property that is suitable for occupancy by the family, and the exclusion of the equity in the family's homeownership unit from the net family assets, is being implemented through a proposed rule published September 17, 2019, at 84 FR 48820.

a. PHA-Owned Units (§ 982.628(d)

HUD is proposing to make a clarifying change to § 982.628(d) to reference the definition of a PHA-owned unit in the proposed § 982.4.

b. Homeownership Counseling (§ 982.630(e))

The regulation currently allows a PHA to use a housing counseling agency that is not approved by HUD if the PHA ensures that the counseling program of such agency is consistent with the homeownership counseling provided under HUD's Housing Counseling program. HUD is proposing to revise the homeownership regulation to conform with current Housing Counseling requirements, which require any homeownership counseling to be conducted by a HUD-certified housing counselor working for a HUD-approved housing counseling agency. HUD believes that the homeownership counseling is a critical component for the success of the HCV homeownership program and believes this proposed change will help ensure that the counselor and the counseling meet acceptable standards.

c. Amount and Distribution of HAP (§§ 982.635(b), 982.641(f))

Currently, the utility allowance amount for a homeownership family is based on the lower of the size of the home purchased or the family unit size per PHA subsidy standards. The proposed rule would require that the utility allowance for a homeownership family always be based on the size of the home purchased. This will minimize the possibility of default when the family composition changes in the home because the amount of the

family's expenses for purposes of calculating homeownership assistance will still reflect the actual utility allowance for which the family is responsible.

The proposed rule also proposes to restructure the payment standard provisions and clarify that the payment standard amount used to calculate the family's homeownership assistance cannot be lower than what the payment standard was at the start of homeownership assistance. This is the current requirement, but HUD is proposing to refine the wording of the regulation so that the requirement is more easily understood.

12. PBV: When the Tenant-Based Voucher Rule Applies (§ 983.2)

Unit size and utility allowance schedule. The regulation governing the utility allowance schedule for tenant-based assistance (§ 982.517(d)) requires the PHA to use the utility allowance for the lesser of the unit size rented by the family or the unit size per PHA subsidy standards (the size of the voucher). This provision is not applicable to the PBV program, because a family residing in a PBV-assisted unit must be housed in a unit consistent with the family unit size per the PHA subsidy standards. PBV regulations currently state at § 983.2(c)(3) that § 982.517 applies to the PBV program in its entirety. HUD proposes to make a technical correction to expressly provide that § 982.517(d), which states that the PHA must use the appropriate utility allowance for the lesser of the size of dwelling unit actually leased by the family or the family unit size as determined under the PHA subsidy standards, is not applicable to the PBV program. This change would further clarify that the PHA continues to use the utility allowance for the unit size leased by a family for the period of time prior to a family's move to an appropriately sized unit, in cases in which a family is in a wrong-sized PBV-assisted unit due, for example, to a change in family size.

Other technical fixes. HUD has taken this opportunity to clarify that § 982.201(e) does not apply to the PBV program. Section 982.201(e) provides that the PHA must receive information verifying that an applicant is eligible within the period of 60 days before the PHA issues a voucher to the applicant. However, voucher issuance is one of the HCV provisions that does not apply to the PBV program. HUD has also revised § 983.251(a)(2) to clarify that the PHA determines eligibility for admission of an applicant family (other than a voucher participant determined eligible at original admission to the voucher program) within 60 days before commencement of PBV assistance.

13. PBV Definitions (§ 983.3)

For administrative ease and convenience, the proposed rule would revise the PBV definitions section to include those part 982 terms that are also used in part 983. In limited cases, where there is a slight PBV distinction to the part 982 term, an annotation would be made in this section.

In addition to adding the applicable terms that are defined in part 982, the following terms would be added: *Applicant, areas where vouchers are difficult to use, in-place family, participant, tenant selection plan, transferee,* and *waiting list admission.* The terms *applicant, in-place family, participant, tenant selection plan,* and *waiting list admission* were terms previously used but not defined in the regulation.

The following previously defined terms would be revised to conform to the HOTMA changes: *Agreement to enter into a HAP contract, development activity* (formerly ''development''), *excepted units, existing housing, newly constructed housing, rehabilitated housing,* and *Request for Release of Funds.* Also, the term *admission* would be revised to specify the date of admission for families that were not previously admitted to the HCV tenant-based program.

Areas Where Vouchers Are Difficult To Use

HOTMA establishes exceptions to the percentage limitation and income-mixing requirement for projects located in areas where vouchers are ''difficult to use.'' HUD requested comments on this provision on the January 18, 2017, notice, though it did not implement the provision at that time. Commenters offered a variety of suggestions for how HUD might define areas where vouchers are ''difficult to use'' such as: Rental vacancy rates; voucher lease-up success rates; areas with rapid rent appreciation; areas undergoing revitalization; and high-cost areas. Ultimately, HUD would adopt the following definition in this proposed rule: (1) A ZIP code area where the rental vacancy rate is less than 4 percent; or (2) A ZIP code area where 90 percent of the Small Area FMR is more than 110 percent of the metropolitan FMR. HUD took into consideration the ideas submitted but determined that many of them would be administratively burdensome to determine and/or monitor and, in some cases, not determinable for a specific area of a PHA's jurisdiction. Instead, HUD is proposing two factors that are easily identifiable and consistent data points.

Question 12. HUD seeks feedback on this proposal, which defines areas where vouchers are difficult to use as areas where costs are high relative to metropolitan area FMRs. Keeping in mind that HUD wants the definition to be fairly straightforward (*i.e.,* not involving a complex calculation), is there a better way to identify such areas?

Existing Housing

With respect to the definition of existing housing, HUD is concerned that the current definition is overly broad. The current definition of ''existing housing'' is housing that exists on the proposal selection date and ''substantially complies'' with HQS on that date. By further defining what is meant by ''substantially complies,'' HUD intends to provide greater clarity to PHAs and prospective owners regarding whether a property may be selected as ''existing housing'' or must undergo rehabilitation prior to being placed under a HAP contract. This distinction becomes even more critical as this proposed rule is also implementing the HOTMA provision that eliminates the environmental review requirement for PBV existing housing in certain circumstances.

On June 25, 2014, at 79 FR 36145, HUD published a final rule making conforming changes to regulations as a result of the Housing and Economic Recovery Act of 2008 (HERA), entitled, ''Changes to the Section 8 Tenant-Based Voucher and Section 8 Project-Based Voucher Programs'' (HERA Final Rule). In that rule, HUD left the current definition of ''existing housing'' in place, while the preamble explained that HUD would continue to determine if changes were appropriate:

> HUD will further consider what may be the best metric for determining compliance with HQS; that is, whether HUD should measure the amount of time that must pass from the date of selection to date of compliance or identify an appropriate dollar standard of the total amount of work that must be performed, or determine some other mechanism. HUD will resubmit for public comment any proposed changes to the definition of existing housing.

HUD is using this proposed rule to propose changes to the definition of existing housing as provided in the HERA Final Rule preamble. Under this proposed rule, the definition of existing housing would be revised to define ''substantially complying'' with HQS as a unit that has HQS deficiencies that require only minor repairs to correct (repairs that could reasonably be

expected to be completed within 48 hours of notification of the deficiencies). To qualify as existing housing, all proposed PBV units in the project must reasonably be expected to be in compliance with HQS within 48 hours of notification. Furthermore, to qualify as existing housing, the project is ready to go under HAP contract with minimal delay—after the unit inspections are complete, all proposed PBV units not meeting HQS could be brought into compliance to allow PBV HAP contract execution within 48 hours.

The distinction between PBV existing housing and PBV rehabilitation under the proposed rule is, at its essence, based on whether the units in their ''as-is'' condition either meet or can meet (with minimal repairs and little or no delay in HAP contract execution) the Housing Quality Standards, which would allow the PHA to promptly execute the PBV HAP contract with the owner. If the repairs are extensive in nature, or if the number of units that require repairs is so large that the HAP contract execution cannot occur within a relatively short amount of time, then the appropriate type of PBV for the project is rehabilitation.

HUD believes that this standard, which is based on the time the HQS repairs could reasonably be expected to take as the measure of substantial compliance and how promptly the project would be able to be placed under HAP contract, has advantages over the use of a dollar threshold because of the variation of repair costs across the country and because a cost measure would need to be adjusted periodically to reflect cost increases. It would also provide a common-sense standard—for a project to qualify as existing housing for PBV assistance, any repairs needed to bring the units into HQS compliance would have to be relatively minor in nature and easily completed. Any project requiring more extensive and time-consuming repairs would not qualify as existing housing and instead would be subject to the PBV rehabilitation requirements.

The current definition provides that the existing units must fully comply with the HQS before execution of the HAP contract. Since that requirement will not apply if the PHA is using either the alternative inspection or NLT option in fulfilling the initial HQS inspection requirements for the PBV existing housing project, HUD is proposing to revise the definition to state that the units must meet the pre-HAP inspection requirements, as opposed to HQS, prior to HAP execution.

Question 13. HUD seeks comment on the proposed change to the definition of existing housing. Is the 48-hour standard reasonable, particularly for larger projects? Are there better alternative definitions of existing housing that would meet the objective of more clearly providing uniformity as to whether a project qualifies as existing housing? HUD also seeks comment on whether the definition should be tightened to prevent the circumvention of rehabilitation program requirements by selecting a project as existing housing when significant work is needed for the property to comply fully with HQS. For example, a previous proposed definition of existing housing provided that to qualify as existing housing, the owner must not be planning to perform rehabilitation work on the units within one year after HAP contract execution that would cause the units to be in noncompliance with HQS and that would total more than $1,000 per assisted unit.

Question 14: The proposed and current definition of ''project'' is statutory and must be used to determine PHA compliance with the income-mixing requirement. HUD has applied this statutory definition to the PBV program in general for the sake of administrative consistency. Should HUD adopt a different definition of ''project'' for other elements of the PBV program? If so, what definition should HUD adopt, and for which program elements?

14. Cross-Reference to Other Federal Requirements (§ 983.4)—Labor Standards

The proposed rule would make changes to the description of labor standards to conform to the changes made elsewhere in the rule regarding the applicability of Davis-Bacon wage rates to the PBV program. Please see the detailed preamble discussion concerning the proposed Davis Bacon change in § 983.210, below.

15. Description of PBV Program (§ 983.5)

The proposed rule would revise § 983.5(a)(3) to conform it to changes made elsewhere in the rule that newly constructed or rehabilitated housing may be developed with or without an Agreement. Please see the below preamble discussion on the proposed change to implement the HOTMA provision that PBV housing may be developed without an Agreement if certain requirements are met at § 983.155.

The rule would also make another conforming change to § 983.5(d) to reference the new section on PBV provisions in the Administrative Plan that is proposed at § 983.10 and discussed later in this preamble. Finally, HUD is also proposing to revise this section to clarify that PBV assistance may be attached to both single-family and multifamily buildings, and that HCV administrative fee funding made available to the PHA is used for both the administration of tenant-based and project-based assistance.

16. Maximum Amount of PBV Assistance (§ 983.6)

HUD implemented the HOTMA PBV program limit provisions through the FR Implementation Notice. HUD is proposing to substantially revise § 983.6 to codify the new HOTMA requirements in the 24 CFR part 983 program regulations.

HOTMA changed the methodology used to calculate the PBV program limit from a budget authority percentage to a unit count, meaning that a PHA may project-base up to 20 percent of its authorized voucher units. This proposed rule updates § 983.6(a) to reflect that change. Notwithstanding the change in the program limit methodology, PHAs would still be responsible for determining that they have sufficient funding available to support the vouchers they are planning to place under a PBV HAP contract.

HOTMA also authorizes a PHA to project-base an additional 10 percent of its authorized voucher units, but only for units that serve the homeless, veterans, provide supportive housing to persons with disabilities or elderly persons, or are located in areas where vouchers are difficult to use. HOTMA also authorizes a PHA to project-base an additional 10 percent of its authorized voucher units, but only for units that serve the homeless, veterans, provide supportive housing to persons with disabilities or elderly persons, or are located in areas where vouchers are difficult to use. Under this proposed rule, solely for purposes of applying the additional 10 percent veterans exception to the PBV program cap, the term ''veteran'' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable, which is the definition of veteran defined by 38 U.S.C. 101. For purposes of determining this statutory cap exception, the term veteran needs to have a standard definition that is applied consistently by PHAs across the program. This definition does not preclude a PHA from applying the term ''veteran'' differently for other purposes of program administration. For example, the PHA could choose to apply a

broader standard as to who would qualify as a veteran when establishing a local preference for admissions for veterans. However, under this proposed rule in order for a PBV unit to qualify for the 10% exception on the basis that the unit is designated for veterans, the veteran must be a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.

These additional units are covered by proposed changes in § 983.6(d). In addition, HUD would add a proposed definition of ''areas where vouchers are difficult to use'' to § 983.3, which is discussed in detail in section 13 of the section-by-section summary.

Commenters on the FR Implementation Notice suggested that other categories of units (*e.g.,* units that need preservation) should be made eligible for project-basing under the 10 percent exception; HUD however lacks the authority to except units that are not specified in statute.

Commenters also stated that limiting the exception to contracts that were first executed on or after April 18, 2017, as provided in the FR Implementation Notice, penalizes PHAs who have already made efforts to serve the populations favored with the exception. HUD lacks the statutory authority to apply the exception retroactively to units that were under contract prior to April 18, 2017. After further considering these comments, however, HUD proposes to allow units that are added to an existing contract under § 983.207(b) and are eligible for the exception to qualify for the exception, even if the existing contract itself was executed prior to April 18, 2017.

HOTMA excludes certain categories of units from this program limitation entirely (these are referred to in the proposed regulation as units excepted from the program cap and project cap). Please see the discussion concerning these units later in this preamble under § 983.59.

Lastly, under the current regulation at § 983.6(d), a PHA must submit information to HUD prior to issuing a request for proposals or otherwise selecting a project for an award of PBVs. The intent of the requirement is to assure that PHAs determine whether any new selection will push them above the statutory cap on project-basing. Taken as a whole, HOTMA significantly complicates this calculation through the number of different ways a cap may be expanded, or may not apply to a unit. In this proposed rule, HUD would eliminate the requirement at § 983.6(d) and establish a new § 983.58 that would state all the scenarios under which a PHA must perform calculations prior to project-basing additional units of assistance.

17. PBV Provisions in the Administrative Plan (§ 983.10)

The proposed rule would redesignate the current § 983.10, Project-based certificate (PBC) program, as § 983.11 and add a new § 983.10 to contain Administrative Plan requirements unique to the PBV program. It would define areas in which the PHA has discretion to establish policies with respect to such things as the PHA's standard for deconcentrating poverty and expanding housing and economic opportunity, waiting list management, and whether the PHA will retain the use of an Agreement for new construction/rehabilitation. The list provided in the rule is not intended to be an all-inclusive list; instead, the list highlights the major policy areas where the PHA has some discretion.

18. Project-Based Certificate (PBC) Program (§ 983.11)

HUD is proposing to redesignate § 983.10, Project-based certificate (PBC) program, to § 983.11. There are no proposed changes to the text.

19. Prohibition of Excess Public Assistance (§ 983.12)

HUD is proposing to add a new section as part of an effort to better organize and clarify the subsidy layering requirements for the PBV program. Currently, the subsidy layering requirements are found in § 983.55, which is found in Subpart B, Selection of PBV Owner Proposals. The prohibition of excess public assistance applies only to newly constructed and rehabilitated housing after the project is selected and placed under HAP. In order to better clarify the current requirements and to consolidate information related to development requirements, HUD is proposing to add a new § 983.12 that speaks generally to the prohibition of excess public assistance for PBV new construction and rehabilitated housing. The new section would refer readers to § 983.153(b) for the requirements related to placing new construction and rehabilitated housing under HAP contract. In addition, this new section would include language (currently found in the PBV HAP contract for new construction and rehabilitated housing) that the owner must disclose information to the PHA regarding any additional related public assistance that is made available with respect to the contract units during the term of the PBV new construction and rehabilitation HAP contract. In those instances, a new subsidy layering review would be required to determine if the additional assistance would result in excess public assistance in the project. The PHA must adjust the housing assistance payments to the owner if the additional public assistance results in excess public assistance to the project.

As is currently the case and in accordance with section 8(o)(13)(M)(i) of the 1937 Act, under this proposed rule the subsidy layering requirements never apply when a PHA is attaching PBV assistance to existing housing, either prior to HAP contract execution or during the term of the contract.

20. Owner Proposal Selection Procedures (§ 983.51)

HOTMA authorizes a PHA that is engaged in an initiative to improve, develop, or replace a public housing property or site to attach PBV assistance to an existing, newly constructed, or rehabilitated structure in which the PHA has an ownership interest or over which the agency has control without following a competitive process, as long as the PHA has notified the public of its intent to do so through its PHA Plan. While the PHA must have ownership interest in or control over the project to attach PBV assistance to it without following a competitive process, it is important to emphasize that having ''ownership interest'' in the project does not mean that the unit must meet the definition of PHA-owned unit. An ownership interest means that the PBV PHA or its officers, employees, or agents are in an entity that holds any direct or indirect interest in the project in which the units are located, including but not limited to an interest as: Titleholder, lessee, stockholder, member, or general or limited partner; or member of a limited liability corporation. A PHA ownership interest also includes cases where the PBV PHA is the lessor of the ground lease for the land upon which the PBV project is located. With this proposed rule, HUD proposes to codify this HOTMA provision in the 24 CFR part 983 regulations, which was previously implemented in the FR Implementation Notice. In § 983.51(c) under the proposed rule, the PHA may select a project in their public housing inventory, or a project that may have been removed from the public housing inventory through any available legal removal tool within 5 years of the proposal selection date. In accordance with § 983.54, Prohibition of assistance for units in subsidized housing (redesignated as § 983.53 in this

proposed rule), the PHA may not attach or pay PBV assistance until the public housing units are removed from the public housing inventory. HUD would also make clear in this proposed rule that newly developed or replacement housing developed under this authority need not be on the same site as the original public housing, in contrast with replacement units for which a PHA is claiming an exception from the PBV program and project caps (see § 983.59(d)).

HUD is also proposing to eliminate the $25,000 per unit cost requirement for rehabilitation and new construction that was part of the initial implementation requirements for this HOTMA provision in the FR Implementation Notice by not proposing it in this rule. The purpose of the cost test was to ensure that the PHA was truly engaged in an initiative to improve the public housing project or site and not simply avoiding following the competitive selection process by undertaking minor repairs at the project. However, by its very nature, a PBV new construction project is replacing the public housing project, which fulfills the HOTMA requirement that the PHA is engaged in an initiative to improve, develop, or replace the public housing project or site. Likewise, if the project will be assisted through PBV for rehabilitated housing, the rehabilitation that is undertaken in order to attach the PBV assistance to the project constitutes an initiative to improve the project.

In addition, HUD is also proposing, at § 983.51(c)(2), to allow a PHA that is engaged in an initiative to improve, develop, or replace a public housing property or site to attach PBV assistance to an existing, newly constructed, or rehabilitated structure without following a competitive process in cases where the PHA has no ownership interest or control over the site but where the PHA is administering the PBV assistance because the public housing project in question is owned by another PHA that does not administer the HCV program. The public housing project must either still be in the public housing inventory or removed from the public housing inventory through any available legal removal tool within 5 years of the proposal selection date. In addition, the PBV assistance must have been specifically identified as the replacement housing for the impacted public housing residents as part of the public housing demolition/disposition application, voluntary conversion application, or any other application process submitted to and approved by HUD to remove the public housing project from the public housing inventory. HUD believes under these limited circumstances the administering PHA should be able to attach the PBV assistance to the public housing project without following a competitive process since the conversion of the project to PBV assistance was part of the overall plan approved by HUD to reposition the project and preserve it as affordable housing for the public housing residents and the community.

HUD is proposing several non-HOTMA related clarifications to this section. HUD would add a reference to the required PHA inspections that must occur prior to the proposal selection that are covered elsewhere in the regulation since those requirements are a key component of the proposal selection process (§ 983.51(e)). HUD is also proposing to define the proposal selection date (§ 983.51(g)). For projects selected through a request for proposals or based on a previous competition, the proposal selection date would be the date on which the PHA provides written notice to the party that submitted the selected proposal. For former public housing projects selected without a competitive process, the date of proposal selection would be the date of the PHA's board resolution approving the project-basing of assistance at the specific project. This change is intended to ensure that the date of selection is consistently applied in relation to a project's eligibility for selection based on a previous competition or without regard to a competitive process. Finally, the proposed rule would add a new paragraph (k), which serves as a reminder that a PHA may not commit project-based assistance to a project if the owner or any principal or interested party is debarred, suspended, subject to a limited denial of participation, or otherwise excluded under 2 CFR part 2424 or is listed on the U.S. General Services Administration list of parties excluded from Federal procurement programs.

Question 15: Are there other situations that should be exempt from competitive selection requirements? For example, should HUD also exempt the placement of project-based vouchers that are used to replace previously federally assisted or rent-restricted properties from competitive selection requirements?

21. Prohibition of Assistance for Ineligible Units (§ 983.52)

HUD would redesignate § 983.53, Prohibition of assistance for ineligible units, as § 983.52. HUD is proposing to delete the current § 983.52, Housing Type, cover the definition of existing housing in § 983.4, and incorporate the provisions currently found at § 983.52(a)(1) and (2) into the newly designated § 983.52(d). HUD would also revise § 983.52(d) in this proposed rule to conform with the proposed implementation of the PHA option to undertake PBV development without an Agreement under § 983.155 that is discussed later in this preamble.

22. Prohibition of Assistance for Units in Subsidized Housing (§ 983.53)

HUD would redesignate § 983.54, Prohibition of assistance for units in subsidized housing, as § 983.53. There are no proposed changes to the current text.

23. Cap on Number of PBV Units in Each Project (§ 983.54)

HOTMA made significant changes to the PBV project cap (also known as the income-mixing requirement) that determines how many units in a particular project may be PBV assisted. These HOTMA changes were implemented by the FR Implementation Notice. HUD is proposing to modify the PBV regulation (most notably at §§ 983.54 and 983.262) to conform to all of these statutory changes as implemented in the FR notice.

In this proposed rule, HUD would redesignate § 983.56, Cap on number of PBV units in each project, as § 983.54 and revise § 983.54 to codify the following HOTMA requirements:

Under HOTMA, the project cap is whichever number is greater: 25 units or 25 percent of units (assisted or unassisted) in the project. This means that a project with 25 or fewer units may be fully assisted with project-based vouchers, provided all other PBV requirements are met.

HOTMA also makes changes to the exceptions to the project cap. Prior to HOTMA, dwelling units specifically made available to elderly families, disabled families, and families receiving supportive services were excepted from the project cap. HOTMA retains the exception for elderly families, modifies the exception for families receiving supportive services so that families must simply be ''eligible for'' supportive services, and eliminates the exception for disabled families, while grandfathering in the exception for projects that were under a PBV HAP contract prior to April 18, 2017. HOTMA also excluded certain categories of units from the project cap entirely (these are referred to in the proposed regulation as units excepted from the program cap and project cap and discussed at § 983.59 below). HOTMA also allowed a higher (40 percent) project cap in two scenarios:

Where the project is in a Census tract with a poverty rate of 20 percent or less, and where the project is in an area where vouchers are difficult to use. As stated previously, the definition of ''areas where vouchers are difficult to use'' has been added to § 983.4.

Public comments in response to the January 18, 2017, notice were mostly in the context of the supportive services exception. Several commenters stated that failure to complete a Family Self-Sufficiency (FSS) contract should not result in termination and eviction of the family. HUD addressed this comment in the July 14, 2017, technical corrections notice, explaining that current FSS requirements do not allow termination from the housing assistance program for failure to complete the FSS contract of participation. Accordingly, in this rule HUD also proposes to remove the provision at § 983.257(b), which permitted lease termination by the owner where a family failed to complete its FSS contract without good cause. As is the case under the FR Implementation Notice, the proposed rule would also clarify that a PHA that administers an FSS program may use FSS as part of its supportive services package in meeting the project cap supportive services exception. However, the PHA may not rely solely on FSS in meeting the exception. A PHA could, however, make the supportive services used in connection with the FSS program available to non-FSS PBV families at the project.

Other commenters proposed that HUD should not require supportive services to be made available to all families in a project, but that the services should be made available just to those units designated as supportive housing units. HUD is unable to implement such a change through regulation because it would be in conflict with the current statutory language.

The proposed rule would also clarify, as stated in the January 18, 2017, notice, that HAP contracts in effect prior to April 18, 2017, remain obligated by the terms of those HAP contracts with respect to the requirements that apply to the number and type of excepted units in a project, unless the owner and the PHA mutually agree to change those requirements. HUD has also taken this opportunity to propose to specify that the PHA has discretion to determine whether to except units and the number of units to be excepted (see § 983.54(d)). The proposed rule would remove the reference to combining exception categories in a project. This is because while a PHA may offer both the elderly and the supportive services exception categories at a project, the supportive services exception requires that the supportive services be available to all PBV-assisted families at the project, making such combination provision irrelevant.

The proposed rule would revise § 983.262, When occupancy may exceed the project cap, to codify the HOTMA changes regarding the project cap. Because these changes are so closely related to the proposed revisions to § 983.54, they are described in detail both here and later in the preamble discussion at § 983.262. In § 983.262(b), the proposed rule would clarify that while a PHA may establish criteria for occupancy of particular units in ensuring that excepted units are occupied by a family who qualifies for the exception, families who will occupy excepted units must be selected through an admissions preference. Section 983.262(c) would set forth the requirements for the supportive services exception to apply. The unit would be excepted if any member of the family is eligible for one or more of the supportive services, even if the family chooses not to participate in the services. Also, if any member of the family successfully completes the supportive services, the unit would continue to be excepted for as long as any member of the family resides in the unit. The unit would only lose its excepted status if no member of the family successfully completed the supportive services and the entire family becomes ineligible during the tenancy for all supportive services that are made available to the residents of the project.

The proposed § 983.262(c) would provide that a family may not be terminated from the program or evicted from the unit when the unit loses its excepted status. Under this proposed rule, the § 983.262(d) (formerly (e)) requirements concerning wrong-sized units would be revised to remove the reference to disabled family members since, under HOTMA, there is no longer an exception to the income mixing requirement for disabled families. The current regulatory provisions continue to apply under the proposed rule to excepted elderly units in cases where the elderly family member no longer resides in the unit but the PHA allows the remaining family members to remain in the unit. The proposed regulation (in § 983.262(f)) also addresses the options available to the PHA when an excepted unit loses its excepted status.

Question 16. Does the proposed rule sufficiently address the project cap requirements in relation to a unit losing its excepted status?

Question 17. Should other options not considered by the proposed rule be available to the PHA when a unit loses its excepted status?

Question 18. Does the regulation clearly convey how FSS may be used in meeting the supportive services exception?

24. Site Selection Standards (§ 983.55)

HUD would redesignate § 983.57, Site selection standards, as § 983.55. There are no changes to the regulatory text.

25. Environmental Review (§ 983.56)

HUD would redesignate § 983.58, Environmental review, as § 983.56. HUD is proposing to revise the environmental review requirements for existing housing in accordance with section 106(a)(8) of HOTMA. Section 106(a)(8) of HOTMA amended section 8(o)(13)(M)(ii) of the 1937 Act, which addresses environmental reviews for existing PBV projects. The provision in the 1937 Act was originally added by section 2835 of the Housing and Economic Recovery Act (HERA),[5] and read as follows:

> A public housing agency shall not be required to undertake any environmental review before entering into a housing assistance payments contract under this paragraph for an existing structure, except to the extent such a review is otherwise required by law or regulation.

However, as HUD explained in the November 24, 2008, **Federal Register** notice implementing HERA changes, the original statutory provision was problematic in that it exempted PHAs, which do not undertake environmental reviews, instead of responsible entities or HUD, which do the reviews. In addition, environmental reviews are always conducted as a result of a statutory or regulatory requirement. The notice concluded that the HERA provision did not eliminate any environmental reviews.[6]

HOTMA addressed the second of these two problems, by requiring reviews when the review is required by law or regulation ''relating to funding other than housing assistance payments.''[7] Therefore, any

[5] Public Law 110–289, approved July 30, 2008.

[6] *See* 82 FR 5458.

[7] Section 106(a)(1) of HOTMA also changed the word ''structure'' to ''project'' throughout paragraph 8(o)(13) of the 1937 Act. Consequently section 8(o)(13)(M)(ii) as amended by HOTMA reads ''(ii) Environmental review.—A public housing agency shall not be required to undertake any environmental review before entering into a housing assistance payments contract under this paragraph for an existing project, except to the extent such a review is otherwise required by law or regulation relating to funding other than housing assistance payments.''

environmental reviews required just because of the provision of HAP would no longer be required. However, the language of HOTMA still left in place the part of the 1937 Act that exempted PHAs instead of responsible entities. A basic canon of statutory construction is that a statutory provision should be read so as to give every word meaning.[8] Accordingly, despite the continued presence of the word ''PHA'', HUD is seeking to give effect to the apparent intent of Congress expressed in HOTMA. While it is the responsible entity that actually undertakes the environmental review, HUD believes that Congress referred to PHAs in the provision because they are responsible for ensuring that the required review has been conducted before undertaking a project or activity. Thus, rather than rendering the statutory provision (and the subsequent amendment in HOTMA) a nullity, the reference to PHAs emphasizes that it is these entities that will be held accountable by HUD for compliance with the environmental review requirements prior to undertaking an activity.

In endeavoring to give full effect to the words of section 8(o)(13)(M)(ii) of the 1937 Act, HUD is also cognizant that the statute provides only a partial exemption to environmental reviews. Specifically, the applicability of the provision would be limited to ''existing projects.'' Environmental reviews would continue to be applicable to PBV rehabilitation and new construction projects. The limited scope of the proposed exemption from environmental reviews reflects Congress's continuing emphasis on the importance of Federal assistance being used in an environmentally sound manner. For example, statutory provisions authorizing HUD to waive, or establish alternate, statutory requirements explicitly exclude environmental, labor, and fair housing statutory requirements.[9]

Another generally accepted principle of statutory construction is that the words of statutory provisions should be read so as to avoid results inconsistent with expressed congressional intent.[10] A superficial reading of the statutory provision would exempt all existing projects where PBV assistance is being added from environmental review and only require that newly constructed and rehabilitated housing comply with environmental requirements, even if such existing project had never had an environmental review performed. Such a reading appears to be in contravention of Congress's oft-repeated intent that housing assisted with site-based rental assistance comply with Federal environmental review requirements. To avoid what HUD believes is this unintended consequence, this rule proposes to allow an exemption from further environmental review if an existing housing project has ever undergone an earlier environmental review pursuant to receiving any form of federal assistance. In other words, if a project that meets the definition of ''existing housing'' as defined in the PBV regulations for program purposes has not previously undergone a federal environmental review because it did not receive federal assistance, then the project would not be exempt from an environmental review. HUD believes this reading strikes the appropriate balance between granting PHAs relief from the burden of duplicative environmental reviews while ensuring that all HUD assistance complies with Federal environmental standards.

Question 19. HUD recognizes that properties that were previously Federally assisted and conducted their environmental reviews long ago may not be able to access documentation proving the review was conducted. How should HUD ensure that a review was conducted for those properties? Should HUD revise the requirement so that any existing PBV project that was formerly federally assisted and would have been subject to a federal environmental review (and an environmental review is not otherwise required by law or regulation related to funding other than PBV housing assistance) would qualify for the exception regardless of whether any environmental review documentation is available?

Question 20. How administratively burdensome will it be for owners to demonstrate that an environmental review was conducted for the project in the past? Is such information readily available to a project owner, even if the environmental review may have been conducted many years ago?

Question 21. Should the final rule establish a time limit for accepting environmental reviews conducted for previously Federally assisted properties? For example, if the environmental review for such a property was conducted 25 years ago, should HUD require that a new review be conducted? If such a limit is appropriate, what should the time limit be?

Question 22. HUD's legal reading of section 8(o)(13)(M)(ii)—upon which the proposed implementation of the PBV existing housing exception from environmental review requirements is based—is that the intent of the statute is not to except all existing PBV projects from environmental reviews but rather to balance the PBV existing exception against Congress's intent that HUD-assisted housing comply with Federal environmental review requirements. Are there alternative approaches to striking this balance that would be preferable to HUD's proposed implementation of the environmental review exception for PBV existing projects? For example, project-based vouchers may be attached to existing projects with non-Federal affordable housing financing. HUD is interested in what non-Federal financing and financial closing also include review of contamination screening, floodplain management, flood insurance map reviews, or other environmental risk mitigation requirements. Are there site suitability reviews that occur in the non-Federal assistance context that would address HUD's concerns that PBV assistance is not attached to buildings or sites that pose potential risks to the residents' health and safety or the viability of the project?

26. PHA-Owned Units (§ 983.57)

HUD would redesignate § 983.59, PHA-owned units, as § 983.57. The redesignated § 983.57 governs the selection of PHA-owned units and the role of independent entities in operating such units in the PBV program. Most of the changes in this section are intended to improve readability. However, § 983.57(b)(1) would specify that, in addition to determining the rent to the owner, the independent entity must determine OCAF adjustments. This is a new responsibility for the independent entity, resulting from the HOTMA provision that allows for rent adjustments under the PBV program using an OCAF established by the Secretary and published in the **Federal Register**. HUD is proposing to implement the OCAF option in this rule at § 983.302(b)(2); please see the related discussion on the OCAF rent adjustment option later in this preamble.

[8] *See Alaska Department of Environmental Conservation* v. *EPA,* providing that a statute should be construed so that, ''if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'' (540 U.S. 461, 489 n.13 (2004)).

[9] *See, e.g.,* the Rental Assistance Demonstration (RAD) Program in the Consolidated and Further Continuing Appropriations Act, 2012 (Pub. L. 112–55, approved Dec. 23, 2011); and appropriations for the Community Development Block Grant Disaster Recovery programs in Public Laws 115–23 (approved April 13, 2017) and 115–72 (approved October 16, 2017).

[10] *See Church of the Holy Trinity* v. *United States,* 143 U.S. 457 (1892).

Additionally, in § 983.57(b)(4), HUD is proposing that, when PHAs carry out development or rehabilitation of PBV PHA-owned units, the PHA must submit evidence to the independent entity that the work has met applicable requirements. HUD believes the determination that the development or rehabilitation of the PHA-owned PBV project has met the applicable requirements should be added to the responsibilities of the independent entity. The PHA, as the owner of the PBV project, has a conflict in making that PHA determination for the HAP contract to be executed.

27. PHA Determination Prior to Selection (§ 983.58)

Under the current regulation at § 983.6(d), a PHA must submit information to HUD prior to issuing a request for proposals or otherwise selecting a project for an award of PBVs. The intent of the requirement is to assure that PHAs determine whether any new selection will push them above the statutory cap on project-basing. Taken as a whole, HOTMA significantly complicates this calculation through the number of different ways a cap may be expanded or may not apply to a unit. In this proposed rule, HUD would eliminate the requirement at § 983.6(d) and establish a new § 983.58 that states all the scenarios under which a PHA must perform calculations prior to project-basing additional units of assistance. Under the proposed § 983.58, the PHA would determine, in accordance with the program limit requirements at § 983.6, if it is able to project-base additional vouchers before it issues a request for proposals or makes a selection based on a previous competition, attaches assistance without competition in accordance with the proposed requirements of § 983.51(c) of this rule, or when it amends a current HAP contract to add units in accordance with § 983.207(b).

28. Units Excepted From Program Cap and Project Cap (§ 983.59)

HOTMA excepts certain types of units from both the program cap and the project cap. These are units that were previously subject to certain federal rent restrictions or that were receiving another type of long-term housing subsidy provided by HUD. HUD implemented the exception for these units as part of the FR Implementation Notice. Because the lists for both exceptions are the same, HUD proposes to establish a new § 983.59, which would list the types of units that are covered by the exceptions in §§ 983.6 (program cap) and 983.54 (project cap). Also, in response to comments received on the January 18, 2017, notice, HUD has included two additional types of units in the list of units ''previously subject to federally required rent restrictions'' that were not included in the list of excepted units implemented under the FR Implementation Notice: (1) Units financed with Low-Income Housing Tax Credits (26 U.S.C. 42) and (2) units subsidized with Section 515 Rural Rental Housing Loans (42 U.S.C. 1485). In addition to listing the covered units, the proposed rule would codify the existing FR Implementation Notice requirement that the unit must have received one of the covered forms of HUD assistance or been subject to one of the covered federally required rent restrictions in the 5 years prior to the date of the request for proposals or the date of selection (without competition or a selection based on a prior competition).

As was provided under the FR Implementation Notice, HUD is also proposing to exclude HUD–VASH vouchers specifically designated by HUD for project-based assistance from the PBV program limits and project caps. The proposed rule would also clarify that PBV units under the Rental Assistance Demonstration (RAD) are not subject to the program limitation or project caps.

Finally, the proposed rule would address the issue of when newly constructed units developed under the PBV program may be excluded from the program limitation and project cap because they are replacing units that meet the criteria of excepted units because the units were formerly subject to federal rent restrictions or were receiving HUD assistance. As is the case under the FR Implementation Notice, the newly constructed unit would have to be located on the same site as the unit it is replacing; however, expansion or modification to the prior project's site boundaries is acceptable under certain conditions. In addition, the primary purpose of the newly constructed units would be required to replace the previous federally assisted or rent-restricted eligible units. The PHA would be able to demonstrate compliance with this requirement by giving former residents of the original project a selection preference that provides the residents with the right of first occupancy at the PBV new construction project, or, prior to the demolition of the original project, identifying the PBV new construction project as replacement housing as part of a documented plan for the redevelopment of the site.

While HOTMA significantly expands the potential number of vouchers that may be project-based through this broad exception policy, PHAs considering increasing their use of project-basing are cautioned that all other PBV requirements apply to these formerly federally assisted or rent-restricted excepted units, including that a family occupying the PBV unit still has the right to move with tenant-based assistance after 12 months of occupancy. Section 8(o)(13)(E) of the 1937 Act (42 U.S.C. 1437f) provides that a PHA must provide HCV tenant-based assistance or comparable tenant-based assistance to a family that seeks to exercise this right. If such assistance is not immediately available, then the PHA must provide the family with priority to receive the next voucher (or other tenant-based assistance) that becomes available. PHAs with large percentages of PBV units as a result of these exceptions may find it increasingly challenging to reach families on the tenant-based waiting list, as families moving under the statutory mobility requirements of the PBV program have priority over waiting list families for the next available voucher.

Question 23. HUD recognizes that PBV assistance can be an effective tool to preserve affordable project-based housing units in a community. However, HUD is concerned about the unintended consequences that over-use of this broad and unlimited exception authority may have in terms of the PHA's ability to meet its obligations to provide families with tenant-based vouchers when they wish to exercise their statutory right to move from the PBV unit with tenant-based assistance. Since these families are given priority for the next available voucher, this concern also has significant implications for families on the tenant-based waiting list and the PHA's ability to address the local needs and priorities of their communities through the reissuance of turnover vouchers. HUD seeks comment on this issue. For example, should PHAs that wish to project-base vouchers over a certain number threshold be required to analyze the impact on the availability of vouchers and demonstrate that they will still have sufficient tenant-based vouchers (or other voucher assistance) available within a reasonable period of time for eligible PBV families that wish to move? What other approaches should be considered to address this concern? Is there a specific threshold in terms of the overall percentage of vouchers that are project-based where the PHA and/or HUD should focus on the potential impact on the availability of tenant-based assistance to provide PBV

families with a meaningful opportunity to move with tenant-based assistance?

29. Housing Quality Standards (§ 983.101)

HUD is proposing to make a conforming change to § 983.101(e) as part of the changes to implement the HOTMA provision that permits the PHA to enter into a PBV HAP contract with an owner that is under construction or recently has been constructed whether or not the PHA and owner sign an Agreement (see preamble discussion below at § 983.155). This change would remove the requirement that any additional requirements for quality, architecture, or design of PBV housing establish by the PHA must be specified in the Agreement (since there is no Agreement if the PHA opts not to require the Agreement).

30. Inspecting Units (§ 983.103)

As discussed previously in this preamble, HOTMA made significant changes to the inspection requirements for both HCV tenant-based and project-based assistance. Please see the description of all the HOTMA section 101 changes to the unit inspection requirements in § 982.305. HUD is proposing to change § 983.103 to codify the PBV-related inspection requirements previously implemented under the FR Implementation Notice, as well as proposing new requirements to implement the HOTMA HQS enforcement and family relocation provisions that were not covered by the notice.

This proposed rule would revise § 983.103 to codify the initial inspection options (NLT and alternative inspections) that were implemented under the FR Implementation Notice. However, HUD proposes in this rule to limit the use of the NLT and alternative inspection options to existing housing. Regarding the NLT deficiencies initial inspection option, HUD's view is that the provision of PBV assistance for new construction or rehabilitation is intended to increase the supply of affordable housing that is decent, safe, and sanitary. HUD's expectation, therefore, is that newly constructed or rehabilitated units will fully meet Housing Quality Standards (*i.e.,* such units will have no HQS deficiencies).

With respect to the use of an alternative inspection option for the initial HQS inspection, HUD cannot identify a scenario under which a PHA could realistically rely on an alternative inspection completed prior to the rehabilitation. The unit, by virtue of the rehabilitation, is no longer in the same condition as it was at the time of the alternative inspection. Furthermore, if the rehabilitation was done improperly, then the unit may have unsafe conditions that did not exist at the time of the alternate inspection. As for newly constructed units, the alternative inspection provision does not appear to be a viable option, because, prior to construction, the units did not exist.

Similar to the proposed change for HCV tenant-based assistance in § 982.406, HUD is proposing to change the time frame by which the PHA must conduct its own inspection of the unit for existing PBV housing under the initial HQS inspection alternative inspection. For both tenant-based and project-based units under this proposed rule, the PHA would be required to conduct HQS inspections on all the assisted units within 30 days of the project selection date, as opposed to the 15-day standard established under the FR Implementation Notice.

HUD also proposes clarifying changes to § 983.103 to expressly provide the timeframes within which the PHA must conduct an inspection when notified of a potential life-threatening or non-life-threatening deficiency in a PBV unit. If the family or a government official notifies the PHA of a potentially life-threatening deficiency, the PHA would have to inspect the unit within 24 hours and notify the owner if the life-threatening deficiency is confirmed. If the reported condition is non-life-threatening, the PHA would have to inspect the unit, and provide the owner notification if the deficiency is confirmed, within 15 days. The rule further proposes that the owner may provide photographic evidence or other reliable evidence to the PHA in order for the PHA to verify that a defect has been corrected.

In addition to codifying the HOTMA initial inspection options for PBV, § 982.103 would be revised for clarity regarding the inspection of units prior to proposal selection (§ 983.103(a)) and HAP contract execution (§ 983.103(b)). These clarifying changes would also include revising the text to incorporate the proposed new definition for PBV existing housing, which is discussed in subsection 13 of the section-by-section summary.

The current regulation requires the independent entity to provide a copy of the inspection report for a PHA-owned PBV unit to the PHA and to the HUD field office. To reduce administrative burden, HUD proposes to remove the requirement that the report be provided to the HUD field office, instead proposing to require that the independent entity or PHA must provide the report to the field office upon request.

Question 24. HUD requests comment on the use of the NLT and alternative inspection options for PBV new construction and rehabilitation. Are there circumstances where it would be acceptable for a newly constructed or rehabilitated PBV unit to fail to meet HQS once the construction or rehabilitation was completed, making the NLT a reasonable option for PHAs? Are there circumstances where the alternative inspection option can fulfill the initial HQS inspection requirements for PBV rehabilitation or new construction?

31. Applicability (§ 983.151)

HUD is proposing to substantially restructure Subpart D (§§ 983.151 through 983.157). HUD solicits comment on the reorganization of this subpart, which is intended to provide clarity regarding the applicability of development requirements. Section 983.151 would be revised to better express Subpart D's purpose, which is to set forth the requirements related to development activity under the PBV program, including those requirements related to development activities undertaken on units that are under HAP contract (discussed below at § 983.157).

32. Nature of Development Activity (§ 983.152)

A new § 983.152 would explain which sections and requirements of Subpart D are applicable to an owner undertaking development activity for the purpose of either placing a project under a HAP contract (newly constructed and rehabilitated housing) or, in the case of a partially assisted project (*e.g.,* a project that includes both PBV-assisted and unassisted units), in order to add additional units in the project to the PBV HAP contract. (A new § 983.157 would cover when development activity may be undertaken for units assisted under a HAP contract and what requirements apply.) All the development requirements under § 983.153 would apply to development activity undertaken to place newly constructed or rehabilitated housing under a HAP contract. For development activity undertaken to add previously unassisted units in the project to a HAP contract, the development requirements related to equal employment opportunity, accessibility, and broadband infrastructure would apply, as applicable.

33. Development Requirements (§ 983.153)

In this rule HUD is proposing to re-designate § 983.154, Conduct of Development Work, as § 983.153, and re-title the section ''Development Requirements.'' HUD believes that consolidating the development requirements in one section of the regulations will provide greater clarity and ease of understanding to PHAs and owners.

The development requirements described in this section would include subsidy layering reviews (see the related discussion at § 983.12), labor standards (please see the discussion regarding Davis-Bacon requirements in this preamble at § 983.210), equal opportunity (section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u), and the implementing regulations at 24 CFR part 135), equal employment opportunity, accessibility, broadband eligibility, and eligibility to participate in federal programs and activities. These requirements are the same requirements that are currently applicable to development activities carried out for newly constructed and rehabilitated housing.

34. Development Agreement (§ 983.154)

This section would cover the existing requirements for the Agreement in terms of the timing of the execution of the Agreement and the required contents, which are found in the current regulations at § 983.152, and implement a new HOTMA provision under which the PHA may choose not to execute an Agreement. HOTMA creates new discretionary authority for a PHA to enter into a PBV HAP contract with an owner for housing that is under construction or recently has been constructed whether or not the PHA and owner sign an Agreement to Enter into a HAP contract (Agreement). The law provides that, even when an Agreement is not used, an owner must be able to demonstrate ''compliance with applicable requirements prior to execution of the housing assistance payments contract.'' HUD interprets this language to mean that a PHA must affirm, for any work done after proposal submission and prior to proposal selection, that the owner has complied with all such requirements. Once the PHA has affirmed that any work done from the point of proposal submission complies with all such requirements, the two parties may enter into an Agreement—or not. Under either scenario, all work completed from the point of proposal submission forward would have to be developed and completed in compliance with the applicable requirements.

35. Completion of Work (§ 983.155)

HUD is proposing to revise the section, Completion of Work, to conform to the change that the PHA may enter into the PBV HAP contract without first entering into an Agreement. In addition, HUD is proposing that the PHA shall determine the form and manner by which the owner must submit evidence and certify to the PHA that the development activity was completed and all such work was completed in accordance with the applicable requirements, rather than regulation specifying those requirements.

36. PHA Acceptance of Completed Units (§ 983.156)

HUD is proposing to revise this section to conform to the change that the PHA may enter into the PBV HAP contract without first entering into an Agreement.

37. Development Activity on Units Under a HAP Contract (§ 983.157)

HUD is proposing to add a new section to cover development requirements should the owner undertake development activity on units under HAP contract. HUD recognizes that, given that PBV HAP contracts may be in effect for twenty years or longer, owners may need over the course of the contract to undertake work that meets the definition of development activity. In addition, standards need to be established to prevent the circumvention of development requirements where units are placed under a HAP contract as existing housing even though the owner intends to undertake significant development activity on the assisted units shortly thereafter.

HUD proposes to permit development activity on units currently under HAP contract if the owner is approved to do so by the PHA. However, except in extraordinary circumstances (such as repairs necessitated due to a fire or natural disaster), this would normally occur within the first five years from the effective date of the HAP contract. The owner's request would have to include a description of the proposed development activity and the length of time, if any, that it is anticipated that some or all the assisted units will not meet HQS as a result of the development activity. The owner's request would be required to include a description of how the families will be rehoused during the period that their unit does not comply with Housing Quality Standards because of the development activity. Housing assistance payments would not be made during the time the units are not in compliance with the Housing Quality Standards during the development activity.

The proposed rule would provide that the development requirements for equal employment opportunity, accessibility standards, and broadband infrastructure apply, as applicable. The other development requirements under § 983.153, the Development agreement requirements at § 983.154, and the PHA acceptance of unit requirements at § 983.156 would not apply.

Question 25: HUD is specifically seeking comment on the time period proposed within which development work would not be permitted except in extraordinary circumstances. Is five years within the first five years from the effective date of the HAP contract a reasonable time frame? The intent of establishing such a timeframe is to prevent the circumvention of PBV requirements that apply for PBV rehabilitation projects but not existing housing (*e.g.,* environmental reviews in certain circumstances, subsidy layering reviews, Davis Bacon, etc.) but not to preclude post-HAP execution work that would improve the quality of the housing for the assisted families or to protect the longer-term health and continued viability of the project. Are there alternative time-frames or other approaches that would better balance and address these two concerns? Are there reasonable, routine reasons why an owner may need to or choose to perform development activity within the first five years of the effective date of the HAP contract (please provide examples)?

Question 26: Given that owners of properties under PBV contract will periodically need to undertake development to modernize and rehabilitate properties, has HUD laid out reasonable guidelines for undertaking development activity on units under a HAP contract?

38. HAP Contract Information (§ 983.203)

HUD is proposing to revise § 983.203, HAP contract information, so that the current reference to units that exceed the normally applicable project cap in paragraph (h) accurately reflect the new HOTMA exceptions. Unrelated to HOTMA, the section has proposed revisions to expressly state the features described in the HAP contract provided to comply with program accessibility requirements include those related to the Fair Housing Act and the Americans

with Disabilities Act, as applicable, in addition to section 504 of the Rehabilitation Act. Finally, HUD proposes to require that the PBV HAP contract specify whether the PHA has elected not to reduce rents below the initial rent to owner. The current regulations at § 983.302(c)(2) provide that if the PHA has elected, within the HAP contract, to not reduce rents below the initial rent to owner, the rent to owner may not be reduced below the initial rent except in certain circumstances. However, the current regulation lacks a corresponding provision in § 983.203, which covers HAP contract information. The proposed change would better align the two sections with respect to this HAP contract provision.

39. When HAP Contract Is Executed (§ 983.204)

As previously discussed, the proposed rule would address how the PHA executes the HAP contract for a PHA-owned unit for both tenant-based units (§ 982.451(c)) and project-based units (§ 983.204(d)). Please see the earlier discussion at § 983.451(c).

HUD has not provided a HUD-prescribed certification option for the Agreement to Enter into a HAP Contract (Agreement) for PHA-owned units, as it has for the HAP contract. While a PHA may not enter into an Agreement with itself for a PHA-owned unit where the PHA (not a separate legal entity) is the owner, the PHA has the option to not require the Agreement for PBV new construction and rehabilitated projects. The PHA could either create a separate legal entity to execute the Agreement as well as the HAP contract as the owner, or could use its discretion to not require the Agreement. (The PHA as the owner could still decide to voluntarily meet the Davis-Bacon wage requirements if it wanted to do so, regardless of the fact the Davis-Bacon wage requirements are not applicable if the PHA does not require the use of the Agreement. See related discussion concerning the Davis-Bacon requirements at § 983.210.)

HUD is also proposing to conform § 983.204 to address proposed changes related to initial inspections discussed in detail elsewhere in this preamble. HUD is proposing to revise the existing language in § 983.204(a) and (b) to reflect that for PBV existing housing, the PHA may use the initial inspection NLT and alternative inspection options. The language would reflect that the PHA must determine that the applicable pre-HAP contract HQS requirements have been met, rather than specifying requirements that may not be applicable if the PHA implemented and applied either initial inspection option to the PBV existing project.

Likewise, HUD is proposing to revise § 983.204(c) to remove the references to the Agreement for newly constructed or rehabilitated housing in describing the determinations the PHA must make before executing the PBV HAP contract, since elsewhere in this rule HUD is proposing to implement the option under which the PHA may choose not to execute the Agreement for PBV new construction and rehabilitation.

40. Term of HAP Contract (§ 983.205)

HUD implemented section 106(a)(4) of HOTMA, which extends from 15 to 20 years the term of an initial PBV HAP contract or contract extension, in the FR Implementation Notice. In codifying this provision in the PBV regulations, HUD proposes to restructure the underlying regulation in § 983.205 to clarify the differences between the initial PBV HAP contract term, the extension of the initial contract term, and subsequent extensions, as suggested in comments on the January 18, 2017, Notice.

In addition to the HOTMA changes related to the initial term and extensions, HUD is also proposing to move the current regulatory provisions at § 983.205(c) and § 983.210(d), which discuss HAP contract terminations, to § 983.206. This proposed change would consolidate all provisions related to contract terminations under § 983.206.

Question 27: With respect to the prohibition against extending a contract beyond 40 years until 24 months prior to the expiration of the HAP contract (§ 983.205(b)(3)(i)), are there circumstances under which HUD should permit a contract extension prior to that period in order to facilitate needed financing? If so, what period of time would be reasonable for the PHA to determine that such an extension is appropriate to continue providing affordable housing for low-income families or to expand housing opportunities?

41. Contract Termination or Expiration and Statutory Notice Requirements (§ 983.206)

Section 983.206 currently covers the statutory owner notice requirements to the families and the PHA regarding the termination of the contract. In this proposed rule, HUD is proposing to expand the section to cover two new HOTMA requirements related to the termination of contracts, both of which were previously implemented under the FR Implementation Notice. In addition, HUD is proposing to move a couple of provisions currently found in § 983.205 to § 983.206 to better align the 24 CFR part 983 regulations.

HOTMA requires that the PBV HAP contract must provide that, upon termination or expiration of a PBV HAP contract without extension, each assisted family may elect to remain in the same project with tenant-based assistance, if its unit complies with HUD's Housing Quality Standards, the PHA determines or has determined that the rent for the unit is reasonable, and the family pays its required share of the rent and the amount, if any, by which the unit rent (including the amount allowed for tenant-based utilities) exceeds the applicable payment standard. In other words, the family receives the voucher that was previously used to assist the family under the PBV contract and may choose to use the voucher to stay at the project with continued rental assistance if certain conditions are met.

In this proposed rule, at § 983.206(b), HUD would codify these requirements and further specify that this provision applies unless the termination or expiration without extension occurs as a result of a determination of insufficient funding, as described below. If the PHA is terminating the contract because of insufficient funding, the PHA would not have funding to provide the families with tenant-based vouchers for them to elect to either stay or move from the project. The proposed rule would also provide that an owner may not terminate the tenancy of the family that elects to remain at the project with the tenant-based assistance except as the result of a serious or repeated lease violations, or other good cause under § 982.310. (Under § 982.310, the owner may not terminate the tenancy for ''other good cause'' during the initial lease term, unless the owner is terminating the tenancy because of something the family did or failed to do.)

Question 28. Should the family have the ability to remain in the same unit and not just the same project?

HOTMA also provides that, in the event of insufficient appropriated funding, payments due under HCV or PBV HAP contracts must be made if the PHA is able to implement cost-saving measures that make it possible for the PHA to avoid terminating an existing HAP contract. As of the publication date of this proposed rule, cost-saving measures are governed by Notice PIH 2011–28.

In § 983.206(c) of this proposed rule, HUD would codify that the PHA may terminate a PBV HAP contract only after it determines that it lacks sufficient funding to continue housing assistance

payments for all voucher units currently under a HAP contract and has taken appropriate cost-saving measures, as applicable. In addition, HUD would have to determine that the PHA lacks sufficient funding. HUD proposes as well that a PHA must describe in its Administrative Plan the factors it will take into consideration when determining which HAP contracts to terminate first (*e.g.,* prioritizing protecting PBV HAP contracts over tenant-based HAP contracts or prioritizing protecting contracts that serve vulnerable families or individuals over other contracts when determining which contracts shall be terminated due to insufficient funding). See the related discussion on changes proposed for the PHA HCV administrative plan at § 982.54.

Section 983.206(d) would provide that the owner may terminate the contract when the amount of rent to owner for any contract unit is reduced in accordance with the rent adjustment requirements of § 983.302 below the amount of the initial rent to owner, and the assisted families residing in the assisted units will be offered tenant-based assistance. This provision is currently found in § 983.205(d). HUD is proposing to include a reference that the family may remain in the project with the tenant-based assistance in accordance with the new HOTMA provision. HUD is also proposing to add a sentence that expressly provides that the requirement that the owner provide at least one-year owner notice of the termination of the HAP contract is not applicable to this situation.

42. HAP Contract Amendments (To Add or Substitute Contract Units) (§ 983.207)

The current regulation establishes a three-year window following the execution date of a PBV HAP contract during which units may be added to the contract without a request for proposals. HOTMA eliminates this window, allowing units to be added at any time during the term of a PBV HAP contract, which HUD implemented through the FR Implementation Notice. Section 983.207 of this proposed rule would incorporate the HOTMA change, including specifying that the PHA may not add units if doing so would push the agency out of compliance with the program limitation at § 983.6 or the project cap at § 983.54, and the units must comply with the requirements of the PBV HAP contract (*e.g.,* rents must be reasonable, etc.). In implementing this provision, HUD is also proposing in § 983.10 to require that a PHA describe in its Administrative Plan the circumstances under which it will consider amending a PBV HAP contract to substitute or add contract units and how those circumstances support the goals of the PBV program. The rule would further clarify that units added to the HAP contract following the execution of the HAP contract must be units that existed and were part of the project when the HAP contract was executed.

HUD is also proposing related changes to two other sections of the 983 regulations, specifically that if the owner undertakes development activity in order to add previously unassisted units to the HAP contract, then certain development requirements may apply (see §§ 983.152 and 983.153). Please see previous preamble discussion related to those sections.

43. Condition of Contract Units (§ 983.208)

HUD is proposing similar changes to § 983.208 to implement these same HOTMA HQS enforcement and tenant relocation provisions for the PBV program that were discussed earlier in this preamble under § 982.404 for the tenant-based program.

The proposed rule would expand § 983.208(b) to make the change that the unit is not in compliance with HQS not only if the PHA, but also if an inspector authorized by the State or unit of local government, determines upon inspection of the unit that the unit fails to comply with HQS, the PHA or inspector notifies the owner in writing of the failure, and the defects are not corrected within the new statutorily mandated time-frames. Additionally, § 983.208(b) would include a new paragraph implementing the HOTMA standard for HQS deficiencies that are caused by any member or guest of the household, whereby the PHA may waive the owner's responsibility to remedy the violation and require the family to do so. Section 983.208(c) would be revised in similar fashion to § 982.404 to cover when the PHA may withhold payments and when the PHA must abate the payment and remove a unit from the PBV HAP contract due to HQS deficiencies.

HUD is proposing to allow the PHA to choose to abate payments for the entire PBV HAP contract rather than just the individual unit due to the unit's noncompliance with the HQS. Likewise, the PHA would be permitted to choose to terminate the entire PBV HAP contract, rather than simply removing the unit from the HAP contract, due to noncompliance with HQS, which is consistent with current program requirements. Finally, the same provisions related to the relocation of the family that were discussed in detail in the preamble section on § 982.404 would be added to § 983.208. This proposed change would apply the HOTMA protections to PBV families forced to relocate due to the owner's failure to correct the HQS deficiency, including the PHA's option to use up to 2 months of withheld or abated HAP for costs directly associated with relocating to a new unit, including security deposits or reasonable moving costs.

As explained earlier in the preamble discussion on § 982.404, these HOTMA provisions are set forth in section 8(o)(8)(G) of the United States Housing Act of 1937.

The law provides that these provisions shall apply ''to any dwelling unit for which a housing assistance payments contract is entered into or renewed after the date of the effectiveness of the regulations implementing subparagraph (G).'' For tenant-based HAP contracts, HUD is interpreting a contract that is ''renewed'' to mean a HAP contract that has continued beyond the end of the initial lease term. For PBV, HUD is interpreting a contract that is ''renewed'' to be a contract that has been extended beyond the initial term of the contract. For contracts that were not entered into or renewed after the effective date of the regulations, §§ 982.404 and 983.208 in effect as of the date before the effective date of the final rule will remain in effect.

Unlike tenant-based HAP contracts, the transition period between when a HAP contract executed before the effective date and the final rule and its actual renewal may be quite lengthy in the PBV program. HUD understands that this adds complexity to the administration of PBV HAP contracts, particularly for PHAs that may be administering multiple PBV HAP contracts, some of which will be covered by the newly revised § 983.208 while others remain under the regulation as it stood prior to the effective date of the final rule. The applicability of subparagraph (G) is statutory, and as a result HUD may not conform all PBV HAP contracts to the new enforcement standards and tenant protections under that subparagraph through this rulemaking.

44. Owner Certification (§ 983.210)—Davis Bacon, Other Conforming Changes

HUD proposes to remove § 983.210(j), which provides that by execution of the HAP contract, the owner certifies that at such execution and at all times during the term of the HAP contract, that repair work on project selected as an existing project that is performed after HAP

execution within such post execution period as specified by HUD may constitute development activity, and if determined to be development activity, the repair work undertaken shall be completed in compliance with Davis-Bacon wage requirements.

Section 12 of the 1937 Act mandates the use of Davis-Bacon wage rates in the ''development'' of low-income housing projects, including projects under section 8 of the 1937 Act, with nine or more assisted units where there is an agreement for use of Section 8 program funds before the construction or rehabilitation begins.

In this proposed rule, HUD is proposing to return to its requirements prior to a final rule, published June 25, 2014, at 79 FR 36146, regarding Davis-Bacon applicability and PBV. Specifically, the proposal would apply Davis-Bacon wage rates in the PBV program to ''rehabilitated'' and ''newly constructed'' housing where an Agreement covering nine or more assisted units is entered into between the PHA and the owner. Within this context, under the proposal, PBV ''existing housing'' would not be covered by Davis-Bacon. This approach long pre-dates the PBV program. Predecessor Section 8 project-based assistance programs conditioned applicability of Davis-Bacon on execution of an Agreement prior to rehabilitation or construction. In contrast, HUD programs that applied to ''existing housing'' did not require an ''Agreement,'' and Davis-Bacon wage rates did not apply.

The 2014 final rule substantially redefined the meaning of ''agreement'' for Davis-Bacon purposes and provided for application of Davis-Bacon to PBV ''existing housing'' under certain conditions. In particular, HUD revised the cross-reference to labor standards in 24 CFR 983.4 to remove the reference to labor standards ''applicable to an Agreement'' covering nine or more assisted units and substitute a reference to labor standards ''applicable to development (including rehabilitation) of a project comprising'' nine or more assisted units. HUD stated that this language ''clarifies that Davis-Bacon requirements may apply to existing housing (which is not subject to the agreement) when the nature of any work planned to be performed prior to HAP contract execution or after HAP contract execution, within such post-execution period as may be specified by HUD, constitutes development of the project.'' Subsequent guidance from HUD specified that ''work that constitutes remodeling that alters the nature or type of housing units in a PBV project, reconstruction, or a substantial improvement in the quality or kind of original equipment and materials'' conducted within 18 months after the effective date of the HAP contract counted as ''development'' and was therefore subject to Davis-Bacon wage requirements.[11]

The implication of this is that under the 2014 final rule, HUD may require Davis-Bacon wages both: (i) Where the rehabilitation occurs *prior* to the owner entering into a HAP contract or any agreement for subsequent Section 8 use; and (ii) where the rehabilitation occurs within 18 months after the effective date of the HAP contract, regardless of whether the receipt of the assistance is conditioned upon the completion of the rehabilitation.

After careful consideration of the differing views on this subject, HUD has concluded that the pre-2014 PBV requirements, rather than the requirements contained in the June 25, 2014, final rule, are more consistent with the express terms of section 12 of the 1937 Act. In the first instance, where rehabilitation occurs prior to the execution of a HAP contract or any agreement for subsequent Section 8 use, the statutory requirement that there be ''an agreement for such [Section 8] use *before* the construction or rehabilitation is commenced'' cannot be satisfied under the 2014 final rule. In the second instance, the sole focus on temporal proximity of the rehabilitation to the assistance agreement allows HUD to require Davis-Bacon even in those instances where the agreement for assistance is not conditioned upon the completion of the rehabilitation. This is inconsistent with the intent of section 12 and is inconsistent with the otherwise longstanding HUD practice of allowing owners of existing housing to engage in rehabilitation of Section 8-assisted housing without triggering Davis-Bacon wage requirements. In addition, the application of Davis-Bacon wage rates to federally supported housing is a large federal regulatory cost on housing production.

HUD acknowledges that the broad, open-ended definition of ''existing housing'' in 24 CFR 983.3 has proven insufficient to ensure that PHAs properly classify PBV housing types and contributed to some of the Davis-Bacon issues that the June 25, 2014, final rule attempted to address. In order to remedy this problem, HUD has proposed a much more specific and tighter definition of ''existing housing,'' which is discussed in subsection 13 of this preamble.

In addition, the amendment made by section 106(a)(4) of HOTMA, discussed in subsection 34 of this preamble, may significantly impact Davis-Bacon coverage. This provision amends section 8(o)(13)(F) of the 1937 Act to allow a PHA to enter into a HAP contract for housing to be rehabilitated or newly constructed whether or not the PHA has entered into an Agreement, provided that the owner demonstrates compliance with ''applicable requirements'' prior to execution of the HAP contract. Thus, HOTMA allows rehabilitation or new construction to occur in the absence of an Agreement. In these cases, under HUD's proposal to construe the reference to ''an agreement for such [Section 8] use'' in section 12 of the 1937 Act to refer exclusively to an Agreement, Davis-Bacon would not apply. In this rule, HUD is proposing to provide the PHA with discretion to decide whether to require the Agreement (per § 983.155(e)). HUD recognizes that permitting the PHA to exclude all rehabilitation and new construction PBV projects from Davis-Bacon requirements by not requiring use of the Agreement may be viewed as an unintended consequence of HOTMA's elimination of the need for an Agreement.

Question 29. Should the PHA have the flexibility to exclude rehabilitation or new construction of PBV projects from Davis-Bacon coverage? Given the language in HOTMA that does not require an Agreement, should HUD still require Davis-Bacon coverage for new construction and rehabilitation through an alternate document?

HUD is also proposing a conforming change to § 983.210(c) to reflect the fact that eligible families may be selected from an owner-maintained waiting list if applicable, rather than referred to the owner by the PHA. Please see the preamble discussion on owner-maintained waiting lists at § 983.251.

45. Removal of Unit From HAP Contract (§ 983.211)

HUD is proposing a conforming change to § 983.211(c) to reflect the fact that families may be selected from an owner-maintained waiting list, rather than be referred to the owner by the PHA. Please see the related preamble discussion on the proposed implementation of the HOTMA provision allowing for owner-maintained site-based waiting lists at § 983.251.

[11] Applicability of Davis-Bacon Labor Requirements to Projects Selected as Existing Housing Under the Section 8 Project-Based Voucher Program—Guidance, published March 9, 2015 at 80 FR 12511.

46. How Participants Are Selected (§ 983.251)

Section 106(a)(7)(B) of HOTMA provides that a PHA (or owner, if the owner maintains a site-based waiting list as discussed further below) may establish a selection preference for families who qualify for voluntary services, including disability-specific services, offered in conjunction with assisted units, provided that the preference is consistent with the PHA Plan. HUD implemented this provision of HOTMA in the FR Implementation Notice. HUD proposes to revise § 983.251(d) to cover PHA and owner preferences for families that qualify for these voluntary services. As previously implemented under the FR Implementation notice, a key component of the changes that the proposed rule provides is that the preference is for families who qualify for the voluntary services offered at a particular project. Prior to the effective date of this HOTMA provision on April 18, 2017, PHAs were required to provide the preference to any disabled family who needed the voluntary supportive services, regardless of whether the family was eligible to receive the services.

While PHAs and owners would be permitted provide the preference for families that qualify for disability-specific services, the current prohibition on granting preferences to persons with a specific disability at § 982.207(b)(3) would continue to apply. Furthermore, the HOTMA provision specifically provides that the selection preference is for families that qualify for *voluntary* services, including, but not limited to, disability-specific services. Families may not be required to accept the particular services offered at the project, and the preference may not be based on the family's agreement or commitment to accept the offered services. The preference may only be based on whether the family qualifies for the services offered in conjunction with the assisted unit. These preference requirements apply regardless of whether the preference is for a PBV excepted unit or a PBV non-excepted unit.

The current regulatory restrictions at § 983.251(d)(1) that limit the services preference only to a population of families with disabilities that (i) significantly interfere with their ability to obtain and maintain themselves in housing, (ii) who would not be able to obtain or maintain themselves in housing, and (iii) for whom such services cannot be provided in a non-segregated setting would be eliminated in this proposed rule. HOTMA does not put limits or conditions of this nature on the families that may receive the preference or the supportive services, including disability-specific services, that may be offered in conjunction with the assisted unit, other than that those services must be voluntary. However, the PHA would still have to ensure that the PBV project complies with all applicable Fair Housing and Civil Rights requirements, including but not limited to the requirement to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities under section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (see 24 CFR 8.4(d) and 28 CFR 35.130(d)). Additionally, the PBV project where Medicaid-funded home and community based services will be offered as part of ''disability-specific services'' must also fully comply with the federal home and community-based settings requirements found at 42 CFR 441.301(c)(4), (5) (''Home and Community-Based Settings'').

HOTMA also authorizes the use of owner-maintained, site-based waiting lists for PBV units. Under current requirements, while a PHA may have project specific PBV waiting lists, such waiting lists must be maintained by the PHA, and the owner can assist only eligible families referred by the PHA from the PHA's waiting list. This proposed rule would implement the HOTMA provision that would allow an owner to maintain the PBV waiting list for a project. HUD did not implement this provision under the FR Implementation Notice and instead reserved its implementation for this rulemaking process. In addition, HUD is proposing several non-HOTMA related changes to § 983.251.

The proposed rule at § 983(c)(7) would detail the roles and responsibilities for the PHA and if the PHA decides to allow the owner to maintain the site-based waiting list. Under an owner-maintained waiting list, the owner, not the PHA, is responsible for managing the waiting list, including processing changes in an applicant's information, contacting families when their name is reached on the waiting list, removing applicant names from the waiting list, and opening and closing the waiting list. HUD is proposing that PHAs may choose to use owner maintained PBV waiting lists for specific owners or projects. In other words, the PHA would not have to allow all owners to maintain the waiting list for their PBV projects. The rule proposes to allow the PHA to permit an owner to manage a single waiting list that covers multiple projects owned by the owner.

If a PHA decides to let an owner maintain the site-based waiting list, HUD is proposing that the owner must develop and submit a written tenant selection plan to the PHA for approval. The tenant selection plan would have to include the policies and procedures the owner must follow in maintaining the waiting list, including any preferences for admission. The PHA must incorporate the approved owner tenant selection plan into the PHA's Administrative Plan.

Under the proposed rule, applicants may apply directly at the project instead of at the PHA. The PHA may choose to delegate the responsibility of making a preliminary eligibility determination for purposes of placing the family on the waiting list and determining the family's eligibility for any preference for the site-based waiting list, or the PHA may continue to carry out those responsibilities for the owner-maintained waiting list. Regardless of whether the PHA delegates this responsibility to the owner, the PHA would always be responsible for conducting any informal review for the applicant.

Under the proposed rule, the owner may not determine the family's final program eligibility. This would always be a PHA administrative responsibility. Related to owner maintained waiting lists, the proposed rule would also revise § 983.254 to establish that, in cases where an owner-maintained waiting list is used, the owner must promptly notify the PHA of any vacancy or expected vacancy in a contract unit and refer the family to the PHA for final eligibility determination. The PHA must then make every reasonable effort to promptly make such final eligibility determination. Also, while owners would be required to follow all waiting list administration program requirements, including the public notice requirements of § 982.206 when opening the waiting list, the proposed rule would also require the owner to follow such public notice requirements in the limited cases where the owner-maintained waiting list is already open and additional applicants are needed to fill vacant units. Other technical changes have been proposed to other parts of the regulation (§§ 983.210(c), 983.211(c), and 983.253(a)) to conform with the proposed provision authorizing the PBV program.

The PHA would be responsible for oversight of any owner-maintained waiting lists to ensure they are administered properly and in

accordance with all program requirements, including fair housing requirements. The owner would have to give the PHA, HUD, and the Comptroller General full and free access to its offices and records concerning the waiting list. Finally, the rule proposes that HUD may take enforcement actions against either the owner or the PHA, or both parties, for any program violations related to the owner-maintained waiting list.

The proposed rule would also clarify that the income-targeting requirements apply to owner-maintained waiting lists for the PBV program.

HUD is proposing to make several non-HOTMA related changes and clarifying edits to § 983.251, How participants are selected. Specifically, HUD is proposing to reorganize and revise § 983.251(b) for greater clarity. As in current regulations, the proposed rule would continue to afford PHAs discretion to determine how to structure the PBV waiting list (whether a single waiting list for the entire PBV program, a project-specific waiting list, or as part of its HCV waiting list). The PHA would be able to choose to use a combination of these options. For example, the PHA may choose to use a central PBV waiting list for some PBV projects (either using a dedicated PBV waiting list or as part of the tenant-based waiting list) and use project-specific waiting lists for the other PBV project(s) in its portfolio. In the case of project-specific waiting lists, the PHA would have discretion to determine whether the owner will maintain such waiting lists.

HUD is also proposing to expand this subsection to specifically address situations where the in-place family is a tenant-based voucher participant. These are not new requirements but clarify how the related requirements in § 982.310(d) concerning when the owner may terminate the tenant-based tenancy come into play in terms of protections for in-place families under the PBV program. This proposed rule would provide that during the initial term of the lease, the in-place tenant-based voucher family may agree but is not required to mutually terminate the lease with the owner and enter into a PBV lease. If the family is not willing to terminate the tenant-based lease during the initial term, the owner would not be permitted to terminate the lease for other good cause, unless the owner is terminating the tenancy because of something the family did or failed to do. The owner would not be permitted to terminate the tenancy during the initial lease term because the family is unwilling to terminate the lease and accept the owner's offer of a new lease under the PBV program, and the unit may not be added to the PBV HAP contract during that time. The proposed rule would further provide that, after the initial term of the tenant-based lease, the owner may choose not to renew the lease or may terminate the tenant-based lease for other good cause, and the family would be required to move with their tenant-based voucher or could choose to stay if they were willing to give up their tenant-based voucher and enter into the PBV lease at that time.

The current regulation addresses the impact of a family's rejection of the PBV offer or the owner's rejection of the family based on a family's position on the tenant-based waiting list, but it does not address the impact on a family's position on the PBV waiting list. The proposed rule would give discretion to the PHA to determine in its Administrative Plan the number of offers a family may reject before the family is removed from a central PBV waiting list. Likewise, the PHA's Administrative Plan would be required to address whether an owner's rejection will affect the family's place on a central PBV waiting list. Where a project-specific PBV waiting list is used, the family's name would be removed from the project-specific waiting list connected to the family's rejection of the offer or the owner's rejection of the family. Likewise, the family's place on the tenant-based waiting list would not be affected regardless of which type of PBV waiting list is used.

Question 30. Should HUD establish additional or different criteria for the removal of the family from the PBV waiting list when a family rejects an offer or the owner rejects the family?

Question 31. The proposed regulation at § 983.251 addresses the roles and responsibilities of the owner and the PHA when owner-maintained waiting lists are used. Are there any additional areas concerning this topic that require further clarification?

47. PHA Information for Accepted Family (§ 983.252)

HUD has taken this opportunity to propose clarifications to the requirements concerning the oral briefing and the information packet the PHA is required to provide to a family selected for the PBV program. These are all non-HOTMA related changes. Specifically, HUD proposes that the oral briefing must include information on the family's right to move. With respect to the information packet, the proposed regulation would require PHAs to include information on federal, state, and local equal opportunity laws. Lastly, HUD proposes that the information packet must include information about the PHA's subsidy standards, including when the PHA will consider granting exceptions. This requirement is consistent with the information packet requirements of the HCV program. HUD expects that most PHAs already provide such information to PBV families.

48. Leasing of Contract Units (§ 983.253)

HUD is proposing a conforming change to § 983.253(c) to reflect the fact that under this proposed rule, families could be selected from an owner-maintained waiting list, rather than be referred to the owner by the PHA. Please see the related preamble discussion on the proposed implementation of the HOTMA provision allowing for owner-maintained site-based waiting lists at § 983.251.

In addition, HUD is proposing a non-HOTMA related change to § 983.253(a)(3), which would require that when a PBV owner rejects an applicant and notifies the applicant in writing of the grounds for the rejection, the owner must also provide the PHA with a copy of the written notice. HUD believes that this information is important for the PHA to have in cases where an owner has rejected an otherwise eligible applicant for a vacant PBV unit.

49. Vacancies (§ 983.254)

HUD is proposing conforming changes to § 983.254 to reflect the fact that families could be selected from an owner-maintained waiting list, rather than be referred to the owner by the PHA. Please see the related preamble discussion on the proposed implementation of the HOTMA provision allowing for owner-maintained site-based waiting lists at § 983.251.

As discussed previously in the preamble section on § 983.251, the owner would not determine the family's final program eligibility as part of the owner's responsibilities for an owner-maintained site-based waiting list. The final eligibility determination for an applicant family would always be a PHA administrative responsibility. HUD is consequently proposing to revise § 983.254 to reflect that if an owner maintained waiting list is used, the owner must promptly notify the PHA of any vacancy or expected vacancy in a contract unit and refer the family to the PHA for final eligibility determination, and the PHA must then make every reasonable effort to promptly make such final eligibility determination.

Finally, HUD is proposing to revise § 983.254(a) to expressly provide that both the PHA and the owner must make reasonable, good-faith efforts to minimize the likelihood and length of any vacancy. This general requirement would cover any circumstance where there is a vacant PBV unit, regardless of whether the PHA is administering the waiting list directly or has implemented an owner-maintained site-based waiting list for the vacancy in question.

Question 32. What would be a reasonable timeframe for the PHA to complete this final eligibility determination?

50. Owner Termination of Tenancy and Eviction (§ 983.257)

As previously discussed in this preamble at § 983.54, Cap on number of PBV units in each project, current FSS requirements do not allow termination from the HCV program for failure to complete the FSS contract of participation. Accordingly, HUD proposes to remove the outdated provision at § 983.257(b), which permitted lease termination by the owner where a family failed to complete its FSS contract without good cause. This proposed change would conform the regulation to the current FSS program requirements, the HOTMA-related provision that the exception from the cap on the number of PBV units in each project for supportive services is dependent on the services being voluntary, and that tenants may not have their tenancies terminated because they decline to accept (or choose to no longer accept) the voluntary supportive service offered in conjunction with the assisted unit.

51. Security Deposit: Amounts Owed by Tenant (§ 983.259)

The regulation governing security deposits currently gives PHAs discretion to prohibit an owner from charging PBV-assisted tenants a higher security deposit than the private market practice or higher than what the owner would charge unassisted tenants. Unrelated to HOTMA, HUD is proposing to revise the regulation by removing the PHA discretion to prohibit this practice of charging HCV families a higher security deposit and instead prohibit it in all cases. This would provide consistency with rent reasonableness requirements, where assisted families cannot be charged a higher rent than unassisted families.

52. Overcrowded, Under-Occupied, and Accessible Units (§ 983.260)

HUD is proposing several non-HOTMA related changes to § 983.260. To provide certainty regarding the amount of time a family may remain in a wrong-sized unit or an accessible unit with features that the family does not need, the proposed rule would establish a timeframe of 30 days for the PHA to notify the family and owner that the family is in such a unit. (See 24 CFR 8.27 of the current regulations for further explanation of occupancy of accessible units.) Also, while the PHA would continue to set the time within which a family must move out of the unit when the PHA offers a form of continued assistance other than an HCV, the proposed rule would establish a maximum of 90 days within which a family must move. HUD also proposes restructuring the section to make the requirements clearer.

Question 33. Are these proposed timeframes reasonable?

53. When Occupancy May Exceed the Project Cap (§ 983.262)

The proposed rule would revise § 983.262, When occupancy may exceed the project cap, to codify the HOTMA changes to project cap limits. In § 983.262(b), the proposed rule would clarify that, while a PHA may establish criteria for occupancy of particular units in ensuring that units excepted from the project cap are occupied by a family who qualifies for the exception, families who will occupy excepted units must be selected through an admissions preference. Please see the related discussion at § 983.54 above in this preamble.

As discussed previously in the preamble discussion on the project cap at § 983.54, § 983.262(c) would set forth the requirements for the HOTMA supportive services exception to be applicable to a unit. The unit would be excepted if any member of the family is eligible for one or more of the supportive services, even if the family chooses not to participate in the services. Also, if any member of the family successfully completes the supportive services, the unit would continue to be excepted for as long as any member of the family resides in the unit. The unit would only lose its excepted status if no member of the family successfully completed the supportive services and the entire family becomes ineligible during the tenancy for all supportive services that are made available to the residents of the project. The proposed § 983.262(c) would also provide that a family may not be terminated from the program or evicted from the unit when the unit loses its excepted status.

Under this proposed rule, the § 983.262(d) (formerly (e)) provisions concerning wrong-sized units would be revised to remove the reference to disabled family members since, under HOTMA, there is no longer an exception to the PBV unit project cap for disabled families. The current regulatory provisions would continue to apply under the proposed rule to excepted elderly units in cases where the elderly family member no longer resides in the unit but the PHA allows the remaining family members to remain in the unit. Finally, the proposed regulation (in § 983.262(f)) would cover in detail the options available to the PHA when an excepted unit loses its excepted status.

Question 34. Does the proposed rule sufficiently address the project cap requirements in relation to a unit losing its excepted status?

Question 35. Should other options not considered by the proposed rule be available to the PHA when a unit loses its excepted status?

Question 36. Does the regulation clearly convey how FSS may be used in meeting the supportive services exception?

54. Determining the Rent to Owner (§ 983.301)

HUD is proposing to make several non-HOTMA related changes to § 983.301(f), Use of FMRs and utility allowance schedule in determining the amount of rent to owner.

First, the current regulation states that a PHA must use the same utility allowance schedule for both its tenant-based and project-based programs. HUD is proposing to allow a PHA to request HUD field office approval to establish a project-specific utility allowance (for example, based on a flat fee charged by an owner or a third-party determination of actual or projected utility costs) for a project assisted under the PBV program. HUD will direct PHAs to use the process used for PBRA described in Notice H 2015–04 unlesPIH promulgates guidance specific to the PBV program. The use of a project-specific utility allowance is intended to assure that payments to tenants for utilities more closely reflect actual utility costs.

HUD is aware that a project-specific utility allowance that under-estimates the actual costs of utilities will have a negative impact on families. Therefore, the proposed change would further provide that the PHA request must demonstrate that the utility allowances used in its voucher program would either create an undue cost on families (because the utility allowance provided under the voucher program is too low), or that use of the utility allowances will discourage conservation and efficient use of HAP funds (because the utility

allowances provided under the voucher program would be excessive if applied to the project). The PHA would have to submit an analysis of utility rates for the community and consumption data of project residents in comparison to community consumption rates; and a proposed alternative methodology for calculating utility allowances on an ongoing basis. In addition, under this proposed change, HUD may establish additional standards or requirements for the PHA requests through a **Federal Register** notice subject to public comment. This would allow HUD to further refine the information and documentation that is needed based on experience over time without having to change the regulation, while still ensuring that any such requirements have the benefit of public comments before being implemented.

Question 37. How could HUD streamline its utility allowance policies across the RAD PBV, traditional PBV, and HCV programs?

Question 38. Should HUD permit the use of a site-specific utility allowance schedule for the HCV program? Is there additional information, including utility consumption data sources, that HUD should consider in setting utility allowance policy?

Second, HUD is proposing several clarifying changes that to better reflect how the current requirements, in § 888.113(c)(5) and § 888.113(h) for Small Area FMRs and project-based vouchers and the requirements at § 982.503 for exception payment standards, determine the amount of rent to owner under the PBV program. Specifically, the proposed change would clarify that for any area in which SAFMRs are in effect, a HUD-approved exception payment standard amount will apply to the PHA's project-based voucher program only if the PHA has adopted a policy applying SAFMRs to its PBV program (see § 888.113(h)).

55. Redetermination of Rent to Owner (§ 983.302)

HOTMA authorizes a PHA and owner to agree that a PBV HAP contract will be adjusted by an annual operating cost adjustment factor (OCAF), subject to the applicable PBV cap on the rent to owner and the rent reasonableness requirement. HUD is proposing to implement this change by revising § 983.302(b) under this rule. Under HOTMA, this OCAF option applies only to PBV HAP contracts that were entered into after the date of enactment of HOTMA (July 29, 2016).

The proposed rule would provide that a rent increase may occur as the result of an owner request or, if both parties agree and provided for in the HAP contract, through an automatic adjustment by an operating cost adjustment factor. However, regardless of the method of the adjustment, the rent increase could not result in a rent that exceeds the maximum rent for the PBV project, as determined by the PHA pursuant to § 983.301. Except for certain tax credit units, the rent to owner must not exceed an amount determined by the PHA, which in accordance with the statutory provision in section 8(o)(13)(H) of the 1937 Act may not exceed the lowest of 110 percent of the FMR (or any exception payment standard approved by HUD under paragraph (1)(D))) for the unit bedroom size minus any utility allowance, the reasonable rent, or the rent requested by the owner. For example, if the rent to owner is capped by the PHA at 105 percent of the FMR, the owner would be unable to receive an OCAF adjustment that results in rents above this level.

Question 39. Should HUD permit a PHA and owner to agree to OCAF adjustments up to the maximum level permitted by the statute without regard to the cap adopted by the PHA, as long as rents remain reasonable?

In the event an annual OCAF adjustment fails to increase a property's rent up to the maximum level established by the PHA, HOTMA states that an owner may request an additional adjustment up to that level. Lastly, HOTMA states that, in the case of a PBV HAP contract that is adjusted by an OCAF, the contract must require an adjustment, if requested, up to the maximum level established by the PHA, at the point of contract extension. These HOTMA provisions are included in the proposed changes to § 983.302(b) to implement the OCAF adjustment option.

In addition to the HOTMA changes discussed above, HUD is also proposing to make the following non-HOTMA-related change to § 983.302(c), regarding the PHA option not to reduce PBV rents below the initial rent to owner. The regulation currently allows PHAs to elect within the HAP contract not to reduce PBV rents below the initial rent to owner but does not specifically address the timing of such election. The proposed rule would allow a PHA to make such an election at any time during the term of the HAP contract. The proposed rule would also clarify that if rents have already been reduced below the initial rent to owner, then the PHA may not make such an election as a way to increase the rents. If rents increase (pursuant to a rent increase under § 983.302(b)) above the initial rent to owner, then the election would once again become available to the PHA. Additionally, the proposed rule would make a technical change to this provision by removing the following phrase: ''for dwelling units under the initial HAP contract.'' HUD believes this phrase may be misconstrued to limit a PHA's ability to make the ''rent floor'' choice only during the initial term of a HAP contract, or only for units covered under an initial HAP contract. To avoid such confusion, the phrase would be removed.

56. Reasonable Rent (§ 983.303)

To reduce administrative cost and burden, HUD proposes to eliminate the requirement that the independent entity furnish a copy of its determination of reasonable rent for PHA-owned units to the HUD field office. HUD would retain the requirement that the independent entity furnish this information to the PHA.

HUD is also proposing a conforming change in § 983.303(f) to revise the existing reference to 983.59 to 983.57, as that section would be redesignated as § 983.57 under this proposed rule.

57. Purpose and Applicability (§ 985.1)

The proposed rule includes a revision to 24 CFR 985.1(b) to make clear that SEMAP applies to the PBV program in the same manner in which it applies to the former project-based certificate program. Specifically, SEMAP applies to the PBV program to the extent that PBV family and unit data are reported and measured under the stated HUD verification method.

58. Indicators, HUD Verification Methods, and Ratings (§ 985.3)

HUD is proposing a change to § 985.3(i), to correct the current reference to § 982.503(c)(iii). The reference should read § 982.503(c)(3).

Additional Requests for Comment

In addition to the provision-specific questions above, HUD is specifically soliciting comment on the following general questions.

Question 40. HUD is not proposing any changes to the existing 24 CFR 983.261 (Family Right to Move). Is § 983.261 clear? If not, what needs to be clarified?

Question 41. HUD is interested in aligning PBV program requirements with Housing Trust Fund (HTF) program requirements and solicits input from stakeholders regarding areas in which alignment will be particularly beneficial.

Question 42. Under HUD's Rental Assistance Demonstration, PBV assistance may be transferred from one

site to another. Should HUD establish a new regulatory provision in part 983 governing transfers of assistance from one project to another? If so, what factors should HUD take into consideration in developing such a provision?

Question 43. To make progress on eliminating regulatory barriers as reflected in the E.O. 13878, HUD is seeking public comment as it relates to this proposed rule to take productive steps in this policy area, if applicable. Given that the funding to support PBVs is a valuable resource to increase/preserve affordable housing units in communities, what, if any, policies related to PBVs could HUD consider to incent communities to reduce local regulatory barriers (*e.g.,* prohibit impact fees on PBVs, increase by-right zoning, reduce affordable housing permitting) that would effectively decrease the cost of developing and producing housing? In addition, if HUD were to explore the need for data collection in this area, what are some existing PBV-related community level data that HUD could collect to help inform future policy making?

III. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the Executive Order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.''

This proposed rule would update HUD regulations for the HCV and PBV programs to conform to changes made by HOTMA. These changes include alternatives to HUD's housing quality standard inspection requirement, establishing a statutory definition of PHA-owned housing, and other elements of both programs, ranging from owner proposal selection procedures to how participants are selected. In addition to implementing these HOTMA provisions, HUD has included changes that are intended to reduce the burden on public housing agencies, by either modifying requirements or simplifying and clarifying existing regulatory language.

This proposed rule was determined to be a significant regulatory action under section 3(f) of Executive Order 12866 (although not an economically significant regulatory action under the Order). HUD has prepared an initial Regulatory Impact Analysis (RIA) that addresses the costs and benefits of the proposed rule. HUD's RIA is part of the docket file for this rule, which is available for public inspection at *www.regulations.gov.*

Executive Order 13771

Executive Order 13771, entitled ''Reducing Regulation and Controlling Regulatory Costs,'' was issued on January 30, 2017. This proposed rule is considered an E.O. 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's RIA.

Information Collection Requirements

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2577–0226. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule will not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of UMRA.

Environmental Review

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available online at *www.regulations.gov.*

Impact on Small Entities

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

For purposes of this rule, HUD defines a small PHA as a PHA for which the sum of the number of public housing dwelling units administered by the agency and the number of vouchers is 550 or fewer. There are approximately 2,700 such agencies; some are voucher-only, some are combined, some are public housing-only. HUD includes all of these agencies among the number that could be affected by the proposed rule. For those that operate voucher programs, the potential to be affected is evident. For public housing-only agencies, the potential effect of the proposed rule depends on whether the agency removes its public housing from the public housing program via one of the available legal removal tools, then project-bases any tenant protection vouchers awarded in connection with that removal.

This proposed rule revises HUD regulations in certain ways that will reduce the burden on or provide flexibility for all PHAs, owners, and other responsible entities, irrespective of whether they are small entities. For example, the proposed rule leverages Small Area Fair Market Rents to provide PHAs with greater autonomy in setting exception payment standard amounts. It proposes to implement HOTMA's exceptions to the program and project caps under the PBV program, such as authorizing a PHA to project-base 100 percent of the units in any project with 25 units or fewer. It extends from 15 to 20 years the permissible duration of a PBV HAP contract, resulting in less frequent need for extensions, and eliminates the three-year window during which units may be added to an existing contract without a PHA issuing a new request for proposals (RFP). The rule proposes to eliminate extraneous requirements specific to the project-basing of VASH and FUP vouchers, as long as project-basing is done consistent with PBV program rules. It proposes to provide PHAs with greater flexibility in the establishment of utility allowance schedules. It also proposes to implement new discretionary authority for a PHA to enter into a PBV HAP contract with an owner for housing that is newly constructed or recently rehabilitated, as long as PBV program rules are followed, even if construction or rehabilitation commenced prior to the PHA issuing an RFP. HUD estimates that such changes have the potential to generate a range of cost savings but is unable to estimate the number of small entities that would experience cost savings as a result of changes proposed

by this rule, as such savings depend largely on actions that PHAs will take (or not) at their own discretion.

For the reasons presented, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Executive Order.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers applicable for the programs that would be affected by this rule are: 14.871, 14.880, and 14.896.

List of Subjects

24 CFR Part 888

Grant programs-housing and community development, rent subsidies.

24 CFR Part 982

Grant programs-housing and community development, Grant programs-Indians, Indians, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 983

Grant programs-housing and community development, Low and moderate income housing, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 985

Grant programs-housing and community development, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD proposes to amend 24 CFR parts 888, 982, 983, and 985 as follows:

PART 888—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—FAIR MARKET RENTS AND CONTRACT RENT ANNUAL ADJUSTMENT FACTORS

■ 1. The authority for part 888 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535d.

■ 2. In § 888.113, revise the second sentence in paragraph (c)(3) to read as follows:

§ 888.113 Fair market rents for existing housing: Methodology.

* * * * *

(c) * * *

(3) * * * A PHA administering an HCV program in a metropolitan area not subject to the application of Small Area FMRs may use Small Area FMRs after requesting and receiving approval from its local HUD field office.

* * * * *

PART 982—SECTION 8 TENANT-BASED ASSISTANCE: HOUSING CHOICE VOUCHER PROGRAM

■ 3. The authority for part 982 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 4. In § 982.4:

■ a. Revise paragraph (a); and

■ b. In paragraph (b):

■ i. Add in alphabetical order definitions for ''abatement'' and ''authorized voucher units'';

■ ii. Revise the definition of ''Fair market rent (FMR)''; and

■ iii. Add in alphabetical order definitions for ''Independent entity'', ''PHA-owned unit'', ''Request for Tenancy Approval (RFTA)'', ''Section 8 Management Assessment Program (SEMAP)'', ''Small Area Fair Market Rents (SAFMRs)'', ''Tenant-paid utilities'', and ''Withholding''.

The revisions and additions read as follows:

§ 982.4 Definitions.

(a) *Definitions found elsewhere.* (1) The following terms are defined in 24 CFR part 5, subpart A: 1937 Act, covered person, drug, drug-related criminal activity, federally assisted housing, guest, household, HUD, MSA, other person under the tenant's control, public housing, Section 8, and violent criminal activity.

(2) The terms ''adjusted income,'' ''annual income,'' ''extremely low income family,'' ''tenant rent,'' ''total tenant payment,'' ''utility allowance,'' ''utility reimbursement,'' and ''welfare assistance'' are defined in part 5, subpart F of this title. The definitions of ''tenant rent'' and ''utility reimbursement'' in part 5, subpart F of this title do not apply to the HCV program under this part.

(b) * * *

Abatement. Stopping HAP payments to an owner with no potential for retroactive payment.

* * * * *

Authorized voucher units. The number of units for which a PHA is authorized to make assistance payments to owners under the annual contributions contract.

* * * * *

Fair market rent (FMR). The rent, including the cost of utilities (except telephone), as established by HUD for units of varying sizes (by number of bedrooms), that must be paid in the housing market area to rent privately owned, existing, decent, safe and sanitary rental housing of modest (non-luxury) nature with suitable amenities. In the HCV program, the FMR may be established at the ZIP code level (see definition of Small Area Fair Market Rents), metropolitan area level, or non-metropolitan county level.

* * * * *

Independent entity. The entity responsible for performing the functions described at § 982.352(b)(1)(iv)(A) (and at § 982.628(d)(3) under the homeownership option) for PHA-owned units. Such entity may be the unit of general local government or a HUD-approved entity. If the PHA itself is the unit of general local government or an agency of such government, then the next level of general local government (or an agency of such government) may perform such functions without HUD approval. If there is no next level of general local government, then the independent entity must be approved by HUD. HUD-approved independent entities cannot be connected to the PHA legally, financially (except regarding compensation for services performed for PHA-owned units), or in any other manner that could cause the PHA to improperly influence the independent entity.

* * * * *

PHA-owned unit. (i) A dwelling unit in a project that is:

(A) Owned by the PHA (including having a controlling interest in the entity that owns the project);

(B) Owned by an entity wholly controlled by the PHA; or

(C) Owned by a limited liability company or limited partnership in which the PHA (or an entity wholly controlled by the PHA) holds a controlling interest in the managing member or general partner.

(ii) A controlling interest is:

(A) Holding more than 50 percent of the stock of any corporation;

(B) Having the power to appoint more than 50 percent of the members of the board of directors of a non-stock corporation (such as a nonprofit corporation);

(C) Where more than 50 percent of the members of the board of directors of any corporation also serve as directors, officers, or employees of the PHA;

(D) Holding more than 50 percent of all managing member interests in an LLC;

(E) Holding more than 50 percent of all general partner interests in a partnership; or

(F) Equivalent levels of control in other ownership structures.

* * * * *

Request for Tenancy Approval (RFTA). A form (form HUD–52517) that a family submits to a PHA once the family has identified a unit that it wishes to rent using tenant-based voucher assistance.

* * * * *

Section 8 Management Assessment Program (SEMAP). A system used by HUD to measure PHA performance in key Section 8 program areas. See 24 CFR part 985.

* * * * *

Small Area Fair Market Rents (SAFMRs). Small Area FMRs are FMRs established at the U.S. Postal Service ZIP code level. SAFMRs are calculated in accordance with 24 CFR 888.113(a) and (b) for areas meeting the definition in 24 CFR 888.113(d)(2).

* * * * *

Tenant-paid utilities. Utilities and services that are not included in the rent to owner and are the responsibility of the assisted family, regardless of whether the payment goes to the utility company or the owner. The utilities and services are those necessary in the locality to provide housing that complies with the Housing Quality Standards.

* * * * *

Withholding. Stopping HAP payments to an owner while holding them for potential retroactive disbursement.

■ 5. In § 982.54, revise the section heading, amend paragraph (b) by removing ''PHA plan'' and adding in its place ''PHA Plan'', and revise paragraph (d).

The revisions reads as follows:

§ 982.54 Administrative Plan.

* * * * *

(d) The PHA Administrative Plan must cover, at a minimum, the PHA's policies on the following subjects (see § 983.10 for a list of subjects specific to the PBV program that must be included in the Administrative Plan of a PHA that operates a PBV program):

(1) Selection and admission of applicants from the PHA waiting list, including any PHA admission preferences, procedures for removing applicant names from the waiting list, and procedures for closing and reopening the PHA waiting list;

(2) Issuing or denying vouchers, including PHA policy governing the voucher term and any extensions of the voucher term. If the PHA decides to allow extensions of the voucher term, the PHA Administrative Plan must describe how the PHA determines whether to grant extensions and how the PHA determines the length of any extension.

(3) Any special rules for use of available funds when HUD provides funding to the PHA for a special purpose (*e.g.,* desegregation), including funding for specified families or a specified category of families;

(4) Occupancy policies, including:

(i) Definition of what group of persons may qualify as a ''family'';

(ii) Definition of when a family is considered to be ''continuously assisted'';

(iii) Standards for denying admission or terminating assistance based on criminal activity or alcohol abuse in accordance with § 982.553, or other factors in accordance with §§ 982.552, 982.554, and 982.555;

(iv) Policies concerning residency by a foster child or live-in aide, including defining when PHA consent for occupancy by a foster child or live-in aide may be given or denied;

(5) Encouraging participation by owners of suitable units located outside areas of low-income or minority concentration;

(6) Assisting a family that claims that illegal discrimination has prevented the family from leasing a suitable unit;

(7) Providing information about a family to prospective owners;

(8) Disapproval of owners;

(9) Subsidy standards;

(10) Family absence from the dwelling unit;

(11) How to determine who remains in the program if a family breaks up;

(12) Informal review procedures for applicants;

(13) Informal hearing procedures for participants;

(14) Payment standard policies, including:

(i) The process for establishing and revising payment standards, including whether the PHA has voluntarily adopted the use of Small Area Fair Market Rents (SAFMRs);

(ii) A description of how the PHA will administer decreases in the payment standard amount for a family continuing to reside in a unit for which the family is receiving assistance (see § 982.505(d)(3)); and

(iii) If the PHA establishes different payment standard amounts for designated areas within its jurisdiction, including exception areas, the criteria used to determine the designated areas and the payment standard amounts for those designated areas (see § 982.503(a)(2)) (all such areas must be described in the PHA's Administrative Plan or payment standard schedule).

(15) The method of determining that rent to owner is a reasonable rent (initially and during the term of a HAP contract);

(16) Special policies concerning special housing types in the program (*e.g.,* use of shared housing);

(17) Policies concerning payment by a family to the PHA of amounts the family owes the PHA;

(18) Policies concerning interim redeterminations of family income and composition, the frequency of determinations of family income, and income-determination practices, including whether the PHA will accept a family declaration of assets;

(19) Restrictions, if any, on the number of moves by a participant family (see § 982.354(c));

(20) Approval by the Board of Commissioners or other authorized officials to charge the administrative fee reserve;

(21) Procedural guidelines and performance standards for conducting required housing quality standard inspections, including:

(i) The specific life-threatening conditions that will be identified through the PHA's inspections. This list must include the HUD required conditions found in § 982.401(o), as well as any amendments to the definition by HUD, and any life-threatening deficiency adopted by the PHA prior to January 18, 2017.

(ii) For PHAs that adopt the non-life-threatening provision:

(A) The PHA policy on whether the provision will apply to all initial inspections or a portion of initial inspections.

(B) If the provision will be applied to only some inspections, how the units will be selected.

(C) The PHA policy on using withheld HAP funds to repay an owner once the unit is in compliance with Housing Quality Standards.

(iii) For PHAs that adopt the alternative inspection provision:

(A) The PHA policy on how it will apply the provision to initial and biennial inspections.

(B) The specific alternative inspection method used by the PHA.

(C) The specific properties or types of properties where the alternative inspection method will be employed.

(D) The maximum amount of time the PHA will withhold HAP if the owner does not correct the HQS deficiencies within the cure period, and the period of time after which the PHA will terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

(iv) The PHA policy on charging a reinspection fee to owners.

(22) PHA screening of applicants for family behavior or suitability for tenancy;

(23) Whether the PHA will permit a family to submit more than one Request for Tenancy Approval at a time (§ 982.302(b)); and

(24) In the event of insufficient funding, taking into account any cost-savings measures taken by the PHA, a description of the factors the PHA will consider when determining which HAP contracts to terminate first (*e.g.,* prioritization of PBV HAP contracts over tenant-based HAP contracts or prioritization of contracts that serve vulnerable families or individuals).

* * * * *

■ 6. In § 982.301, revise the paragraph (a) subject heading and paragraphs (a)(2) and (4) and (b) and add paragraph (c) to read as follows:

§ 982.301 Information when family is selected.

(a) *Oral briefing.* * * *

(2) The PHA may not discourage the family from choosing to live anywhere in the PHA jurisdiction, or outside the PHA jurisdiction under portability procedures, unless otherwise expressly authorized by statute, regulation, PIH Notice, or court order. The family must be informed of how portability may affect the family's assistance through screening, subsidy standards, payment standards, and any other elements of the portability process that may affect the family's assistance.

* * * * *

(4) In briefing a family that includes any persons with disabilities, the PHA must take appropriate steps to ensure effective communication in accordance with 24 CFR 8.6 and 28 CFR part 35, subpart E.

* * * * *

(b) *Information packet.* When a family is selected to participate in the program, the PHA must give the family a packet that includes information on the following subjects:

(1) The term of the voucher, voucher suspensions, and PHA policy on any extensions of the term. If the PHA allows extensions, the packet must explain how the family can request an extension.

(2) How the PHA determines the amount of the housing assistance payment for a family, including:

(i) How the PHA determines the payment standard for a family; and

(ii) How the PHA determines the total tenant payment for a family.

(3) How the PHA determines the maximum rent for an assisted unit.

(4) Where the family may lease a unit and an explanation of how portability works, including information on how portability may affect the family's assistance through screening, subsidy standards, payment standards, and any other elements of the portability process that may affect the family's assistance.

(5) The HUD-required ''tenancy addendum'' that must be included in the lease.

(6) The form that the family uses to request PHA approval of the assisted tenancy, and an explanation of how to request such approval.

(7) A statement of the PHA policy on providing information about a family to prospective owners.

(8) PHA subsidy standards, including when the PHA will consider granting exceptions to the standards, including when required as a reasonable accommodation for persons with disabilities under Section 504, the Fair Housing Act, or the ADA.

(9) Materials (*e.g.,* brochures) on how to select a unit and any additional information on selecting a unit that HUD provides.

(10) Information on federal, State, and local equal opportunity laws, the contact information for the Section 504 coordinator, a copy of the housing discrimination complaint form, and information on how to request a reasonable accommodation or modification under Section 504, the Fair Housing Act, and the Americans with Disabilities Act.

(11) A list of landlords known to the PHA who may be willing to lease a unit to the family or other resources (*e.g.,* newspapers, organizations, online search tools) known to the PHA that may assist the family in locating a unit. PHAs must ensure that the list of landlords or other resources covers areas outside of poverty or minority concentration.

(12) Notice that if the family includes a person with disabilities, the PHA is subject to the requirement under 24 CFR 8.28(a)(3) that the family may request a current listing of accessible units known to the PHA that may be available and, if necessary, other assistance in locating an available accessible dwelling unit.

(13) Family obligations under the program, including any obligations of a welfare-to-work family.

(14) The advantages of areas that do not have a high concentration of low-income families.

(15) A description of when the PHA is required to give a participant family the opportunity for an informal hearing and how to request a hearing.

(c) *Providing information for persons with limited English proficiency.* The PHA shall take reasonable steps to assure meaningful access by persons with limited English proficiency in accordance with obligations contained in Title VI of the Civil Rights Act of 1964, Executive Order 13166, and HUD's LEP Guidance.

* * * * *

■ 7. In § 982.305, revise paragraphs (a) introductory text, (b)(1) introductory text, and (b)(2)(ii), add paragraph (b)(2)(iii), revise paragraphs (c)(3) and (4), and add paragraph (f) to read as follows:

§ 982.305 PHA approval of assisted tenancy.

(a) *Program requirements.* The PHA may not give approval for the family of the assisted tenancy, or execute a HAP contract, until the PHA has determined that:

* * * * *

(b) * * *

(1) All of the following must be completed before the beginning of the initial term of the lease for a unit:

* * * * *

(2) * * *

(ii) The 15-day clock (under paragraph (b)(2)(i)(A) or (B) of this section) is suspended during any period when the unit is not available for inspection.

(iii) If the PHA has implemented, and the unit is covered by, the alternative inspection option for initial inspections under § 982.406(f), the PHA is not required to inspect the unit, determine whether the unit satisfies the HQS, and notify the family and owner of the determination within the time period described in paragraphs (b)(1)(i) and (ii) of this section. Instead, the PHA must have determined that the unit is covered by the alternative inspection and notified the family and the owner that the alternative inspection option is available in accordance with the time periods described in paragraphs (b)(1)(i)

and (ii). See § 982.406(e) for the PHA initial inspection requirements under the alternative inspection option.

* * * * *

(c) * * *

(3) If the HAP contract is executed within 60 calendar days from the beginning of the lease term, the PHA will pay housing assistance payments after execution of the HAP contract (in accordance with the terms of the HAP contract), to cover the portion of the lease term before execution of the HAP contract (a maximum of 60 days).

(4) Any HAP contract executed after the 60-day period is void, and the PHA may not pay any housing assistance payment to the owner. If there are extenuating circumstances that prevent or prevented the PHA from meeting the 60-day deadline, then the PHA may submit to HUD a request for an extension. The request must include an explanation of the extenuating circumstances and any supporting documentation.

* * * * *

(f) *Initial HQS inspection requirements.* (1) Unless the PHA has implemented, and determined that the unit is covered by, either of the two initial HQS inspection options in paragraphs (f)(2) and (3) of this section, the unit must be inspected by the PHA and pass HQS before:

(i) The PHA may approve the assisted tenancy and execute the HAP contract, and

(ii) The beginning of the initial lease term.

(2) If the PHA has implemented, and determines that the unit is covered by, the non life-threatening deficiencies option at § 982.405(i), the unit must be inspected by the PHA and must have no life-threatening deficiencies as defined under § 982.401(o) before:

(i) The PHA may approve the assisted tenancy and execute the HAP contract, and

(ii) The beginning of the initial lease term.

(3) If the PHA has implemented and determines that the unit is covered by the alternative inspection option at § 982.406(e), then the PHA must determine that the unit was inspected in the previous 24 months by an inspection that meets the requirements of § 982.406 before:

(i) The PHA may approve the assisted tenancy and execute the HAP contract, and

(ii) The beginning of the initial lease term.

(4) If the PHA has implemented and determines that the unit is covered by both the no life-threatening deficiencies option and the alternative inspection option, the unit is subject only to paragraph (f)(3) of this section, not paragraph (f)(2) of this section.

* * * * *

■ 8. In § 982.352, revise paragraphs (a) and (b) to read as follows:

§ 982.352 Eligible housing.

(a) *Ineligible housing.* The following types of housing may not be assisted by a PHA in the tenant-based programs:

(1) A public housing or Indian housing unit;

(2) A unit receiving project-based assistance under section 8 of the 1937 Act (42 U.S.C. 1437f);

(3) Nursing homes, board and care homes, or facilities providing continual psychiatric, medical, or nursing services;

(4) College or other school dormitories;

(5) Units on the grounds of penal, reformatory, medical, mental, and similar public or private institutions; or

(6) A unit occupied by its owner or by a person with any interest in the unit. (For provisions on PHA disapproval of an owner, *see* § 982.306.)

(b) *PHA-owned housing.* (1) PHA-owned units, as defined in § 982.4, may be assisted under the tenant-based program only if all the following conditions are satisfied:

(i) The PHA must inform the family, both orally and in writing, that the family has the right to select any eligible unit available for lease.

(ii) A PHA-owned unit is freely selected by the family, without PHA pressure or steering.

(iii) The unit selected by the family is not ineligible housing.

(iv) During assisted occupancy, the family may not benefit from any form of housing subsidy that is prohibited under paragraph (c) of this section.

(v)(A) The PHA must obtain the services of an independent entity, as defined in § 982.4, to perform the following PHA functions as required under the program rule:

(*1*) To determine rent reasonableness in accordance with § 982.507. The independent entity shall communicate the rent reasonableness determination to the family and the PHA.

(*2*) To assist the family in negotiating the rent to owner in accordance with § 982.506.

(*3*) To inspect the unit for compliance with HQS in accordance with §§ 982.305(a) and 982.405 (except that § 982.405(e) is not applicable). The independent entity shall communicate the results of each such inspection to the family and the PHA.

(B) The PHA may compensate the independent entity from PHA administrative fees (including fees credited to the administrative fee reserve) for the services performed by the independent entity. The PHA may not use other program receipts to compensate the independent entity for such services. The PHA and the independent entity may not charge the family any fee or charge for the services provided by the independent entity.

* * * * *

■ 9. In § 982.401, revise paragraph (a)(3) and add paragraphs (a)(5) and (o) to read as follows:

§ 982.401 Housing quality standards (HQS).

(a) * * *

(3) All program housing must meet the HQS requirements both at commencement of assisted occupancy (§ 982.305(f)), and throughout the assisted tenancy (§ 982.404).

* * * * *

(5) All defects that are not life-threatening conditions defined in paragraph (o) of this section must be remedied within 30 days of the owner's receipt of written notice of the defects or a reasonable longer period that the PHA establishes.

* * * * *

(o) *Life-threatening conditions.* (1) Life-threatening conditions must be cured within 24 hours after written notice of the defects has been provided. Failure to do so may result in termination, suspension, or reduction of housing assistance payments and termination of the HAP contract.

(2) Life-threatening conditions are defined as:

(i) Gas (natural or liquid petroleum) leak or fumes. A life-threatening condition under this standard is one of the following:

(A) A fuel storage vessel, fluid line, valve, or connection that supplies fuel to a HVAC unit is leaking; or

(B) A strong gas odor detected with potential for explosion or fire, or that results in health risk if inhaled.

(ii) Electrical hazards that could result in shock or fire. A life-threatening condition under this standard is one of the following:

(A) A light fixture is readily accessible, is not securely mounted to the ceiling or wall, and electrical connections or wires are exposed;

(B) A light fixture is hanging by its wires;

(C) A light fixture has a missing or broken bulb, and the open socket is readily accessible to the tenant during the day to day use of the unit;

(D) A receptacle (outlet) or switch is missing or broken and electrical connections or wires are exposed;

(E) A receptacle (outlet) or switch has a missing or damaged cover plate and electrical connections or wires are exposed;

(F) An open circuit breaker position is not appropriately blanked off in a panel board, main panel board, or other electrical box that contains circuit breakers or fuses;

(G) A cover is missing from any electrical device box, panel box, switch gear box, control panel, etc., and there are exposed electrical connections;

(H) Any nicks, abrasions, or fraying of the insulation that expose conducting wire;

(I) Exposed bare wires or electrical connections;

(J) Any condition that results in openings in electrical panels or electrical control device enclosures;

(K) Water leaking or ponding near any electrical device; or

(L) Any condition that poses a serious risk of electrocution or fire and poses an immediate life-threatening condition.

(iii) Inoperable or missing smoke detector. A life-threatening condition under this standard is one of the following:

(A) The smoke detector is missing; or

(B) The smoke detector does not function as it should.

(iv) Interior air quality. A life-threatening condition under this standard is one of the following:

(A) The carbon monoxide detector is missing; or

(B) The carbon monoxide detector does not function as it should.

(v) Gas/oil fired water heater or heating, ventilation, or cooling system with missing, damaged, improper, or misaligned chimney or venting. A life-threatening condition under this standard is one of the following:

(A) The chimney or venting system on a fuel fired water heater is misaligned, negatively pitched, or damaged, which may cause improper or dangerous venting of gases;

(B) A gas dryer vent is missing, damaged, or is visually determined to be inoperable, or the dryer exhaust is not vented to the outside;

(C) A fuel fired space heater is not properly vented or lacks available combustion air;

(D) A non-vented space heater is present;

(E) Safety devices on a fuel fired space heater are missing or damaged; or

(F) The chimney or venting system on a fuel fired heating, ventilation, or cooling system is misaligned, negatively pitched, or damaged which may cause improper or dangerous venting of gases.

(vi) Lack of alternative means of exit in case of fire or blocked egress. A life-threatening condition under this standard is one of the following:

(A) Any of the components that affect the function of the fire escape are missing or damaged;

(B) Stored items or other barriers restrict or prevent the use of the fire escape in the event of an emergency; or

(C) The building's emergency exit is blocked or impeded, thus limiting the ability of occupants to exit in a fire or other emergency.

(vii) Other interior hazards. A life-threatening condition under this standard is a fire extinguisher (where required) that is missing, damaged, discharged, overcharged, or expired.

(viii) Deteriorated paint, as defined by 24 CFR 35.110, in a unit built before 1978 that is to be occupied by a family with a child under 6 years of age. This is a life-threatening condition only for the purpose of a condition that would prevent a family from moving into the unit. All lead hazard reduction requirements in 24 CFR part 35, including the timeline for lead hazard reduction procedures, still apply.

(ix) Any other condition identified by the administering PHA as life-threatening in the PHA's administrative plan.

(3) Any other condition subsequently identified by HUD as life-threatening. These additional items will be added through a document published in the **Federal Register** for 30 days of public comment, followed by a final notice announcing any additional life-threatening conditions and the date on which the additions take effect.

■ 10. In § 982.404, revise paragraphs (a), (b)(1) introductory text, and (b)(2) and add paragraphs (c) through (f) to read as follows:

§ 982.404 Maintenance: Owner and family responsibility; PHA remedies.

(a) *Owner obligation.* (1) The owner must maintain the unit in accordance with HQS. A unit is not in compliance with HQS if the PHA or other inspector authorized by the State or local government determines that the unit fails to comply with HQS, the agency or inspector notifies the owner in writing of the failure to comply, and the defects are not remedied within the appropriate timeframe.

(2) If the owner fails to maintain the dwelling unit in accordance with HQS, the PHA must withhold or must abate housing assistance payments and terminate HAP contracts in accordance with this section.

(3) If a defect is life-threatening, the owner must correct the defect within no more than 24 hours after notification. For other defects, the owner must correct the defect within no more than 30 calendar days after notification (or any PHA-approved extension).

(4) In the case of an HQS deficiency that is caused by any member, or guest of the assisted family, the PHA may waive the owner's responsibility to remedy the violation. If the PHA waives the owner's responsibility, then the family must make the repairs in accordance with paragraph (b)(2) of this section. However, the PHA may terminate assistance to a family because of an HQS breach caused by any member or guest of the assisted family.

(b) * * *

(1) The family may be held responsible for a breach of the HQS that is caused by any of the following:

* * * * *

(2) If an HQS breach caused by the family is life threatening, the family must correct the defect within no more than 24 hours after receiving notification. For other family-caused defects, the family must correct the defect within 30 calendar days after notification (or any PHA-approved extension).

* * * * *

(c) *Determination of noncompliance with Housing Quality Standards.* The unit is in noncompliance with Housing Quality Standards if:

(1) The PHA or authorized inspector determines the unit fails to comply based upon an inspection;

(2) The PHA notified the owner in writing of the unit failure; and

(3) The unit failures are not corrected in accordance with the timeframes established in § 982.401(a)(5) and (o).

(d) *PHA remedies for HQS deficiencies identified during regular or interim inspections.* This subsection covers PHA actions when HQS deficiencies are identified as a result of a regular inspection (HQS inspection conducted for a unit under HAP contract at least biennially) or interim inspection (when the PHA inspects the unit at other times as needed, such as when a family or government official notifies the PHA of a deficiency). For PHA HQS enforcement actions for HQS deficiencies under the initial HQS inspection NLT or alternative inspection options, *see* §§ 982.405(i) and 982.406(e), respectively.

(1) A PHA may withhold assistance payments for units that do not meet HQS once the PHA has notified the owner in writing of the deficiencies. If the unit is brought into compliance during the applicable cure period (24 hours for life-threatening deficiencies and 30 days (or other reasonable period established by the PHA) for non-life-threatening deficiencies, the PHA must:

(i) Resume assistance payments; and

(ii) Provide assistance payments to cover the time period for which the assistance payments were withheld.

(2)(i) The PHA must abate the HAP if the owner fails to make the repairs within the applicable cure period (24 hours for life-threatening deficiencies and 30 days (or other reasonable period established by the PHA) for non-life-threatening deficiencies).

(ii) If a PHA abates the assistance payments under this paragraph, the PHA must notify the family and the owner that it is abating payments and that if the unit does not meet HQS within 60 days (or a reasonable longer period established by the PHA) after the determination of noncompliance in accordance with paragraph (c) of this section, the PHA will terminate the HAP contract for the unit, and the family will have to move if the family wishes to receive continued assistance. The PHA must issue the family its voucher and provide the family with any other forms necessary to move to another unit with continued HCV assistance.

(3) An owner may not terminate the tenancy of any family due to the withholding or abatement of assistance under paragraph (a) of this section. During the period that assistance is abated, the family may terminate the tenancy by notifying the owner and the PHA. If the family chooses to terminate the tenancy, the HAP contract will automatically terminate on the effective date of the tenancy termination or the date the family vacates the unit.

(4) If the family did not terminate the tenancy and the owner makes the repairs and the unit complies with HQS within 60 days (or a reasonable longer period established by the PHA) of the notice of abatement, the PHA must recommence payments to the owner. The PHA does not make any payments to the owner for the period of time that the payments were abated.

(5) If the owner fails to make the repairs within 60 days (or a reasonable longer period established by the PHA) of the notice of abatement, the PHA must terminate the HAP contract.

(e) *Relocation due to HQS deficiencies.* (1) The PHA must give any family residing in a unit for which the HAP contract is terminated under paragraph (d)(5) of this section due to a failure to correct HQS deficiencies at least 90 days or a longer period as the PHA determines is reasonably necessary following the termination of the HAP contract to lease a new unit.

(2) If the family is unable to lease a new unit within the period provided by the PHA under paragraph (e)(1) of this section and the PHA owns or operates public housing, the PHA must offer, and, if accepted, provide the family a preference for the first appropriately sized public housing unit that becomes available for occupancy after the time period expires.

(3) PHAs may assist families relocating under this paragraph (e) in finding a new unit, including using up to 2 months of the withheld and abated assistance payments for costs directly associated with relocating to a new unit, including security deposits or reasonable moving costs as determined by the PHA based on their locality. If the family receives security deposit assistance from the PHA for the new unit, the PHA may require the family to remit the security deposit returned by the owner of the new unit at such time that the lease is terminated, up to the amount of the security deposit assistance provided by the PHA for that unit. The PHA must include in its Administrative Plan the policies it will implement for this provision.

(f) *Applicability.* This section is applicable to HAP contracts that were either executed on or renewed after [EFFECTIVE DATE OF FINAL RULE]. For purposes of this paragraph, a HAP contract is renewed if the HAP contract continues beyond the initial term of the lease. For all other HAP contracts, § 982.404 as in effect on [DATE ONE DAY BEFORE EFFECTIVE DATE OF FINAL RULE] remains applicable.

* * * * *

■ 11. Revise § 982.405 to read as follows:

§ 982.405 PHA initial and periodic unit inspection.

(a) *Initial unit inspections.* The PHA must conduct an initial unit inspection, and then inspect the unit at least biennially and at other times as needed during assisted occupancy, to determine if the unit meets HQS. (*See* § 982.305(b)(2) concerning timing of initial inspection by the PHA and § 982.406 concerning the use of alternative inspections in meeting the initial and biennial inspection requirements.)

(b) *Supervisory quality control inspections.* The PHA must conduct supervisory quality control HQS inspections.

(c) *Scheduling inspections.* In scheduling inspections, the PHA must consider complaints and any other information brought to the attention of the PHA.

(d) *PHA notification of owner.* The PHA must notify the owner of defects shown by the inspection.

(e) *Charge to family for inspection.* The PHA may not charge the family for an initial inspection or reinspection of the unit.

(f) *Charge to owner for inspection.* The PHA may not charge the owner for the inspection of the unit prior to the initial term of the lease or for a first inspection during assisted occupancy of the unit. The PHA may establish a reasonable fee to owners for a reinspection if an owner notifies the PHA that a repair has been made or the allotted time for repairs has elapsed and a reinspection reveals that any deficiency cited in the previous inspection that the owner is responsible for repairing pursuant to § 982.404(a) was not corrected. The owner may not pass this fee along to the family. Fees collected under this paragraph (f) will be included in a PHA's administrative fee reserve and may be used only for activities related to the provision of the HCV program.

(g) *Other inspection.* When a participant family or government official notifies the PHA of a potential life-threatening deficiency as defined in § 982.401(o), the PHA must, within 24 hours, both inspect the housing unit and notify the owner if the life-threatening deficiency is confirmed. The owner must then make the repairs within 24 hours of PHA notification. If the reported condition is non-life-threatening, the PHA must, within 15 days, both inspect the unit and notify the owner if the deficiency is confirmed. The owner must then make the repairs within 30 days of notification from the PHA or within any PHA-approved extension. In the event of extraordinary circumstances, such as if a unit is within a presidentially declared disaster area, HUD may waive the 24-hour or the 15-day inspection requirement until such time as an inspection is feasible.

(h) *Verification methods.* When a PHA must verify correction of a deficiency, the PHA may use verification methods other than another on-site inspection. The PHA may establish different verification methods for initial and subsequent inspections or for different HQS deficiencies. Upon either an inspection for initial occupancy or a reinspection, the PHA may accept photographic evidence or other reliable evidence from the owner to verify that a defect has been corrected.

(i) *Initial HQS inspection option: No life-threatening deficiencies.* (1) A PHA may elect to approve an assisted tenancy, execute the HAP contract, and begin making assistance payments for a unit that failed the initial HQS inspection, provided that the unit has no life-threatening conditions as defined in § 982.401(o). A PHA that implements

this option (NLT option) may apply the option to all the PHA's initial inspections or may limit the use of the option to certain units. The PHA's Administrative Plan must specify the circumstances under which the PHA will exercise the NLT option. If the PHA has established, and the unit is covered by, both the NLT option and the alternative inspections option for the initial HQS inspection, *see* § 982.406(f).

(2) The PHA must notify the owner and the family if the NLT option is available for the unit selected by the family. After completing the inspection and determining there are no life-threatening deficiencies, the PHA provides both the owner and the family with a list of all the non–life threatening deficiencies identified by the initial HQS inspection and, should the owner not complete the repairs within 30 days, the maximum amount of time the PHA will withhold HAP before abating assistance. The PHA must also inform the family that if the family accepts the unit and the owner fails to make the repairs within the cure period, which may not exceed 180 days from the effective date of the HAP contract, the PHA will terminate the HAP contract, and the family will have to move to another unit in order to receive voucher assistance. The family may choose to decline the unit based on the deficiencies and continue its housing search.

(3) If the family decides to lease the unit, the PHA and the owner execute the HAP contract, and the family enters into the assisted lease with the owner. The PHA commences making assistance payments to the owner.

(4) The owner must correct the deficiencies within 30 days from the effective date of the HAP contract. If the owner fails to correct the deficiencies within the 30-day cure period, the PHA must withhold the housing assistance payments until the owner makes the repairs and the PHA verifies the correction. Once the deficiencies are corrected, the PHA may use the withheld housing assistance payments to make payments for the period that payments were withheld.

(5) A PHA relying on the non life-threatening inspection provision must identify in the PHA Administrative Plan all the optional policies identified in § 982.54(d)(21).

■ 12. In § 982.406, revise paragraphs (a), (b), (c)(1), and (c)(2) introductory text, redesignate existing paragraph (e) as paragraph (g), and add new paragraph (e) and paragraph (f).

The revisions and additions read as follows:

§ 982.406 Use of alternative inspections.

(a) *In general.* (1) A PHA may comply with the initial inspection requirements in 982.405(a) by relying on an alternative inspection (*i.e.,* an inspection conducted for another housing program) only if the PHA is able to obtain the results of the alternative inspection. The PHA may implement the use of alternative inspections for both initial and biennial inspections or may limit the use of alternative inspections to either initial or biennial inspections. The PHA may limit the use of alternative inspections to certain units, as provided in the PHA's Administrative Plan.

(2) If an alternative inspection method employs sampling, then a PHA may rely on such alternative inspection method to comply with the requirements in § 982.405(a) only if HCV units are included in the population of units forming the basis of the sample.

(3) Units in properties that are mixed-finance properties assisted with project-based vouchers may be inspected at least triennially pursuant to 24 CFR 983.103(h).

(b) *Administrative Plan.* A PHA relying on an alternative inspection to fulfill the requirements in § 982.405(a) must identify in the PHA Administrative Plan all the optional policies identified in § 982.54(d)(21).

(c) * * *

(1) A PHA may rely upon inspections of housing assisted under the HOME Investment Partnerships (HOME) program or housing financed using Low-Income Housing Tax Credits (LIHTCs), or inspections performed by HUD.

(2) If a PHA wishes to rely on an inspection method other than a method listed in paragraph (c)(1) of this section, then, prior to amending its Administrative Plan, the PHA must submit to the Real Estate Assessment Center (REAC) a copy of the inspection method it wishes to use, along with its analysis of the inspection method that shows that the method ''provides the same or greater protection to occupants of dwelling units'' as would HQS.

* * * * *

(e) *Initial inspections using the alternative inspection option.* (1) The PHA may approve the tenancy, allow the family to enter into the lease agreement, and execute the HAP contract for a unit that has been inspected in the previous 24 months where the alternative inspection meets the requirements of this section. If the PHA has established and the unit is covered by both the NLT option under § 982.405(i) and the alternative inspections option for the initial HQS inspection, see paragraph (f) of this section.

(2) The PHA notifies the owner and the family that the alternative inspection option is available for the unit selected by the family. The PHA must provide the family with the PHA list of HQS deficiencies that are considered life-threatening under § 982.401(o) as part of this notification. If the owner and family agree to the use of this option, the PHA approves the assisted tenancy, allows the family to enter into the lease agreement with the owner, and executes the HAP contract on the basis of the alternative inspection.

(3) The PHA must conduct an HQS inspection within 30 days of receiving the Request for Tenancy Approval. If the family reports a deficiency to the PHA prior to the PHA's HQS inspection, the PHA must inspect the unit within the time period required under § 982.404(g) or within 30 days of the effective date of the HAP contract, whichever time period ends first.

(4) The PHA must enter into the HAP contract with the owner before conducting the HQS inspection. The PHA may not make housing assistance payments to the owner until the PHA has inspected the unit.

(5) The PHA may commence housing assistance payments to the owner and make housing assistance payments retroactive to the effective date of the HAP contract only after the unit passes the PHA's HQS inspection. If the unit does not pass the HQS inspection, the PHA may not make housing assistance payments to the owner until all the deficiencies have been corrected. If a defect is life threatening, the owner must correct the defect within 24 hours of notification from the PHA. For other defects, the owner must correct the defect within no more than 30 calendar days (or any PHA-approved extension) of notification from the PHA. If the owner corrects the deficiencies within the required cure period, the PHA makes the housing assistance payments retroactive to the effective date of the HAP contract.

(6) The PHA establishes in the Administrative Plan:

(i) The maximum amount of time it will withhold payments if the owner does not correct the deficiencies within the required cure period before abating payments; and

(ii) The date by which the PHA will terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

(f) *Initial inspection: Using the alternative inspection option in combination with the no life-threatening deficiencies option.* (1) The PHA notifies the owner and the family that both the alternative inspection option and the NLT option are available for the unit selected by the family. The PHA must provide the family the list of HQS deficiencies that are considered life-threatening under § 982.401(o) as part of this notification. If the owner and family agree to the use of both options, the PHA approves the assisted tenancy, allows the family to enter into the lease agreement with the owner, and executes the HAP contract on the basis of the alternative inspection.

(2) The PHA must conduct an HQS inspection within 30 days after the family and owner submit a complete Request for Tenancy Approval. If the family reports a deficiency to the PHA prior to the PHA's HQS inspection, the PHA must inspect the unit within the time period required under § 982.404(g) or within 30 days of the effective date of the HAP contract, whichever time period ends first.

(3) The PHA must enter into the HAP contract with the owner before conducting the HQS inspection. The PHA may not make housing assistance payments to the owner until the PHA has inspected the unit. If the unit passes the HQS inspection, the PHA commences making housing assistance payments to the owner and makes payments retroactive to the effective date of the HAP contract.

(4) If the unit fails the PHA's HQS inspection but has no life-threatening deficiencies, the PHA commences making housing assistance payments, which are made retroactive to the effective date of the HAP contract. The owner must correct the deficiencies within 30 days from the effective date of the HAP contract. If the owner fails to correct the deficiencies within the 30-day cure period, the PHA must withhold the housing assistance payments until the owner makes the repairs and the PHA verifies the correction. Once the unit is in compliance with HQS, the PHA may use the withheld housing assistance payments to make payments for the period that payments were withheld.

(5) If the unit does not pass the HQS inspection and has life-threatening deficiencies, the PHA may not commence making housing assistance payments to the owner until all the deficiencies have been corrected. The owner must correct all life-threatening deficiencies within 24 hours of notification from the PHA. For other defects, the owner must correct the defect within 30 days (or any PHA-approved extension) of notification from the PHA. If the owner corrects the deficiencies within the required cure period, the PHA makes the housing assistance payments retroactive to the effective date of the HAP contract.

(6) The PHA establishes in the Administrative Plan:

(i) The maximum amount of time it will withhold payments if the owner fails to correct the deficiencies within the required cure period before abating payments; and

(ii) The date by which the PHA will terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

* * * * *

■ 13. In § 982.451, add subject headings to paragraphs (a) and (b), revise paragraphs (b)(4)(i) introductory text and (b)(5)(iii), and add paragraph (c) to read as follows:

§ 982.451 Housing assistance payments contract.

(a) *Form and term.*

* * * * *

(b) *Housing assistance payment amount.*

* * * * *

(4)(i) The part of the rent to owner that is paid by the tenant may not be more than:

* * * * *

(5) * * *

(iii) The PHA may use only the following sources to pay a late payment penalty from program receipts under the consolidated ACC: Administrative fee income for the program or the administrative fee reserve for the program. The PHA may not use other program receipts for this purpose.

(c) *PHA-owned units.* If the PHA-owned unit is not owned by a separate legal entity from the PHA (*e.g.,* an entity wholly controlled by the PHA or a limited liability company or limited partnership owned by the PHA), the PHA must choose one of the two following options for the PHA-owned unit, because the PHA cannot execute a HAP contract with itself.

(1) *HAP contract execution.* (i) Prior to execution of a HAP contract, the PHA must establish a separate legal entity to serve as the owner. The separate legal entity must have the legal capacity to lease units and must be one of the following:

(A) A non-profit affiliate or instrumentality of the PHA;

(B) A limited liability corporation;

(C) A limited partnership;

(D) A corporation; or

(E) Any other legally acceptable entity recognized under State law.

(ii) In cases where the independent entity, as defined in § 982.4, is required to notify the PHA of a determination, the independent entity may notify the PHA or the separate legal entity, or both.

(2) *PHA certification option.* (i) Instead of executing the HAP contract for the PHA-owned unit, the PHA signs the HUD-prescribed certification covering the PHA-owned unit. By signing the HUD certification, the PHA certifies that it will fulfill all the required program responsibilities of the private owner under the HAP contract, and that it will also fulfill all of the program responsibilities required of the PHA for the PHA-owned unit.

(ii) The PHA executed certification serves as the equivalent of the HAP contract for the PHA-owned unit.

(iii) The PHA must obtain the services of an independent entity to perform the required PHA functions in accordance with § 982.352(b)(1)(v) before signing the certification.

(iv) The PHA may not use the PHA-owned certification if the PHA-owned unit is owned by a separate legal entity from the PHA (*e.g.,* an entity wholly controlled by the PHA or a limited liability corporation or limited partnership controlled by the PHA).

■ 14. Revise § 982.503 to read as follows:

§ 982.503 Payment standard areas, schedule, and amounts.

(a) *Payment standard areas.* (1) Annually, HUD publishes fair market rents (FMRs) for Small Area FMR areas (U.S. Postal Service ZIP code areas within designated metropolitan areas), metropolitan areas, and nonmetropolitan counties (*see* 24 CFR 888.113). Within each of these FMR areas, the applicable FMR is:

(i) The HUD-published Small Area FMR for:

(A) Any metropolitan area designated as a Small Area FMR area by HUD in accordance with 24 CFR 888.113(c)(1).

(B) Any area where a PHA has notified HUD that the PHA will voluntarily use SAFMRs in accordance with 24 CFR 888.113(c)(3).

(ii) The HUD-published metropolitan FMR for any other metropolitan area.

(iii) The HUD-published FMR for any non-metropolitan county.

(2) The PHA must adopt a payment standard schedule that establishes voucher payment standard amounts for each FMR area in the PHA jurisdiction. These payment standard amounts are used to calculate the monthly housing assistance payment for a family (§ 982.505).

(3) The PHA may designate payment standard areas within each FMR area and establish payment standard amounts for such designated areas. If the PHA designates payment standard areas, then it must include in its Administrative Plan the criteria used to determine the designated areas and the payment standard amounts for those areas.

(i) The PHA may designate payment standard areas within which payment standards will be established according to paragraph (c) (basic range) or paragraph (d) (exception payment standard), of this section.

(ii) A PHA-designated payment standard area may be no smaller than a census tract block group.

(b) *Payment standard schedule.* For each payment standard area, the PHA must establish a payment standard amount for each unit size, measured by number of bedrooms (zero-bedroom, one-bedroom, and so on). These payment standard amounts comprise the PHA's payment standard schedule.

(c) *Basic range payment standard amounts.* A basic range payment standard amount is a dollar amount that is equivalent to any amount in the range from 90 percent up to and including 110 percent of the published FMR for a unit size.

(1) The PHA may establish a basic payment standard amount without HUD approval.

(2) The PHA's basic range payment standard amount for each unit size may be based on the same percentage of the published FMR (*i.e.,* all payment standard amounts may be set at 100 percent of the FMR), or the PHA may establish different payment standard amounts for different unit sizes (for example, 90 percent for efficiencies, 100 percent for 1-bedroom units, 110 percent for larger units).

(3) The PHA must revise its payment standard amounts and schedule no later than 3 months following the effective date of the published FMR if revisions are necessary to stay within the basic range.

(d) *Exception payment standard amounts.* An exception payment standard amount is a dollar amount that exceeds 110 percent of the published FMR.

(1) The PHA may establish exception payment standard amounts for all units, or for units of a particular size, in a designated part of the FMR area (called an ''exception area''). The exception area must meet the minimum area requirement at § 982.503(a)(3)(ii).

(2) A PHA that is not in a designated Small Area FMR area or has not opted voluntarily to implement Small Area FMRs under 24 CFR 888.113(c)(3) may establish exception payment standards for a ZIP code area that exceed the basic range for the metropolitan area FMR as long as the amounts established by the PHA do not exceed 110 percent of the HUD published SAFMR for the applicable ZIP code. The exception payment standard must apply to the entire ZIP code area. If an exception area crosses one or more FMR boundaries, then the maximum exception payment standard amount that a PHA may adopt for the exception area without HUD approval is 110 percent of the ZIP code area with the lowest SAFMR amount.

(3) In all other cases, the PHA must request approval from HUD to establish an exception payment standard amount for an exception area that exceeds 110 percent of the applicable FMR. In its request to HUD, the PHA must provide rental market data demonstrating that the requested exception payment standard amount is needed in order for families to access rental units in the exception area. Once HUD has approved the exception payment standard for the requesting PHA, any other PHA with jurisdiction in the HUD approved exception payment standard area may also use the exception payment standard amount.

(4) If required as a reasonable accommodation in accordance with 24 CFR part 8 for a person with a disability, the PHA may establish, without HUD approval, an exception payment standard amount that does not exceed 120 percent of the applicable FMR. A PHA may establish a payment standard greater than 120 percent of the applicable FMR as a reasonable accommodation for a person with a disability in accordance with 24 CFR part 8, after requesting and receiving HUD approval.

(e) *Payment standard amount below 90 percent of the applicable FMR.* (1) Without HUD approval, the PHA may establish a payment standard amount that is not lower than 90 percent of the Small Area FMR for the relevant ZIP code area in its jurisdiction that is currently under a metropolitan FMR.

(2) In cases other than the circumstance described in paragraph (e)(1) of this section, a PHA that wishes to establish a payment standard amount that is below the basic range must obtain HUD approval. In determining whether to approve the PHA request, HUD will consider such factors as whether approval of the request is necessary to prevent the termination of program participants or increase the number of families the PHA may assist.

(f) *Success rate payment standard amounts.* In order to increase the number of voucher holders who become participants, HUD may approve requests from PHAs whose FMRs are computed at the 40th percentile rent to establish higher, success rate payment standard amounts. A success rate payment standard amount is defined as any amount from 90 percent up to and including 110 percent of the 50th percentile rent, calculated in accordance with the methodology described in 24 CFR 888.113.

(1) A PHA may obtain HUD Field Office approval of success rate payment standard amounts provided the PHA demonstrates to HUD that it meets the following criteria:

(i) Fewer than 75 percent of the families to whom the PHA issued rental vouchers during the most recent 6-month period for which there is success rate data available have become participants in the voucher program;

(ii) The PHA has established payment standard amounts for all unit sizes in the entire PHA jurisdiction within the FMR area at 110 percent of the published FMR for at least the 6-month period referenced in paragraph (f)(1)(i) of this section and up to the time the request is made to HUD; and

(iii) The PHA has a policy of granting automatic extensions of voucher terms to at least 90 days to provide a family who has made sustained efforts to locate suitable housing with additional search time.

(2) In determining whether to approve the PHA request to establish success rate payment standard amounts, HUD will consider whether the PHA has a SEMAP overall performance rating of ''troubled.'' If a PHA does not yet have a SEMAP rating, HUD will consider the PHA's SEMAP certification.

(3) HUD approval of success rate payment standard amounts shall be for all unit sizes in the FMR area. A PHA may opt to establish a success rate payment standard amount for one or more unit sizes in all or a designated part of the PHA jurisdiction within the FMR area.

(g) *Payment standard protection for PHAs that meet deconcentration objectives.* This paragraph applies only to a PHA with jurisdiction in an FMR area where the FMR had previously been set at the 50th percentile rent to provide a broad range of housing opportunities throughout a metropolitan area, pursuant to 24 CFR 888.113(i)(3), but is now set at the 40th percentile rent.

(1) Such a PHA may obtain HUD Field Office approval of a payment standard amount based on the 50th percentile

rent if the PHA scored the maximum number of points on the deconcentration bonus indicator in § 985.3(h) in the prior year, or in two of the last three years.

(2) HUD approval of payment standard amounts based on the 50th percentile rent shall be for all unit sizes in the FMR area that had previously been set at the 50th percentile rent pursuant to 24 CFR 888.113(i)(3). A PHA may opt to establish a payment standard amount based on the 50th percentile rent for one or more unit sizes in all or a designated part of the PHA jurisdiction within the FMR area.

(h) *HUD review of PHA payment standard schedules.* (1) HUD will monitor rent burdens of families assisted in a PHA's voucher program. HUD will review the PHA's payment standard for a particular unit size if HUD finds that 40 percent or more of such families occupying units of that unit size currently pay more than 30 percent of adjusted monthly income as the family share. Such determination may be based on the most recent examinations of family income.

(2) After such review, HUD may, at its discretion, require the PHA to modify payment standard amounts for any unit size on the PHA payment standard schedule. HUD may require the PHA to establish an increased payment standard amount within the basic range.

■ 15. In § 982.505, revise paragraphs (c)(3) through (5) and remove paragraph (d).

The revisions read as follows:

§ 982.505 How to calculate housing assistance payment.

* * * * *

(c) * * *

(3) Decrease in the payment standard amount while the family remains assisted in the same unit. The PHA may choose not to reduce the payment standard amount used to calculate the subsidy for a family for as long as the family continues to reside in the unit for which the family is receiving assistance.

(i) If the PHA chooses to reduce the payment standard amount used to calculate such a family's subsidy in accordance with its Administrative Plan, then the initial reduction to the family's payment standard amount may not be applied any earlier than two years following the effective date of the decrease in the payment standard, and then only if the family has received the notice required under paragraph (c)(3)(iii) of this section.

(ii) The PHA may choose to reduce the payment standard amount for the family to the current payment standard amount in effect on the PHA voucher payment standard schedule, or it may reduce the payment standard amount to an amount that is higher than the normally applicable payment standard amount on the PHA voucher payment standard schedule. After an initial reduction, the PHA may further reduce the payment standard amount for the family during the time the family resides in the unit, provided any subsequent reductions continue to result in a payment standard amount that meets or exceeds the normally applicable payment standard amount on the PHA voucher payment standard schedule.

(iii) The PHA must provide the family with at least 12 months' written notice of any reduction in the payment standard amount that will affect the family if the family remains in place. In the written notice, the PHA must state the new payment standard amount, explain that the family's new payment standard amount will be the greater of the amount listed in the current written notice or the new amount (if any) on the PHA's payment standard schedule at the end of the 12-month period, and make clear where the family will find the PHA's payment standard schedule (*i.e.,* online).

(iv) The PHA must administer decreases in the payment standard amount for the family in accordance with the PHA policy as described in the PHA Administrative Plan. The PHA may establish different policies for different designated areas within its jurisdiction (*e.g.,* for different ZIP code areas), but the PHA administrative policy on decreases to payment standard amounts must apply to all families under HAP contract at the time of the effective date of a decrease in the payment standard amount within a designated area.

(4) If the payment standard amount is increased during the term of the HAP contract, the PHA must use the increased payment standard amount to calculate the monthly housing assistance payment for the family beginning no later than the earliest of:

(i) The effective date of an increase in the gross rent that would result in an increase in the family share;

(ii) The family's first regular reexamination; or

(iii) One year following the effective date of the increase in the payment standard amount.

(5) Irrespective of any increase or decrease in the payment standard amount, if the family unit size increases or decreases during the HAP contract term, the new family unit size must be used to determine the payment standard amount for the family beginning at the family's first regular reexamination following the change in family unit size.

■ 16. In § 982.517, revise paragraphs (a)(2), (b), and (e) to read as follows:

§ 982.517 Utility allowance schedule.

(a) * * *

(2) At HUD's request, the PHA must provide the utility allowance schedule and any information or procedures used in preparation of the schedule.

(b) *How allowances are determined.* (1)(i) A PHA's utility allowance schedule, and the utility allowance for an individual family, must include the utilities and services that are necessary in the locality to provide housing that complies with the Housing Quality Standards.

(ii) In the utility allowance schedule, the PHA must classify utilities and other housing services according to the following general categories: Space heating; air conditioning; cooking; water heating; water; sewer; trash collection (disposal of waste and refuse); other electric; refrigerator (cost of tenant-supplied refrigerator); range (cost of tenant-supplied range); and other specified housing services.

(iii) The PHA must provide a utility allowance for tenant-paid air-conditioning costs if the majority of housing units in the market provide centrally air-conditioned units or there is appropriate wiring for tenant-installed air conditioners.

(iv) The PHA may not provide any allowance for non-essential utility costs, such as costs of cable, satellite television, or wireless internet.

(2)(i) The PHA must maintain an area-wide utility allowance schedule. The area-wide utility allowance schedule must be determined based on the typical cost of utilities and services paid by energy-conservative households that occupy housing of similar size and type in the same locality. In developing the schedule, the PHA must use normal patterns of consumption for the community as a whole and current utility rates.

(ii) The PHA may maintain an area-wide, energy-efficient utility allowance schedule to be used for units that are in a building that meets LEED or Energy Star or other Energy Savings Design standards included in HUD's Utility Schedule Model. HUD may subsequently identify additional Energy Savings Design standards, which will be modified or added through a document published in the **Federal Register** for 30 days of public comment, followed by a final document announcing the modified Energy Savings Design standards and the date on which the modifications take effect. The energy-

efficient utility allowance schedule is to be maintained in addition to, not in place of, the area-wide utility allowance schedule described in paragraph (b)(2)(i) of this section, unless all units within a PHA's jurisdiction meet one or more of the required standards.

(iii) The PHA may base its utility allowance payments on actual flat fees charged by an owner for utilities that are billed directly by the owner, but only if the flat fee charged by the owner is less than the PHA's applicable utility allowance for the utilities covered by the fee. If an owner charges a flat fee for only some of the utilities, then the PHA must pay a separate allowance for any tenant-paid utilities that are not covered in the flat fee.

(iv) The PHA must state its policy for utility allowance payments in its Administrative Plan and apply it consistently to all similarly situated households.

* * * * *

(e) *Higher utility allowance as reasonable accommodation for a person with disabilities.* On request from a family that includes a person with disabilities, the PHA must approve a utility allowance which is higher than the applicable amount on the utility allowance schedule if a higher utility allowance is needed as a reasonable accommodation under 24 CFR part 8, the Fair Housing Act and 24 CFR part 100, or Titles II or III of the Americans with Disabilities Act and 28 CFR parts 35 and 36, to make the program accessible to and usable by the family member with a disability.

* * * * *

■ 17. Revise § 982.623 to read as follows:

§ 982.623 Manufactured home space rental: Housing assistance payment.

(a) *Amount of monthly housing assistance payment.* The monthly housing assistance payment is calculated as the lower of:

(1) The PHA payment standard, determined in accordance with § 982.503 minus the total tenant payment; or

(2) The family's eligible housing expenses minus the total tenant payment.

(b) *Eligible housing expenses.* The family's eligible housing expenses are the total of:

(1) The rent charged by the owner for the manufactured home space.

(2) Charges for the maintenance and management the space owner must provide under the lease.

(3) The monthly payments made by the family to amortize the cost of purchasing the manufactured home established at the time of application to a lender for financing the purchase of the manufactured home if monthly payments are still being made, including any required insurance and property taxes included in the loan payment to the lender.

(i) Any increase in debt service or term due to refinancing after purchase of the home may not be included in the amortization cost.

(ii) Debt service for installation charges incurred by a family may be included in the monthly amortization payments. Installation charges incurred before the family became an assisted family may be included in the amortization cost if monthly payments are still being made to amortize the charges.

(4) The applicable allowances for tenant-paid utilities, as determined under §§ 982.517 and 982.624.

(c) *Distribution of housing assistance payment.* In general, the monthly housing assistance payment is distributed as follows:

(1) The PHA pays the owner of the space the lesser of the housing assistance payment or the portion of the monthly rent due to the owner. The portion of the monthly rent due to the owner is the total of:

(i) The actual rent charged by the owner for the manufactured home space; and

(ii) Charges for the maintenance and management the space owner must provide under the lease.

(2) If the housing assistance payment exceeds the portion of the monthly rent due to the owner, the PHA may pay the balance of the housing assistance payment to the family. Alternatively, the PHA may pay the balance to the lender or utility company, in an amount no greater than the amount due for the month to each, respectively, subject to the lender's or utility company's willingness to accept the PHA's payment on behalf of the family. If the PHA elects to pay the lender or the utility company directly, the PHA must notify the family of the amount paid to the lender or the utility company and must pay any remaining balance directly to the family.

(d) *PHA option: Single housing assistance payment to the family.* (1) If the owner of the manufactured home space agrees, the PHA may make the entire housing assistance payment to the family, and the family shall be responsible for paying the owner directly for the full amount of rent of the manufactured home space due to the owner, including owner maintenance and management charges. If the PHA exercises this option, the PHA may not make any payments directly to the lender or utility company.

(2) The PHA and owner of the manufactured home space must still execute the HAP contract, and the owner is still responsible for fulfilling all of the owner obligations under the HAP contract, including but not limited to complying with Housing Quality Standards and rent reasonableness requirements. The owner's acceptance of the family's monthly rent payment during the term of the HAP contract serves as the owner's certification to the reasonableness of the rent charged for the space in accordance with § 982.622(b)(4).

(3) If the family and owner agree to the single housing assistance payment, the owner is responsible for collecting the full amount of the rent and other charges under the lease directly from the family. The PHA is not responsible for any amounts owed by the family to the owner and may not pay any claim by the owner against the family.

■ 18. In § 982.625, revise paragraphs (a), (b), (f), and add a paragraph (g) subject heading to read as follows:

§ 982.625 Homeownership option: General.

(a) *Applicability.* The homeownership option is used to assist a family residing in a home purchased and owned by one or more members of the family.

(b) *Family status.* A family assisted under the homeownership option may be a newly admitted or existing participant in the program.

* * * * *

(f) *Live-in aide.* The PHA must approve a live-in aide if needed as a reasonable accommodation so that the program is readily accessible to and useable by persons with disabilities in accordance with parts 8 and 100 of this title. (See § 982.316 concerning occupancy by a live-in aide.)

(g) *PHA capacity.* * * *

* * * * *

■ 19. In § 982.628, revise paragraphs (d) introductory text and (d)(3) introductory text to read as follows:

§ 982.628 Homeownership option: Eligible units.

* * * * *

(d) *PHA-owned units.* A family may purchase a PHA-owned unit, as defined in § 982.4, with homeownership assistance only if all of the following conditions are satisfied:

* * *

(3) The PHA must obtain the services of an independent entity, as defined in § 982.4 and in accordance with

§ 982.352(b)(1)(iv)(B), to perform the following PHA functions:

* * * * *

■ 20. In § 982.630, revise paragraph (a), add a paragraph (b) subject heading, and revise paragraphs (c) through (e) to read as follows:

§ 982.630 Homeownership option: Homeownership counseling.

(a) *Pre-assistance counseling.* Before commencement of homeownership assistance for a family, the family must attend and satisfactorily complete the pre-assistance homeownership and housing counseling program required by the PHA (pre-assistance counseling).

(b) *Counseling topics.* * * *

* * * * *

(c) *Local circumstances.* The PHA may adapt the subjects covered in pre-assistance counseling (as listed in paragraph (b) of this section) to local circumstances and the needs of individual families.

(d) *Additional counseling.* The PHA may also offer additional counseling after commencement of homeownership assistance (ongoing counseling). If the PHA offers a program of ongoing counseling for participants in the homeownership option, the PHA shall have discretion to determine whether the family is required to participate in the ongoing counseling.

(e) *HUD-certified housing counselor.* Any homeownership counseling provided to families in connection with this section must be conducted by a HUD certified housing counselor working for an agency approved to participate in HUD's Housing Counseling Program.

■ 21. In § 982.635, revise paragraphs (b)(3), (c)(2)(vii), and (c)(3)(vii) to read as follows:

§ 982.635 Homeownership option: Amount and distribution of monthly homeownership assistance payment.

* * * * *

(b) * * *

(3) The payment standard amount may not be lower than what the payment standard amount was at commencement of homeownership assistance.

* * * * *

(c) * * *

(2) * * *

(vii) Principal and interest on mortgage debt incurred to finance costs for major repairs, replacements or improvements for the home. If a member of the family is a person with disabilities, such debt may include debt incurred by the family to finance costs needed to make the home accessible for such person, if the PHA determines that allowance of such costs as homeownership expenses is needed as a reasonable accommodation so that the homeownership option is readily accessible to and usable by such person, in accordance with parts 8 and 100 of this title; and

* * * * *

(3) * * *

(vii) Principal and interest on debt incurred to finance major repairs, replacements or improvements for the home. If a member of the family is a person with disabilities, such debt may include debt incurred by the family to finance costs needed to make the home accessible for such person, if the PHA determines that allowance of such costs as homeownership expenses is needed as a reasonable accommodation so that the homeownership option is readily accessible to and usable by such person, in accordance with 24 CFR parts 8 and 100.

* * * * *

■ 22. In § 982.641, revise paragraph (f)(3) to read as follows:

§ 982.641 Homeownership option: Applicability of other requirements.

* * * * *

(f) * * *

(3) Section 982.517 (Utility allowance schedule), except that § 982.517(d) does not apply because the utility allowance is always based on the size of the home bought by the family with homeownership assistance.

* * * * *

PART 983—PROJECT-BASED VOUCHER (PBV) PROGRAM

■ 23. The authority for part 983 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 24. In part 983, revise all references to ''structure'' to read ''project''.

■ 25. In § 983.2, revise paragraphs (c)(1), (c)(2)(iii), and (c)(6)(iii) to read as follows:

§ 983.2 When the tenant-based voucher rule (24 CFR part 982) applies.

* * * * *

(c) * * *

(1) In subpart E of part 982: §§ 982.201(e), 982.202(b)(2), and 982.204(d);

(2) * * *

(iii) Section 982.316 (live-in aide) applies to the PBV program;

* * * * *

(6) * * *

(iii) Section 982.517 (utility allowance schedule), except that § 982.517(d) does not apply.

* * * * *

■ 26. Revise § 983.3 to read as follows:

§ 983.3 PBV definitions.

(a) *General.* This section defines PBV terms used in this part. For administrative ease and convenience, those part 982 terms that are also used in this part are included in this section. In limited cases, where there is a slight PBV distinction to the part 982 term, an annotation is made in this section.

(b) *Definitions.*

1937 Act. The United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*).

Abatement. See 24 CFR 982.4.

Activities of daily living. Eating, bathing, grooming, dressing, and home management activities.

Administrative fee. See 24 CFR 982.4.

Administrative fee reserve. See 24 CFR 982.4.

Administrative Plan. See 24 CFR 982.4.

Admission. The point when the family becomes a participant in the PHA's tenant-based or project-based voucher program. If the family is not already a tenant-based voucher participant, the date of admission for the project-based voucher program is the first day of the initial lease term (the commencement of the assisted tenancy) in the PBV unit. After admission, and so long as the family is continuously assisted with tenant-based or project-based voucher assistance from the PHA, a shift from tenant-based or project-based assistance to the other form of voucher assistance is not a new admission.

Agreement to enter into HAP contract (Agreement). A written contract between the PHA and the owner in the form prescribed by HUD. The Agreement defines requirements for development activity undertaken for units to be assisted under this section. When development is completed by the owner in accordance with the Agreement, the PHA enters into a HAP contract with the owner. The Agreement is not used for existing housing assisted under this section.

Applicant. A family that has applied for admission to the PBV program but is not yet a program participant.

Area where vouchers are difficult to use. An area where a voucher is difficult to use is:

(i) A ZIP code area where the rental vacancy rate is less than 4 percent; or

(ii) A ZIP code area where 90 percent of the Small Area FMR is more than 110 percent of the metropolitan area FMR.

Assisted living facility. A residence facility (including a facility located in a larger multifamily property) that meets all the following criteria:

(i) The facility is licensed and regulated as an assisted living facility by

the state, municipality, or other political subdivision;

(ii) The facility makes available supportive services to assist residents in carrying out activities of daily living; and

(iii) The facility provides separate dwelling units for residents and includes common rooms and other facilities appropriate and available to provide supportive services for the residents.

Authorized voucher units. See 24 CFR 982.4.

Budget authority. See 24 CFR 982.4.

Comparable rental assistance. A subsidy or other means to enable a family to obtain decent housing in the PHA jurisdiction renting at a gross rent that is not more than 40 percent of the family's adjusted monthly gross income.

Congregate housing. See 24 CFR 982.4.

Continuously assisted. See 24 CFR 982.4.

Contract units. The housing units covered by a HAP contract.

Cooperative housing. See 24 CFR 982.4.

Cooperative member. See 24 CFR 982.4.

Covered housing provider. For Project-Based Voucher (PBV) program, ''covered housing provider,'' as such term is used in HUD's regulations in 24 CFR part 5, subpart L (Protection for Victims of Domestic Violence, Dating Violence, Sexual Assault, or Stalking) refers to the PHA or owner (as defined in 24 CFR 982.4), as applicable given the responsibilities of the covered housing provider as set forth in 24 CFR part 5, subpart L. For example, the PHA is the covered housing provider responsible for providing the notice of occupancy rights under VAWA and certification form described at 24 CFR 5.2005(a). In addition, the owner is the covered housing provider that may choose to bifurcate a lease as described at 24 CFR 5.2009(a), while the PHA is the covered housing provider responsible for complying with emergency transfer plan provisions at 24 CFR 5.2005(e).

Development activity. The replacement of equipment and/or materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind does not constitute development activity. Development activity is activity that entails either:

(i) New construction or rehabilitation work done after the proposal selection date in order for the PHA and owner to execute a PBV HAP contract for newly constructed or rehabilitated housing, or

(ii) One of the following activities undertaken during the term of the PBV HAP contract:

(A) Remodeling that alters the nature or type of housing units in a project,

(B) Reconstruction, or

(C) A substantial improvement in the quality or kind of equipment and materials.

Excepted units. Units in a project not counted against the project cap. See § 983.54(c).

Existing housing. A housing project in which all the proposed PBV units either fully comply or substantially comply with the HQS on the proposal selection date. (The units must comply with the initial pre-HAP inspection requirements in accordance with § 983.103(b) and (c) before execution of the HAP contract.) A unit substantially complies with the HQS if it has HQS deficiencies that require only minor repairs to correct (repairs that are minor in nature and could reasonably be expected to be completed within 48 hours of notification of the deficiency.) To qualify as existing housing, the project is ready to be placed under HAP contract with minimal delay—after the unit inspections are complete, all proposed PBV units not meeting HQS can brought into compliance to allow PBV HAP contract execution within 48 hours.

Family. See 24 CFR 982.4.

Family self-sufficiency program. See 24 CFR 982.4.

Group home. See 24 CFR 982.4.

HAP contract. See 24 CFR 982.4.

Household. The family and any PHA-approved live-in aide.

Housing assistance payment. The monthly assistance payment for a PBV unit by a PHA, which includes:

(i) A payment to the owner for rent to owner under the family's lease minus the tenant rent; and

(ii) An additional payment to or on behalf of the family, if the utility allowance exceeds the total tenant payment, in the amount of such excess.

Housing credit agency. For purposes of performing subsidy layering reviews for proposed PBV projects, a housing credit agency includes a State housing finance agency, a State participating jurisdiction under HUD's HOME program (*see* 24 CFR part 92), or other State housing agencies that meet the definition of ''housing credit agency'' as defined by section 42 of the Internal Revenue Code of 1986.

Housing quality standards (HQS). See 24 CFR 982.4.

Independent entity. See 24 CFR 982.4, except that under the PBV program, the independent entity functions are described in § 983.57.

Initial rent to owner. See 24 CFR 982.4.

In-place family. An eligible family residing in a proposed contract unit on the proposal selection date.

Jurisdiction. See 24 CFR 982.4.

Lease. See 24 CFR 982.4.

Multifamily building. A building with five or more dwelling units (assisted or unassisted).

Newly constructed housing. Housing units that do not exist on the proposal selection date and are developed after the date of selection for use under the PBV program.

Owner. See 24 CFR 982.4.

Partially assisted project. A project in which there are fewer contract units than residential units.

Participant. A family that has been admitted and is currently assisted in the PBV (or HCV) program. If the family is not already a tenant-based voucher participant, the family becomes a participant on the effective date of the initial lease term (the commencement of the assisted tenancy) in the PBV unit.

PHA-owned unit. See 24 CFR 982.4.

Premises. The project in which the contract unit is located, including common areas and grounds.

Program. The voucher program under section 8 of the 1937 Act, including tenant-based or project-based assistance.

Project. A project is a single building, multiple contiguous buildings, or multiple buildings on contiguous parcels of land. Contiguous in this definition includes ''adjacent to'', as well as touching along a boundary or a point.

Project-based certificate (PBC) program. The program in which project-based assistance is attached to units pursuant to an Agreement executed by a PHA and owner before January 16, 2001 (*see* § 983.11).

Proposal selection date. See § 983.51(e)(2).

Public housing agency (PHA). See 24 CFR 982.4.

Reasonable rent. See 24 CFR 982.4.

Rehabilitated housing. Housing units that exist on the proposal selection date, but do not substantially comply with the HQS on that date, and are developed for use under the PBV program.

Request for Release of Funds and Certification (for purposes of environmental review). Under 24 CFR 58.1(b)(6)(iii) and § 983.56, HUD approves the local PHA's Request for Release of Funds and Certification (form HUD–7015.15) by issuing a Letter to Proceed or form HUD–7015.16, authorizing the PHA to execute an ''agreement to enter into housing assistance payment contract'' (Agreement) or enter directly into a HAP

contract with an owner of units selected under the PBV program, or execute a PHA certification under § 983.204(d)(2).

Rent to owner. The total monthly rent payable by the family and the PHA to the owner under the lease for a contract unit. Rent to owner includes payment for any housing services, maintenance, and utilities to be provided by the owner in accordance with the lease. (Rent to owner must not include charges for non-housing services including payment for food, furniture, or supportive services provided in accordance with the lease.)

Responsible entity (RE) (for environmental review). The unit of general local government within which the project is located that exercises land use responsibility or, if HUD determines this infeasible, the county or, if HUD determines that infeasible, the state.

Single-family building. A building with no more than four dwelling units (assisted or unassisted).

Single room occupancy housing (SRO). See 24 CFR 982.4.

Site. The grounds where the contract units are located or will be located after development.

Small Area Fair Market Rents (SAFMRs). See 24 CFR 982.4. (*See also* 24 CFR 888.113(c)(5).)

Special housing type. Subpart M of 24 CFR part 982 states the special regulatory requirements for different special housing types. Subpart M provisions on shared housing, manufactured home space rental, and the homeownership option do not apply to PBV assistance under this part.

Subsidy standards. See 24 CFR 982.4.

Tenant. See 24 CFR 982.4.

Tenant-paid utilities. See 24 CFR 982.4.

Tenant-selection plan. A written document that describes the owner's policies and procedures for the selection of tenants for occupancy of PBV units as described in §§ 983.251(c)(7) and 983.253(a).

Waiting list admission. An admission from the PBV waiting list in accordance with § 983.251.

Wrong-size unit. A unit occupied by a family that does not conform to the PHA's subsidy standard for family size, by being either too large or too small compared to the standard.

■ 27. In § 983.4, revise ''labor standards'' to read as follows:

§ 983.4 Cross-reference to other Federal requirements.

* * * * *

Labor standards. Regulations implementing the Davis-Bacon Act, Contract Work Hours and Safety Standards Act (40 U.S.C. 3701–3708), 29 CFR part 5, and other federal laws and regulations pertaining to labor standards applicable to an Agreement covering nine or more assisted units.

* * * * *

■ 28. Revise § 983.5 to read as follows:

§ 983.5 Description of the PBV program.

(a) *How PBV works.* (1) The PBV program is administered by a PHA that already administers the tenant-based voucher program under an annual contributions contract (ACC) with HUD. In the PBV program, the assistance is ''attached to the structure,'' which may be a multifamily building or single-family building. (See description of the difference between ''project-based'' and ''tenant-based'' rental assistance at 24 CFR 982.1(b).)

(2) The PHA enters into a HAP contract with an owner for units in existing housing or in newly constructed or rehabilitated housing.

(3) In the case of new construction or rehabilitation, the housing may be developed pursuant to an Agreement (§ 983.155) between the owner and the PHA. In the Agreement, the PHA agrees to execute a HAP contract after the owner completes the construction or rehabilitation of the units. Alternatively, the housing may be developed without such an Agreement (§ 983.155(e)).

(4) During the term of the HAP contract, the PHA makes housing assistance payments to the owner for units leased and occupied by eligible families.

(b) *How PBV is funded.* If a PHA decides to operate a PBV program, the PHA's PBV program is funded with a portion of appropriated funding (budget authority) available under the PHA's voucher ACC. This pool of funding is used to pay housing assistance for both tenant-based and project-based voucher units. Likewise, the administrative fee funding made available to a PHA is used for the administration of both tenant-based and project-based voucher assistance.

(c) *PHA discretion to operate PBV program.* A PHA has discretion whether to operate a PBV program. HUD approval is not required, except that the PHA must notify HUD of its intent to project-base its vouchers. The PHA must also state in its Administrative Plan that it will engage in project-basing and must amend its Administrative Plan to address the subjects listed in § 983.10, as applicable.

■ 29. Revise § 983.6 to read as follows:

§ 983.6 Maximum amount of PBV assistance (percentage limitation).

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, a PHA may commit project-based assistance to no more than 20 percent of its authorized voucher units at the time of commitment.

(1) A PHA is not required to reduce the number of units to which it has committed PBV assistance under an AHAP or HAP if the number of authorized voucher units is subsequently reduced and the number of PBV units consequently exceeds the program limitation.

(2) A PHA that was within the program limit prior to January 18, 2017, and exceeded the program limit on that date due solely to the change in how the program cap is calculated is not required to reduce the number of PBV units under an Agreement or HAP contract.

(3) In the circumstances described in paragraphs (a)(1) and (2) of this section, the PHA may not add units to PBV HAP contracts, or enter into new Agreements or HAP contracts (except for HAP contracts resulting from Agreements entered into before the reduction of authorized units or January 18, 2017, as applicable), unless such units meet the conditions described in paragraph (d) of this section.

(b) *Units subject to percentage limitation.* All PBC and project-based voucher units for which the PHA has issued a notice of proposal selection or which are under an Agreement or HAP contract for PBC or project-based voucher assistance count against the 20 percent maximum.

(c) *PHA determination.* The PHA is responsible for determining the amount of budget authority that is available for project-based vouchers and for ensuring that the amount of assistance that is attached to units is within the amounts available under the ACC.

(d) *Increased cap.* A PHA may project-base an additional 10 percent of its authorized voucher units, provided the additional units meet both of the conditions in paragraphs (d)(1) and (2) of this section:

(1) The units are part of a HAP contract executed on or after April 18, 2017, or are added on or after that date to any current HAP contract, including a contract entered into prior to April 18, 2017; and

(2) The units fall into at least one of the following categories:

(i) The units are specifically made available to house individuals and families that meet the definition of homeless under section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302), included in 24 CFR 578.3.

(ii) The units are specifically made available to house families that are

comprised of or include a veteran. For purposes of the increased cap, a veteran means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.

(iii) The units provide supportive housing to persons with disabilities or to elderly persons, as defined in 24 CFR 5.403. Supportive housing means that the project makes supportive services available for all of the assisted families in the project and provides a range of services tailored to the needs of the residents occupying such housing. Such supportive services need not be provided by the owner or on site but must be reasonably available to the families receiving PBV assistance in the project.

(iv) The units are located in a census tract with a poverty rate of 20 percent or less, as determined by HUD.

(v) The units are located in an area where vouchers are difficult to use as defined in § 983.3.

(e) *Units previously subject to federally required rent restrictions or that received long-term rental assistance from HUD.* Units covered by a PBV HAP contract will not count toward the program cap if the units meet the requirements of § 983.59.

■ 30. Revise § 983.10 to read as follows:

§ 983.10 PBV provisions in the Administrative Plan.

(a) In addition to complying with the requirements of § 982.54, a PHA that has implemented or plans to implement a PBV program must state the PHA policy on all PBV-related matters over which the PHA has policymaking discretion.

(b) With respect to the PHA's PBV program, the PHA Administrative Plan must cover, at a minimum, the following PHA policies:

(1) Regarding the selection of PBV proposals:

(i) A description of the procedures for owner submission of PBV proposals and for PHA selection of PBV proposals (§ 983.51(a));

(ii) Whether the PHA will select, without competition, a proposal for housing assisted under another program that required competitive selection of proposals (§ 983.51(b)(2));

(iii) If the PHA will project-base assistance as part of an initiative to improve, develop, or replace a public housing property or site without following a competitive process, its scope of work for the project or site, and how many units of PBV it plans to add (§ 983.51(c));

(2) A description of the types of services that will be offered to families for a project to qualify for the exception from the project cap and the extent to which such voluntary services will be available (*e.g.,* length of time services will be provided to a family, frequency of services, and depth of services) (§ 983.54(c)(1)(ii));

(3) Regarding site selection standards:

(i) The PHA's standard for deconcentrating poverty and expanding housing and economic opportunities, which must be consistent with the PHA Plan under 24 CFR part 903 (§ 983.55(b)(1));

(ii) The PHA's site selection policy, which must explain how the PHA's site selection procedures promote the PBV goals (§ 983.55(c)(1));

(4) PHA inspection policies, including:

(i) How frequently a PHA will conduct inspections during the term of a HAP contract in order to ensure that the premises are maintained in accordance with HUD's Housing Quality Standards (§ 983.103(d) and (g));

(ii) If the PHA has adopted either the non-life threatening deficiencies option or the alternative inspection option, or both, in accordance with § 982.405(i) and/or § 982.305(f), for initial inspections of existing housing, the PHA policies that will apply to such inspections;

(iii) If the PHA will attach PBV assistance to existing housing, the amount of time that may elapse between the initial inspection of a unit and execution of a HAP contract for that unit;

(5) Whether and under what circumstances the PHA will enter into a PBV HAP contract for new construction or rehabilitation without first entering into an Agreement (§ 983.204(c));

(6) A description of the circumstances under which a PHA will consider amending PBV HAP contracts to substitute or add contract units, and how those circumstances support the goals of the PBV program (§ 983.207(a) and (b));

(7) A description of the PHA's waiting list policies for admission to PBV units. Specifically:

(i) Whether the PHA will establish a separate waiting list for admission to PBV units (§ 983.251(c)(2)(i));

(ii) Whether the PHA will establish separate waiting lists for admission to individual projects or buildings (or for sets of such units), including the names of the project(s) (§ 983.251(c)(2)(iii));

(iii) Any criteria or preferences that the PHA has decided to establish for admission to any PBV units, including the name of the project(s) and the specific criteria or preferences that are to be used by project (§ 983.251(c)(3));

(iv) Whether the PHA will allow for owner-maintained, site-based waiting lists (§ 983.251(c)(7)), including the name of the project(s), the oversight procedures the PHA will use to ensure owner-maintained waiting lists are administered properly and in accordance with program requirements, and the approval process of an owner's tenant selection plan (including any preferences). The owner's tenant-selection plan must be incorporated in the PHA's Administrative Plan;

(v) Whether a family's position on a central PBV waiting list will be affected by the family's rejection of the PBV offer, without good cause, or the owner's rejection of the family (§ 983.251(e)(2));

(8) Regarding tenant screening:

(i) Whether the PHA will screen applicants for family behavior or suitability for tenancy (§ 983.255(a)(1));

(ii) whether the PHA will offer information to an owner about a family that wishes to lease a dwelling unit from the owner, including information about the tenancy history of family members or about drug trafficking and criminal activity by family members (§ 983.255(c)(2));

(9) The PHA's policy on continued housing assistance for a family that occupies a wrong-sized unit or a unit with accessibility features that the family does not require (§ 983.260(b)(2));

(10) Whether the PHA will allow a family that initially qualified for occupancy of a unit excepted based on elderly family status to continue to reside in the unit where, through circumstances beyond the control of the family, the elderly family member no longer resides in the unit (§ 983.262(d));

(11) Whether the PHA will establish site-specific utility allowances at any of its PBV-assisted properties (§ 983.301);

(12) For an owner that wishes to request a rent increase, the length of the required notice period and the form in which such request must be submitted (§ 983.302(b)(2));

(13) Whether the PHA will employ a PBV HAP contract that provides for vacancy payments to an owner, for what duration of time such payments will be made, and the form and manner in which requests for such vacancy payments must be made (§ 983.352(b)(1) and (4));

(14) Whether utility reimbursements will be paid to the family or to the utility supplier (§ 983.353(d)(2);

(15) Which option the PHA will select if a unit loses its excepted status (§ 983.262(f)); and

(16) If the PHA is employing SAFMRs in the operation of its Housing Choice Voucher program, whether it will apply

SAFMRs to its PBV program per 24 CFR 888.113(h);

■ 31. Add § 983.11 to subpart A to read as follows:

§ 983.11 Project-based certificate (PBC) program.

(a) *What is it*? ''PBC program'' means project-based assistance attached to units pursuant to an Agreement executed by a PHA and owner before January 16, 2001, and in accordance with:

(1) The regulations for the PBC program at 24 CFR part 983, codified as of May 1, 2001, and contained in 24 CFR part 983 revised as of April 1, 2002; and

(2) Section 8(d)(2) of the 1937 Act, as in effect before October 21, 1998 (the date of enactment of Title V of Public Law 105–276, the Quality Housing and Work Responsibility Act of 1998, codified at 42 U.S.C. 1437 *et seq.*).

(b) *What rules apply*? Units under the PBC program are subject to the provisions of 24 CFR part 983, codified as of May 1, 2001, with the following exceptions:

(1) *PBC renewals*—(i) *General.* Consistent with the PBC HAP contract, at the sole option of the PHA, HAP contracts may be renewed for terms for an aggregate total (including the initial and any renewal terms) of 15 years, subject to the availability of appropriated funds.

(ii) *Renewal of PBC as PBV.* At the sole discretion of the PHA, upon the request of an owner, PHAs may renew a PBC HAP contract as a PBV HAP contract. All PBV regulations (including 24 CFR part 983, subpart G—Rent to Owner) apply to a PBC HAP contract renewed as a PBV HAP contract with the exception of §§ 983.51, 983.56, and 983.57(b)(1). In addition, the following conditions apply:

(A) The term of the HAP contract for PBC contracts renewed as PBV contracts shall be consistent with § 983.205.

(B) A PHA must make the determination, within one year before expiration of a PBC HAP contract, that renewal of the contract under the PBV program is appropriate to continue providing affordable housing for low-income families.

(C) The renewal of PBC assistance as PBV assistance is effectuated by the execution of a PBV HAP contract addendum as prescribed by HUD and a PBV HAP contract for existing housing.

(2) *Housing quality standards.* The regulations in 24 CFR 982.401 (Housing Quality Standards) (HQS) apply to units assisted under the PBC program.

(i) *Special housing types.* HQS requirements for eligible special housing types, under this program, apply (See 24 CFR 982.605. 982.609, and 982.614).

(ii) *Lead-based paint requirements.* (A) The lead-based paint requirements at 24 CFR 982.401(j) do not apply to the PBC program.

(B) The Lead-based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at 24 CFR part 35, subparts A, B, H, and R, apply to the PBV program.

(iii) *HQS enforcement.* The regulations in 24 CFR parts 982 and 983 do not create any right of the family or any party, other than HUD or the PHA, to require enforcement of the HQS requirements or to assert any claim against HUD or the PHA for damages, injunction, or other relief for alleged failure to enforce the HQS.

(c) *Statutory notice requirements.* In addition to provisions of 24 CFR part 983 codified as of May 1, 2001, § 983.206 applies to the PBC program.

■ 32 Add § 983.12 to subpart A to read as follows:

§ 983.12 Prohibition of excess public assistance.

(a) The PHA may provide PBV assistance for newly constructed and rehabilitation housing only in accordance with HUD subsidy layering regulations (24 CFR 4.13) and other requirements.

(b) The subsidy layering requirements are not applicable to existing housing.

(c) For the subsidy layering requirements related to development activity to place newly constructed or rehabilitated housing under a HAP contract, see § 983.153(b).

(d)(1) For newly constructed or rehabilitated housing under a HAP contract, the owner must disclose to the PHA, in accordance with HUD requirements, information regarding any additional related assistance from the Federal Government, a State, or a unit of general local government, or any agency or instrumentality thereof, that is made available with respect to the contract units during the term of the HAP contract. Such related assistance includes but is not limited to any loan, grant, guarantee, insurance, payment, rebate, subsidy, credit, tax benefit, or any other form of direct or indirect assistance.

(2) A subsidy layering review is required to determine if the additional related assistance in paragraph (d)(1) of this section would result in excess public assistance to the project.

(3) Housing assistance payments must not be more than is necessary, as determined in accordance with HUD requirements, to provide affordable housing after taking account of such related assistance. The PHA must adjust in accordance with HUD requirements, the amount of the housing assistance payments to the owner to compensate in whole or in part for such related assistance.

■ 33. Revise subpart B to read as follows:

Subpart B—Selection of PBV Owner Proposals

Sec.
983.51 Owner proposal selection procedures.
983.52 Prohibition of assistance for ineligible units.
983.53 Prohibition of assistance for units in subsidized housing.
983.54 Cap on number of PBV units in each project (income-mixing requirement).
983.55 Site selection standards.
983.56 Environmental review.
983.57 PHA-owned units.
983.58 PHA determination prior to selection.
983.59 Units excepted from program cap and project cap.

Subpart B—Selection of PBV Owner Proposals

§ 983.51 Owner proposal selection procedures.

(a) *Procedures for selecting PBV proposals.* The PHA Administrative Plan must describe the procedures for owner submission of PBV proposals and for PHA selection of PBV proposals. Before selecting a PBV proposal, the PHA must determine that the PBV proposal complies with HUD program regulations and requirements, including a determination that the property is eligible housing (§§ 983.52 and 983.53), complies with the cap on the number of PBV units per project (§ 983.54), and meets the site selection standards (§ 983.55).

(b) *Methods of selection.* The PHA must select PBV proposals in accordance with the selection procedures in the PHA Administrative Plan. (See paragraph (f) of this section for information about the selection of PHA-owned units.) The PHA must select PBV proposals by either of the following two methods:

(1) The PHA may issue a Request for Proposals (RFP), selecting a PBV proposal through a competition. The PHA's RFP may not limit proposals to a single site or impose restrictions that explicitly or practically preclude owner submission of proposals for PBV housing on different sites.

(2) The PHA may select, without a PBV competition, a proposal for housing assisted under a Federal, State, or local

government housing assistance, community development, or supportive services program that required competitive selection of proposals (*e.g.,* HOME, and units for which competitively awarded Low-Income Housing Tax Credits (LIHTCs) have been provided), where the proposal has been selected in accordance with such program's competitive selection requirements within 3 years of the PBV proposal selection date. The earlier competitively selected housing assistance proposal must not have involved any consideration that the project would receive PBV assistance.

(c) *Exceptions to competitive selection.* (1) A PHA may attach PBV assistance to an existing, newly constructed, or rehabilitated structure in which the PHA has an ownership interest or over which the PHA has control without regard to a competitive process when the PHA is engaged in an initiative to improve, develop, or replace a public housing property or site. The PHA must have notified the public of its intent through its PHA Plan. Newly developed or replacement housing need not be on the same site as the original public housing in order for this exception to apply. In addition, the public housing properties or sites may be in the public housing inventory or they may have been removed from the public housing inventory through any available legal removal tool within 5 years of the proposal selection date.

(2) A PHA may select a project formerly assisted under the public housing program in which a PHA has no ownership interest or control over without regard to a competitive process, or a project that is replacing the public housing project, provided:

(i) The public housing project is either still in the public housing inventory or had been removed from the public housing inventory through any available legal removal tool within 5 years of the proposal selection date;

(ii) The PHA that owned or owns the public housing project does not administer the HCV program; and

(iii) The PBV assistance was specifically identified as replacement housing for the impacted public housing residents as part of the public housing demolition/disposition application, voluntary conversion application, or any other application process submitted to and approved by HUD to remove the public housing project from the public housing inventory.

(d) *Public notice of PHA request for PBV proposals.* If the PHA will be selecting proposals under paragraph (b)(1) of this section, PHA procedures for selecting PBV proposals must be designed and actually operated to provide broad public notice of the opportunity to offer PBV proposals for consideration by the PHA. The public notice procedures may include publication of the public notice in a local newspaper of general circulation and other means designed and actually operated to provide broad public notice. The public notice of the PHA request for PBV proposals must specify the submission deadline. Detailed application and selection information must be provided at the request of interested parties.

(e) *Inspections required prior to proposal selection.* (1) The PHA must examine the proposed site before the proposal selection date to determine whether the site complies with the site selection standards (§ 983.55).

(2) The PHA may enter into a HAP contract for existing housing if:

(i) The project fully or substantially complies with the HQS on the proposal selection date, which the PHA must determine via inspection,

(ii) If applicable, the project meets the environmental review requirements at § 983.153(a), and

(iii) The project meets the initial inspection requirements in accordance with § 983.103(b).

(f) *PHA written notice of proposal selection.* The PHA must give prompt written notice to the party that submitted a selected proposal under either paragraph (b)(1) or (2) of this section and must also give prompt public notice of such selection. The PHA's requirement to provide public notice may be met via publication of the public notice in a local newspaper of general circulation or other means designed and actually operated to provide broad public notice.

(g) *Proposal selection date.* (1) The proposal selection date is the date on which the PHA provides written notice to the party that submitted the selected proposal under either paragraph (b)(1) or (2) of this section.

(2) For properties selected in accordance with § 983.51(c), the date of proposal selection is the date of the PHA's board resolution approving the project-basing of assistance at the specific project.

(h) *PHA-owned units.* A PHA-owned unit may be assisted under the PBV program only if the HUD field office or the independent entity reviews the selection process the PHA undertook and determines that the PHA-owned units were appropriately selected based on the selection procedures specified in the PHA Administrative Plan. Under no circumstances may PBV assistance be used with a public housing unit. With the exception of properties selected in accordance with § 983.51(c), the PHA's selection procedures must be designed in a manner that does not effectively eliminate the submission of proposals for non-PHA-owned units or give preferential treatment (*e.g.,* additional points) to PHA-owned units.

(i) *Public review of PHA selection decision documentation.* The PHA must make documentation available for public inspection regarding the basis for the PHA selection of a PBV proposal.

(j) *Previous participation clearance.* HUD approval of specific projects or owners is not required. For example, owner proposal selection does not require submission of form HUD–2530 (Previous Participation Certification) or other HUD previous participation clearance.

(k) *Excluded from Federal procurement.* A PHA may not commit project-based assistance to a project if the owner or any principal or interested party is debarred, suspended subject to a limited denial of participation, or otherwise excluded under 2 CFR part 2424 or is listed on the U.S. General Services Administration list of parties excluded from Federal procurement or non-procurement programs.

§ 983.52 Prohibition of assistance for ineligible units.

(a) *Ineligible unit.* The PHA may not attach or pay PBV assistance for units in the following types of housing:

(1) Shared housing;

(2) Units on the grounds of a penal, reformatory, medical, mental, or similar public or private institution;

(3) Nursing homes or facilities providing continuous psychiatric, medical, nursing services, board and care, or intermediate care. However, the PHA may attach PBV assistance for a dwelling unit in an assisted living facility that provides home health care services such as nursing and therapy for residents of the housing;

(4) Units that are owned or controlled by an educational institution or its affiliate and are designated for occupancy by students of the institution;

(5) Manufactured homes; and

(6) Transitional Housing.

(b) *Prohibition against assistance for owner-occupied unit.* The PHA may not attach or pay PBV assistance for a unit occupied by an owner of the housing. A member of a cooperative who owns shares in the project assisted under the PBV program shall not be considered an owner for purposes of participation in the PBV program.

(c) *Prohibition against selecting unit occupied by an ineligible family.* Before

a PHA selects a specific unit to which assistance is to be attached, the PHA must determine whether the unit is occupied and, if occupied, whether the unit's occupants are eligible for assistance. The PHA must not select or enter into an Agreement or HAP contract for a unit occupied by a family ineligible for participation in the PBV program.

(d) *Prohibition against assistance for units for which commencement of construction or rehabilitation occurred prior to AHAP.* Unless a PHA has exercised the discretion at § 983.155(e) to undertake development activity without an Agreement, the PHA may not attach PBV assistance to units on which construction or rehabilitation commenced after proposal submission and prior to execution of an Agreement.

(1) Units for which rehabilitation or new construction began after proposal submission but prior to execution of an Agreement (if applicable) do not subsequently qualify as existing housing.

(2) Units that were newly constructed or rehabilitated in violation of program requirements also do not qualify as existing housing.

§ 983.53 Prohibition of assistance for units in subsidized housing.

A PHA may not attach or pay PBV assistance to units in any of the following types of subsidized housing:

(a) A public housing dwelling unit;

(b) A unit subsidized with any other form of Section 8 assistance (tenant-based or project-based);

(c) A unit subsidized with any governmental rent subsidy (a subsidy that pays all or any part of the rent);

(d) A unit subsidized with any governmental subsidy that covers all or any part of the operating costs of the housing;

(e) A unit subsidized with Section 236 rental assistance payments (12 U.S.C. 1715z–1). However, the PHA may attach assistance to a unit subsidized with Section 236 interest reduction payments;

(f) A unit subsidized with rental assistance payments under Section 521 of the Housing Act of 1949, 42 U.S.C. 1490a (a Rural Housing Service Program). However, the PHA may attach assistance for a unit subsidized with Section 515 interest reduction payments (42 U.S.C. 1485);

(g) A Section 202 project for non-elderly persons with disabilities (assistance under Section 162 of the Housing and Community Development Act of 1987, 12 U.S.C. 1701q note);

(h) Section 811 project-based supportive housing for persons with disabilities (42 U.S.C. 8013);

(i) Section 202 supportive housing for the elderly (12 U.S.C. 1701q);

(j) A Section 101 rent supplement project (12 U.S.C. 1701s);

(k) A unit subsidized with any form of tenant-based rental assistance (as defined at 24 CFR 982.1(b)(2)) (*e.g.,* a unit subsidized with tenant-based rental assistance under the HOME program, 42 U.S.C. 12701 *et seq.*);

(l) A unit with any other duplicative federal, state, or local housing subsidy, as determined by HUD or by the PHA in accordance with HUD requirements. For this purpose, ''housing subsidy'' does not include the housing component of a welfare payment; a social security payment; or a federal, state, or local tax concession (such as relief from local real property taxes).

§ 983.54 Cap on number of PBV units in each project (income-mixing requirement).

(a) *Project cap.* Except as provided in paragraph (b) of this section, the number of units in a project that the PHA may place under an Agreement or a HAP contract cannot be more than the greater of 25 percent of the number of dwelling units (assisted or unassisted) in the project or 25 units.

(b) *Higher project cap.* A PHA may provide PBV assistance to the greater of 25 units or 40 percent of the number of dwelling units (assisted or unassisted) in the project if:

(1) The project is located in a census tract with a poverty rate of 20 percent or less, as determined by HUD, or

(2) The project is located in an area where vouchers are difficult to use as defined in § 983.3.

(c) *Exceptions to the project cap.* (1) PBV units are not counted against the project cap in the following cases:

(i) Units exclusively serving elderly families, as such term is defined in 24 CFR 5.403.

(ii) Units exclusively made available to households eligible for supportive services available to the residents of the project assisted with project-based voucher assistance. The project must make supportive services available to all PBV assisted families in the project, but the family may not be required to participate in the services as a condition of living in the excepted unit. Such supportive services need not be provided by the owner or on-site, but must be reasonably available to the families receiving PBV assistance in the project and designed to help the families in the project achieve self-sufficiency or live in the community as independently as possible. The PHA must include in its Administrative Plan the types of services offered to families that will enable the units to qualify under the exception and the extent to which such services will be provided (*e.g.,* length of time services will be provided to a family, frequency of services, and depth of services). A PHA that manages an FSS program may offer FSS as part of its supportive services package but must not rely solely on FSS to meet the exception. A PHA may, however, make the supportive services used in connection to the FSS program available to non-FSS PBV families at the project.

(2) Units covered by a PBV HAP contract will not count toward the project cap if the units meet the requirements of § 983.59.

(3)(i) The PBV HAP contract must specify, and the owner must set aside, the number of excepted units made available for occupancy by families who qualify for the exception.

(ii) For a unit to be considered excepted it must be occupied by a family who qualifies for the exception.

(d) *Existing HAP contracts.* (1) In general, HAP contracts in effect prior to April 18, 2017, are governed by the terms of those HAP contracts with respect to the requirements that apply to the number and type of excepted units in a project. The owner must continue to designate the same number of contract units and assist the same number and type of excepted units as provided under the HAP contract during the remaining term of the HAP contract and any extension.

(2) The owner and the PHA may mutually agree to change the requirements for excepted units under the HAP contract to comply with the excepted unit requirements in subsection (c) of this section. However, any change to the HAP contract may only be made if the change does not jeopardize an assisted family's eligibility for continued assistance at the project.

(e) *PHA determination.* The PHA determines the number of units in the project for which the PHA will provide project-based assistance, including whether and how many units will be excepted, subject to the provisions of this section. See § 983.262 for more detail on the occupancy requirements of excepted units.

(f) *HUD monitoring.* HUD may establish additional monitoring and oversight requirements for PBV projects in which more than 40 percent of the dwelling units are assisted under a PBV HAP contract through a **Federal Register** document, subject to public comment.

§ 983.55 Site selection standards.

(a) *Applicability.* The site selection requirements in paragraph (d) of this section apply only to site selection for existing housing and rehabilitated PBV housing. The site selection requirements in paragraph (e) of this section apply only to site selection for newly constructed PBV housing. Other provisions of this section apply to selection of a site for any form of PBV housing, including existing housing, newly constructed housing, and rehabilitated housing.

(b) *Compliance with PBV goals, civil rights requirements, and HQS.* The PHA may not select a proposal for existing, newly constructed, or rehabilitated PBV housing on a site or enter into an Agreement or HAP contract for units on the site, unless the PHA has determined that:

(1) Project-based assistance for housing at the selected site is consistent with the goal of deconcentrating poverty and expanding housing and economic opportunities. The standard for deconcentrating poverty and expanding housing and economic opportunities must be consistent with the PHA Plan under 24 CFR part 903 and the PHA Administrative Plan. In developing the standards to apply in determining whether a proposed PBV development will be selected, a PHA must consider the following:

(i) Whether the census tract in which the proposed PBV development will be located is in a HUD-designated Enterprise Zone, Economic Community, or Renewal Community;

(ii) Whether a PBV development will be located in a census tract where the concentration of assisted units will be or has decreased as a result of public housing demolition;

(iii) Whether the census tract in which the proposed PBV development will be located is undergoing significant revitalization;

(iv) Whether state, local, or federal dollars have been invested in the area that has assisted in the achievement of the statutory requirement;

(v) Whether new market rate units are being developed in the same census tract where the proposed PBV development will be located and the likelihood that such market rate units will positively impact the poverty rate in the area;

(vi) If the poverty rate in the area where the proposed PBV development will be located is greater than 20 percent, the PHA should consider whether in the past five years there has been an overall decline in the poverty rate;

(vii) Whether there are meaningful opportunities for educational and economic advancement in the census tract where the proposed PBV development will be located.

(2) The site is suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d(4)) and HUD's implementing regulations at 24 CFR part 1; Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601–3629); and HUD's implementing regulations at 24 CFR parts 100 through 199; Executive Order 11063 (27 FR 11527; 3 CFR, 1959–1963 Comp., p. 652) and HUD's implementing regulations at 24 CFR part 107. The site must also be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of the Americans with Disabilities Act and implementing regulations, and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and HUD's implementing regulations at 24 CFR part 8, including meeting the Section 504 site selection requirements described in 24 CFR 8.4(b)(5).

(3) The site meets the HQS site standards at 24 CFR 982.401(l).

(c) *PHA PBV site selection policy.* (1) The PHA administrative plan must establish the PHA's policy for selection of PBV sites in accordance with this section.

(2) The site selection policy must explain how the PHA's site selection procedures promote the PBV goals.

(3) The PHA must select PBV sites in accordance with the PHA's site selection policy in the PHA administrative plan.

(d) *Existing and rehabilitated housing site and neighborhood standards.* A site for existing or rehabilitated housing must meet the following site and neighborhood standards. The site must:

(1) Be adequate in size, exposure, and contour to accommodate the number and type of units proposed, and adequate utilities and streets must be available to service the site. (The existence of a private disposal system and private sanitary water supply for the site, approved in accordance with law, may be considered adequate utilities.)

(2) Promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(3) Be accessible to social, recreational, educational, commercial, and health facilities and services and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of unassisted, standard housing of similar market rents.

(4) Be so located that travel time and cost via public transportation or private automobile from the neighborhood to places of employment providing a range of jobs for lower-income workers is not excessive. While it is important that housing for the elderly not be totally isolated from employment opportunities, this requirement need not be adhered to rigidly for such projects.

(e) *New construction site and neighborhood standards.* A site for newly constructed housing must meet the following site and neighborhood standards:

(1) The site must be adequate in size, exposure, and contour to accommodate the number and type of units proposed, and adequate utilities (water, sewer, gas, and electricity) and streets must be available to service the site.

(2) The site must not be located in an area of minority concentration, except as permitted under paragraph (e)(3) of this section, and must not be located in a racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.

(3) A project may be located in an area of minority concentration only if:

(i) Sufficient, comparable opportunities exist for housing for minority families in the income range to be served by the proposed project outside areas of minority concentration (see paragraphs (e)(3)(iii) through (v) of this section for further guidance on this criterion); or

(ii) The project is necessary to meet overriding housing needs that cannot be met in that housing market area (see paragraph (e)(3)(vi) of this section for further guidance on this criterion).

(iii) As used in paragraph (e)(3)(i) of this section, ''sufficient'' does not require that in every locality there be an equal number of assisted units within and outside of areas of minority concentration. Rather, application of this standard should produce a reasonable distribution of assisted units each year, that, over a period of several years, will approach an appropriate balance of housing choices within and outside areas of minority concentration. An appropriate balance in any jurisdiction must be determined in light of local conditions affecting the range of housing choices available for low-income minority families and in relation to the racial mix of the locality's population.

(iv) Units may be considered ''comparable opportunities,'' as used in paragraph (e)(3)(i) of this section, if they have the same household type (elderly, disabled, family, large family) and tenure type (owner/renter); require approximately the same tenant contribution towards rent; serve the same income group; are located in the same housing market; and are in standard condition.

(v) Application of this sufficient, comparable opportunities standard involves assessing the overall impact of HUD-assisted housing on the availability of housing choices for low-income minority families in and outside areas of minority concentration, and must take into account the extent to which the following factors are present, along with other factors relevant to housing choice:

(A) A significant number of assisted housing units are available outside areas of minority concentration.

(B) There is significant integration of assisted housing projects constructed or rehabilitated in the past 10 years, relative to the racial mix of the eligible population.

(C) There are racially integrated neighborhoods in the locality.

(D) Programs are operated by the locality to assist minority families that wish to find housing outside areas of minority concentration.

(E) Minority families have benefited from local activities (*e.g.,* acquisition and write-down of sites, tax relief programs for homeowners, acquisitions of units for use as assisted housing units) undertaken to expand choice for minority families outside of areas of minority concentration.

(F) A significant proportion of minority households has been successful in finding units in non-minority areas under the tenant-based assistance programs.

(G) Comparable housing opportunities have been made available outside areas of minority concentration through other programs.

(vi) Application of the ''overriding housing needs'' criterion, for example, permits approval of sites that are an integral part of an overall local strategy for the preservation or restoration of the immediate neighborhood and of sites in a neighborhood experiencing significant private investment that is demonstrably improving the economic character of the area (a ''revitalizing area''). An ''overriding housing need,'' however, may not serve as the basis for determining that a site is acceptable, if the only reason the need cannot otherwise be feasibly met is that discrimination on the basis of race, color, religion, sex, national origin, age, familial status, or disability renders sites outside areas of minority concentration unavailable or if the use of this standard in recent years has had the effect of circumventing the obligation to provide housing choice.

(4) The site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(5) The neighborhood must not be one that is seriously detrimental to family life or in which substandard dwellings or other undesirable conditions predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions.

(6) The housing must be accessible to social, recreational, educational, commercial, and health facilities and services and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of unassisted, standard housing of similar market rents.

(7) Except for new construction, housing designed for elderly persons, travel time, and cost via public transportation or private automobile from the neighborhood to places of employment providing a range of jobs for lower-income workers, must not be excessive.

§ 983.56 Environmental review.

(a)(1) HUD environmental regulations at 24 CFR parts 50 and 58 apply to activities under the PBV program, except as provided in paragraph (a)(2) of this section.

(2) Existing housing is exempt from environmental review only if the project in which the units are located has previously received federal assistance and has undergone a federal environmental review under the applicable federal program. This exemption does not apply if a federal environmental review is required by law or regulation relating to funding other than PBV housing assistance payments.

(b) Under 24 CFR part 58, a unit of general local government, a county or a state (the ''responsible entity'' or ''RE'') is responsible for the federal environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and related applicable federal laws and authorities in accordance with 24 CFR 58.5 and 58.6. If a PHA objects in writing to having the RE perform the federal environmental review, or if the RE declines to perform it, then HUD may perform the review itself (24 CFR 58.11). 24 CFR part 50 governs HUD performance of the review. The PHA must supply all available, relevant information necessary for the RE (or HUD, if applicable) to perform any required environmental review for any site.

(c) For any project that is not exempt from an environmental review, if such a review has not been conducted prior to the proposal selection date, then the PHA's written notice of proposal selection must state that the selection is subject to completion of a favorable environmental review and that the project site may be rejected based on the results of the environmental review.

(d) When an environmental review is required, a PHA may not enter into an Agreement or HAP contract with an owner, amend a HAP contract to add units pursuant to the authority at § 983.207(b)(3), or execute a PHA certification under § 983.204(d)(2), and the PHA, the owner, and its contractors may not acquire, rehabilitate, convert, lease, repair, dispose of, demolish, or construct real property or commit or expend program or local funds for these activities, until one of the following occurs:

(1) The responsible entity has determined that the project to be assisted is exempt under 24 CFR 58.34 or is categorically excluded and not subject to compliance with environmental laws under 24 CFR 58.35(b);

(2) The responsible entity has completed the environmental review procedures required by 24 CFR part 58, and HUD has approved the PHA's Request for Release of Funds and Certification (form HUD–7015.15), as defined in § 983.3(b); or

(3) HUD has performed an environmental review under 24 CFR part 50 and has notified the PHA in writing of environmental approval of the site.

(e) HUD will not issue a Letter to Proceed or form HUD–7015.16 to the PHA if any of the activities described in paragraph (d) of this section have already occurred.

(f) Any mitigating measures required by HUD pursuant to a HUD review under 24 CFR part 50 must be included in HUD's written environmental approval of the site.

(g) The PHA must supply all available, relevant information necessary for the RE (or HUD, if applicable) to perform any required environmental review for any site.

§ 983.57 PHA-owned units.

(a) *Selection of PHA-owned units.* The selection of PHA-owned units must be done in accordance with § 983.51(f).

(b) *Independent entity functions.* The independent entity, as defined in § 983.3, must perform the following functions in connection with PHA-owned units:

(1) The independent entity must determine rent to owner, including the reasonable rent and the OCAF adjustment, in accordance with §§ 983.301 through 983.305.

(2) The term of the HAP contract and any HAP contract renewal for PHA-owned units must comply with the requirements of § 983.205 and must be agreed upon by the PHA and the independent entity.

(3) The independent entity must perform unit inspections in accordance with § 983.103(f).

(4) The PHA must carry out development activity under § 983.152 or rehabilitation of units subject to a HAP contract under § 983.153 in accordance with the applicable requirements and must submit evidence to the independent entity that work has been completed in accordance with such requirements.

(c) *Payment to independent entity.* (1) The PHA may compensate the independent entity from PHA ongoing administrative fee income (including amounts credited to the administrative fee reserve). The PHA may not use other program receipts to compensate the independent entity for its services.

(2) The PHA, and the independent entity, may not charge the family any fee for the services provided by the independent entity.

§ 983.58 PHA determination prior to selection.

Before a PHA issues a request for proposals in accordance with § 983.51(b)(1), makes a selection based on a previous competition in accordance with § 983.51(b)(2), amends an existing HAP contract to add units in accordance with § 983.207(b), or attaches assistance without competition in accordance with § 983.51(c), it must calculate the number of authorized voucher units that it is permitted to project-base and determine the amount of budget authority that it has available for project-basing in accordance with HUD requirements.

§ 983.59 Units excepted from program cap and project cap.

(a) *General.* For HAP contracts entered into on or after April 18, 2017, the PHA may commit project-based assistance to units that meet the requirements for exclusion in paragraphs (b) and (c) of this section without the units counting against the program cap or project cap described in §§ 983.6 and 983.54, respectively.

(b) *Requirements for exclusion of existing or rehabilitated units.* Such units must, in the 5 years prior to the request for proposals (RFP) or selection without competition or selection based on a prior competition, fall into one of the following categories:

(1) The units have received one of the following forms of HUD assistance:

(i) Public Housing Capital or Operating Funds (section 9 of the 1937 Act).

(ii) Project-Based Rental Assistance (section 8 of the 1937 Act). Project-based rental assistance under section 8 includes the section 8 moderate rehabilitation program, including the single-room occupancy (SRO) program.

(iii) Housing For the Elderly (section 202 of the Housing Act of 1959).

(iv) Housing for Persons With Disabilities (section 811 of the Cranston-Gonzalez National Affordable Housing Act).

(v) The Rent Supplement (Rent Supp) program (section 101 of the Housing and Urban Development Act of 1965).

(vi) Rental Assistance Program (RAP) (section 236(f)(2) of the National Housing Act).

(vii) Flexible Subsidy Program (section 201 of the Housing and Community Development Amendments Act of 1978).

(2) The units have been subject to a federally required rent restriction under one of the following programs:

(i) The Low Income Housing Tax Credit program (26 U.S.C. 42).

(ii) Section 515 Rural Rental Housing Loans (42 U.S.C. 1485).

(iii) The following HUD programs:

(A) Section 236.

(B) Section 221(d)(3) or (d)(4) Below Market Interest Rate.

(iii) Housing For the Elderly (section 202 of the Housing Act of 1959).

(iv) Housing for Persons With Disabilities (section 811 of the Cranston-Gonzalez National Affordable Housing Act).

(v) Flexible Subsidy Program (section 201 of the Housing and Community Development Amendments Act of 1978).

(c) *Other excluded units.* PBV units pursuant to a conversion of public housing assistance under HUD's Rental Assistance Demonstration (RAD) program and HUD–VASH awarded vouchers specifically designated by HUD for project-based assistance are excluded from the PBV program and project caps.

(d) *Replacement units.* Newly constructed units developed under the PBV program may be excluded from the program cap and project cap provided the primary purpose of the newly constructed units is or was to replace units that meet the criteria of paragraph (b)(1) or (2) of this section. The newly constructed unit must be located on the same site as the unit it is replacing; however, an expansion of or modification to the prior project's site boundaries as a result of the design of new construction project is acceptable as long as a majority of the replacement units are built back on the site of the original public housing development and any replacement units that are not located on the existing site are part of a project that shares a common border with, are across a public right of way from, or touch that site. In addition, in order for the replacement units to be excluded from the program and project caps, one of the following must be true:

(1) Former residents of the original project must be provided with a selection preference that provides the residents with the right of first occupancy at the PBV new construction project when it is ready for occupancy.

(2) Prior to the demolition of the original project, the PBV new construction project must have been identified as replacement housing for that original project as part of a documented plan for the redevelopment of the site.

(e) *Unit size configuration and number of units for new construction and rehabilitation projects.* The unit size configuration of the PBV new construction or rehabilitation project may differ from the unit size configuration of the original project that the PBV units are replacing. In addition, the total number of PBV-assisted units may differ from the number of units in the original project. However, only the total number of units in the original project are excepted from the program limitation and the project cap. Units that exceed the total number of covered units in the original project are subject to the program limitation and the project cap.

■ 34. In § 983.101, revise the second sentence of paragraph (e) to read as follows:

§ 983.101 Housing quality standards.

* * * * *

(e) * * * However, the PHA may elect to establish additional requirements for quality, architecture, or design of PBV housing.

■ 35. Revise § 983.103 to read as follows:

§ 983.103 Inspecting units.

(a) *Inspection of existing units prior to selection.* If the units to be assisted already exist, the PHA must inspect all units before the proposal selection date

and must determine if the project meets the definition of existing housing. The PHA may not execute the HAP contract until all units meet the initial inspection requirements in accordance with paragraph (c) of this section.

(b) *Inspection of new construction and rehabilitation projects.* Following completion of work pursuant to §§ 983.155 and 983.156, the PHA must inspect each proposed PBV unit before execution of the HAP contract. Each proposed PBV unit must fully comply with the Housing Quality Standards prior to HAP execution.

(c) *Initial inspection requirements for existing housing*—(1) *In general.* If the PHA has not adopted the initial inspection non-life-threatening deficiency option (NLT option) or the alternative inspection option for the project, the PHA must inspect and determine that all of the proposed PBV units fully comply with the Housing Quality Standards below entering the HAP contract.

(2) *Initial inspection—NLT option.* (i) A PHA may execute the HAP contract and begin making assistance payments for all of the assisted units, including units that failed the initial HQS inspection, provided that no unit has no life-threatening conditions as defined in § 982.401(o), if the owner agrees to the NTL option. If the PHA has established and the unit is covered by both the NLT option and the alternative inspections option for the initial HQS inspection, see § 983.103(c)(4).

(ii) After completing the inspections and determining there are no life-threatening deficiencies, for any unit with non-life threatening deficiencies, the PHA provides both the owner and the family (any eligible in-place family (§ 983.251(d)) or any family referred from the PBV waiting list being offered that unit) with a list of the non-life-threatening deficiencies identified by the initial HQS inspection and, should the owner not complete the repairs within 30 days, the maximum amount of time the PHA will withhold HAP before abating assistance. The PHA must also inform the family that if the family accepts the unit and the owner fails to make the repairs within the cure period, which may not exceed 180 days from the effective date of the HAP contract, the PHA will remove the unit from the HAP contract, and the family will be issued a voucher to move to another unit in order to receive voucher assistance. The family referred from the waiting list may choose to decline the unit and remain on the waiting list. An eligible in-place family may decline the unit, and the PHA must issue the family a tenant-based voucher to move from the unit in that circumstance.

(iii) If the family decides to lease the unit, the family enters into the assisted lease with the owner. The PHA commences making assistance payments to the owner.

(iv) The owner must correct the deficiencies within 30 days from the effective date of the HAP contract. If the owner fails to correct the deficiencies within the 30-day cure period, the PHA must withhold the housing assistance payments for the unit until the owner makes the repairs and the PHA verifies the correction. Once the deficiencies are corrected, the PHA may use the withheld housing assistance payments to make payments for the period that payments were withheld.

(iv) The PHA must state in its Administrative Plan the maximum amount of time it will withhold payments before abating payments, and the number of days after which the PHA will either terminate the PBV HAP contract or remove the unit from HAP contract as a result of the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract; and

(vi) The owner may not terminate the tenancy of a family because of the withholding or abatement of assistance payments. During any period the assistance is abated under the NLT option, the family may terminate the tenancy by notifying the owner and the PHA, and the PHA must provide the family with tenant-based assistance. In the case of an in-place family, the family may also choose to terminate the tenancy during the withholding period following the 30-day cure period, and the PHA must offer the family either another assisted unit in the PBV project that fully complies with HQS or tenant-based assistance.

(3) *Initial inspection—alternative inspection option.* The PHA may adopt the alternative inspection option for initial inspections of existing housing.

(i) After the PHA determines the project meets the definition of existing housing in accordance with paragraph (a) of this section, the PHA execute the HAP contract for the project if the project has been inspected in the previous 24 months where the alternative inspection meets the requirements of § 982.406, as opposed to re-inspecting the project to make such all units fully comply with the Housing Quality Standards before executing the HAP contract, if the owner agrees to the use of the alternative inspection option. If the PHA has established and the unit is covered by both the NLT option under paragraph (c)(2) of this section and the alternative inspections option for the initial HQS inspection, see paragraph (c)(4) of this section.

(ii) The PHA notifies all families (any eligible in-place family (§ 983.251(d)) or any family referred from the PBV waiting list being offered that unit) that will occupy the unit before the PHA conducts the HQS inspection that the alternative inspection option is in effect for the project. The PHA must provide each family with the PHA list of HQS deficiencies that are considered life-threatening under § 982.401(o) as part of this notification. A family on the waiting list may decline to accept the unit due to unit conditions and retain its place on the PBV waiting list.

(iii) The PHA must conduct an HQS inspection within 30 days of the project selection date. If the family reports a deficiency to the PHA prior to the PHA's inspection, the PHA must inspect the unit within the time period required under § 983.103(f) or within 30 days of the effective date of the HAP contract, whichever time period ends first.

(iv) The PHA may not make housing assistance payments to the owner until the PHA has inspected all the units under the HAP contract and determined they meet Housing Quality Standards.

(v) The PHA may commence housing assistance payments to the owner and make housing assistance payments retroactive to the effective date of the HAP contract only after the assisted units pass the PHA's HQS inspection. If any unit does not pass the HQS inspection, the PHA may not make housing assistance payments to the owner until all the deficiencies have been corrected. If a defect is life threatening, the owner must correct the defect within 24 hours of notification from the PHA. For other defects, the owner must correct the defect within no more than 30 calendar days (or any PHA-approved extension) of notification from the PHA. If the owner corrects the deficiencies within the required cure period, the PHA makes the housing assistance payments retroactive to the effective date of the HAP contract.

(vi) The PHA establishes in the Administrative Plan the maximum amount of time it will withhold payments if the owner does not correct the deficiencies within the required cure period before abating payments, and the date by which the PHA will either remove the unit from the HAP contract or terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

(vii) If the owner fails to make the repairs within the applicable time

periods, the PHA must abate the payments for the non-compliant units, while continuing to withhold payments for the HQS compliant units until all the units meet HQS.

(viii) The owner may not terminate the tenancy of a family because of the withholding or abatement of assistance payments. During the abatement period, a family may terminate the tenancy by notifying the owner, and the PHA must provide the family with tenant-based assistance. The PHA must state in its Administrative Plan the number of days after which the PHA will terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

(4) *Initial inspection—use of both the NTL and alternative options.* The PHA may adopt both the NLT option and the alternative inspection option for initial inspections of existing housing.

(i) If the owner agrees to both the NLT option and the alternative inspection option, then the PHA notifies all families (any eligible in-place family (§ 983.251(d)) or any family referred from the PBV waiting list that will occupy the unit before the PHA conducts the HQS inspection) that both the NLT option and the alternative inspection option will be used for the family's unit. As part of this notification, the PHA must provide the family with the PHA's list of HQS deficiencies that are considered life-threatening under 24 CFR 982.401(o). A family on the waiting list may decline to move into a unit due to unit conditions and retain its place on the PBV waiting list.

(ii) The PHA executes the HAP contract with the owner on the basis of the alternative inspection. The PHA must conduct an HQS inspection within 30 days after the date of project selection. If the family reports a deficiency to the PHA during this interim period, the PHA must inspect the unit within the time period required under 24 CFR 983.103(f) or within 30 days of the project selection date, whichever time period ends first.

(iii) The PHA may not make housing assistance payments to the owner until the PHA has inspected all the assisted units.

(iv) If none of the units have any life-threatening deficiencies, the PHA commences payments and makes retroactive payments to the effective date of the HAP contract for all the assisted units. For any unit that failed the PHA's HQS inspection but has no life-threatening deficiencies, the owner must correct the deficiencies within no more than 30 days from the effective date of the HAP contract. If the owner fails to correct the deficiencies within the 30-day cure period, the PHA must withhold the housing assistance payments for that unit until the owner makes the repairs and the PHA verifies the correction. Once the unit is in compliance with HQS, the PHA may use the withheld housing assistance payments to make payments for the period that payments were withheld.

(v) If any units have life-threatening deficiencies, the PHA may not commence making housing assistance payments to the owner until all the HQS deficiencies (life-threatening and non-life threatening) have been corrected. The owner must correct all life-threatening deficiencies within no more than 24 hours. For other defects, the owner must correct the defect within no more than 30 calendar days (or any PHA-approved extension). If the owner corrects the all the deficiencies within the required cure period, the PHA makes the housing assistance payments retroactive to the effective date of the HAP contract.

(vi) The owner may not terminate the tenancy of the family because of the withholding or abatement of assistance payments. During the period the assistance is abated, a family may terminate the tenancy by notifying the owner, and the PHA must provide the family with tenant-based assistance. The PHA must establish in its Administrative Plan:

(A) The maximum amount of time it will withhold payments if the owner fails to correct the deficiencies within the required cure period before abating payments; and

(B) The number of days after which the PHA will terminate the HAP contract for the owner's failure to correct the deficiencies, which may not exceed 180 days from the effective date of the HAP contract.

(d) *Turnover inspections.* Before providing assistance to a new family in a contract unit, the PHA must inspect the unit. The PHA must not provide assistance on behalf of a family for a unit that fails to comply fully with HQS.

(e) *Biennial inspections.* (1) At least biennially during the term of the HAP contract, the PHA must inspect a random sample, consisting of at least 20 percent of the contract units in each building, to determine if the contract units and the premises are maintained in accordance with HQS. Turnover inspections pursuant to paragraph (c) of this section are not counted toward meeting this inspection requirement.

(2) If more than 20 percent of the sample of inspected contract units in a building fail the initial inspection, then the PHA must reinspect 100 percent of the contract units in the building.

(3) A PHA may also use the procedures applicable to HCV units in 24 CFR 982.406.

(f) *Other inspections.* (1) When a participant family or government official notifies the PHA of a potential life-threatening deficiency as defined in 24 CFR 982.401(o), the PHA must inspect the housing unit within 24 hours and notify the owner if the life-threatening deficiency is confirmed. The owner must then make the repairs within 24 hours of PHA notification. If the reported condition is non–life threatening, within 15 days, the PHA must inspect the unit and provide the owner notification if the deficiency is confirmed. The owner must then make the repairs within 30 days or any PHA-approved extension. In the event of extraordinary circumstances, such as if a unit is within a Presidentially declared disaster area, HUD may waive the 24-hour or the 15-day inspection requirement until such time as an inspection is feasible.

(2) The PHA must conduct follow-up inspections needed to determine if the owner (or, if applicable, the family) has corrected an HQS violation, and must conduct inspections to determine the basis for exercise of contractual and other remedies for owner or family violation of the HQS. (Family HQS obligations are specified in 24 CFR 982.404(b).)

(3) In conducting PHA supervisory quality control HQS inspections, the PHA should include a representative sample of both tenant-based and project-based units.

(g) *Inspecting PHA-owned units.* (1) In the case of PHA-owned units, the inspections required under this section must be performed by an independent entity designated in accordance with § 983.57, rather than by the PHA.

(2) The independent entity must furnish a copy of each inspection report to the PHA.

(3) The PHA must take all necessary actions in response to inspection reports from the independent entity, including exercise of contractual remedies for violation of the HAP contract by the PHA owner.

(h) *Verification methods.* When a PHA must verify correction of a deficiency, the PHA may use verification methods other than another on-site inspection. The PHA may establish different verification methods for initial and subsequent inspections or for different HQS deficiencies. Upon either an inspection for initial occupancy or a reinspection, the PHA may accept photographic evidence or

other reliable evidence from the owner to verify that a defect has been corrected.

(i) *Mixed-finance properties.* In the case of a property assisted with project-based vouchers (authorized at 42 U.S.C. 1437f(o)(13)) that is subject to an alternative inspection, the PHA may rely upon inspections conducted at least triennially to demonstrate compliance with the inspection requirement of 24 CFR 982.405(a).

■ 36. Revise subpart D to read as follows:

Subpart D—Requirements for Rehabilitated and Newly Constructed Units

Sec.
983.151 Applicability.
983.152 Nature of development activity.
983.153 Development requirements.
983.154 Development agreement.
983.155 Completion of work.
983.156 PHA acceptance of completed units.
983.157 Development activity on units under a HAP contract.

Subpart D—Requirements for Rehabilitated and Newly Constructed Units

§ 983.151 Applicability.

This subpart applies to development activity, as defined in § 983.3, under the PBV program.

§ 983.152 Nature of development activity.

(a) *Purpose of development activity.* An owner may undertake development activity, as defined at § 983.3, for the purpose of:

(1) Placing a project under a HAP contract (new construction or rehabilitation), or

(2) Adding previously unassisted units in the project to the HAP contract in accordance with § 983.207(b)(3).

(b) *Development requirements.* (1) Development activity undertaken in order to place a new construction or rehabilitation project under a HAP contract must comply with the requirements of §§ 983.153 through 983.156.

(2) Development activity undertaken in order to add previously unassisted units in the project to the HAP contract must comply with the requirements of §§ 983.153(e), (f), and (g); 983.155; and 983 156. Section 983.154, Development agreement, is not applicable if the development activity is undertaken to add previously unassisted units in the project to the HAP contract.

§ 983.153 Development requirements.

(a) *Environmental review requirements.* The development activity must comply with any applicable environmental review requirements at § 983.56.

(b) *Subsidy layering review.* (1) The PHA may provide PBV assistance only in accordance with the HUD subsidy layering regulations (24 CFR 4.13) and other requirements. A subsidy layering review is required when an owner undertakes development activity to place a project under a HAP contract (new construction or rehabilitation) at § 983.152(a)(1) and housing assistance payment subsidy under the PBV program is combined with other governmental housing assistance from federal, state, or local agencies, including assistance such as tax concessions or tax credits. The subsidy layering review is intended to prevent excessive public assistance for the housing by combining (layering) housing assistance payment subsidy under the PBV program with other governmental housing assistance from federal, state, or local agencies, including assistance such as tax concessions or tax credits.

(2) When a subsidy layering review is required, it must occur before a PHA commits to provide assistance to a project. Specifically, the PHA may not enter into an Agreement or HAP contract with an owner until HUD or a housing credit agency approved by HUD has conducted any required subsidy layering review and determined that the PBV assistance is in accordance with HUD subsidy layering requirements.

(3) If a PHA is undertaking development activity to place a project under a HAP contract (new construction or rehabilitation) at § 983.152(a)(1), a further subsidy layering review is not required if HUD's designee has conducted a review in accordance with HUD's PBV subsidy layering review guidelines and that review included a review of PBV assistance.

(4) The HAP contract must contain the owner's certification that the project has not received and will not receive (before or during the term of the HAP contract) any public assistance for acquisition, development, or operation of the housing other than assistance disclosed in the subsidy layering review in accordance with HUD requirements. A subsidy layering review is required for newly constructed or rehabilitated housing under a HAP contract that receives additional assistance, as described in § 983.12(d).

(5) Existing housing is exempt from subsidy layering requirements.

(c) *Labor standards.* (1) Labor standards as described in paragraphs (c)(2) and (3) of this section apply to development activity undertaken to place a new construction or rehabilitation project under a HAP contract if the PHA and owner execute an Agreement in accordance with § 983.154(a). If the PHA decides not to require the Agreement in accordance with § 983.154(e), the labor standards described in paragraphs (c)(2) and (3) of this section do not apply.

(2) In the case of development involving nine or more contract units (whether or not completed in stages), the owner and the owner's contractors and subcontractors must pay Davis-Bacon wages to laborers and mechanics employed in development of the housing.

(3) The owner and the owner's contractors and subcontractors must comply with the Contract Work Hours and Safety Standards Act, Department of Labor regulations in 29 CFR part 5, and other applicable federal labor relations laws and regulations. The PHA must monitor compliance with labor standards.

(4) For any project to which labor standards apply, the PHA's written notice of proposal selection must state that any construction contracts must incorporate a Davis-Bacon contract clause and the current applicable prevailing wage determination.

(d) *Equal opportunity.* Development activity at § 983.152 is subject to Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and the implementing regulations at 24 CFR part 135.

(e) *Equal employment opportunity.* Development activity at § 983.152 is subject to the federal equal employment opportunity requirements of Executive Orders 11246 as amended (3 CFR, 1964–1965 Comp., p. 339), 11625 (3 CFR, 1971–1975 Comp., p. 616), 12432 (3 CFR, 1983 Comp., p. 198), and 12138 (3 CFR, 1977 Comp., p. 393).

(f) *Accessibility.* As applicable, the design and construction requirements of the Fair Housing Act and implementing regulations at 24 CFR 100.205; the accessibility requirements of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR 8.22 and 8.23; and Title II of the Americans with Disabilities Act (42 U.S.C. 12131–12134) and implementing regulations at 28 CFR part 35, including §§ 35.150 and 35.151 apply to development activity at § 983.152. A description of any required work item resulting from these requirements must be included in the Agreement (if applicable), as specified in § 983.155(d)(9).

(g) *Broadband infrastructure.* (1) Any development activity under § 983.152(a) that constitutes substantial rehabilitation as defined by 24 CFR

5.100 of a building with more than 4 rental units and where the date of the notice of proposal selection or the start of the development activity while under a HAP contract is after January 19, 2017, must include installation of broadband infrastructure, as this term is defined in 24 CFR 5.100, except where the owner determines and documents the determination that:

(i) The location of the new construction or substantial rehabilitation makes installation of broadband infrastructure infeasible;

(ii) The cost of installing broadband infrastructure would result in a fundamental alteration in the nature of its program or activity or in an undue financial burden; or

(iii) The structure of the housing to be substantially rehabilitated makes installation of broadband infrastructure infeasible.

(2) A description of any required work item resulting from this requirement must be included in the Agreement (if applicable), as specified in § 983.55(d)(9).

(h) *Eligibility to participate in federal programs and activities.* (1) An owner or project principal who is on the U.S. General Services Administration list of parties excluded from federal procurement and nonprocurement programs may not participate in development activity or the rehabilitation of units subject to a HAP contract. Both the Agreement (if applicable) and the HAP contract must include a certification by the owner that the owner and other project principals (including the officers and principal members, shareholders, investors, and other parties having a substantial interest in the project) are not on such list.

(2) An owner must disclose any possible conflict of interest that would be a violation of the Agreement (if applicable), the HAP contract, or HUD regulations.

§ 983.154 Development agreement.

(a) *Agreement to enter into a HAP contract (Agreement).* Except as specified in paragraph (e) of this section, the PHA and owner must enter into an Agreement that will govern development activity under § 983.152. In the Agreement the owner agrees to develop the contract units to comply with HQS, and the PHA agrees that, upon timely completion of such development activity in accordance with the terms of the Agreement, the PHA will enter into an initial HAP contract with the owner for the contract units.

(b) *Timing of Agreement.* The Agreement must be signed prior to the commencement of development activity, as described in paragraph (c) of this section, and must be in the form required by HUD (*see* § 982.162(b)).

(c) *Commencement of development activity.* The PHA may not enter into an Agreement if development activity has commenced after the date of proposal submission (for housing subject to competitive selection) or the date of the PHA's board resolution approving the project-basing of assistance at the project (for housing excepted from competitive selection).

(1) In the case of new construction, development activity begins with excavation or site preparation (including clearing of the land);

(2) In the case of rehabilitation, development activity begins with the physical commencement of rehabilitation activity on the housing.

(d) *Contents of Agreement.* At a minimum, the Agreement must describe the following features of the housing to be developed and assisted under the PBV program:

(1) Site;

(2) Location of contract units on site;

(3) Number of contract units by area (square footage) and number of bedrooms and bathrooms;

(4) Services, maintenance, or equipment to be supplied by the owner without charges in addition to the rent to owner;

(5) Utilities available to the contract units, including a specification of utility services to be paid by the owner (without charges in addition to rent) and utility services to be paid by the tenant;

(6) The Agreement must include a description of any required work item necessary to comply with the accessibility requirements of § 983.153(f).

(7) If the requirement at § 983.153(g) to install broadband infrastructure applies, then the Agreement must include a description of any required work item resulting from this requirement.

(8) Estimated initial rents to owner for the contract units;

(9) Description of the work to be performed under the Agreement.

(i) If the Agreement is for new construction, then the work description must include the working drawings and specifications.

(ii) If the Agreement is for rehabilitation, then the work description must include the rehabilitation work write-up and, where determined necessary by the PHA, specifications and plans.

(e) *PHA discretion.* With respect to development activity under § 983.152, the PHA may decide whether to require the use of an Agreement.

(1) A PHA that will not require the use of an Agreement must state this in its Administrative Plan.

(2) The following conditions apply:

(i) The owner of the project must be able to document its compliance with the requirements of § 983.153 from the date of proposal submission (for housing subject to competitive selection) or from the date of the PHA's board resolution approving the project-basing of assistance at the project (for housing excepted from competitive selection);

(ii) Prior to selecting the project, the PHA must confirm that, from the point of proposal submission (for housing subject to competitive selection) or from the date of the PHA's board resolution approving the project-basing of assistance at the project (for housing excepted from competitive selection), the owner has complied with the requirements of § 983.153.

(3) Following the date of proposal selection, the PHA and owner may enter into an Agreement but are not required to do so.

§ 983.155 Completion of work.

The owner must submit evidence and certify to the PHA, in the form and manner required by the PHA, that development activity under § 983.152 or development activity undertaken on units under a HAP contract under § 983.157 has been completed, and that all such work was completed in accordance with the applicable requirements.

§ 983.156 PHA acceptance of completed units.

(a) *Inspection of units.* After the PHA has received all required evidence of completion and the owner's certification that all work was completed in accordance with the applicable requirements, the PHA must inspect the units to determine whether they were completed in accordance with HUD's Housing Quality Standards (*see* § 983.103(b)(1)) and any additional design or quality requirements specified by the PHA.

(b) *Execution or amendment of the HAP contract.* If the PHA determines that the development activity was completed in accordance with the applicable requirements, and the units meet HUD's Housing Quality Standards and any additional design or quality requirements specified by the PHA, then the PHA must submit the HAP contract for execution by the owner and must execute the HAP contract for PBV rehabilitation and new construction

projects (§ 983.152(a)(1)) or amend the HAP contract to add the units to the HAP contract (§ 983.152(a)(2).

§ 983.157 Development activity on units under a HAP contract.

(a) *Owner request to undertake development activity on units under a HAP contract.* The owner may undertake development activity on units currently under a HAP contract if approved to do so by the PHA. The owner may not request, and a PHA may not approve, the owner's request within the first five years of the effective date of the HAP contract except in extraordinary circumstances (*e.g.,* the units were damaged by fire, natural disaster, etc.). The owner's request must include a description of the development activity proposed to be undertaken and the length of time, if any, it is anticipated that the units will not meet HQS. If any of the units will not meet Housing Quality Standards during the period of the development activity, the owner's request must include a description of how the families will be rehoused during the period the units will not meet Housing Quality Standards. Housing assistance payments may not be made during the time the units are not in compliance with Housing Quality Standards requirements during the development activity. The PHA may choose to temporarily remove units from the PBV HAP contract during the time the units will not meet Housing Quality Standards during the development activity.

(b) *Applicable requirements.* The following development requirements under § 983.153 apply to development activity undertaken on units under a HAP contract.

(1) The equal opportunity employment opportunity requirements at § 982.153(e) shall apply, as applicable.

(2) The accessibility standards at § 983.153(f) shall apply, as applicable.

(3) The broadband infrastructure requirements at § 983.153(g) shall apply, as applicable.

(c) *Inapplicable requirements.* (1) Except as provided in paragraph (b) of this section, the development requirements under § 983.153 do not apply to development activity undertaken for units under a HAP contract.

(2) Section § 983.154, Development agreement, does not apply to development activity undertaken for units that are currently under a HAP contract.

(3) Section § 983.156, PHA acceptance of completed units, does not apply to development activity undertaken for units that are currently under a HAP contract.

■ 37. In § 983.203, revise paragraphs (f) through (i) and add paragraph (j) to read as follows:

§ 983.203 HAP contract information.

* * * * *

(f) Features provided to comply with program accessibility requirements of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR part 8, the Fair Housing Act, and the Americans with Disabilities Act, as applicable;

(g) The HAP contract term;

(h) The number of units in any project that will exceed the 25 percent per-project project cap (as described in § 983.54), which will be set-aside for occupancy by families who qualify for an exception (as described in § 983.54);

(i) The initial rent to owner (for the first 12 months of the HAP contract term); and

(j) Whether the PHA has elected not to reduce rents below the initial rent to owner in accordance with 24 CFR 983.302(c)(2).

■ 38. Revise § 983.204 to read as follows:

§ 983.204 When HAP contract is executed.

(a) *PHA inspection of housing.* Before execution of the HAP contract, the PHA must determine that applicable pre-HAP contract HQS requirements have been met in accordance with § 983.103(b). The PHA may not enter into the HAP contract for any contract unit that does not meet the pre-HAP contract HQS requirements.

(b) *Existing housing.* In the case of existing housing, the HAP contract must be executed promptly after PHA selection of the owner proposal and PHA determination that the applicable pre-HAP contract HQS requirements have been met.

(c) *Newly constructed or rehabilitated housing.* In the case of newly constructed or rehabilitated housing, the HAP contract must be executed after the PHA determines that the housing was completed in accordance with the applicable requirements, HUD's Housing Quality Standards, and any additional design or quality requirements specified by the PHA. .

(d) *PHA-owned units.* If the PBV project containing PHA-owned units is not owned by a separate legal entity from the PHA (*e.g.,* an entity wholly controlled by the PHA or a limited liability company or limited partnership owned by the PHA), the PHA must choose one of the two following options because the PHA cannot execute a PBV HAP contract with itself.

(1) *PBV HAP contract execution.* (i) Prior to execution of the PBV HAP contract, the PHA must establish a separate legal entity to serve as the owner. The separate legal entity must have the legal capacity to lease units and must be one of the following:

(A) A non-profit affiliate or instrumentality of the PHA;

(B) A limited liability corporation;

(C) A limited partnership;

(D) A corporation; or

(E) Any other legally acceptable entity recognized under State law.

(ii) In cases where the independent entity, as defined in § 982.4, is required to notify the PHA of a determination, the independent entity may notify the PHA or the separate legal entity, or both.

(2) *PHA certification option.* (i) Instead of executing the PBV HAP contract, the PHA signs the HUD-prescribed certification covering the PHA-owned PBV project. By signing the HUD certification, the PHA certifies that it will fulfill all the required program responsibilities of the private owner under the PBV HAP contract, and that it will also fulfill all of the program responsibilities required of the PHA for the PHA-owned PBV project.

(ii) The PHA executed certification serves as the equivalent of the PBV HAP contract for the PHA-owned PBV project.

(iii) The PHA must obtain the services of an independent entity to perform the required PHA functions in accordance with § 983.57(b) before signing the certification.

(iv) The PHA may not use the PHA-owned certification if the PHA-owned PBV project is owned by a separate legal entity from the PHA (*e.g.,* an entity wholly controlled by the PHA or a limited liability corporation or limited partnership controlled by the PHA).

■ 39. Revise § 983.205 to read as follows:

§ 983.205 Term of HAP contract.

(a) *Initial term.* The PHA may enter into a HAP contract with an owner for an initial term of up to 20 years for each contract unit. The length of the term of the HAP contract for any contract unit may not be less than one year, nor more than 20 years.

(b) *Extension of term.* (1) The PHA and owner may agree to extend the term of the HAP contract for up to 20 years beyond the initial term of the contract, provided the PHA determines the extension is appropriate to continue providing affordable housing for low-income families.

(2) The PHA and owner may agree to extend the contract term multiple times during the term of the HAP contract,

provided that the extensions cumulatively do not extend more than 20 years beyond the end of the initial contract term.

(3) The PHA and owner may subsequently agree to extend the term of the contract beyond 20 years from the end of the initial term, but only if the following conditions are met:

(i) No earlier than 24 months prior to the expiration of the HAP contract, the PHA determines that the extension is appropriate to continue providing affordable housing for low-income families or to expand housing opportunities; and

(ii) The term of the new extension may not exceed 20 years.

(4) Any extension of the term must be on the form and subject to the conditions prescribed by HUD at the time of the extension.

(c) *PHA-owned units.* In the case of PHA-owned units, the term of the HAP contract and any HAP contract extension must comply with the requirements of this section and must be agreed upon by the PHA and the independent entity (*see* § 983.57(b)(2)).

■ 40. Revise § 983.206 to read as follows:

§ 983.206 Contract termination or expiration and statutory notice requirements.

(a) *Nonextension by owner—notice requirements.* (1) Notices required in accordance with this section must be provided in the form prescribed by HUD.

(2) Not less than one year before termination of a PBV or PBC HAP contract, the owner must notify the PHA and assisted tenants of the termination.

(3) The term ''termination'' for applicability of this notice requirement means the expiration of the HAP contract or an owner's refusal to renew the HAP contract.

(4) If an owner fails to provide the required notice, the owner must permit the tenants in assisted units to remain in their units for the required notice period with no increase in the tenant portion of their rent, and with no eviction as a result of an owner's inability to collect an increased tenant portion of rent.

(5) An owner and PHA may agree to extend the terminating contract for a period of time sufficient to provide tenants with the required notice, under such terms as HUD may require.

(b) *Termination or expiration without extension—required provision of tenant-based assistance.* The PBV HAP contract must provide that, unless a termination or expiration without extension occurs as a result of a determination of insufficient funding pursuant to paragraph (c) of this section upon termination or expiration without extension of a PBV HAP contract, each assisted family may elect to use their tenant-based assistance to remain in the same project, subject to the following:

(1) The unit must comply with HUD's Housing Quality Standards;

(2) The PHA must determine or have determined that the rent for the unit is reasonable;

(3) The family must pay its required share of the rent and the amount, if any, by which the unit rent (including the amount allowed for tenant-based utilities) exceeds the applicable payment standard (the limitation at § 982.508 regarding maximum family share at initial occupancy shall not apply);

(4) The family shall not be considered a new admission to the tenant-based program

(5) The family shall not count toward the PHA's income-targeting requirements at § 982.201(b)(2)(i); and

(6) An owner may not terminate the tenancy of a family that elects to use their tenant-based assistance to remain in the same project, except for in response to serious or repeated lease violations, or for other good cause (*see* § 982.310).

(c) *Termination by PHA.* (1) The HAP contract must provide that the term of the PHA's contractual commitment is subject to the availability of sufficient appropriated funding (budget authority) as determined by HUD. For purposes of this section, ''sufficient funding'' means the availability of appropriations, and of funding under the ACC from such appropriations, to make full payment of housing assistance payments payable to the owner for any contract year in accordance with the terms of the HAP contract. Consistent with the policies in the PHA's Administrative Plan, the PHA has the option of terminating a PBV HAP contract only if:

(i) The PHA determines that it lacks sufficient funding to continue housing assistance payments for all voucher units under a HAP contract;

(ii) The PHA has taken cost-saving measures specified by HUD; and

(iii) HUD determines that the PHA lacks sufficient funding.

(2) If the PHA determines that a breach has occurred, the PHA may exercise any of its rights or remedies under the HAP contract, including but not limited to contract termination. In the case of contract termination, families shall be provided tenant-based assistance, as described in paragraph (b) of this section.

(d) *Termination by owner—reduction below initial rent.* If the amount of the rent to owner for any contract unit, as adjusted in accordance with § 983.302, is reduced below the amount of the initial rent to owner, the owner may terminate the HAP contract, upon notice to the PHA, and families must be provided tenant-based assistance and may elect to remain in the project in accordance with paragraph (b) of this section. The owner is not required to provide the one-year notice of the termination of the HAP contract to the family and the PHA, as described in paragraph (a) of this section, when terminating the HAP contract due to rent reduction below the initial rent to owner.

■ 41. Revise § 983.207 to read as follows:

§ 983.207 HAP contract amendments (to add or substitute contract units).

(a) *Amendment to substitute contract units.* At the discretion of the PHA and subject to all PBV requirements, the HAP contract may be amended to substitute a different unit with the same number of bedrooms in the same project for a previously covered contract unit. Prior to such substitution, the PHA must inspect the proposed substitute unit to determine whether it complies with HQS and must determine the reasonable rent for such unit.

(b) *Amendment to add contract units.* At the discretion of the PHA, and provided that the total number of units in a project that will receive PBV assistance will not exceed the limitations in § 983.6 or § 983.54, a HAP contract may be amended to add PBV units in the same project to the contract, without a new proposal selection.

(1) Added units that qualify for an exception to the program cap (as described in § 983.6 and § 983.59) or the project cap (as described in § 983.54 and § 983.59) will not count against such cap(s).

(2) The anniversary and expiration dates of the HAP contract for the additional units must be the same as the anniversary and expiration dates of the HAP contract term for the PBV units originally placed under HAP contract.

(3) A unit that is not under a HAP contract but is in a project with other units that are under a HAP contract may undergo repairs or renovation prior to amending the PBV HAP contract to add the unit. If such repairs or renovation constitutes development activity as defined in § 983.3, then the requirements at § 983.152(b) must be met.

(4) Units may only be added to the HAP contract if the units existed at the time of HAP contract execution.

(c) *Staged completion of contract units.* Even if contract units are placed under the HAP contract in stages commencing on different dates, there is a single annual anniversary for all contract units under the HAP contract. The annual anniversary for all contract units is the annual anniversary date for the first contract units placed under the HAP contract. The expiration of the HAP contract for all the contract units completed in stages must be concurrent with the end of the HAP contract term for the units originally placed under HAP contract.

■ 42. Revise § 983.208 to read as follows:

§ 983.208 Condition of contract units.

(a) *Owner maintenance and operation.* (1) The owner must maintain and operate the contract units and premises in accordance with HUD's Housing Quality Standards, including performance of ordinary and extraordinary maintenance.

(2) The owner must provide all the services, maintenance, equipment, and utilities specified in the HAP contract with the PHA and in the lease with each assisted family.

(3) At the discretion of the PHA, the HAP contract may also require continuing owner compliance during the HAP term with additional housing quality requirements specified by the PHA (in addition to, but not in place of, compliance with HUD's Housing Quality Standards). Such additional requirements may be designed to assure continued compliance with any design, architecture, or quality requirement specified by the PHA (§ 983.204(c)).

(b) *Enforcement of Housing Quality Standards.* (1) The PHA must vigorously enforce the owner's obligation to maintain contract units in accordance with HUD's Housing Quality Standards. The PHA may not make any HAP payment to the owner for a contract unit covering any period during which the contract unit does not comply with HUD's Housing Quality Standards.

(2) The unit is considered to be in noncompliance with Housing Quality Standards if:

(i) The PHA or authorized inspector determines the unit fails to comply based upon an inspection;

(ii) The PHA notified the owner in writing of the unit failure; and

(iii) The unit failures are not corrected in accordance with the timeframes established in § 982.401(a)(5) and/or § 982.401(o).

(3) In the case of an HQS deficiency that is caused byany member or guest of the assisted family, the PHA may waive the owner's responsibility to remedy the violation. If the PHA waives the owner's responsibility, then the family must make the repairs in accordance with the applicable timeframes. However, the PHA may terminate assistance to a family because of HQS breach caused by the family, which may result in removing the unit from the HAP contract.

(c) *PHA remedies.* This paragraph covers PHA actions when HQS deficiencies are identified as the result of a regular inspection (HQS inspection conducted on the PBV project at least biennially or interim inspection (when the PHA inspects a PBV unit at other times as needed, such as when a family or government official notifies the PHA of a deficiency)). See § 983.103 for PHA enforcement actions related to the initial HQS inspection options for PBV existing housing.

(1) A PHA may withhold assistance payments for individual units that do not meet HQS once the PHA has notified the owner in writing of the deficiencies. If the unit is brought into compliance during the applicable cure period (24 hours for life-threatening deficiencies and 30 days (or other reasonable period established by the PHA), the PHA must:

(i) Resume assistance payments; and

(ii) Provide assistance payments to cover the time period for which the assistance payments were withheld.

(2)(i) The PHA must abate the HAP for the PBV unit if the owner fails to make the repairs within the applicable cure period (24 hours for life-threatening deficiencies and 30 days (or other reasonable period established by the PHA)). Once the repairs are made and the unit complies with HQS, the PHA must recommence HAP.

(ii) If the PHA abates HAP under this paragraph, the PHA must notify the tenant and the owner that it is abating payments and that if the unit does not meet HQS within 60 days after the determination of noncompliance or a reasonable longer period established by the PHA, the PHA will remove the unit from the HAP contract, and the family will have to move if the family wishes to receive continued assistance. The PHA must provide the family with any forms necessary to move to another unit and transfer the rental assistance accordingly.

(iii) The PHA may choose to abate payments for the entire PBV HAP due to unit's noncompliance with the HQS, even if some of the units continue to meet HQS. The PHA may terminate the entire HAP contract, rather than simply removing the unit from the HAP contract, due to noncompliance with HQS.

(iv) If a PHA abates the HAP for the unit, the PHA must notify the family and the owner that it is abating payments and that if the unit does not meet HQS within 60 days after the determination of noncompliance (or a reasonable longer period established by the PHA), the PHA will either terminate the HAP contract or remove the unit from the HAP contract, and the family will have to move if the family wishes to receive continued assistance. The PHA must issue the family its voucher and provide the family with any other forms necessary to move to another unit with continued HQS assistance.

(3) An owner may not terminate the tenancy of any family due to the withholding or abatement of assistance. During the period that assistance is abated, the family may terminate the tenancy by notifying the owner.

(4) If the owner makes the repairs and the unit complies with HQS within 60 days (or a reasonable longer period established by the PHA) of the notice of abatement, the PHA must recommence payments to the owner. The PHA does not make any payments for the unit to the owner for the period of time that the payments were abated.

(5) If the owner fails to make the repairs within 60 days (or a reasonable longer period established by the PHA) of the notice of abatement, the PHA must either remove the unit from the HAP contract or terminate the HAP contract in its entirety.

(6)(i) The PHA must give any family residing in a unit that is either removed from the HAP contract or for which the HAP contract is terminated under this paragraph (c) due to a failure to correct HQS deficiencies at least 90 days or a longer period as the PHA determines is reasonably necessary following the termination of the HAP contract to lease a unit with tenant-based assistance.

(ii) If the family is unable to lease a unit within the period under paragraph (c)(6) of this section and the PHA owns or operates public housing, the PHA must offer, and if accepted, provide the family a preference for the first appropriately sized public housing unit that becomes available for occupancy after the time period expires.

(iii) PHAs may assist families relocating under this paragraph (c) in finding a new unit, including using up to 2 months of the withheld and abated assistance payments for costs directly associated with relocating to a new unit, including security deposits or reasonable moving costs as determined

by the PHA based on their locality. If the family receives security deposit assistance from the PHA for the new unit, the PHA may require the family to remit the security deposit returned by the owner of the new unit at such time that the lease is terminated, up to the amount of the security deposit assistance provided by the PHA for that unit. The PHA must include in its Administrative Plan the policies it will implement for this provision.

(d) *Maintenance and replacement—Owner's standard practice.* Maintenance and replacement (including redecoration) must be in accordance with the standard practice for the building concerned as established by the owner.

(e) *Applicability.* This section is applicable to HAP contracts that were either executed on or renewed after [EFFECTIVE DATE OF FINAL RULE]. For purposes of this paragraph, a HAP contract is renewed when the HAP contract is extended beyond the initial term of the lease. For all other HAP contracts, § 983.208 as in effect on [DATE ONE DAY BEFORE EFFECTIVE DATE OF FINAL RULE] remains applicable.

■ 43. In § 983.210, revise paragraphs (a), (c), and (e) and remove paragraph (j).

The revisions read as follows:

§ 983.210 Owner certification.

* * * * *

(a) The owner is maintaining the premises and all contract units in accordance with HUD's Housing Quality Standards.

* * * * *

(c) Each contract unit for which the owner is receiving housing assistance payments is leased to an eligible family referred by the PHA, or selected from the owner-maintained waiting list in accordance with § 983.251, and the lease is in accordance with the HAP contract and HUD requirements.

* * * * *

(e) The owner (including a principal or other interested party) is not the spouse, parent, child, grandparent, grandchild, sister, or brother of any member of a family residing in a contract unit unless needed as a reasonable accommodation under Section 504, the Fair Housing Act, or the ADA, for a household member who is a person with disabilities.

* * * * *

■ 44. In § 983.211, revise paragraph (a) and the final sentence of paragraph (c) to read as follows:

§ 983.211 Removal of unit from HAP contract.

(a) Units occupied by families whose income has increased during their tenancy resulting in the tenant rent equaling the rent to the owner, shall be removed from the HAP contract 180 days following the last housing assistance payment on behalf of the family.

* * * * *

(c) * * * Families must be selected in accordance with program requirements under § 983.251 of this part.

■ 45. Revise § 983.251 to read as follows:

§ 983.251 How participants are selected.

(a) *Who may receive PBV assistance*? (1) The PHA may select families who are participants in the PHA's tenant-based voucher program and families who have applied for admission to the voucher program.

(2) Except for tenant-based voucher participants (determined eligible at original admission to the voucher program), the PHA may only select families determined eligible for admission within 60 days prior to commencement of PBV assistance.

(3) The protections for victims of domestic violence, dating violence, sexual assault, or stalking in 24 CFR part 5, subpart L, apply to admission to the project-based voucher program.

(4) A PHA may not approve a tenancy if the owner (including a principal or other interested party) of a unit is the parent, child, grandparent, grandchild, sister, or brother of any member of the family, unless the PHA determines that approving the unit would provide reasonable accommodation under Section 504, the Fair Housing Act, or the ADA, for a family member who is a person with disabilities.

(b) *Protection of in-place families.* (1) In order to minimize displacement of in-place families, if an existing unit or a unit requiring rehabilitation is occupied by an eligible family on the proposal selection date, the in-place family must be placed on the PBV waiting list (if the family is not already on the list) and given an absolute selection preference. If a project-specific waiting list is not used for the project, the PHA must refer the family to the applicable project owner for an appropriately sized PBV unit in the project.

(2) The in-place family protection applies only to families that are eligible to participate in the PBV program on the proposal selection date. If the in-place family is a tenant-based voucher participant, program eligibility is not re-determined. However, the PHA may deny or terminate assistance for the grounds specified in 24 CFR 982.552 and 982.553.

(3)(i) During the initial term of the tenant-based lease, an in-place tenant-based voucher family may agree, but is not required, to mutually terminate the tenant-based lease with the owner and enter into a PBV lease. If the family chooses to continue under the tenant-based lease, the unit may not be added to the PBV HAP contract. The owner may not terminate the lease for other good cause during the initial term of the tenant-based lease unless the owner is terminating the tenancy because of something the family did or failed to do in accordance with 24 CFR 982.310(d)(2). The owner is expressly prohibited from terminating the tenancy during the initial term of the lease based on the family's failure to accept the offer of a new lease or revision, or for a business or economic reason.

(ii) After the initial term of the tenant-based lease, an owner may choose not to renew the tenant-based lease or may terminate the tenant-based lease for other good cause (as defined in § 982.310(d)). In this case, the family would be required to move with continued tenant-based assistance or relinquish the tenant-based voucher and enter into a PBV lease.

(4) Admission of in-place families is not subject to income-targeting under 24 CFR 982.201(b)(2)(i).

(c) *Selection from waiting list.* (1) Applicants who will occupy PBV units must be selected from the waiting list for the PBV program.

(2) The PHA has the following options in determining how to structure the waiting list for the PBV program:

(i) The PHA may use a separate, central, waiting list comprised of more than one, or all, PBV projects;

(ii) The PHA may use the same waiting list for both tenant-based assistance and some or all PBV projects; or

(iii) The PHA may use separate waiting lists for PBV units in individual projects or buildings (or for sets of such units). This option may be used in combination with option in paragraph (c)(2)(i) or (ii) of this section. The PHA may permit the owner to maintain such waiting lists (*see* § 983.251(c)(7) for more information).

(3) For any of the options under paragraph (c)(2) of this section, the waiting list may establish preferences for occupancy of particular units. Criteria for occupancy of units (*e.g.* elderly families) may also be established; however, selection of families must be done through an admissions preference.

(4) The PHA may merge the waiting list for PBV assistance with the PHA waiting list for admission to another assisted housing program.

(5) Where applicable, the PHA may place families referred by the PBV owner on its PBV waiting list.

(6) If the PHA chooses to use a separate waiting list for admission to PBV units, under paragraphs (c)(2)(i) and (iii) of this section, the PHA must offer to place applicants who are listed on the waiting list for tenant-based assistance on the waiting list for PBV assistance (including owner-maintained PBV waiting lists).

(7) PHAs using separate waiting lists for individual projects or buildings, as described in paragraph (c)(2)(iii) of this section, may permit owners to maintain such waiting lists. PHAs may choose to use owner-maintained PBV waiting lists for specific owners or projects. And, PHAs may permit an owner to maintain a single waiting list across multiple projects owned by the owner. Under an owner-maintained waiting list, the owner is responsible for carrying out responsibilities including, but not limited to, processing changes in applicant information, removing an applicant's name from the waiting list, opening and closing the waiting list. Where a PHA allows for owner-maintained waiting lists, all the following apply:

(i) The owner must develop and submit a written tenant selection plan to the PHA for approval. The tenant selection plan must include policies and procedures concerning waiting list management and selection of applicants from the project's waiting list, including any admission preferences, procedures for removing applicant names from the waiting list, and procedures for closing and reopening the waiting list. The owner must receive approval from the PHA of its tenant selection plan in accordance with the process established in the PHA's Administrative Plan. The owner's tenant-selection plan must be incorporated in the PHA's Administrative Plan.

(ii) The owner must receive approval from the PHA for any preferences that will be applicable to the project. The PHA will approve such preferences as part of its approval of the owner's tenant selection plan. Each project may have a different set of preferences. Preferences must be consistent with the PHA plan and listed in the owner's tenant-selection plan.

(iii) The owner is responsible for opening and closing the waiting list, including providing public notice when the owner opens the waiting list in accordance with § 982.206. If the owner-maintained waiting list is open and additional applicants are needed to fill vacant units, the owner must give public notice in accordance with the requirements of § 982.206 and the tenant selection plan.

(iv) The applicant may apply directly at the project, or the applicant may request that the PHA refer the applicant to the owner for placement on the project's waiting list. The PHA must disclose to the applicant all the PBV projects available to the applicant, including the projects' contact information and other basic information about the project.

(v) Applicants already on the PHA's waiting list must be permitted to place their names on the project's waiting lists.

(vi) At the discretion of the PHA, the owner may make preliminary eligibility determinations for purposes of placing the family on the waiting list, and preference eligibility determinations. The PHA may choose to make this determination rather than delegating it to the owner.

(vii) If the PHA delegated the preliminary eligibility and preference determinations to the owner, the owner is responsible for notifying the family of the owner's determination not to place the applicant on the waiting list and a determination that the family is not eligible for a preference. The PHA is then responsible for conducting the informal review.

(viii) Once an owner selects the family from the waiting list, the owner refers the family to the PHA who then determines the family's final program eligibility. The owner may not offer a unit to the family until the PHA determines that the family is eligible for the program.

(ix) All HCV waiting list administration requirements that apply to the PBV program (24 CFR part 982, subpart E, other than §§ 982.202(b)(2) and 982.204(d)) apply to owner-maintained waiting lists.

(x) The PHA is responsible for oversight of owner-maintained waiting lists to ensure that they are administered properly and in accordance with program requirements, including fair housing requirements under the authorities cited at 24 CFR 5.105(a). The owner is responsible for maintaining complete and accurate records as described in § 982.158. The owner must give the PHA, HUD, and the Comptroller General full and free access to its offices and records concerning waiting list management, as described in § 982.158(c). HUD may take enforcement action against either the owner or the PHA, or both.

(8) Not less than 75 percent of the families admitted to a PHA's tenant-based and project-based voucher programs during the PHA fiscal year from the PHA waiting list shall be extremely low-income families. The income-targeting requirements at 24 CFR 982.201(b)(2) apply to the total of admissions to the PHA's project-based voucher program and tenant-based voucher program during the PHA fiscal year from the PHA waiting list (including owner maintained PBV waiting lists) for such programs.

(9) Families who require particular accessibility features for persons with disabilities must be selected first to occupy PBV units with such accessibility features (see 24 CFR 8.26 and 100.202). Also see § 983.260.

(d) *Preference for services offered.* In selecting families, PHAs (or owners in the case of owner-maintained waiting lists) may give preference to families who qualify for voluntary services, including disability-specific services, offered at a particular project, consistent with the PHA plan and Administrative Plan.

(1) The prohibition on granting preferences to persons with a specific disability at § 982.207(b)(3) continues to apply.

(2) Families shall not be required to accept the particular services offered at the project.

(3) In advertising the project, the owner may advertise the project as offering services for a particular type of disability; however, the preference must be provided to all applicants who qualify for the voluntary services offered in conjunction with the assisted units.

(e) *Offer of PBV assistance or owner's rejection.* (1) If a family refuses the PHA's offer of PBV assistance or the owner rejects a family for admission to the owner's PBV units, the family's position on the PHA waiting list for tenant-based assistance is not affected (regardless of the type of PBV waiting list used by the PHA).

(2) The impact (of a family's rejection of the offer or the owner's rejection of the family) on a family's position on the PBV waiting list will be determined as follows:

(i) If a central PBV waiting list is used, the PHA's Administrative Plan must address the number of offers a family may reject before the family is removed from the PBV waiting list and whether the owner's rejection will impact the family's place on the PBV waiting list.

(ii) If a project-specific PBV waiting list is used, the family's name is removed from the project's waiting list connected to the family's rejection of the offer or the owner's rejection of the

family. The family's position on any other project-specific PBV waiting list is not affected.

(3) None of the following actions may be taken against an applicant who has applied for, received, or refused an offer of PBV assistance:

(i) Refuse to list the applicant on the PHA waiting list for tenant-based assistance or any other available PBV waiting list. However, the PHA (or owner in the case of owner-maintained waiting lists) is not required to open a closed waiting list to place the family on that waiting list;

(ii) Deny any admission preference for which the applicant is currently qualified;

(iii) Change the applicant's place on the waiting list based on preference, date, and time of application, or other factors affecting selection from the waiting list;

(iv) Remove the applicant from the waiting list for tenant-based voucher assistance.

■ 46. Revise § 983.252 to read as follows:

§ 983.252 PHA information for accepted family.

(a) *Oral briefing.* When a family accepts an offer of PBV assistance, the PHA must give the family an oral briefing. The briefing must include information on the following subjects:

(1) A description of how the program works;

(2) Family and owner responsibilities; and

(3) Family right to move.

(b) *Information packet.* The PHA must give the family a packet that includes information on the following subjects:

(1) How the PHA determines the total tenant payment for a family;

(2) Family obligations under the program;

(3) Information on federal, State, and local equal opportunity laws, the contact information for the Section 504 coordinator, a copy of the housing discrimination complaint form, and information on how to request reasonable accommodations and modifications under Section 504, the Fair Housing Act, or the ADA; and

(4) PHA subsidy standards, including when the PHA will consider granting exceptions to the standards, including when required as a reasonable accommodation for a person with disabilities under Section 504, the Fair Housing Act, or the ADA.

(c) *Providing information for persons with disabilities.* (1) The PHA must take appropriate steps to assure effective communication, in accordance with 24 CFR 8.6 and 28 CFR part 35, subpart E, in conducting the oral briefing and in providing the written information packet, including in alternative formats.

(2) The PHA shall have some mechanism for referring to accessible PBV units a family that includes a person with a mobility or sensory impairment.

(d) *Providing information for persons with limited English proficiency.* The PHA should take reasonable steps to assure meaningful access by persons with limited English proficiency in accordance with obligations contained in Title VI of the Civil Rights Act of 1964, Executive Order 13166, and HUD's LEP Guidance.

■ 47. In § 983.253, revise paragraphs (a)(1) and (3) to read as follows:

§ 983.253 Leasing of contract units.

(a) * * *

(1) During the term of the HAP contract, the owner must lease contract units only to eligible families selected from the waiting list for the PBV program in accordance with § 983.251 of this part.

* * * * *

(3) An owner must promptly notify in writing any rejected applicant of the grounds for any rejection. The owner must provide a copy of such rejection notice to the PHA.

* * * * *

■ 48. Revise § 983.254 to read as follows:

§ 983.254 Vacancies.

(a) *Filling vacant units.* (1) The PHA and the owner must make reasonable good-faith efforts to minimize the likelihood and length of any vacancy.

(i) If an owner-maintained waiting list is used, in accordance with § 983.251, the owner must promptly notify the PHA of any vacancy or expected vacancy in a contract unit and refer the family to the PHA for final eligibility determination. The PHA must make every reasonable effort to promptly make such final eligibility determination.

(ii) If a PHA-maintained waiting list is used, in accordance with § 983.251, the owner must promptly notify the PHA of any vacancy or expected vacancy in a contract unit, and the PHA must, after receiving the owner notice, make every reasonable effort to refer promptly a sufficient number of families for the owner to fill such vacancies.

(2) The owner must lease vacant contract units only to families determined eligible by the PHA.

(b) *Reducing number of contract units.* If any contract units have been vacant for a period of 120 days or more since owner notice of vacancy, as required in paragraph (a) of this section, and notwithstanding the reasonable good-faith efforts of the PHA and the owner to fill such vacancies, the PHA may give notice to the owner amending the HAP contract to reduce the number of contract units by subtracting the number of contract units (by number of bedrooms) that have been vacant for such period.

■ 49. Revise § 983.257 to read as follows:

§ 983.257 Owner termination of tenancy and eviction.

24 CFR 982.310 applies with the exception that § 982.310(d)(1)(iii) and (iv) do not apply to the PBV program. (In the PBV program, ''good cause'' does not include a business or economic reason or desire to use the unit for an individual, family, or non-residential rental purpose.) 24 CFR 5.858 through 5.861 on eviction for drug and alcohol abuse apply to this part. 24 CFR part 5, subpart L (Protection for Victims of Domestic Violence, Dating Violence, Sexual Assault, or Stalking) applies to this part.

■ 50. Revise § 983.259 to read as follows:

§ 983.259 Security deposit: Amounts owed by tenant.

(a) *Security deposit permitted.* The owner may collect a security deposit from the tenant.

(b) *Amount of security deposit.* The PHA must prohibit the owner from charging assisted tenants security deposits in excess of private market practice, or in excess of amounts charged by the owner to unassisted tenants.

(c) *Use of security deposit.* When the tenant moves out of the contract unit, the owner, subject to state and local law, may use the security deposit, including any interest on the deposit, in accordance with the lease, as reimbursement for any unpaid tenant rent, damages to the unit, or other amounts which the tenant owes under the lease.

(d) *Security deposit reimbursement to owner.* The owner must give the tenant a written list of all items charged against the security deposit and the amount of each item. After deducting the amount used to reimburse the owner, the owner must promptly refund the full amount of the balance to the tenant.

(e) *Insufficiency of security deposit.* If the security deposit is not sufficient to cover amounts the tenant owes under the lease, the owner may seek to collect the balance from the tenant. However, the PHA has no liability or responsibility for payment of any

amount owed by the family to the owner.

■ 51. Revise § 983.260 to read as follows:

§ 983.260 Overcrowded, under-occupied, and accessible units.

(a) *Family occupancy of wrong-size or accessible unit.* (1) The PHA subsidy standards determine the appropriate unit size for the family size and composition.

(2) If the PHA determines that a family is occupying a wrong-size unit, or a unit with accessibility features that the family does not require, and the unit is needed by a family that requires the accessibility features (see 24 CFR 8.27), the PHA must, within 30 days from the PHA's determination:

(i) Notify the family and the owner of this determination, and

(ii) Offer the family continued housing assistance in another unit, pursuant to paragraph (b) of this section.

(b) *PHA offer of continued assistance.* The PHA policy on continued housing assistance must be stated in the Administrative Plan and may be in the form of:

(1) Project-based voucher assistance in an appropriate-size unit (in the same project or in another project);

(2) Other project-based housing assistance (*e.g.,* by occupancy of a public housing unit);

(3) Tenant-based rental assistance under the voucher program; or

(4) Other comparable public or private tenant-based assistance (*e.g.,* under the HOME program).

(c) *PHA termination of housing assistance payments.* (1) If the PHA offers the family the opportunity to receive tenant-based rental assistance under the voucher program:

(i) The PHA must terminate the housing assistance payments for a wrong-sized or accessible unit at the earlier of the expiration of the term of the family's voucher (including any extension granted by the PHA) or the date upon which the family vacates the unit.

(ii) If the family does not move out of the wrong-sized unit or accessible unit by the expiration date of the term of the family's voucher, the PHA must remove the unit from the HAP contract.

(2) If the PHA offers the family another form of continued housing assistance (other than a tenant-based voucher), in accordance with paragraph (b)(3) of this section, the PHA must terminate the housing assistance payments for the wrong-sized or accessible unit and remove the unit from the HAP contract when:

(i) The family does not accept the offer and does not move out of the PBV unit within a reasonable time as determined by the PHA, not to exceed 90 days.

(ii) The family accepts the offer but does not move out of the PBV unit within a reasonable time as determined by the PHA, not to exceed 90 days.

■ 52. Revise § 983.262 to read as follows:

§ 983.262 When occupancy may exceed the project cap.

(a) *General.* Pursuant to § 983.54(a), the PHA may not place units under an Agreement or a HAP contract in excess of the project cap. There are certain exceptions to the project cap as described in § 983.54(c). This section provides more detail on the occupancy requirements of excepted units.

(b) *Excepted units.* A unit is excepted only if it is occupied by a family who qualifies for the exception; that is, by an elderly family, or a family eligible for supportive services, as applicable.

(1) Families who will occupy excepted units must be selected from the waiting list for the PBV program through an admissions preference (*see* § 983.251).

(2) Once the family vacates the unit, in order to continue as an excepted unit under the HAP contract, the unit must be made available to and occupied by a family that qualifies for the exception.

(c) *Supportive services exception.* A unit is excepted if any member of the family is eligible for one or more of the supportive services even if the family chooses not to participate in the services. If any member of the family chooses to participate and successfully completes the supportive services, the unit continues to be excepted for as long as any member of the family resides in the unit. The unit loses its excepted status only if the entire family becomes ineligible during the tenancy for all supportive services available to the family. A family cannot be terminated from the program or evicted from the unit because they become ineligible for all supportive services during the tenancy. *See* paragraph (f) of this section.

(d) *Elderly family exception.* The PHA may allow a family that initially qualified for occupancy of an excepted unit based on elderly family status to continue to reside in a unit, where through circumstances beyond the control of the family (*e.g.,* death of the elderly family member or long term or permanent hospitalization or nursing care), the elderly family member no longer resides in the unit. In this case, the unit may continue to count as an excepted unit for as long as the family resides in that unit. However, the requirements of § 983.260, concerning wrong-sized units, apply. If the PHA chooses not to exercise this discretion, the unit is no longer considered excepted; and, if the family is not required to move from the unit as a result of § 983.260, the PHA may use one of the options described in paragraph (f) of this section.

(e) *Disabled family exception.* The same provisions of paragraph (d) of this section apply to units previously excepted based on disabled family status under a HAP contract in effect prior to April 18, 2017.

(f) *Unit loss of excepted status.* If a unit loses its excepted status, the PHA may do one or more of the following:

(1) Substitute the excepted unit for a non-excepted unit if it is possible to do so in accordance with § 983.207(a), so that the overall number of excepted units in the project is not reduced.

(2) Temporarily remove the unit from the PBV HAP contract and provide the family with tenant-based assistance. The family and the owner may agree to use the tenant-based voucher on the unit; otherwise, the family must move from the unit with the tenant-based voucher.

(3) Change the unit's designation to a non-excepted unit, provided that the change in designation does not place non-excepted units above the project cap.

■ 53. In § 983.301, revise paragraphs (f) and (g) to read as follows:

§ 983.301 Determining the rent to owner.

* * * * *

(f) *Use of FMRs and utility allowance schedule in determining the amount of rent to owner.* (1) When determining the initial rent to owner, the PHA shall use the most recently published FMR in effect and the utility allowance schedule in effect at execution of the HAP contract. At its discretion, the PHA may use the amounts in effect at any time during the 30-day period immediately before the beginning date of the HAP contract.

(2) When redetermining the rent to owner, the PHA shall use the most recently published FMR and the PHA utility allowance schedule in effect at the time of redetermination. At its discretion, the PHA may use the amounts in effect at any time during the 30-day period immediately before the redetermination date.

(3)(i) For any area in which Small Area FMRs are not in effect, any HUD-approved exception payment standard amount under 24 CFR 982.503(c) applies to both the tenant-based and project-based voucher programs. HUD will not approve a different payment

standard amount for use in the PBV program.

(ii) For any area in which SAFMRs are in effect, a HUD-approved exception payment standard amount under 24 CFR 982.503(c) will apply to a PHA's project-based voucher programs only if the PHA has adopted a policy applying SAFMRs to its PBV program in accordance with 24 CFR 888.113(h).

(4) At the request of the PHA, the HUD field office may approve a PHA's request to establish a project-specific utility allowance for a PBV-assisted project. Absent the establishment of such a project-specific utility allowance, the PHA's utility allowance schedule applies to both the tenant-based and PBV programs.

(i) The PHA request to establish a project-specific utility allowance must demonstrate that the utility allowances used in its voucher program would either create an undue cost on families (because the utility allowance provided under the voucher program is too low), or that use of the utility allowances will discourage conservation and efficient use of HAP funds (because the utility allowances provided under the voucher program would be excessive if applied to the project). The PHA must submit an analysis of utility rates for the community and consumption data of project residents in comparison to community consumption rates; and a proposed alternative methodology for calculating utility allowances on an ongoing basis.

(ii) A PHA that has established a HUD-approved project-specific utility allowance must use the same utility allowance for residents of the project who have tenant-based assistance.

(iii) HUD may establish additional standards or requirements for PHA requests to establish project specific utility allowances, including but not limited to circumstances where there is another form of rental assistance at the project, through a **Federal Register** notice subject to public comment.

(g) *PHA-owned units.* For PHA-owned PBV units, the initial rent to owner, the annual redetermination of rent at the annual anniversary of the HAP contract, and any project-specific utility allowance must be determined by an independent entity in accordance with § 983.57. The PHA must use the rent to owner established by the independent entity.

■ 54. Revise § 983.302 to read as follows:

§ 983.302 Redetermination of rent to owner.

(a) *Requirement to redetermine the rent to owner.* The PHA must redetermine the rent to owner:

(1) Upon the owner's request; or

(2) When there is a 10 percent decrease in the published FMR.

(b) *Rent increase.* (1) An owner may receive an increase in the rent to owner during the term of a HAP contract. Any such increase will go into effect at the annual anniversary of the HAP contract. (Provisions for special adjustments of contract rent pursuant to 42 U.S.C. 1437f(c)(2)(B) do not apply to the voucher program.)

(2)(i) A rent increase may occur through automatic adjustment by an operating cost adjustment factor (OCAF) or as the result of an owner request for such an increase. Regardless of the method of adjustment, the rent increase must not result in a rent that exceeds the maximum rent, as determined pursuant to § 983.301.

(ii) By agreement of the parties, the HAP contract may provide for rent adjustments using an operating cost adjustment factor (OCAF) established by the Secretary pursuant to section 524(c) of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (which shall not result in a negative adjustment) at each annual anniversary of the HAP contract. OCAFs are established by the Secretary and published annually in the **Federal Register**. The provisions in the following paragraphs (b)(2)(ii)(A) through (D) apply to a contract that provides for rent adjustments using an OCAF:

(A) A rent adjustment using an OCAF may not exceed the maximum rent determined by the PHA pursuant to § 983.301.

(B) The contract may require an additional increase up to the maximum rent determined by the PHA pursuant to § 983.301, if requested by the owner in writing, periodically during the term of the contract.

(C) The contract shall require an additional increase up to the maximum rent determined by the PHA pursuant to § 983.301 at the point of contract extension, if requested by the owner in writing.

(D) A PHA may not provide a rent adjustment that will result in rents that exceed the maximum rent determined by the PHA pursuant to § 983.301.

(iii) If the HAP contract does not provide for automatic adjustment by an OCAF, then an owner who wishes to receive an increase in the rent to owner must request such an increase at the annual anniversary of the HAP contract by written notice to the PHA.

(iv) The PHA must establish the length of the required notice period for any rent increase that requires a written request from the owner. The written request must be submitted as required by the PHA (*e.g.,* to a particular mailing address or email address).

(3) The PHA may not approve and the owner may not receive any increase of rent to owner until and unless the owner has complied with all requirements of the HAP contract, including compliance with the HQS. The owner may not receive any retroactive increase of rent for any period of noncompliance.

(c) *Rent decrease.* (1) If there is a decrease in the rent to owner, as established in accordance with § 983.301, the rent to owner must be decreased, regardless of whether the contract provides for rent adjustments pursuant to an OCAF or if an owner requests a rent adjustment.

(2) At any time during the term of the HAP contract, the PHA may elect within the HAP contract to not reduce rents below the initial rent to owner. If the rents have already been reduced below the initial rent to owner, the PHA may not make such an election as a way to increase the rents. If rents increase (pursuant to paragraph (b) of this section) above the initial rent to owner, then the PHA may once again make that choice. Where a PHA makes such an election, the rent to owner shall not be reduced below the initial rent to owner, except:

(i) To correct errors in calculations in accordance with HUD requirements;

(ii) If additional housing assistance has been combined with PBV assistance after the execution of the initial HAP contract and a rent decrease is required pursuant to § 983.153(b); or

(iii) If a decrease in rent to owner is required based on changes in the allocation of responsibility for utilities between the owner and the tenant.

(d) *Notice of change in rent to owner.* Whenever there is a change in rent to owner, the PHA must provide written notice to the owner specifying the amount of the new rent to owner (as determined in accordance with §§ 983.301 and 983.302). The PHA notice of the rent change in rent to owner constitutes an amendment of the rent to owner specified in the HAP contract.

(e) *Contract year and annual anniversary of the HAP contract.* (1) The contract year is the period of 12 calendar months preceding each annual anniversary of the HAP contract during the HAP contract term. The initial

contract year is calculated from the first day of the first calendar month of the HAP contract term.

(2) The annual anniversary of the HAP contract is the first day of the first calendar month after the end of the preceding contract year. The adjusted rent to owner amount applies for the period of 12 calendar months from the annual anniversary of the HAP contract.

(3) See § 983.207(c) for information on the annual anniversary of the HAP contract for contract units completed in stages.

■ 55. In § 983.303, revise paragraph (f) to read as follows:

§ 983.303 Reasonable rent.

* * * * *

(f) *Determining reasonable rent for PHA-owned units.* (1) For PHA-owned units, the amount of the reasonable rent must be determined by an independent entity in accordance with § 983.57, rather than by the PHA. The reasonable rent must be determined in accordance with this section.

(2) The independent entity must furnish a copy of the independent entity determination of reasonable rent for PHA-owned units to the PHA where the project is located.

PART 985—SECTION 8 MANAGEMENT ASSESSMENT PROGRAM (SEMAP)

■ 56. The authority for part 985 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 57. In § 985.1, revise paragraph (b) to read as follows:

§ 985.1 Purpose and applicability.

* * * * *

(b) *Applicability.* This rule applies to PHA administration of the Housing Choice Voucher (HCV) program (24 CFR part 982), the project-based component (PBC) of the certificate program and the Project-Based Voucher (PBV) program (24 CFR part 983) to the extent that PBC and PBV family and unit data are reported and measured under the stated HUD verification method, and enrollment levels and contributions to escrow accounts for Section 8 participants under the family self-sufficiency program (FSS) (24 CFR part 984).

■ 58. In § 985.3, revise the final sentence in paragraph (i)(1) to read as follows:

§ 985.3 Indicators, HUD verification methods and ratings.

* * * * *

(i) * * *

(1) * * * For purposes of this paragraph (i)(1), payment standards include exception payment standards established by the PHA in accordance with 24 CFR 982.503(d)(2).

* * * * *

Dated: September 23, 2020.

R. Hunter Kurtz,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2020–21400 Filed 10–7–20; 8:45 am]

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Part III

Securities and Exchange Commission

17 CFR 229, 239, and 240

Modernization of Regulation S–K Items 101, 103, and 105; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR 229, 239, and 240

[Release Nos. 33–10825; 34–89670; File No. S7–11–19]

RIN 3235–AL78

Modernization of Regulation S–K Items 101, 103, and 105

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to modernize the description of business, legal proceedings, and risk factor disclosures that registrants are required to make pursuant to Regulation S–K. These disclosure items have not undergone significant revisions in over 30 years. The amendments update these rules to account for developments since their adoption or last revision, to improve disclosure for investors, and to simplify compliance for registrants. Specifically, the amendments are intended to improve the readability of disclosure documents, as well as discourage repetition and the disclosure of information that is not material.

DATES: The final rules are effective on November 9, 2020.

FOR FURTHER INFORMATION CONTACT: Sean Harrison, Office of Rulemaking, at (202) 551–3430, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is amending

Commission reference	CFR citation (17 CFR)
Regulation S–K:	§ 229.10 *et seq.*
Item 101	§ 229.101.
Item 103	§ 229.103.
Item 105	§ 229.105.
Securities Act of 1933 (Securities Act): [1]	
Form S–4	§ 239.25.
Securities Exchange Act of 1934 (Exchange Act): [2]	
Schedule 14A	§ 240.14a–101.

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I. Introduction and Background

On August 8, 2019, the Commission proposed amendments to modernize the description of business (Item 101), legal proceedings (Item 103), and risk factor (Item 105) disclosure requirements in Regulation S–K.[3] The proposals were intended to improve these disclosures

[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 78a *et seq.*

[3] *See Modernization of Regulation S–K Items 101, 103, and 105,* Release No. 33–10668 (Aug. 8, 2019) [84 FR 44358 (Aug. 23, 2019)] (''Proposing Release'').

for investors and to simplify compliance for registrants.[4]

Pursuant to Section 108 of the Jumpstart Our Business Startups Act (''JOBS Act''),[5] the Commission staff prepared the *Report on Review of Disclosure Requirements in Regulation S–K* (''S–K Study''),[6] which recommended that the Commission conduct a comprehensive evaluation of its disclosure requirements. Based on the S–K Study's recommendation, the staff initiated an evaluation of the information our rules require registrants to disclose, how this information is presented, where this information is disclosed, and how we can better leverage technology as part of these efforts (collectively, the ''Disclosure Effectiveness Initiative'').[7] The overall objective of the Disclosure Effectiveness Initiative was to improve our disclosure regime for both investors and registrants.

In connection with the S–K Study and the launch of the Disclosure Effectiveness Initiative, the Commission staff invited public input on how to improve registrant disclosures.[8] In a separate Concept Release issued in 2016,[9] the Commission staff revisited the business and financial disclosure requirements in Regulation S–K and requested public comment on whether these requirements provide the information that investors need to make informed investment and voting decisions, and whether any of our rules have become outdated or unnecessary.

In developing the proposed amendments to Items 101, 103, and 105 of Regulation S–K, we considered input from comment letters we received in response to these disclosure modernization efforts. We also took into account the staff's experience with Regulation S–K arising from the Division of Corporation Finance's disclosure review program and changes in the regulatory and business landscape since the adoption of Regulation S–K. As a recent example, in response to the COVID–19 pandemic, the Division of Corporation Finance closely monitored registrants' disclosure about how COVID–19 affected their financial condition and results of operations. Division staff observed that our principles-based disclosure requirements generally elicited detailed discussions of the impact of COVID–19 on registrants' liquidity position, operational constraints, funding sources, supply chain and distribution challenges, the health and safety of workers and customers, and other registrant- and sector-specific matters.[10]

We also considered the many changes that have occurred in our capital markets and the domestic and global economy in the more than 30 years since the adoption of these disclosure requirements, including changes in the mix of businesses that participate in our public markets, changes in the way businesses operate, changes in technology (in particular technology that facilitates the provision of, and access to, information), and other changes that have occurred simply with the passage of time. Many of the amendments reflect our long-standing commitment to a principles-based, registrant-specific approach to disclosure. Our disclosure requirements, while prescriptive in some respects, are rooted in materiality and facilitate an understanding of a registrant's business, financial condition and prospects through the lens through which management and the board of directors manage and assess the performance of the registrant. We believe that modernizing Items 101, 103, and 105 will result in improved disclosure, tailored to reflect registrants' particular circumstances, and reduce disclosure costs and burdens.

In response to the proposed amendments, we received numerous comment letters, which we discuss in context below.[11] In general, commenters supported some or all of the proposed amendments, although many suggested modifications to, and expansions of, the proposals. In some cases, commenters opposed one or more of the proposed amendments, or aspects of them. After considering all of the public comments received, we are adopting the amendments substantially as proposed with certain modifications. The table below briefly summarizes the final amendments:[12]

[4] The proposals were also consistent with and further promoted the objectives of the Fixing America's Surface Transportation Act (''FAST Act''). *See* Public Law 114–94, 129 Stat. 1312 (Dec. 4, 2015) (requiring, among other things, that the SEC conduct a study, issue a report, and issue a proposed rule on the modernization and simplification of Regulation S–K).

[5] Public Law 112–106, Sec. 108, 126 Stat. 306 (2012). Section 108 of the JOBS Act required the Commission to conduct a review of Regulation S–K to determine how such requirements can be updated to modernize and simplify the registration process for emerging growth companies.

[6] *See Report on Review of Disclosure Requirements in Regulation S–K* (Dec. 2013), available at *https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf* (''S–K Study'').

[7] *See SEC Spotlight on Disclosure Effectiveness,* available at *https://www.sec.gov/spotlight/disclosure-effectiveness.shtml.*

[8] To facilitate public input on the Disclosure Effectiveness Initiative, the Commission invited members of the public to submit comments. *See* Request for Public Comment, available at *http://www.sec.gov/spotlight/disclosure-effectiveness.shtml.* Public comments received in response to that request for comment are available on our website. *See* Comments on Disclosure Effectiveness, available at *https://www.sec.gov/comments/disclosure-effectiveness/disclosure effectiveness.shtml.*

[9] *See Business and Financial Disclosure Required by Regulation S–K,* Release No. 33–10064 (Apr. 13, 2016) [81 FR 23915 (Apr. 22, 2016)] (''Concept Release'').

[10] *See Division of Corporation Finance CF Disclosure Guidance: Topic No. 9A* (June 23, 2020) (encouraging companies to evaluate the current and expected impact of COVID–19 through the eyes of management and to proactively revise and update disclosures, including MD&A, as facts and circumstances change), available at *https://www.sec.gov/corpfin/covid-19-disclosure-considerations.*

[11] The public comments we received are available at *https://www.sec.gov/comments/s7-11-19/s71119.htm.* Unless otherwise indicated, the comment letters cited herein are those received in response to the Proposing Release.

[12] The final amendments to Items 101 and 103 will affect only domestic registrants and ''foreign private issuers'' that have elected to file on domestic forms subject to Regulation S–K disclosure requirements. Regulation S–K does not apply to foreign private issuers unless a form reserved for foreign private issuers (such as Securities Act Form F–1, F–3, or F–4) specifically refers to Regulation S–K. Form 20–F is the combined registration statement and annual report form used by foreign private issuers under the Exchange Act. It also sets forth certain disclosure requirements for registration statements filed by foreign private issuers under the Securities Act. Instead of Items 101 and 103, the foreign private issuer forms refer to Part I, Item 4 and Item 8.A.7., respectively, of Form 20–F. In contrast, the amendment to Item 105 will affect both domestic and foreign registrants because Forms F–1, F–3, and F–4, like their domestic counterparts, all refer to that Item. *See, e.g.,* Item 3 of Form F–1. A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents; and (2) any of the following: (i) A majority of its officers and directors are citizens or residents of the United States; (ii) more than 50% of its assets are located in the United States; or (iii) its business is principally administered in the United States. *See* Securities Act Rule 405 [17 CFR 230.405] and Exchange Act Rule 3b–4(c) [CFR 240.3b–4(c)].

Regulation S–K item	Summary of existing item requirements	Summary of the final amendments
Item 101(a)	Requires a description of the general development of the business of the registrant during the past five years, or such shorter period as the registrant may have been engaged in business.	Revises Item 101(a) to: • Be largely principles-based, requiring disclosure of information material to an understanding of the general development of the business, and eliminating the previously prescribed five-year timeframe. Revises Item 101(h) to: • Eliminate the three-year timeframe with respect to smaller reporting companies. Revises Items 101(a) and (h) to clarify that: • Registrants, in filings made after a registrant's initial filing, may provide an update of the general development of the business rather than a full discussion. The update must disclose all of the material developments that have occurred since the registrant's most recent filing containing a full discussion of the general development of its business, and incorporate by reference that prior discussion.
Item 101(c)	Requires a narrative description of the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in its financial statements. To the extent material to an understanding of the registrant's business taken as a whole, the description of each such segment must include disclosure of several specific matters.	Revises Item 101(c) to: • Clarify and expand the principles-based approach of Item 101(c), with a non-exclusive list of disclosure topic examples (drawn in part from the topics currently contained in Item 101(c)); • Include, as a disclosure topic, a description of the registrant's human capital resources to the extent such disclosures would be material to an understanding of the registrant's business; and • Refocus the regulatory compliance disclosure requirement by including as a topic all material government regulations, not just environmental laws.
Item 103	Requires disclosure of any material pending legal proceedings including the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Similar information is to be included for any such proceedings known to be contemplated by governmental authorities. Contains a threshold for disclosure based on a specified dollar amount ($100,000) for proceedings related to Federal, State, or local environmental protection laws.	Revises Item 103 to: • Expressly state that the required information may be provided by hyperlink or cross-reference to legal proceedings disclosure located elsewhere in the document to avoid duplicative disclosure; and • Implements a modified disclosure threshold that increases the existing quantitative threshold for disclosure of environmental proceedings to which the government is a party from $100,000 to $300,000, but that also affords a registrant the flexibility to select a different threshold that it determines is reasonably designed to result in disclosure of material environmental proceedings, provided that the threshold does not exceed the lesser of $1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis.
Item 105	Requires disclosure of the most significant factors that make an investment in the registrant or offering speculative or risky and specifies that the discussion should be concise, organized logically, and furnished in plain English. The Item also states that registrants should set forth each risk factor under a subcaption that adequately describes the risk. Additionally, Item 105 directs registrants to explain how each risk affects the registrant or the securities being offered and discourages disclosure of risks that could apply to any registrant.	Revises Item 105 to: • Require summary risk factor disclosure of no more than two pages if the risk factor section exceeds 15 pages; • Refine the principles-based approach of Item 105 by requiring disclosure of "material" risk factors; and • Require risk factors to be organized under relevant headings in addition to the subcaptions currently required, with any risk factors that may generally apply to an investment in securities disclosed at the end of the risk factor section under a separate caption.

We discuss our revisions with respect to the proposed amendments in more detail below.

II. Discussion of the Amendments

A. General Development of Business (Item 101(a))

Item 101(a) of Regulation S–K currently requires a description of the general development of the business of the registrant during the past five years, or such shorter period as the registrant may have been engaged in business. In describing the general development of the business, Item 101(a)(1) requires disclosure of the following:

- The year in which the registrant was organized and its form of organization;
- The nature and results of any bankruptcy, receivership or similar proceedings with respect to the registrant or any of its significant subsidiaries;
- The nature and results of any other material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries;
- The acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business; and
- Any material changes in the mode of conducting the business.

The Concept Release solicited input on whether the disclosure provided under this Item continues to be useful

and how this Item might be improved.[13] A number of commenters on the Concept Release recommended eliminating or streamlining the requirements in Item 101(a).[14] Several of these commenters recommended limiting Item 101(a) disclosure to material developments,[15] and a few commenters supported executive summaries and layering techniques for the business section.[16]

In light of this feedback, we proposed to amend Item 101(a)(1) to make it more principles-based and to provide registrants more flexibility to tailor disclosures to their unique circumstances. We discuss the proposals and our revisions with respect to the final amendments below.

1. Elimination of the Five-Year and the Three-Year Disclosure Timeframes

a. Proposed Amendments

Item 101(a) requires a description of the general development of the registrant's business during the past five years, or such shorter period as the registrant may have engaged in business. Item 101(a) also requires information to be disclosed for earlier periods if material to an understanding of the general development of the business. A requirement to provide a brief outline of the general development of the business for the preceding five years was included in the earliest form requirements for registration statements and annual reports.[17] The first version of Regulation S–K, adopted in 1977, included a requirement to describe the development of the registrant's business during the prior five years, or such shorter period as the registrant may have been in business.[18]

Item 101(h) sets forth alternative disclosure standards for smaller reporting companies that allow these registrants to, among other things, provide a less detailed description of the registrant's business than is required under Item 101(a).[19] In addition, Item 101(h) requires a description of three years rather than five years of development of a smaller reporting company's business.

We proposed to amend Item 101(a) to eliminate the five-year disclosure timeframe and to apply a materiality standard to all of a registrant's disclosure of the general development of its business. In addition, we proposed a corresponding amendment to Item 101(h) to eliminate the three-year disclosure timeframe applicable to smaller reporting companies.[20]

b. Comments on the Proposed Amendments

A number of commenters expressed general support for eliminating the five-year disclosure timeframe.[21] Several commenters stated that a prescribed disclosure timeframe does not elicit the most relevant disclosure.[22] One of these commenters stated that the one-size-fits-all, fixed time period under the current rule may discourage registrants from providing relevant disclosure relating to periods outside of the five-year timeframe or result in an inadequate discussion of meaningful recent developments.[23]

Several commenters opposed eliminating the five-year disclosure timeframe.[24] One of these commenters stated that the proposal complicates an area where there are no existing reporting problems.[25] Another commenter stated that the current five-year timeframe is appropriate because it corresponds with other financial reporting requirements in Regulation S–K that have similar five-year disclosure timeframes, such as the selected financial data required by Item 301.[26] A different commenter stated that, without a prescribed timeframe, some registrants might consider it necessary to include information from decades past, which could significantly increase the amount of disclosure with minimal added value to users.[27] This commenter recommended that we retain the five-year timeframe and emphasize that only material developments be disclosed.

We received a few comments on the proposed elimination of the three-year timeframe in Item 101(h).[28] One commenter supported eliminating the three-year timeframe.[29] This commenter stated that investors are generally better able to make informed investment decisions when the disclosure requirements provide a basis for comparison, but noted that smaller reporting companies are by their nature much less comparable to other companies. Another commenter indicated that the Commission should retain the current requirement to provide business development disclosure for predecessors, if any, of the smaller reporting company if the smaller reporting company has not been in business for three years.[30]

c. Final Amendments

After considering the comments, we are adopting the amendments to Item 101(a) and Item 101(h) as proposed, but with a minor change to the rule text of Item 101(h) for clarity. The amendment to Item 101(a) will focus registrants on information material to an understanding of the development of their business, irrespective of a specific timeframe. Similarly, the amendment to Item 101(h) will eliminate the provision that requires smaller reporting companies to describe the development of their business during the last three years, and will direct smaller reporting companies, in describing the development of their business, to provide information for the period of

[13] *See* Concept Release, *supra* note 9, at 23932.

[14] *See* Proposing Release, *supra* note 3, at 44361.

[15] *See id.*

[16] *See id.*

[17] *See, e.g.,* Item 6 of Form A–2 adopted in 1935, which required registrants to outline briefly ''the general development of the business for the preceding five years.'' *See* Release No. 33–276 (Jan. 14, 1935) [not published in the **Federal Register**]. Additionally, Item 5 of Form A–1, adopted in 1933, required registrants to briefly describe the length of time the registrant had been engaged in its business. *See* Release No. 33–5 (July 6, 1933) [not published in the **Federal Register**]. *See also* S–K Study, *supra* note 6 at 32, n. 88.

[18] *See Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules,* Release No. 33–5893 (Dec. 23, 1977) [42 FR 65554 (Dec. 30, 1977)].

[19] The term ''smaller reporting company'' is defined in 17 CFR 230.405 and 17 CFR 240.12b–2 as an issuer that is not an investment company, an asset-backed issuer (as defined in 17 CFR 229.1101), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that had a public float of less than $250 million; or had annual revenues of less than $100 million, and either no public float, or a public float of less than $700 million.

[20] The proposed amendment to Item 101(h), however, retained the requirement that if a smaller reporting company has not been in business for three years, it must provide the same information for its predecessors if there are any.

[21] *See, e.g.,* letters from International Bancshares Corporation (''IBC''), California Lawyers Association (''CLA''), Ernst & Young LLP (''E&Y''), Edison Electric Institute and American Gas Association Accounting Advisory Council (''EEI and AGA''), Society for Corporate Governance (''Society''), British Columbia Investment Management Corporation (''BCI''), Davis Polk & Wardwell (''DP&W''), Nareit, U.S. Chamber of Commerce's Center for Capital Markets Competitiveness (''CCMC''), FedEx Corporation (''FedEx''), and General Motors Company (''GM'').

[22] *See, e.g.,* letters from GM, Society, EEI and AGA, CLA, and IBC.

[23] *See* letter from GM.

[24] *See, e.g.,* letters from Financial Executives International (''FEI''), CFA Institute, and California Public Employees' Retirement System (''CalPERS'').

[25] *See* letter from CalPERS (stating that under the proposal, a registrant could choose to disclose a bankruptcy for only two years rather than for five years as required under the current timeframe).

[26] *See* letter from CFA Institute. Item 301 of Regulation S–K [17 CFR 229.301] requires registrants to furnish selected financial data in comparative tabular form for each of the registrant's last five fiscal years and any additional fiscal years necessary to keep the information from being misleading. We have recently proposed amendments to eliminate this requirement. *See infra* note 32 and accompanying text.

[27] *See* letter from FEI.

[28] *See, e.g.,* letters from CLA and CFA Institute.

[29] *See* letter from CLA.

[30] *See* letter from CFA Institute.

time that is material to an understanding of the general development of the business.

While we have considered commenter concerns about eliminating a fixed timeframe for the description of a registrant's business, we continue to believe that the current timeframes of five years and three years, respectively, may not always elicit the most relevant disclosure. With respect to one commenter's belief that the five-year time period should be retained because it corresponds to other disclosure requirements, we do not think that elimination of the specified period will result in the loss of an important correlation with other disclosure requirements.[31] We believe the final amendments will improve disclosure by affording registrants additional flexibility to tailor their disclosure and provide information material to an understanding of their business. Some registrants may prefer to describe the development of their business over a longer period in order to provide the information that may be material to an investment or voting decision, while others may conclude that the material aspects of their business development can be described over a shorter timeframe. Moreover, we believe the benefits of more tailored and effective disclosure in this context would justify any corresponding loss in comparability.

2. Updated Disclosure in Subsequent Filings

a. Proposed Amendments

Currently, registrants are required to provide disclosure regarding the general development of the business in certain registration statements and annual reports. For filings made after a registrant's initial filing, we proposed to amend Item 101(a)(2) and Item 101(h) to permit a registrant to provide only an update of its business development disclosure with a focus on material developments, if any, in the reporting period. In addition, the proposed amendments would require a registrant that is using this provision to incorporate by reference a discussion of the general development of the registrant's business that, together with the update, would contain the full discussion. The registrant would be required to incorporate the prior discussion by reference using one active hyperlink to the registrant's most recent filing containing that discussion.[32] Under this approach, a reader would have access to a full discussion by reviewing the updated business development disclosure and the disclosure from the previous filing that is incorporated by reference. Alternatively, a registrant could elect to provide a complete discussion of its business development, including any material updates, in which case, it would not need to incorporate by reference business development disclosure from a previous filing.

b. Comments on the Proposed Amendment

A number of commenters generally supported permitting the use of incorporation by reference, and hyperlinking to the most recently filed full discussion of the general development of the registrant's business.[33] One of these commenters stated that this would result in a more organized and efficient picture of the registrant's business for the investing public.[34] Some of these commenters, while supportive of the proposal, did not support mandating the proposed method to present updated Item 101(a)(1) disclosure, as this method might not always be useful to investors.[35] These commenters stated that when registrants have frequent material updates (*e.g.,* multiple significant acquisitions), including the full disclosure of the general development of the business in each filing (or every few filings) may be the most effective way to provide appropriate information to investors in a format that is easy for them to understand.

A number of commenters opposed the proposal to allow registrants to provide an update of material developments during the reporting period and require a hyperlink to the full discussion of the general development of the registrant's business disclosure, because they stated that this approach could lead to a disjointed narrative that would not be user-friendly.[36] One commenter stated the approach would not reduce burdens on registrants as the prior period disclosure has already been prepared.[37] Several other commenters expressed concern that the term ''reporting period'' limited the period of time over which a registrant could provide an update about material developments.[38]

We also received comments recommending that the proposal should not mandate the use of a single hyperlink reference.[39] These commenters stated that if there are multiple updates in more than one reporting period, registrants should be allowed to incorporate by reference and hyperlink to all relevant filings to provide a full discussion of the general development of the business.

c. Final Amendment

After considering the comments, we are adopting the amendments to Item 101(a)(2) and Item 101(h) substantially as proposed, but with clarifications.[40] Under the final amendments, for filings subsequent to its initial registration statement, a registrant may provide an update of the general development of its business disclosing all of the material developments that have occurred, if any, since the most recent full discussion of the general development of its business disclosed in a previously filed registration statement or report. If a registrant chooses this approach, it must incorporate by reference the most recent full discussion of the general development of the registrant's business. Moreover, under the final amendments, registrants are only permitted to incorporate the full discussion of the general development of its business from a single previously filed document. If a registrant does not choose this approach, it must provide a complete discussion of its business development, including any material updates in each filing. In this regard, the approach that we are adopting is more restrictive than existing incorporation by reference requirements that, subject to certain limits, allow registrants to provide disclosure by incorporating by

[31] As noted above, the Commission recently proposed to eliminate Item 301 of Regulation S–K, which requires disclosure of five years of selected financial data, because the information required by that item is largely duplicative of other requirements. *See Commission Guidance on Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information,* Release No. 33–10750 (Jan. 30, 2020) [85 FR 12068 (Feb. 28, 2020)] (''MD&A Release'').

[32] Pursuant to Securities Act Rule 411 [17 CFR 230.411] and Exchange Act Rule 12b–23 [17 CFR 240.12b–23], registrants must, in most cases, include an active hyperlink to information incorporated by reference.

[33] *See, e.g.,* letters from Council of Institutional Investors (''CII''), Jeff LaBerge (''LaBerge''), E&Y, FEI, William F. Dunker (''Dunker''), BCI, DP&W, CCMC, Nareit, and FedEx.

[34] *See* letter from Dunker.

[35] *See* letter from EEI and AGA.

[36] *See, e.g.,* letters from Chevron Corporation (''Chevron''), CLA, GM, CFA Institute, New York City Bar Association (''NYC Bar Association''), and International Corporate Governance Network (''ICGN'').

[37] *See* letter from GM.

[38] *See, e.g.,* letters from CLA, E&Y and CalPERS.

[39] *See* letter from EEI and AGA.

[40] We are also adopting corresponding amendments to Item 101(h) to permit a smaller reporting company, for filings other than initial registration statements, to provide an update to the general development of the business disclosure, instead of a full discussion, that complies with Item 101(a), including the hyperlink option.

reference some or all of it from more than one previously filed document.[41]

In response to the concerns expressed by some commenters that the proposal should not be mandatory,[42] we have added language to the final amendment to clarify that the revision to Item 101(a)(2) provides an optional method for updating general business development disclosure using incorporation by reference to one document. In addition, based on comments received expressing concerns that the term ''reporting period'' limited the period of time over which a registrant could provide an update about material developments,[43] the final amendments clarify that registrants using the update option must disclose all of the material developments that have occurred since the most recent full discussion of the general development of its business disclosed in a previously filed registration statement or report.

As we noted in the Proposing Release, the repetition of Item 101(a) disclosure in successive filings may obscure important developments in a registrant's business. To the extent that registrants present and update their Item 101(a) disclosure under this method, we believe that the final amendments will help focus investor attention on material developments in a registrant's business.

3. Disclosure About Business Strategy

a. Proposed Amendments

We proposed amending the existing prescribed disclosure topics in Item 101(a)(1) to make them more principles-based. The proposed amendments would replace the list of prescribed disclosure topics with a non-exclusive list of the types of information that a registrant may need to disclose. The proposed amendments would also clarify that disclosure of a topic would be required only to the extent such information is material to an understanding of the general development of a registrant's business. As proposed, amended Item 101(a)(1) no longer would include disclosure of the year that the registrant was organized and its form of organization, or disclosure of any material changes in the mode of conducting the registrant's business in its list of disclosure topics. Nevertheless, such disclosure would continue to be required if material to an understanding of the general development of the registrant's business. In addition, we also proposed to include a new disclosure topic that would require, if material to an understanding of the general development of the business, disclosure of transactions and events that affect or may affect the company's operations, including material changes to a registrant's previously disclosed business strategy. We noted that such disclosure may be material to investors and many registrants currently include it in their initial registration statements.

b. Comments on the Proposed Amendment

Many commenters expressed general support for moving to a more principles-based approach to disclosure about the development of a registrant's business.[44] Several commenters stated that a more principles-based approach would reduce the disclosure of immaterial information and give registrants the flexibility to focus on information that is material and unique to the registrant.[45] Several commenters, however, opposed the more principles-based approach under the proposals.[46]

A number of commenters expressed support for including ''material changes to a registrant's previously disclosed business strategy'' as a non-exclusive disclosure example.[47] One commenter viewed the strategic orientation of a company as material to investors and suggested that changes to it should be disclosed to investors on a continuing basis.[48] Several other commenters stated that disclosure of a registrant's business strategy, not just changes to previously disclosed business strategy, should be required for all registrants.[49] Another commenter expressed concern that limiting the requirement to disclose only material changes in business strategy would reduce the amount of business strategy information that companies are currently providing annually to their investors.[50] This commenter recommended that the Commission require annual disclosure of a company's business strategy. Another commenter who expressed support for requiring disclosure of material changes to a previously disclosed business strategy stated that the rules should not mandate disclosure of business strategy because it could cause some registrants to disclose competitive or sensitive forward-looking information.[51] To help mitigate this risk, this commenter recommended that a safe harbor provision be added to the amendment.

Several commenters opposed including transactions and events that affect or may affect the company's operations and material changes to a registrant's previously disclosed business strategy as non-exclusive disclosure topics.[52] Some of these commenters stated that disclosure of material changes to a registrant's previously disclosed business strategy is unnecessary and duplicative because disclosure regarding changes in business strategy would already be reflected in the MD&A.[53] Other commenters stated that to the extent any change would constitute a known trend or uncertainty likely to cause the most recent financial results not to be indicative of future results, Item 303 of Regulation S–K already requires such disclosure.[54] Some commenters that opposed this disclosure topic also stated that the disclosure standard in the proposed amendment was different from the disclosure standard under the MD&A requirements, which provides for disclosure of information that a registrant ''reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.''[55] These commenters recommended that, if the proposed amendment were

[41] Securities Act Rule 411(e) and Exchange Act 12b–23(e), however, provide that information must not be incorporated by reference in any case where such incorporation would render the disclosure incomplete, unclear, or confusing, such as incorporating by reference from a second document if that second document incorporates information pertinent to such disclosure by reference to a third document. We remind registrants that, consequently, a filing that includes an update and incorporates by reference the more complete Item 101(a) discussion could not be incorporated by reference into a subsequent filing, such as a Form S–3 or Form S–4.

[42] *See, e.g.,* letters from EEI and AGA.

[43] *See, e.g.,* letters from CLA, E&Y and CalPERS.

[44] *See, e.g.,* letters from CII, Nasdaq, LaBerge, EEI and AGA, Society, BCI, Dunker, DP&W, Nareit, CCMC, FedEx, FEI, and the Humane Society of the United States (''Humane Society'').

[45] *See, e.g.,* letters from Society, Nasdaq, Dunker, DP&W, and FEI.

[46] *See, e.g.,* letters from Public Citizen, AFL–CIO (principle-based approach would increase the reliance on the subjective judgment of management), Better Markets, Domini Impact Investments LLC (''Domini'') (principles-based approach could reduce the usefulness of corporate disclosures for investors), Principles for Responsible Investment (''PRI''), Breckinridge Capital Advisors (''Breckinridge''), ICGN, and letters from individuals and entities using Letter Type A.

[47] *See, e.g.,* letters from CII, BCI, CCMC, FedEx, American Federation of Labor and Congress of Industrial Organizations (''AFL–CIO''), FEI, CFA Institute, and CalPERS.

[48] *See* letter from BCI.

[49] *See, e.g.,* letters from AFL–CIO and CFA Institute. *See also* letter from CalPERS (suggesting that the rule should make ''clear that material changes in business strategy would not have to be disclosed prospectively'').

[50] *See* letter from AFL–CIO.

[51] *See* letter from FEI.

[52] *See, e.g.,* letters from UnitedHealth Group Incorporated (''UnitedHealth Group''), Dunker, Society, DP&W, Chevron, and GM.

[53] *See, e.g.,* letters from UnitedHealth Group, Society, DP&W, Chevron, and GM.

[54] *See, e.g.,* letters from DP&W, Chevron, and GM.

[55] *See, e.g.,* letters from Society and GM.

adopted, the amendment should be revised to harmonize its standard with the MD&A disclosure standard.

Another commenter noted that, absent a definition of the term ''business strategy,'' it would be difficult for registrants to determine whether disclosure is warranted.[56] Another commenter stated that there is a broad range in the interpretation of what ''strategy'' means and that the amendment would not result in disclosures that would enable investors to make meaningful comparisons among companies, even among companies within the same industry.[57]

Several commenters expressed concern that the proposal would require registrants to disclose sensitive proprietary or business information regarding a registrant's business strategy.[58] One of these commenters recommended that, if adopted, the Commission should clarify that disclosure of proprietary or competitively sensitive information is not required.[59]

Several commenters stated that the proposal could result in disparate treatment between registrants that provide disclosure of their business strategy and therefore would be required to disclose any material changes to their strategy, and registrants that have not previously provided disclosure of their business strategy.[60] One of these commenters stated that a requirement to provide disclosure of any material change in business strategy could become a deterrent to companies considering conducting an initial public offering.[61]

c. Final Amendments

We are adopting the amendments to Item 101(a)(1) largely as proposed, but with several modifications in response to comments received. As proposed, the final amendments retain the existing disclosure topics addressing the results of any bankruptcy, receivership, or similar proceedings; the nature and results of any other material reclassification, merger, or consolidation of the registrant or any of its significant subsidiaries; and the acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business.[62]

We are revising the disclosure topic regarding transactions and events that affect or may affect the company's operations, including material changes to a registrant's previously disclosed business strategy, to eliminate the requirement to disclose transactions and events that affect or may affect the company's operations. We were persuaded by the commenter who stated that this disclosure would be required under Item 303 of Regulation S–K.[63] We agree that the proposed disclosure requirement could result in repetitive disclosures, which would be contrary to one of our objectives in amending Item 101(a). However, we are adopting as a disclosure topic material changes to a registrant's previously disclosed business strategy. While some commenters indicated that the proposal could result in disparate treatment between registrants that currently provide disclosure of their business strategy and those that do not,[64] we believe that once a registrant has disclosed its business strategy, it is appropriate for it to discuss changes to that strategy, to the extent material to an understanding of the development of the registrant's business. As noted by one commenter, many registrants currently tailor their responses under existing Item 101(a) to provide disclosure regarding their business strategy, although this disclosure is not specifically required.[65] The final amendments build on these practices. We emphasize, however, that the principles-based approach of the final amendments will provide registrants with the flexibility to determine the appropriate level of detail for these disclosures and should mitigate any disincentives the amendments create for registrants to disclose their business strategy. We are also not adopting a definition of the term ''business strategy,'' as suggested by one commenter,[66] to provide registrants with the flexibility to tailor their disclosures according to their facts and circumstances.

We are not adding a requirement to disclose a company's business strategy annually, contrary to the suggestion of a commenter.[67] Given that the final amendments are intended to make Item 101(a) more principles-based and require disclosure only to the extent material to an understanding of a registrant's business, we believe that requiring annual disclosure of a company's business strategy would be inconsistent with these goals.

In addition, we are not adopting a safe harbor to address the concern of disclosing competitive or sensitive forward-looking information, as recommended by one commenter. We believe the principles-based nature of the final amendments to Item 101(a)(1) will provide registrants with considerable flexibility to tailor their disclosures to avoid disclosing competitively harmful information while still providing material information to investors. In addition, the amendments do not alter the application of existing statutory safe harbor provisions of the Private Securities Litigation Reform Act (''PSLRA'') that would be available for forward-looking statements made by registrants.[68] We therefore do not believe a new safe harbor is necessary.

B. Narrative Description of Business (Item 101(c))

Item 101(c) requires a narrative description of the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in the financial statements. To the extent material to an understanding of the registrant's business taken as a whole, the description of each such segment must include ten specific items listed in Item 101(c) (*see* Items (1)–(10) in the list below). Item 101(c) specifies two other items that must be discussed with respect to the registrant's business in general (*see* Items (11)–(12) in the list below), although, where material, the registrant must also identify the segments to which those matters are significant. Item 101(c) requires disclosure of:[69]

[56] *See* letter from CLA.

[57] *See* letter from Chevron.

[58] *See, e.g.,* letters from UnitedHealth Group, Dunker, Society, DP&W, and GM.

[59] *See* letter from GM.

[60] *See, e.g.,* letters from UnitedHealth Group, Dunker, and Society.

[61] *See* letter from Society.

[62] The language of the disclosure topic regarding the results of any bankruptcy, receivership or similar proceedings differs slightly from the proposal by calling for disclosure of the ''nature and effects of any material bankruptcy, receivership, or any similar proceeding *with respect to the registrant or any of its significant subsidiaries.*'' The proposed rule text did not include the italicized language. Because the introductory text to Item 101(a)(1) indicates that the disclosure should be provided with respect to the registrant and its subsidiaries, we are making it explicit that Item 101(a)(1)(ii) disclosure should be provided with respect to registrants and their significant subsidiaries.

[63] *See* letter from Chevron.

[64] *See, e.g.,* letters from UnitedHealth Group, Dunker, and Society.

[65] *See* letter from AFL–CIO.

[66] *See* letter from CLA.

[67] *See* letter from AFL–CIO.

[68] *See* Section 27A of the Securities Act [15 U.S.C. 77z–2 (b)] and Section 21E of the Exchange Act [15 U.S.C. 78u–5(b)].

[69] Item 101(c)(1) [17 CFR 229.101(c)(1)] specifies that, to the extent material to an understanding of the registrant's business taken as a whole, the description of each segment must include the

(1) Principal products produced and services rendered;
(2) New products or segments;
(3) Sources and availability of raw materials;
(4) Intellectual property;
(5) Seasonality of the business;
(6) Working capital practices;
(7) Dependence on certain customers;
(8) Dollar amount of backlog orders believed to be firm;
(9) Business subject to renegotiation or termination of government contracts;
(10) Competitive conditions;
(11) The material effects of compliance with environmental laws; and
(12) Number of persons employed.[70]

Many of the enumerated disclosure requirements in Item 101(c) were adopted in 1973.[71] As businesses, markets, and technology have changed since that time, some of the prescribed disclosure topics in Item 101(c) are not relevant to all registrants, and these disclosure requirements may elicit disclosure that is not material to a particular registrant. In the S–K Study, the staff recommended a review of these requirements in light of changes that have occurred in the way businesses operate.[72] In addition, the Concept Release invited comment on whether Item 101(c) continues to provide useful information to investors and how the Item's requirements may be improved.[73]

To facilitate application of our principles-based revisions to Item 101, we proposed to amend Item 101(c) to be more clearly principles-based by replacing the current list of specific items with a non-exclusive list of disclosure topic examples.[74] In developing the proposal, we took into account the comments received on the Concept Release. For example, a number of commenters on the Concept Release stated that working capital practices might be better addressed in MD&A.[75] Under the proposed amendments to Item 101(c), the revised rule would not explicitly reference the disclosure requirements under Item 101(c)(1)(vi) regarding disclosure of working capital practices, Item 101(c)(1)(ii) requirement regarding disclosure about new segments, or the Item 101(c)(1)(viii) dollar amount of backlog orders believed to be firm. Nevertheless, under the proposed principles-based approach, registrants would have to provide disclosure about these topics, as well as any other topics regarding their business, if they are material to an understanding of the business and not otherwise disclosed. For example, if supply chain finance arrangements used by a registrant are a significant part of its working capital practices, they may be material to understanding the nature of its commercial relationships. While MD&A disclosures on the topic are more focused on the potential material impact of such arrangements on the registrant's periodic cash flows and financial condition, the proposed principles-based approach would call for additional disclosure if material to an understanding of those commercial relationships. We discuss the proposals and our revisions with respect to the final amendments below.[76]

1. Revenue-Generating Activities, Products and/or Services, and Any Dependence on Revenue-Generating Activities, Key Products, Services, Product Families, or Customers, Including Governmental Customers

a. Proposed Amendments and Comments

We proposed to retain as a listed disclosure topic information regarding revenue-generating activities, products and/or services, and any dependence on key products, services, product families or customers, including governmental customers, to the extent this information is material to an understanding of the registrant's business. We did not receive any comments that addressed this proposal.

b. Final Amendments

We are adopting the amendment as proposed.[77] Although we did not receive any comments on this proposal, feedback in response to the Concept Release indicated that these elements are key to how reasonable investors often evaluate the future prospects of a registrant's business and that highlighting these topics should elicit more informative disclosures.[78] We continue to believe that disclosure regarding revenue-generating activities, products and/or services, and any dependence on key products, services, product families, or customers, including governmental customers, generally would be material to an investment decision.

2. Status of Development Efforts for New or Enhanced Products, Trends in Market Demand, and Competitive Conditions

a. Proposed Amendments and Comments

We proposed to retain as a listed disclosure topic information regarding development efforts for new or enhanced products, trends in market demand, and competitive conditions. We had proposed this disclosure topic, which elicits more granular information of the type currently specified in Item 101(c), in response to comments received on the Concept Release. Commenters had recommended more disclosure of a registrant's competitive position, especially the market share of its products and industry trends shaping the nature of competition.[79] Our principles-based approach to this topic was intended to provide registrants with flexibility to disclose this information to the extent material to an understanding of their business. We received a few comments on this proposal.[80] One commenter recommended that the proposal clarify that registrants are not required to disclose proprietary or other sensitive information, which could damage their competitive position.[81] Another commenter recommended that this disclosure topic be revised to include ''substantial trends known to

information specified in paragraphs (c)(i) through (x). Information in paragraphs (c)(xi) through (xiii) is required to be discussed for the registrant's business in general and, when material, the segments to which these matters are significant also must be identified.

[70] The Commission removed and reserved Item 101(c)(1)(xi), which required disclosure of company- and customer-sponsored research and development activities, largely because U.S. GAAP requires similar, but broader, disclosure. *See Disclosure Update and Simplification Final Rule,* Release No. 33–10532 (Aug. 17, 2018) [83 FR 50148 (Oct. 4, 2018) (''DUSTR Adopting Release''). Thus, there currently are twelve enumerated disclosure items under Item 101(c).

[71] *See New Ventures, Meaningful Disclosure,* Release No. 33–5395 (June 1, 1973) [38 FR 17202 (June 29, 1973)].

[72] *See* S–K Study, *supra* note 6, at 99–100.

[73] *See* Concept Release, *supra* note 9.

[74] We did not propose to amend the disclosure requirements for smaller reporting companies in Item 101(h)(1) through (6). We believe that this approach will continue to permit smaller reporting companies to provide a less detailed description of their business, consistent with the current scaled disclosure requirements for these companies.

[75] *See* Proposing Release, *supra* note 3, at 44364.

[76] Consistent with the proposal, the final amendments to Item 101(c) no longer explicitly reference the disclosure requirements under Item 101(c)(vi) regarding disclosure of working capital practices; or the Item 101(c)(viii) requirement regarding disclosure about new segments and the dollar amount of backlog orders believed to be firm.

[77] In connection with this amendment, the Commission also proposed several conforming amendments to Form S–4. *See* Section II.C.1 of the Proposing Release, *supra* note 3. We did not receive any comments on these conforming amendments and are adopting them as proposed as well.

[78] *See* Proposing Release, *supra* note 3, at 44365.

[79] *Id.*

[80] *See* letters from Society and Investor Environmental Health Network (''IEHN'').

[81] *See* letter from Society.

the company that may ultimately affect market demand.[82]

b. Final Amendments

We are adopting the amendments as proposed. We are not adding a clarification that the disclosure of proprietary or other sensitive information is not required, as suggested by one commenter. We believe the principles-based nature of Item 101(c) disclosure, which the final amendments are intended to improve, should provide registrants with sufficient flexibility in how they disclose this information, to the extent material, without causing undue harm to their business operations. Indeed, based on our experience with the current rules, we are not aware that registrants have faced significant difficulties providing this disclosure. We are also not adopting revisions to the final amendments to include disclosure of substantial trends known to the company that may ultimately affect market demand, as suggested by one commenter. The principles-based disclosure topic should provide registrants with flexibility to disclose information about competition that is material to an understanding of their business. We also note that Item 303(a)(3)(ii) of Regulation S–K requires a registrant to describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material impact (favorable or unfavorable) on net sales or revenues or income from continuing operations. In addition, if the registrant knows of events that will cause a material change in the relationship between costs and revenues, the change in the relationship must be disclosed under Item 303(a)(3)(ii).[83] Thus, including this disclosure in Item 101(c) could result in duplicative disclosures.

3. Resources Material to a Registrant's Business

Currently, two of the twelve disclosure requirements in Item 101(c) relate to registrants' resources: Item 101(c)(1)(iii) requires disclosure of the sources and availability of raw materials, and Item 101(c)(1)(iv) requires disclosure of the importance to the segment and the duration and effect of all patents, trademarks, licenses, franchises, and concessions held, each to the extent material to an understanding of the registrant's business taken as a whole. We proposed amending these requirements to refocus registrants' disclosure on all resources material to their business. Specifically, we proposed to retain these disclosure topics with minor modifications and combine them into one principles-based, non-exclusive set of examples of information that should be disclosed to extent material to an understanding of a registrant's business as a whole.

a. Raw Materials

Item 101(c)(1)(iii) currently requires disclosure of the sources and availability of raw materials. We received several comment letters in response to the Concept Release that specifically addressed this requirement.[84] A few commenters on the Concept Release recommended retaining this requirement.[85] One of these commenters specified that the disclosure requirement should be retained with a materiality overlay,[86] while the other commenter stated that disclosure should only be required if raw materials are difficult to obtain.[87] Another commenter on the Concept Release stated that, when material, registrants provide disclosures in response to the specific sub-items in Item 101(c), including sources and availability of raw materials, in the business narrative or elsewhere, including MD&A.[88] We proposed retaining sources and availability of raw materials as a listed disclosure topic in Item 101(c).

(ii) Comments on the Proposed Amendments

We received limited comment on this aspect of the proposed amendments. One commenter supported the proposal, but suggested that it should specifically direct registrants to discuss how climate change will affect access to raw materials.[89] Another commenter stated that the availability of raw materials as a disclosure topic was established at a time when the U.S. economy was largely manufacturing-based and is no longer representative of the value drivers of today's technology-based and intangible-based economy.[90]

(iii) Final Amendments

After considering the comments received, we are adopting the amendments as proposed. In accordance with our overall approach to Item 101(c), the final amendments emphasize a principles-based approach and clarify that disclosure regarding sources and availability of raw materials is required only when material to a registrant's business. Although the disclosure topic of raw materials might not be applicable to all registrants, we continue to believe that, for businesses whose products or services depend on raw materials, disclosures regarding such raw materials should be provided to the extent material. The one commenter's suggestion that the final amendments should require all registrants to specifically discuss how climate change will affect access to raw materials is not consistent with the principles-based nature of Item 101(c), so we are not adopting it.

b. The Duration and Effect of All Patents, Trademarks, Licenses, Franchises, and Concessions Held

(i) Proposed Amendments

Item 101(c)(1)(iv) requires disclosure of the duration and effect of all patents, trademarks, licenses, franchises, and concessions held to the extent material to an understanding of the registrant's business taken as a whole. Since the promulgation of this disclosure requirement, intellectual property has become increasingly important to the business of a broad range of registrants. Correspondingly, many registrants provide detailed disclosure in response to Item 101(c)(1)(iv), although disclosure varies among registrants and across industries. The Concept Release solicited feedback on whether to maintain, expand or revise the current scope of this Item and requested comment on the competitive costs of this disclosure. Numerous commenters supported maintaining the current scope of Item 101(c)(1)(iv),[91] with many

[82] *See* letter from IEHN (noting particularly disclosure of trends in the development of peer-reviewed scientific literature demonstrating potential for substantial health or environmental risks associated with the preparer's products or activities).

[83] We recently proposed amendments to our MD&A disclosure requirements to modernize and enhance MD&A disclosures. *See* MD&A Release, *supra* note 32.

[84] *See* Proposing Release, *supra* note 3, at 44365.

[85] *See* letters from Fenwick West LLP (dated Aug. 1, 2016) (''Fenwick'') and New York State Society of Certified Public Accountants (dated July 19, 2016) (''NYSSCPA''), available at *https://www.sec.gov/comments/s7-06-16/s70616.htm.*

[86] *See* letter from Fenwick.

[87] *See* letter from NYSSCPA.

[88] *See* letter from Davis Polk & Wardwell LLP (dated July 22, 2016), available at *https://www.sec.gov/comments/s7-06-16/s70616.htm.*

[89] *See* letter from Southern Environmental Law Center (''SELC'').

[90] *See* letter from CFA Institute.

[91] *See, e.g.,* letters from 36 Organizations with an Interest in Trade Secret Protection (dated Aug. 8, 2016) (''36 Organizations''), Association of American Publishers (dated July 21, 2016), American Intellectual Property Law Association (dated Aug. 9, 2016) (''American IP Law Association''), Intellectual Property Owners Association (dated July 15, 2016) (''IP Owners Association''), and Financial Services Roundtable (dated July 21, 2016), available at *https://www.sec.gov/comments/s7-06-16/s70616.htm.*

of these opposed to expanding this Item based on competitive concerns.[92]

In light of this feedback we proposed to retain as a listed disclosure topic the duration and effect of patents, trademarks, licenses, franchises, and concessions held as non-exclusive types of property that may be material to a registrant's business.

(ii) Comments on the Proposed Amendments

In response to the Commission's request for comment on whether the proposed amendments should include as a disclosure topic the duration and effect of copyright and trade secret protection, one commenter stated that the duration and effect of copyright protection is extrinsic information that is derived from applicable U.S. and foreign copyright laws.[93] This commenter, however, opposed requiring disclosure of the duration of trade secret protection on the ground that this information is generally indefinite as it lasts only as long as the secret is maintained. Another commenter stated that disclosure of a registrant's reliance on copyrights and trade secrets is warranted because such disclosure is significant to an understanding of the registrant's business and strategic plans.[94] Other commenters, however, opposed requiring disclosure of copyrights and trade secrets, contending that such disclosure would not benefit investors and would be costly and time-consuming for registrants to prepare.[95] These concerns are consistent with comments we received on the Concept Release, in which commenters indicated that because copyright and trade secret protection is not contingent on registration, a requirement to disclose even a subset of these two types of intellectual property would force registrants to systematically identify and catalog these types of intellectual property, which could impose substantial costs and require significant time.[96]

(iii) Final Amendment

After consideration of the comments, we are adopting the amendment as proposed. We are retaining, as a non-exclusive example, disclosure about the duration and effect of all patents, trademarks, licenses, franchises, and concessions held to the extent material to an understanding of the registrant's business taken as a whole. We are not expanding the requirement to include the duration and effect of copyright and trade secret protections because of the cost and other concerns highlighted by commenters.

4. A Description of Any Material Portion of the Business That May Be Subject to Renegotiation of Profits or Termination of Contracts or Subcontracts at the Election of the Government

a. Proposed Amendment and Comments

Item 101(c)(1)(ix) requires, to the extent material to an understanding of the registrant's business taken as a whole, disclosure of any material portion of a business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government.

Business contracts with agencies of the U.S. government and the various laws and regulations relating to procurement and performance of U.S. government contracts impose terms and rights that are different from those typically found in commercial contracts. In a 1972 Notice to Registrants, the Commission noted that government contracts are subject to renegotiation of profit and to termination for the convenience of the Government.[97] At any given time in the performance of a government contract, an estimate of its profitability may be subject not only to additional costs to be incurred, but also to the outcome of future negotiations or possible claims relating to costs already incurred.[98]

Registrants with U.S. Government contracts tend to disclose that the funding of these contracts is subject to the availability of Congressional appropriations and that, as a result, long-term government contracts are partially funded initially with additional funds committed only as Congress makes further appropriations. These registrants disclose that they may be required to maintain security clearances for facilities and personnel in order to protect classified information. Additionally, these registrants state that they may be subject to routine government audits and investigations, and any deficiencies or illegal activities identified during the audits or investigations may result in the forfeiture or suspension of payments and civil or criminal penalties.

We proposed to retain renegotiation or termination of government contracts as a disclosure topic, citing our continued belief that, when material to a business, disclosure of this information is important for investors. We did not receive any comments that addressed this proposal.

b. Final Amendment

We are adopting the amendment as proposed for the reasons discussed above.

5. The Extent to Which the Business Is or May Be Seasonal

a. Proposed Amendment and Comments

Item 101(c)(1)(v) requires, to the extent material to an understanding of the registrant's business taken as a whole, disclosure of the extent to which the business of the segment is or may be seasonal. Although we recently considered eliminating this disclosure requirement, noting that other Regulation S–K disclosure requirements and U.S. GAAP require disclosures about seasonality in interim periods,[99] we ultimately decided to retain Item 101(c)(1)(v) and instead to delete Instruction 5 to Item 303(b) of Regulation S–K, which also required a discussion of any seasonal aspects that have had a material effect on a registrant's financial condition or results of operations.[100] We proposed to retain this Item out of concern about the potential loss of information in the fourth quarter regarding the extent to which the business of a registrant or its segment(s) is or may be seasonal

[92] *See, e.g.,* letters from 36 Organizations, American IP Law Association, Financial Services Roundtable, and IP Owners Association, available at *https://www.sec.gov/comments/s7-06-16/s70616.htm.* Item 101(c)(1)(iv) currently does not refer to disclosure of copyrights or trade secrets and these commenters expressed concern that requiring such disclosure would impose substantial costs on registrants and could have an adverse impact on shareholder value.

[93] *See* letter from CLA.

[94] *See* letter from CFA Institute.

[95] *See* letters from Society and GM.

[96] *See, e.g.,* letters from 36 Organizations, American Intellectual Property Law Association (Aug. 9, 2016), U.S. Chamber of Commerce (July 20, 2016), FedEx Corporation (July 21, 2016), Intellectual Property Owners Association (July 15, 2016), National Association of Manufacturers (July 21, 2016), Association of American Publishers (July 21, 2016), available at *https://www.sec.gov/comments/s7-06-16/s70616.htm. But see* letters from International Integrated Reporting Council (July 20, 2016) and CFA Institute (Oct. 6, 2016) (supporting the inclusion of copyrights under Item 101(c)), available at *https://www.sec.gov/comments/s7-06-16/s70616.htm.*

[97] *See Defense and Other Long Term Contracts; Prompt and Accurate Disclosure of Information,* Release No. 33–5263 (June 22, 1972) [37 FR 21464 (Oct. 11, 1972)].

[98] *See id.*

[99] *See Disclosure Update and Simplification Proposed Rule,* Release No. 33–10110 (July 13, 2016) [81 FR 51607 (Aug. 4, 2016)] (''DUSTR Proposing Release''). Public comments on the DUSTR Proposing Release are available at *https://www.sec.gov/comments/s7-15-16/s71516.htm.*

[100] The Commission decided to eliminate Instruction 5 to Item 303(b) because U.S. GAAP in combination with the remainder of Item 303 requires disclosures in interim reports that convey reasonably similar information to the disclosures required by Instruction 5 to Item 303(b). *See* DUSTR Adopting Release, *supra* note 71, at 50169.

because U.S. GAAP may not elicit this disclosure.[101]

We received one comment on this aspect of the proposed amendments. The commenter recommended that the Commission require registrants with seasonal businesses to discuss the impact of climate change on their businesses.[102]

b. Final Amendment

We are adopting the amendment as proposed. Consistent with our previous evaluation of this Item, we continue to believe that the seasonality of the business or a segment should be disclosed to the extent it is material to an understanding of the registrant's business. Although a commenter suggested that this non-exclusive example should require disclosure about the impact of climate change on seasonal businesses, consistent with our response to a similar suggestion regarding the raw materials disclosure topic, we are not adding this additional specificity to avoid undermining the principles-based nature of Item 101(c). Our principles-based approach to this disclosure affords registrants sufficient flexibility to address relevant factors that may affect seasonality to the extent material to an understanding of the registrant's business.

6. Compliance With Material Government Regulations, Including Environmental Regulations

a. Proposed Amendment

Item 101(c)(1)(xii) requires disclosure of the material effects of compliance with environmental laws on the capital expenditures, earnings, and competitive position of the registrant and its subsidiaries, as well as any material estimated capital expenditures for the remainder of the fiscal year, the succeeding fiscal year, and such future periods that the registrant deems material.

Pursuant to the National Environmental Policy Act of 1969 (''NEPA''),[103] which mandated consideration of the environment in regulatory action, in 1973, the Commission adopted a new provision to require disclosure of the material effects that compliance with Federal, state, and local environmental laws may have on the capital expenditures, earnings, and competitive position of the registrant, now designated as Item 101(c)(1)(xii).[104] Subsequent litigation [105] concerning both the denial of a rulemaking petition and adoption of the 1973 environmental disclosure requirements resulted in the Commission initiating public proceedings primarily to elicit comments on whether the provisions of NEPA required further rulemaking.[106] As a result of these proceedings, the Commission in 1976 amended the Item 101 requirements to specifically require disclosure of any material estimated capital expenditures for environmental control facilities for the remainder of the registrant's current and succeeding fiscal years, and for any further periods that are deemed material.[107]

Although there is no separate line item requiring disclosure of government regulations that may be material to a registrant's business, it is common practice for many registrants to include disclosure regarding such information in response to Item 101(c)(1)(xii). In response to the Concept Release, a few commenters supported requiring registrants to disclose all government regulations material to their business given that many registrants already voluntarily provide such information.[108]

In recognition of this common practice and because we believed this disclosure would provide important information to investors, we proposed including the material effects of compliance with material government regulations, not just environmental laws, as a listed disclosure topic in Item 101(c).

b. Comments on the Proposed Amendment

A number of commenters supported the proposal to include the material effects of compliance with material governmental regulations, not just environmental laws, as a listed disclosure topic in Item 101(c).[109] Several of these commenters affirmed that the proposal was consistent with current market practice and would provide material information to investors.[110] One commenter suggested that the Commission should require disclosure of the impact of material government regulations on the business and specify that this must include disclosure about environmental risks.[111] This commenter also recommended the Commission adopt a more prescriptive approach to ensure that this disclosure provides investors with consistent, comparable data about regulatory compliance matters. Other commenters recommended that the Commission should require disclosure of international tax strategies.[112]

One commenter stated that the proposed amendment was confusing because the text of the amendment repeatedly used the term ''material'' and urged the Commission to clarify the rule text.[113] Another commenter recommended that the rule should define the term ''environmental regulations'' to include, as examples of regulations warranting disclosure, animal-welfare and wildlife regulations, and regulations relating to climate change.[114]

Several commenters opposed the proposal to include the material effects of compliance with material governmental regulations, not just environmental laws, as a listed disclosure topic in Item 101(c).[115] All of these commenters stated that registrants are already required to disclose the material impact of compliance with material governmental regulations in their MD&A, risk factor, or financial statement disclosure. Some of these commenters also expressed concern that the preparation of this disclosure could be burdensome to registrants and may result in boilerplate disclosure, as

[101] *See id.* ASC 270–10–45–11 states that entities should consider supplementing interim reports with information for 12-month periods ended at the interim date to avoid the possibility that interim results with material seasonal variations may be taken as fairly indicative of the estimated results for a full fiscal year.

[102] *See* letter from SELC.

[103] Public Law 91–190, 42 U.S.C. 4321–4347 (Jan. 1, 1970).

[104] *See Disclosure with Respect to Compliance with Environmental Requirements and Other Matters,* Release 33–5386 (Apr. 20, 1973) [38 FR 12100 (May 9, 1973)] (''Environmental Disclosure Adopting Release'').

[105] *See Natural Resources Defense Council, Inc.* v. *SEC,* 389 F. Supp. 689 (D.D.C. 1974); and *Natural Resources Defense Council, Inc.* v. *SEC,* 606 F.2d 1031 (D.C. Cir. 1979), rev'g 432 F. Supp. 1190 (D.D.C. 1977). *See also* U.S. Sec. & Exch. Comm'n, *Staff Report on Corporate Accountability* 1, 251–259 (Comm. Print 1979) (''Staff Report'') (providing a description of this litigation).

[106] *See Disclosure of Environmental and Other Socially Significant Matters,* Release No. 33–5569 (Feb. 11, 1975) [40 FR 7013 (Feb. 18, 1975)].

[107] *See Conclusions and Final Action on Rulemaking Proposals Relating to Environmental Disclosure,* Release No. 33–5704 (May 6, 1976) [41 FR 21632 (May 27, 1976)]. For further discussion of how the Commission has sought to consider environmental effects in its business disclosure requirements, *see infra* Section II.C.2.

[108] *See* Concept Release, *supra* note 9. For a more extensive discussion of the related comment letters *see* Section II.B.6 of the Proposing Release, *supra* note 3.

[109] *See, e.g.,* letters from La Berge, EEI and AGA, Nareit, CCMC, FedEx (expressing support for the comments provided by CCMC), Virginia Harper Ho (''Harper Ho''), American Securities Association (''ASA''), PRI, and Humane Society.

[110] *See, e.g.,* letters from CCMC, FedEx, and PRI.

[111] *See* letter from PRI.

[112] *See, e.g.,* letters from individuals and entities using Letter Type A and PRI.

[113] *See* letter from Nareit.

[114] *See* letter from the Humane Society.

[115] *See, e.g.,* letters from Society, DP&W, FEI and GM.

registrants might feel compelled to provide lengthy recitations of all of the laws that affect their business and operations.[116]

c. Final Amendment

After considering the comments received, we are adopting the amendments largely as proposed with certain modifications. Some commenters opposed the proposal, asserting that disclosure of the material impact of compliance with material governmental regulations is required under MD&A or financial statement requirements. Item 101(c)(1), however, seeks to elicit broader disclosure that may be material to an understanding of the registrant's business as a whole, whereas disclosure in a registrant's MD&A or financial statements may focus more narrowly on the specific impact on a registrant's financial results, liquidity and capital resources or balance sheet. As such, we agree with the commenters that supported the proposal and stated that it would provide material information to investors.[117]

The final rule will require, to the extent material to an understanding of the business taken as a whole, disclosure of the material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings, and competitive position of the registrant and its subsidiaries. The final rule also will continue to require registrants to include the estimated capital expenditures for environmental control facilities for the current fiscal year and any other subsequent period that is material.

In response to the concerns of a commenter,[118] we have revised the text of the proposed rule to eliminate the second instance of the word ''material'' that appeared before the term ''government.''[119] Although we included ''material'' there to make clear that disclosure should not include a discussion of every regulation that may apply to a registrant, we were persuaded by commenters that the dual use of the term ''material'' in the text of the proposed amendment could be confusing.[120] The final amendment more closely follows the existing text of Item 101(c)(1)(xii). As we noted in the Proposing Release, while existing Item 101(c)(1)(xii) does not require disclosure of government regulations that are material to a registrant's business, it is common practice for many registrants to include such disclosure in response to the Item. Consequently, we think this formulation will be less likely to cause confusion. In addition, we believe that this principles-based requirement will help provide investors with material information about a registrant's compliance with the government regulations that are material to an understanding of the registrant's business. For this reason, we are not adding prescriptive requirements to the final amendment, such as requiring disclosure of international tax strategies as recommended by some commenters.[121] The principles-based approach of the final rule should improve the ability of each registrant to tailor its disclosure to discuss only those governmental regulations that are of particular importance to it. The Item does not call for, or require, a recitation of every regulation that affects a registrant's business and operations.

With respect to one commenter's suggestion that the final amendment define the term ''environmental regulations'' to include animal-welfare and wildlife regulations, and regulations relating to climate change,[122] we do not believe that this additional specificity is necessary. One of the purposes of the final amendment is to make the disclosure of the material effects of compliance with government regulations more principles-based. Although specific categories of government regulations are not identified in the final amendment, disclosure of the material effects of compliance with government regulations, including animal-welfare and wildlife regulations, would be required if material to an understanding of the registrant's business.

7. Human Capital Disclosure

a. Proposed Amendment

Item 101(c)(1)(xiii) currently requires disclosure of the number of persons employed by the registrant. Some registrants distinguish between the number of full-time and part-time employees, and others specify the number of employees in each department or division. Some registrants with large numbers of employees disclose the approximate number of employees and some registrants discuss their employees' membership in a union or similar organization.

The Concept Release solicited input on this disclosure requirement, requesting feedback on, among other things, whether this numeric disclosure is still important to investors, and what, if any, improvements could be made.[123] Some commenters on the Concept Release recommended retaining and expanding the requirement, while others questioned the continued relevance of the requirement.[124]

Subsequent to the issuance of the Concept Release, we received a rulemaking petition requesting that the Commission adopt new rules, or amend existing rules, to require registrants to disclose information about their human capital management policies, practices and performance.[125] This rulemaking petition generated a substantial number of comments supporting increased disclosure of human capital management policies and specific human capital metrics.[126]

In light of the feedback that we received on the Concept Release and the Human Capital Rulemaking Petition, and as part of our efforts to modernize disclosure, we proposed to amend Item 101(c) to replace the current requirement to disclose the number of persons employed by the registrant with a requirement to provide a description of the registrant's human capital resources, including in such description any human capital measures or objectives that management focuses on in managing the business, to the extent such disclosures would be material to an understanding of the registrant's business taken as a whole.[127] In addition, the proposed amendment included non-exclusive examples of human capital measures and objectives that may be material, depending on the nature of the registrant's business and

[116] *See, e.g.,* letters from Society, GM and DP&W.

[117] *See, e.g.,* letters from CCMC, FedEx and PRI.

[118] *See* letter from Nareit.

[119] We have also made other non-substantive, clarifying changes to the text of this disclosure topic.

[120] *See supra* note 116.

[121] *See, e.g.,* letters from individuals and entities using Letter Type A and PRI.

[122] *See* letter from the Humane Society.

[123] *See* Concept Release, *supra* note 9, at 23936.

[124] *See* Proposing Release, *supra* note 3, at 44369.

[125] *See* Rulemaking petition to require registrants to disclose information about their human capital management policies, practices and performance, File No. 4–711 (July 6, 2017) (''Human Capital Rulemaking Petition''), available at *https://www.sec.gov/rules/petitions/2017/petn4-711.pdf.*

[126] *See* Comments to File No. 4–711 available at *https://www.sec.gov/comments/4-711/4-711.htm.*

[127] *See* Proposing Release, *supra* note 3. The SEC Investor Advisory Committee also recommended that the Commission take measures to improve the disclosure of a registrant's human capital management, and suggested that any disclosure requirements ''should be crafted so as to reflect the varied circumstances of different businesses, and to eschew simple 'one-size-fits-all' approaches that obscure more than they add.'' *Recommendation of the Investor Advisory Committee Human Capital Management Disclosure* (Mar. 28, 2019), available at *https://www.sec.gov/spotlight/investor-advisory-committee-2012/human-capital-disclosure-recommendation.pdf.*

workforce, such as measures or objectives that address the attraction, development, and retention of personnel.

b. Comments on the Proposed Amendment

Many commenters expressed general support for the inclusion of human capital as a disclosure topic.[128] Several commenters expressly supported a principles-based approach to human capital disclosure.[129] While supporting the principles-based approach in the proposal, some commenters urged the Commission to proceed with caution and expressed concerns that prescriptive requirements may elicit immaterial disclosures.[130] Many other commenters called for a combination of principles-based and prescriptive requirements that would include disclosure of specified quantitative metrics.[131]

Many other commenters expressed opposition to the proposed principles-based approach to human capital disclosure.[132] Some of these commenters stated that the proposed principles-based approach would not likely elicit meaningful information about human capital practices, or provide sufficiently comparable disclosure, unless grounded in standardized metrics.[133] Several commenters stated that companies disclose a wide range of human capital information and that this could lead to confusion among investors.[134] One commenter stated that requiring human capital disclosure would be inconsistent with the Commission's mission.[135] Some commenters urged the Commission to consider providing interpretive guidance on human capital in light of existing disclosure obligations.[136] Other commenters expressed concern based on their view that the principles-based approach would rely entirely on the judgment of management to determine the substance of the information to disclose and would result in less disclosure being provided than would be the case under a prescriptive disclosure requirement.[137]

In the Proposing Release, we requested comment on whether the proposed amendment should include other non-exclusive examples of human capital measures or objectives, such as the number and types of employees, including the number of full-time, part-time, seasonal, and temporary workers. A number of commenters supported the inclusion of specific human capital management disclosure metric requirements or examples.[138] Many of these commenters emphasized the importance of comparability and stated that the use of different metrics would make it difficult for investors to analyze and compare information.[139] Several commenters recommended that we require specific, or encourage companies to use certain, third-party disclosure standards or frameworks to provide human capital disclosure.[140] One commenter supported the inclusion of non-exclusive examples that do not focus on numerical measurements, and argued that the disclosure requirement should not promote comparability.[141] This commenter stated that because every registrant is different, the way in which each registrant defines and measures human capital related objectives necessarily varies widely.

A number of commenters, also highlighting the limitations of mandating or suggesting certain metrics for the purpose of increasing comparability in this area, opposed the inclusion of either non-exclusive examples or prescriptive human capital management disclosure metrics.[142] Some of these commenters stated that there was no consensus on the most appropriate metrics or methodology for human capital management disclosure.[143] Other commenters expressed concern that a list of non-

[128] *See, e.g.,* letters from International Center for Enterprise Engagement (''ICEE''), JT Foxx Reviews Research Team (''JT Foxx''), Intellivest Securities, Inc., Enhance Product Development, Inc. (''EPD''), the Hashimoto's Solution (''Hashimoto''), Auto Connection Manassas VA (''Auto Connection''), Yoga Burn Challenge (''Yoga Burn''), Sustainability Accounting Standards Board (letter dated Oct. 17, 2019, ''SASB 1''), Legal & General Investment Management (''LGIM''), CFA Institute, Breckinridge, Paul Rissman (''Rissman''), LaBerge, E&Y, Oregon State Treasury (''OST''), IEHN, Calvert Research and Management (''Calvert''), Dunker, EEI and AGA, CtW Investment Group (''CtW''), CCMC, FedEx, UnitedHealth Group, Harper Ho, Los Angeles County Employees Retirement Association (''LACERA''), PRI, Society for Human Resource Management (''SHRM''), California State Teachers' Retirement System (''CalSTRS''), Judy Schultz (''Schultz''), DP&W, Hermes Equity Ownership Services Limited (''Hermes''), Better Markets Inc. (''Better Markets''), Willis Towers Watson (''Towers Watson''), AFL–CIO, Mercer, Human Capital Management Coalition (''HCMC''), HR Policy Association (''HR Policy''), Senator Mark Warner, (''Sen. Warner''), Public Citizen, Norges Bank Investment Management (''Norges Bank''), CalPERS, the Forum for Sustainable and Responsible Investment (''SIF''), Domini, New York State Common Retirement Fund (''NYSCRF''), Radiant Value Management (''RVM''), GRI, New York City Comptroller (''NYC Comptroller''), BCI, Timothy G. Coville (''Coville''), JUST Capital, Qin Li, ShareAction, Service Employees International Union (''SEIU''), Catherine Smith (''C. Smith''), and.

[129] *See, e.g.,* letters from ICEE, CII, LaBerge, SHRM, Towers Watson, Mercer, HR Policy, Hashimoto, EPD, Auto Connection, GRI, Yoga Burn, EEI and AGA, CCMC, C. Smith, SEIU and FedEx.

[130] *See, e.g.,* letters from SHRM, FedEx, and CCMC.

[131] *See, e.g.,* letters from LGIM, Calvert, OST, CtW, Harper Ho, LACERA, PRI, CalSTRS, Hermes, Better Markets, AFL–CIO, HCMC, BCI, Sen. Warner, Coville, Norges Bank, CalPERS, SIF, Domini, NYSCRF, CFA Institute, ShareAction, JUST Capital and NYC Comptroller.

[132] *See, e.g.,* letters from UnitedHealth Group; CLA; David Burton (''Burton''); Amazon Watch, American Federation of State, County and Municipal Employees, As You Sow, California Clean Money Campaign, Campaign for Accountability, Center for American Progress, Congregation of Sisters of St. Agnes, Environment America, Friends Fiduciary Corporation, Global Witness, Green Century Capital Management, Harrington Investments, Inc., Institute for Agriculture and Trade Policy, Interfaith Center on Corporate Responsibility, Jantz Management LLC, Miller/Howard Investments, Inc., New Progressive Alliance, Newground Social Investment, SPC, NorthStar Asset Management, Inc., Northwest Coalition for Responsible Investment, Oil Change International, OIP Trust, Oxfam America, Pax World Funds, Public Citizen, Railroads & Clearcuts Campaign, Reynders, McVeigh Capital Management LLC, Sierra Club, Teamsters, Tri-State Coalition for Responsible Investment, U.S. PIRG, Union of Concerned Scientists, Women's Institute for Freedom of the Press. (''33 Organizations''); GM; DP&W; Domini; NYSCRF; Public Citizen; RVM; FEI; Schultz; Rissman; Society; ICGN; and Breckinridge.

[133] *See, e.g.,* letters from Domini, RVM, HCMC, CalPERS, Rissman, LGIM, ICGN, OST, NYSCRF, NYC Comptroller, FEI and LACERA.

[134] *See, e.g.,* letters from FEI, LACERA, HCMC and NYSCRF.

[135] *See* letter from the Heritage Foundation (contending that the mission of the Commission does not include furthering any social, environmental or other criteria).

[136] *See, e.g.,* letters from GM, Society, DP&W and Chevron.

[137] *See, e.g.,* letters from HCMC, CalPERS, NYC Comptroller, Domini, NYSCRF, FEI, PRI, LACERA, Breckinridge, ShareAction and SEIU.

[138] *See, e.g.,* letters from Louis E. Matthews, Jr., Schultz, SASB 1, LGIM, IEHN, Dunker, FCLTGlobal (''FCLTGlobal''), PRI, CalSTRS, Better Markets, HCMC, BCI, Sen. Warner, Public Citizen, CalPERS, SIF, Domini, NYSCRF, NYC Comptroller, ICEE, OST, LACERA, Hermes, Burton, SEIU, CtW, ICGN, Towers Watson, AFL–CIO, 33 Organizations, JT Foxx, EPD, Hashimoto, Auto Connection, Yoga Burn, Bec Brideson, Calvert, Breckinridge, CFA Institute, ShareAction, Qin Li, JUST Capital and Letter Type A.

[139] *See, e.g.,* letters from SASB 1, LGIM, Calvert, E&Y, OST, FCLTGlobal, LACERA, PRI, CalSTRS, Hermes, SEIU, E&Y, Better Markets, HCMC, BCI, Sen. Warner, Coville, Public Citizen, Norges Bank, CalPERS, SIF, Domini, NYSCRF, RVM, Breckinridge, ShareAction, CFA Institute and NYC Comptroller.

[140] *See, e.g.,* letters from Domini (recommending frameworks published by the International Organization for Standardization, the Global Reporting Initiative, the Sustainability Accounting Standards Board, the Workforce Disclosure Initiative, and the Carbon Disclosure Project), SASB 1, Coville, Norges Bank (recommending the Sustainability Accounting Standards Board framework), Breckinridge (recommending the Sustainability Accounting Standards Board framework) and RVM. *See also, e.g.,* letters from GRI, ICEE, SASB 1, Coville, CII, LACERA, Domini, RVM, Breckinridge and Norges Bank.

[141] *See* letter from Towers Watson.

[142] *See, e.g.,* letters from CCMC, FedEx, SHRM, GM, Mercer, Society, HR Policy, DP&W, FEI and Chevron.

[143] *See, e.g.,* letters from HR Policy, Society and GM.

exclusive examples could be viewed as mandated disclosure, which could result in registrants providing immaterial disclosure.[144]

In the Proposing Release, we also requested comment on whether we should define human capital. Several commenters stated that human capital should be defined,[145] while a few opposed a Commission definition of the term.[146] One of these commenters stated that there were many definitions of human capital and that the concept is often tailored to the circumstances and objectives of individual companies.[147] The other commenter stated that the Commission should resist defining human capital because there is no standard method to assess ''human capital management'' and because it is a complex concept with many factors influencing human capital management that vary across industries and individual companies.[148]

We also requested comment on whether we should retain the requirement in Item 101(c) for registrants to disclose the number of persons employed by the registrant. Several commenters urged the Commission to retain the requirement.[149] One of these commenters stated that this disclosure provides investors with valuable information that can be used in assessing productivity growth, compensation measures, and capital allocation.[150] A number of commenters recommended that the Commission require additional information regarding the number of persons employed by the registrant, such as the number of full-time, part-time, and contingent workers; the number of seasonal employees; the ratio of full-time to part-time employees; or the number of domestic and foreign employees.[151] Some commenters, however, stated that the requirement to disclose the number of employees was arbitrary, outdated, and of limited use.[152]

c. Final Amendment

After considering public comments, we are adopting this amendment substantially as proposed with certain modifications. Under the final amendments, Item 101(c) will require, to the extent such disclosure is material to an understanding of the registrant's business taken as a whole, a description of a registrant's human capital resources, including any human capital measures or objectives that the registrant focuses on in managing the business. We believe that, in many cases, human capital disclosure is important information for investors. Human capital is a material resource for many companies and often is a focus of management, in varying ways, and an important driver of performance.

The final amendments identify various human capital measures and objectives that address the attraction, development, and retention of personnel as non-exclusive examples of subjects that may be material, depending on the nature of the registrant's business and workforce. We emphasize that these are examples of potentially relevant subjects, not mandates. Each registrant's disclosure must be tailored to its unique business, workforce, and facts and circumstances. Consistent with the views expressed by some commenters, we did not include more prescriptive requirements because we recognize that the exact measures and objectives included in human capital management disclosure may evolve over time and may depend, and vary significantly, based on factors such as the industry, the various regions or jurisdictions in which the registrant operates, the general strategic posture of the registrant, including whether and the extent to which the registrant is vertically integrated, as well as the then-current macro-economic and other conditions that affect human capital resources, such as national or global health matters.[153] Although several commenters expressed concern that the principles-based approach could result in less comparability (as compared to a more prescriptive approach), given the varied and evolving nature of human capital considerations, we believe that this approach will likely lead to more meaningful disclosure being provided to investors. Moreover, we do not believe that prescriptive requirements or a designated standard or framework will ensure more comparable disclosure given the variety in registrant operations as well as how registrants define, calculate, and assess human capital measures.[154] Furthermore, we note that while the final amendments do not require registrants to use a disclosure standard or framework to provide human capital disclosure, as recommended by some commenters,[155] a principles-based approach affords registrants the flexibility to tailor their disclosures to their unique circumstances, including by providing disclosure in accordance with some or all of the components of any current or future standard or framework that facilitates human capital resource disclosure that is material to an understanding of the registrant's business taken as a whole.

We also are not adopting a definition of the term ''human capital'' as recommended by some commenters because this term may evolve over time and may be defined by different companies in ways that are industry specific. This approach is consistent with the view expressed by a number of commenters that noted that there are many definitions of human capital and that the concept, while generally well understood, is often tailored to the circumstances and objectives of individual companies.[156]

In a change from the proposal, a registrant will need to disclose, to the extent material to an understanding of the registrant's business, the number of persons employed by the registrant. We agree with commenters that this disclosure topic should be retained and that it can provide investors with important and useful information that is material to an understanding of the

[144] *See, e.g.,* letters from Mercer (''[P]roviding specific examples of the types of measures or objectives that companies focus on in managing their business, such as those that address the attraction, development, and retention of personnel, as proposed, could result in disclosure that is potentially misleading and is less valuable to investors because it is not tailored to a company's specific business or industry.''), Towers Watson, and HR Policy.

[145] *See, e.g.,* letters from CalSTRS, CtW, HCMC, NYC Comptroller, Towers Watson, ICEE and PRI (advocating for defining human capital management as ''people's competencies, capabilities and experience, and their motivations to innovate.''). *Cf.* letter from Burton (''definition for human capital should include human capital measures or objectives that management focuses on in managing the business'').

[146] *See* letters from Mercer and HR Policy.

[147] *See* letter from HR Policy.

[148] *See* letter from Mercer.

[149] *See, e.g.,* letters from CII, 33 Organizations, PRI and CtW.

[150] *See* letter from CtW.

[151] *See, e.g.,* letters from CalSTRS, Domini, CalPERS, CII, Burton, BCI, NYC Comptroller, ICEE, LGIM, OST, LACERA, PRI, Hermes, SEIU, CFA Institute, CtW, ICGN, Towers Watson, AFL–CIO, HCMC, Sen. Warner, CalPERS, SIF and NYSCRF.

[152] *See, e.g.,* letters from EEI and AGA, CCMC, Hermes, Better Markets, CalSTRS, FedEx and Mercer.

[153] *See, e.g.,* letters from Mercer and HR Policy.

[154] *See, e.g.,* U.S. Gov't Accountability Office, GAO–20–530, Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them (July 2020), *available at https://www.gao.gov/assets/710/707949.pdf* (finding lack of consistency across companies that use the same framework to assess environmental, social, and governance (ESG) matters); Alex Edmans, Grow the Pie: How Great Companies Deliver Both Purpose and Profit (2020) (stating that non-financial measures are inherently incomparable because they depend on a company's unique purpose).

[155] *See, e.g.,* letters from GRI, ICEE, SASB 1, Coville, CII, LACERA, Domini, RVM, Breckinridge and Norges Bank.

[156] *See, e.g.,* letter from HR Policy and Mercer.

registrant's business.[157] The number of persons employed by the registrant can help investors assess the size and scale of a registrant's operations as well as changes over time. In addition, we believe this disclosure will complement, and could provide essential context to, any discussion of a registrant's human capital management. Although many commenters recommended that we expand this disclosure topic to include additional metrics, such as the number of full-time, part-time, and contingent workers, and employee turnover,[158] we are not adopting these prescriptive elements because we believe that they would be inconsistent with our objective to make Item 101(c) more principles-based. We note that, under the principles-based approach we are adopting, to the extent that a measure, for example, of a registrant's part-time employees, full-time employees, independent contractors and contingent workers, and employee turnover, in all or a portion of the registrant's business, is material to an understanding of the registrant's business, the registrant must disclose this information.

C. Legal Proceedings (Item 103)

Item 103 requires disclosure of any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Item 103 also requires disclosure of the name of the court or agency in which the proceedings are pending, the date instituted, and the principal parties thereto and a description of the factual basis alleged to underlie the proceeding and the relief sought. Similar information is to be included for such proceedings known to be contemplated by governmental authorities.

The Commission first adopted a requirement to disclose all pending litigation that may materially affect the value of the security to be offered, describing the origin, nature and name of parties to the litigation, as part of Form A–1 in 1933.[159] Over time, this disclosure requirement was expanded to include, among other things, the date the proceeding was instituted, the identity of the responsible court or agency, and a requirement that material bankruptcy proceedings involving the registrant or its significant subsidiaries be described and any material proceeding involving a director, officer, affiliate, or principal security holder.[160] Moreover, in connection with NEPA, the legal proceedings disclosure requirement was expanded to require additional disclosure about environmental matters.[161]

In the Proposing Release, we noted that Item 103 and U.S. GAAP have overlapping disclosure requirements, but that these requirements nonetheless differ in certain respects.[162] Often, in complying with Item 103, registrants repeat some or all of the disclosures provided in the notes to the financial statements under U.S. GAAP or include a cross-reference thereto. In the DUSTR Proposing Release, the Commission solicited comment concerning whether to retain, modify, eliminate, or refer the Item 103 disclosure requirements to the Financial Accounting Standards Board for potential incorporation into U.S. GAAP.[163] Many of the commenters on the DUSTR Proposing Release opposed the integration of Item 103 into U.S. GAAP.[164]

In response to these concerns, the Commission decided to retain the disclosure requirements in Item 103, stating that further consideration was warranted with respect to the implications of potential changes to these requirements.[165] Given the concerns expressed by commenters in response to the DUSTR Proposing Release, and after further consideration of how to improve the disclosure requirements in Item 103, we proposed the following amendments to Item 103.

1. Expressly Provide for the Use of Hyperlinks or Cross-References To Avoid Repetitive Disclosure

a. Proposed Amendment

In an effort to encourage registrants to avoid duplicative disclosure, we proposed to amend Item 103 to expressly state that this disclosure may be provided by hyperlink or cross-reference to legal proceedings disclosure located elsewhere in the document, such as in Management's Discussion & Analysis (MD&A), Risk Factors, or notes to the financial statements.

b. Comments on the Proposed Amendment

Many commenters supported the use of hyperlinks or cross-references to provide legal proceedings disclosure and to avoid repetitive disclosure.[166] Several commenters indicated that this approach would help decrease duplicative disclosures in filings.[167] Other commenters stated that using hyperlinks would improve the navigability of documents.[168] One commenter stated that many registrants commonly cross-reference to disclosures concerning legal proceedings contained in the notes to the financial statements or elsewhere in a filing.[169]

Another commenter, although supportive of this proposal, expressed concern that the use of multiple hyperlinks or cross-references could increase search costs for investors who would have to spend additional time retrieving and piecing together disclosures located in different sections of a filing.[170] This commenter recommended that the amendment place limits on a registrant's use of multiple hyperlinks.

One commenter expressed opposition to the use of hyperlinks to provide legal proceedings disclosure because it would result in ''search expeditions'' to find the disclosure.[171] This commenter claimed that a registrant is best positioned to determine the most effective means to organize and present information in its filing to investors. Another commenter claimed that duplicative information was not problematic if such disclosures were consistent throughout the filing. In addition, this commenter indicated that the proposal did not address inaccurate or inactive hyperlinks.[172]

c. Final Amendment

We are adopting the amendment as proposed. The final rules will clarify that registrants are permitted to provide disclosure responsive to Item 103 by hyperlink or cross-reference to legal proceedings disclosure elsewhere in the document, such as in MD&A, Risk Factors, or a note to the financial statements.

We do not believe it is necessary to place a restriction on the ability of registrants to use multiple hyperlinks to

[157] *See, e.g.,* letters from CII and CtW.

[158] *See, e.g.,* letters from CalSTRS, Domini, CalPERS, CII, Burton, BCI, NYC Comptroller, ICEE, LGIM, OST, LACERA, PRI, Hermes, SEIU, CFA Institute, CtW, ICGN, Towers Watson, AFL–CIO, HCMC, Sen. Warner, CalPERS, SIF and NYSCRF.

[159] *See* Form A–1, Item 17, adopted in Release No. 33–5 (July 6, 1933) [not published in the **Federal Register**].

[160] *See* Proposing Release, supra note 3, at 44372.

[161] *See* Environmental Disclosure Adopting Release, *supra* note 107.

[162] *See* Proposing Release, *supra* note 3, at 44373.

[163] *See Disclosure Update and Simplification Proposed Rule,* Release No. 33–10110 (July 13, 2016) [81 FR 51607 (Aug. 4, 2016)] (''DUSTR Proposing Release'') at 51633.

[164] *See* Proposing Release, *supra* note 3, at 44372.

[165] *See* DUSTR Adopting Release, *supra* note 71.

[166] *See, e.g.,* letters from IBC, CLA, EEI and AGA, DP&W, Nareit, CCMC, FedEx, CII, Society, GM, NYC Bar Association, Nasdaq, Chevron, and ASA.

[167] *See, e.g.,* letters from EEI and AGA, IBC, CCMC, ASA, Chevron and Nasdaq.

[168] *See, e.g.,* letters from Society, GM and Nasdaq.

[169] *See* letter from FEI.

[170] *See* letter from CII.

[171] *See* letter from ICGN.

[172] *See* letter from CalPERS.

provide disclosure of legal proceedings pursuant to revised Item 103 or address inactive hyperlinks as suggested by some commenters,[173] because a hyperlink used in response to Item 103 would be an internal hyperlink that connects a reader to a different section within the same document or web page (and also would be less likely to become broken or inactive) as opposed to an external hyperlink that connects a reader to a different document. Clarifying that registrants can use hyperlinks furthers a primary goal of the proposal to reduce duplicative disclosure. As we noted in the Proposing Release, in order to comply with existing Item 103, many registrants commonly repeat some or all of the disclosures that are provided in the notes to the financial statements under U.S. GAAP or include a cross-reference to those disclosures. We believe placing restrictions on the use of hyperlinks or cross-references would reduce the flexibility of registrants to present this information in a manner that they deem to be the most effective.

2. Updated Disclosure Threshold for Environmental Proceedings in Which the Government Is a Party

a. Proposed Amendments

Instruction 5.C. to Item 103 specifically requires registrants to disclose any proceeding under environmental laws to which a governmental authority is a party unless the registrant reasonably believes it will not result in sanctions of $100,000 or more; provided, however, that such proceedings which are similar in nature may be grouped and described generally. The Commission added this requirement to Item 103 in 1982.[174] Since that time, the $100,000 disclosure threshold for environmental proceedings in which the government is a party has not been changed. We proposed to increase this threshold to $300,000 to adjust it for inflation.[175] In addition, we proposed to reorganize Item 103 to incorporate its instructions into the text of the Item.

b. Comments on the Proposed Amendments

Comments on the proposed amendment were mixed. Several commenters supported the proposal to revise the $100,000 threshold for environmental proceedings to which the government is a party to $300,000 to adjust for inflation, or supported the retention of a quantitative threshold without recommending a specific amount.[176] One of these commenters concurred that a bright-line disclosure threshold provides a useful benchmark and promotes comparability.[177] Another commenter, while supportive of the increased threshold, recommended that the Commission consider whether the fixed dollar amount should be eliminated in favor of a materiality standard.[178] Other commenters recommended that the threshold should be periodically indexed for inflation.[179] A few commenters suggested adopting a hybrid approach of requiring disclosure of any fine above a quantitative threshold of at least $300,000 that is determined to be material.[180]

Many commenters opposed the proposal to revise the $100,000 threshold to $300,000 to adjust for inflation.[181] Several of these commenters recommended that the proposed amendment use a materiality-based standard rather than a fixed dollar amount.[182] Some of these commenters recommended that the proposed amendment include a non-exhaustive list of qualitative factors that a registrant should consider when assessing the materiality of an environmental proceeding.[183] These commenters suggested that such factors could include whether a fine brought by a governmental authority is indicative of potentially significant environmental compliance problems and whether the fine relates to conduct for which the company previously has been sanctioned. These commenters also suggested that if the Commission were to retain a quantitative threshold, we should correlate the threshold to a registrant's market capitalization or some other benchmark that may be more indicative of materiality on a company-specific basis.[184] Some of these commenters stated that the use of a materiality-based standard would eliminate the guesswork to determine whether a potential monetary sanction will equal or exceed the dollar threshold and require disclosure.[185] Several commenters that supported a materiality-based threshold stated that one-size-fits-all quantitative thresholds are arbitrary and result in disclosure that may not be material to investors and can obscure other, more meaningful information about a company's material legal proceedings.[186]

Other commenters, however, opposed the use of a materiality standard for environmental proceedings and stated that larger registrants likely would not provide any disclosure of environmental proceedings under Item 103.[187] A few commenters recommended that we retain the current $100,000 threshold.[188] Several commenters expressed concerns that the proposed $300,000 threshold may result in reduced environmental proceedings disclosure.[189]

We also received comments that supported increasing the disclosure threshold above $300,000.[190] However, these commenters did not believe that the threshold should be a fixed dollar amount. These commenters stated that it was more burdensome for larger registrants to gather and disclose environmental proceedings based on a universal fixed threshold applicable to all registrants as such a threshold would likely not be material to larger registrants. These commenters recommended using a threshold that was the greater of $1 million or an amount that was material to the registrant.[191] These commenters stated that such an approach would ensure that information disclosed is useful to investors without the risk of being overly burdensome to the preparers of filings or becoming obsolete due to passage of time.

c. Final Amendment

After considering the public comments, we are adopting the

[173] *See* letters from CII and CalPERS.

[174] *See Adoption of Integrated Disclosure System,* Release No. 33–6383 (Mar. 3, 1982) [47 FR 11380 (Mar. 16, 1982)] (''1982 Integrated Disclosure Adopting Release'').

[175] Starting from May 1981, the month the release in which the $100,000 amount was first published, Commission staff used the Consumer Price Index (CPI) Inflation Calculator (available at *https://data.bls.gov/cgi-bin/cpicalc.pl*) to calculate the inflation adjusted amount to be $285,180.40 as of May 2019. For ease of reference, the Commission rounded this figure to $300,000.

[176] *See, e.g.,* letters from Harper Ho, SELC, NYC Bar Association and Nasdaq.

[177] *See* letter from SELC.

[178] *See* letter from Nasdaq.

[179] *See, e.g.,* letters from DP&W, Society and GM.

[180] *See, e.g.,* letters from Society and DP&W.

[181] *See, e.g.,* letters from CII, 33 Organizations, E&Y, IEHN, Society, DP&W, CCMC, NYSCRF, EEI and AGA, David Young, FedEx, FEI, Chevron, CalPERS, Humane Society, Domini, PRI, CFA Institute and GM.

[182] *See, e.g.,* letters from E&Y, Society, DP&W, CCMC, FedEx, Chevron and GM.

[183] *See* letters from Society, DP&W and GM.

[184] *Id.*

[185] *See* letters from Society and DP&W.

[186] *See, e.g.,* letters from Society and DP&W.

[187] *See, e.g.,* letters from CalPERS and PRI.

[188] *See, e.g.,* letters from CalPERS and Humane Society (suggesting that the $100,000 threshold be maintained or adjusted to reflect an actual data-driven dollar amount that more accurately represents a division between environmental proceedings that pose material risks to businesses and those that do not).

[189] *See, e.g.,* letters from IEHN, Public Citizen, CalPERS, Domini and PRI.

[190] *See* letter from EEI and AGA.

[191] *Id.*

amendments to reorganize Item 103 to eliminate the current instructions to the Item and incorporate their contents in the text of Item 103 as proposed. In addition, as discussed in more detail below, we are adopting a modified disclosure threshold that increases the existing quantitative threshold but that also affords a registrant some flexibility by providing a range within which the registrant can select a different threshold that it determines is reasonably designed to result in disclosure of material environmental proceedings.[192]

The Commission has in the past considered and received feedback on a materiality standard for environmental disclosures.[193] As the Commission noted when it first adopted the $100,000 threshold for disclosure of environmental proceedings in 1981, disclosure of fines by governmental authorities may be of particular importance in assessing a registrant's environmental compliance, as governmental fines may be more indicative of possible illegality and conduct contrary to public policy.[194] At the same time, as pointed out by several commenters on the proposal, for many registrants a one-size-fits-all quantitative threshold may result in the disclosure of information that is not material in assessing whether a registrant has significant environmental compliance problems.[195]

We further observe that environmental proceedings often can be complex from a factual and legal standpoint. A bright-line test can help registrants assess whether a particular proceeding is subject to disclosure and provide certainty about when disclosure is required. However, we also recognize that a single numerical threshold may result in some disclosures that are not material.

After weighing these various considerations, we are persuaded by commenters who suggested a hybrid approach that includes a quantitative threshold while also providing registrants with the flexibility to apply a more tailored disclosure threshold that would best accomplish the Commission's objectives.[196] We believe a hybrid approach will continue to elicit information that is important to investors in assessing a registrant's environmental compliance while enabling registrants to apply a disclosure threshold that is more indicative of materiality on a company-specific basis. For these reasons, we are adopting a modified disclosure requirement for environmental proceedings involving monetary sanctions that sets forth a quantitative disclosure threshold range within which registrants may determine a threshold that will result in disclosure of material information concerning environmental proceedings.

Accordingly, under the final rule, disclosure will be required for any proceeding that involves potential monetary sanctions of $300,000 or more, or at the election of the registrant, such other amount that the registrant determines is reasonably designed to result in disclosure of any such proceeding that is material to its business or financial condition. However, irrespective of any alternative threshold adopted by the registrant, disclosure will be required in all cases for any proceeding when the potential monetary sanctions exceed the lesser of $1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis. Furthermore, if a registrant chooses to use a threshold other than the $300,000 threshold, it must disclose this threshold (including any change thereto) in each annual and quarterly report. We believe this approach avoids a mandatory one-size-fits-all disclosure threshold that may potentially result in the disclosure of information that is not material by allowing registrants to determine a company-specific disclosure threshold that is more relevant to their particular circumstances.

We acknowledge commenters' concerns that use of a materiality standard for environmental proceedings could result in larger registrants providing less disclosure under Item 103. For that reason, the final rule stipulates that the alternative disclosure threshold may not exceed certain parameters. The sliding-scale standard of the lesser of $1 million or one percent of the current assets builds on commenter suggestions to use a higher dollar threshold, such as $1 million, or a company-specific benchmark that scales with the size of the company. These parameters, together with the bright-line $300,000 threshold, are intended to ensure that investors continue to receive relevant information about environmental sanctions while also realizing the benefits of a more principles-based approach.

D. Risk Factors (Item 105)

Item 105 requires disclosure of the most significant factors that make an investment in the registrant or offering speculative or risky and specifies that the discussion should be concise and organized logically.[197] The principles-based requirement further directs registrants to explain how each risk affects the registrant or the securities being offered, discourages disclosure of risks that could apply generically to any registrant, and requires registrants to set forth each risk factor under a sub-caption that adequately describes the risk.

In proposing amendments to Item 105, we aimed to address the lengthy and generic nature of the risk factor disclosure presented by many registrants. Although the length and number of risk factors disclosed by registrants vary, some recent studies have indicated that risk factor disclosures have increased over time.[198]

The inclusion of generic, boilerplate risks that could apply to any offering or registrant appears to contribute to the increased length of risk factor disclosure. Although Item 105 instructs registrants not to present risks that could apply generically to any registrant, and despite longstanding Commission and staff guidance stating that risk factors should be focused on the ''most significant'' risks and should

[192] We are also amending Schedule 14A to update a cross-reference to the instructions to Item 103.

[193] For example, in 1996, the Task Force on Disclosure Simplification recommended replacing the $100,000 threshold with a general materiality standard or, alternatively, recommended raising the dollar threshold. *See Report of the Task Force on Disclosure Simplification* (Mar. 5, 1996), available at *https://www.sec.gov/news/studies/smpl.htm.* More recently, in 2016, the Commission received feedback from commenters on the DUSTR Proposing Release that opposed the elimination of any bright-line thresholds in Commission disclosure requirements because the thresholds establish a baseline of disclosure for all registrants in certain areas. *See* DUSTR Proposing Release, *supra* note 99.

[194] *See Proposed Amendments to Item 5 of Regulation S–K Regarding Disclosure of Certain Environmental Proceedings,* Release No. 33–6315 (May 5, 1981) [46 FR 25638 (May 8, 1981)].

[195] *See, e.g.,* letters from Society and DP&W.

[196] *See supra* note 184.

[197] Smaller reporting companies are not required to provide the information under Item 105 in their Exchange Act filings on Form 10 [17 CFR 249.210], Form 10–K [17 CFR 249.310], and Form 10–Q [17 CFR 249.308a].

[198] For example, one study found that registrants increased the length of risk factor disclosures from 2006 to 2014 by more than 50 percent in terms of word count, compared to the word count in other sections of Form 10–K that increased only by about ten percent, and that this increase in risk factor word count may not be associated with better disclosure. *See* Anne Beatty et al., *Are Risk Factor Disclosures Still Relevant? Evidence from Market Reactions to Risk Factor Disclosures Before and After the Financial Crisis,* 36 Contemp. Acct. Res., 805 (2019). To examine the ''informativeness'' of risk factor disclosures, the authors of this study analyzed risk factor disclosures about financial constraints and argue that as litigation risk increased during and after the 2008 financial crisis, registrants were more likely to disclose immaterial risks, resulting in a deterioration of disclosure quality.

not be boilerplate,[199] it is not uncommon for companies to include generic risks. Registrants often disclose risk factors that are similar to those used by others in their industry without tailoring the disclosure to their circumstances and particular risk profile.

To address these concerns, we proposed the following amendments to the Item 105 risk factor disclosure requirement.

1. Summary Risk Factor Disclosure if the Risk Factor Section Exceeds 15 Pages

a. Proposed Amendment

As a way of addressing the length of risk factor disclosure, the Commission has previously considered requiring a page limit for risk factor disclosure.[200] However, comments received in response to prior initiatives have dissuaded the Commission from adopting such a requirement. For example, while the Concept Release did not seek specific feedback on reducing or limiting the length of risk factor disclosure, several commenters on the Concept Release nonetheless opposed a page limit.[201] Commenters on the Concept Release attributed the growing length of risk factor disclosure to the fear of litigation for failing to disclose risks if events turn negative.[202] Similar comments were received in response to the Disclosure Effectiveness Initiative's general solicitation of comment.[203]

Given the increasing length of risk factor disclosure and after considering the feedback on the Concept Release, we proposed to amend Item 105 to require summary risk factor disclosure in the forepart of the document if the risk factor section exceeds 15 pages.

b. Comments on the Proposed Amendment

Several commenters supported the proposal to require summary risk factor disclosure.[204] One commenter stated that a summary would enhance readability and make documents containing risk factor disclosure more user-friendly and recommended a lower threshold based on investor-testing.[205] Another commenter recommended that summary risk factor disclosure should be required for all registrants.[206]

A number of commenters opposed the proposal.[207] Several of these commenters expressed concern that investors may focus only on the risk factor summary, which may give them an imprecise understanding of the risks.[208] A few commenters stated that the proposed risk factor summary would not enhance the readability of the document.[209] One of these commenters suggested that the risk factor summary could result in investors discounting the full risk factor presentation.[210] Another commenter stated that registrants would provide lengthy summaries of their risks out of concern about the potential liability for any omissions in their disclosure.[211] Other commenters stated that grouping similar risk factors and including subheadings would achieve the objective of enhancing the readability of risk factors, making a summary duplicative.[212]

Several commenters emphasized that many registrants decide to provide lengthy risk factor disclosure because they believe this will help limit their legal exposure.[213] One of these commenters stated that many registrants have risk factors that exceed 15 pages in order to provide adequate disclosure about risks that are important for investors to be aware of and to limit legal exposure.[214] This commenter stated that a risk factor summary would not include the appropriate level of detail necessary to understand fully a registrant's risk factors and could open up companies to potential litigation. Another commenter stated that the proposal would not eliminate boilerplate disclosure.[215] One commenter recommended that summary risk factor disclosure be optional.[216]

Another commenter expressed concern that the proposal to require registrants to summarize the ''principal'' risk factors would effectively require registrants to rank their risk factors, which some registrants may find difficult.[217] Yet another commenter expressed concern that providing summary risk factor disclosure could be burdensome on registrants and stated that the proposal could discourage some companies from going public.[218]

c. Final Amendment

We are adopting the amendments substantially as proposed with a modification in response to comments received. Under the final amendments, if a registrant's risk factor disclosure exceeds 15 pages, Item 105(b) will require in the forepart of the document a series of concise, bulleted or numbered statements summarizing the principal factors that make an investment in the registrant or offering speculative or risky.[219] We believe specifying this format for the risk factor summary will avoid concerns that the requirement could lead to lengthy summaries or result in investors discounting the full risk factor presentation. In a change from the proposal, and for similar reasons, the final amendments limit the risk summary to no more than two pages. We believe that imposing a page limit on the risk summary should lessen the burden of preparing the summary and also act as an incentive for registrants to give due consideration to the risk factors that are material to investors. Because the risk summary is not required to contain all of the risk factors identified in the full risk factor discussion, registrants may prioritize certain risks and omit others. Nonetheless, we believe that a summary of the principal risks will help investors navigate lengthy risk factor disclosure that exceeds 15 pages and enhance the readability and usefulness of the

[199] *See, e.g., Plain English Disclosure,* Release No. 33–7497 (Jan. 28, 1998) [63 FR 6370 (Feb. 6, 1998)] (''Plain English Disclosure Adopting Release''). *See also* Updated Staff Legal Bulletin No. 7: Plain English Disclosure (June 7, 1999), available at *https://www.sec.gov/interps/legal/cfslb7a.htm.*

[200] For example, as part of the *Plain English Disclosure* rulemaking, the Commission solicited comment on whether to limit risk factor disclosure to a specific number of risk factors or a specific number of pages. *See Plain English Disclosure,* Release No. 33–7380 (Jan. 14, 1997), [62 FR 3152, 3163 (Jan. 21, 1997)]. The Commission ultimately did not adopt such limits on risk factor disclosure in that rulemaking. *See* Plain English Disclosure Adopting Release, 63 FR at 6372.

[201] *See* Proposing Release, *supra* note 3, at 44375.

[202] *See id.*

[203] *See id.*

[204] *See, e.g.,* letters from CII, E&Y, Better Markets, CCMC, CFA Institute and David Young.

[205] *See* letter from Better Markets.

[206] *See* letter from CFA Institute.

[207] *See, e.g.,* letters from CalPERS, International Bancshares, Society, Nareit, UnitedHealth Group, CLA, ICGN, DP&W, and FEI.

[208] *See, e.g.,* letters from IBC, ICGN, Society, CLA and FEI.

[209] *See* letters from Society and DP&W.

[210] *See* letter from DP&W.

[211] *See* letter from Nareit.

[212] *See, e.g.,* letters from UnitedHealth Group, Nareit, and Society.

[213] *See, e.g.,* letters from CCMC, FEI and Allen Huang (''Huang'').

[214] *See* letter from FEI.

[215] *See* letter from ICGN.

[216] *See* letter from UnitedHealth Group.

[217] *See* letter from Nareit.

[218] *See* letter from Society.

[219] Item 3(b) to Form S–11 [17 CFR 239.18] includes such a requirement, stating that where appropriate to a clear understanding by investors, an introductory statement shall be made in the forepart of the prospectus, in a series of short, concise paragraphs, summarizing the principal factors which make the offering speculative. The risk factor summary included in a Form S–11 filing typically consists of a series of bulleted or numbered statements comprising no more than one page on average. Given our experience with this format in the Form S–11 context, we think it provides an appropriate model for the summary risk factor presentation required under the final amendments.

disclosure for investors. We also note that the requirement to provide a risk factor summary may create an incentive for registrants to reduce the length of their risk factor discussion to avoid triggering the summary requirement, to the extent that such an incentive outweighs perceived litigation risks.

With respect to commenters' concerns that the risk factor summary would require registrants to rank their risk factors or would not include the appropriate level of detail necessary to fully understand a registrant's risks and could subject companies to potential litigation,[220] we note that the final amendment is similar to other disclosure requirements under our rules that require disclosure of a summary.[221] Based on Commission staff experience with those rules, we believe that a summary will not detract from a registrant's more extensive disclosure elsewhere in a filing or subject a registrant to greater litigation risk. Instead, we believe a summary will enhance the ability of investors to process relevant information and will focus registrants on disclosing material risks.

Finally, although some commenters suggested a lower threshold for triggering the summary risk factor disclosure or requiring the summary in all instances,[222] we continue to believe that the 15-page threshold is an appropriate threshold. Based on an analysis of filings, Commission staff estimates that the 15-page threshold would affect approximately 40 percent of filers.[223] Thus, if registrants maintain the same length of their risk factor disclosure, the final amendments will result in summary risk factor disclosure being provided in a significant number of filings, without imposing undue costs on registrants with less complex risk profiles.

2. Replace the Requirement To Disclose the ''Most Significant'' Factors With the ''Material'' Factors

a. Proposed Amendment

Since the Commission first published guidance on risk factor disclosure in 1964,[224] it has underscored that risk factor disclosure should be focused on the ''most significant'' or ''principal'' factors that make a registrant's securities speculative or risky.[225] Notwithstanding this additional guidance, the length of risk factor disclosure and the number of risks disclosed has increased in recent years.

We proposed to amend Item 105 to change the standard for disclosure from the ''most significant'' risks to ''material'' risks [226] to focus registrants on disclosing the risks to which reasonable investors would attach importance in making investment or voting decisions.

b. Comments on the Proposed Amendment

Comments on this proposal were generally supportive. Many commenters expressed support for replacing the requirement to discuss the ''most significant'' risks with ''material'' risks.[227] Some commenters stated that changing to a materiality standard would significantly enhance the informative value of this disclosure.[228] Another commenter stated that this proposal could reduce or eliminate generic risk factors.[229] A different commenter conditionally supported the proposal, recommending that we revise the definition of ''material'' to include ''information in which there is a substantial likelihood that disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information available in deciding how to vote or make an investment decision.'' [230] This commenter expressed concern that the current definition excludes consideration of voting decisions.

A few commenters opposed the proposed amendment.[231] One of these commenters stated that the other proposed amendments to Item 105 would adequately address the increase in risk factor disclosure without the need to revise the current disclosure standard.[232] Another commenter stated that registrants are subject to litigation over immaterial misstatements or omissions and suggested that, therefore, registrants may prepare their risk factors to address many risks, including risks that are not material.[233] This commenter further expressed concern that a change from the current disclosure standard could create a presumption of materiality in the risk factor section that could lead to some registrants choosing to disclose fewer risks.

Other commenters stated that changing the disclosure standard from ''most significant'' to ''material'' would likely not meaningfully reduce the amount of risk factor disclosures in filings.[234] One commenter recommended that registrants should be required to disclose cybersecurity risk.[235]

c. Final Amendment

After considering the comments, we are adopting the amendment as proposed. Under the final amendment, registrants will be required to disclose the material factors that make an investment in the registrant or offering speculative or risky. We believe that the final amendment will result in risk factor disclosure that is more tailored to the particular facts and circumstances of each registrant, which should reduce the disclosure of generic risk factors and potentially shorten the length of the risk factor discussion, to the benefit of both investors and registrants.[236] Consistent with this principles-based approach, we are not adding a specific requirement to disclose cybersecurity risk as recommended by a commenter.[237] Although certain commenters expressed concerns about the use of the term ''material,'' [238] we do not believe that the use of that term would be too narrow or would lead to the disclosure of fewer risks. Materiality is a broad concept that encompasses both investment and voting decisions. As the Commission explained in the Concept Release, the concept of materiality is used throughout the federal securities laws. The Supreme Court has held that

[220] *See* letters from FEI and Nareit.

[221] *See, e.g.,* Item 3(b) to Form S–11 and the optional summary in Item 16 to Form 10–K.

[222] *See, e.g.,* letter from Better Markets.

[223] *See* Proposing Release, *supra* note 3, at 44382–44383.

[224] *See Guides for Preparation and Filing of Registration Statements,* Release No. 33–4666 (Feb. 7, 1964) [29 FR 2490 (Feb. 15, 1964)] (''1964 Guides'').

[225] ''Principal'' was the term used in the 1982 Integrated Disclosure Adopting Release and ''most significant'' was the term used in the Plain English Disclosure Adopting Release.

[226] Securities Act Rule 405 [17 CFR 230.405] and Exchange Act Rule 12b–2 [17 CFR 240. 12b–2] both generally define materiality as information to which there is a substantial likelihood that a reasonable investor would attached important in it investment decision.

[227] *See, e.g.,* letters from Harper Ho, Burton, NYC Bar Association, GRI, IBC, Better Markets, Nareit, David Young, Nasdaq, CFA Institute and Humane Society.

[228] *See, e.g.,* letters from IBC and David Young.

[229] *See* letter from Nasdaq.

[230] *See* letter from CII. *Cf.* letter from CalPERS (requesting that the Commission clarify and simplify the definition of materiality and use ''the definition for materiality that is used in Regulation S–X. Under Regulation S–X, Rule 1–02(0), material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters about which an average prudent investor ought reasonably to be informed.'').

[231] *See, e.g.,* letters from CCMC, AFL–CIO and Chevron.

[232] *See* letter from AFL–CIO.

[233] *See* letter from CCMC.

[234] *See, e.g.,* letters from Chevron and FEI.

[235] *See* letter from Better Markets.

[236] At the same time, we do not expect the final amendment will discourage registrants from disclosing material risks that would enable investors to make informed investment decisions.

[237] *See* letter from Better Markets.

[238] *See, e.g.,* letters from CCMC, CII and CalPERS.

information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision.[239] The Court further explained that information is material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ''total mix'' of information available.[240] The term ''material'' as used in the final amendments to Item 105, as well as in the amendments to Items 101 and 103, is defined under Rule 12b–2 of the Exchange Act and Rule 405 of the Securities Act. As the Commission has previously stated, the definitions of ''material'' in Rule 12b–2 and Rule 405 are consistent with the Supreme Court's holding in *TSC Industries*.[241]

3. Require Registrants To Organize Risk Factors Under Relevant Headings

a. Proposed Amendment

Since 1964, the Commission has periodically emphasized the importance of organized and concise risk factor disclosure.[242] Most recently, in the Concept Release, the Commission solicited public input on ways in which we could improve the organization of registrants' risk factor disclosure to help investors better navigate the disclosure.[243]

After considering the comments received on the Concept Release, we proposed to amend Item 105 to require registrants to organize their risk factor disclosure under relevant headings in addition to the subcaptions that are currently required. In addition, the proposed amendments would require registrants to present risks that could apply to any registrant or any offering at the end of the risk factor section under a separate caption entitled ''General Risk Factors.'' The proposed amendments were intended to improve the organization of risk factor disclosure in an effort to help readers comprehend lengthy risk factor disclosures.

b. Comments on the Proposed Amendment

Many commenters supported organizing risk factors under relevant headings.[244] Several commenters stated that this proposal would make risk factor disclosure more user-friendly and improve the readability of this disclosure.[245] One commenter stated that the proposal would enable investors to more easily discern those risk factors that are more general in nature.[246] Other commenters stated that many registrants already categorize their risk factors.[247]

Some commenters opposed organizing risk factors under relevant headings.[248] One commenter stated that organizing risk factors under relevant headings could result in less investor-friendly disclosure because it would preclude the practice that many registrants currently employ, which is to organize risks in order of materiality.[249] This commenter stated that registrants should have the flexibility to organize risk factors in a way that a registrant believes is most useful to investors.

Comments were mixed on the proposed amendment to require registrants to disclose generic risk factors at the end of the risk factor section under a separate ''General Risk Factors'' caption. A number of commenters agreed with the proposed amendment.[250] Several commenters, however, opposed this aspect of the proposal, or expressed concern about it.[251] Some of these commenters stated that this proposal has the potential to undermine the existing ways registrants' categorize risk factors.[252] One commenter expressed concern that this amendment creates a second-class tier of risk factors that investors might automatically perceive as less important simply due to their different characterization and that such a result is counter to the notion of risk factors generally.[253]

Another commenter stated that registrants use risk factor disclosure to satisfy the ''meaningful cautionary language'' required by the safe harbor provision of the PSLRA,[254] and expressed concern that classifying some risk factors as generic could potentially disqualify this disclosure as ''meaningful cautionary language'' in securities class action lawsuits and potentially increase the litigation risk to registrants.[255] This commenter also asserted that if registrants are required to disclose generic risk factors at the end of the risk factor section, they may caption most or all as specific risk factors or curtail their forward-looking disclosure in MD&A due to higher litigation risks.

A few commenters expressed concern that it could be difficult for registrants to differentiate risks as ''specific'' or ''general.'' [256] These commenters recommended that if we were to adopt this revision, the final amendments would have to be clearer as to what qualifies as a ''General Risk Factor'' in order to enable registrants to apply the rule consistently and avoid mischaracterization of risks.

In the Proposing Release, we also requested comment on whether Item 105 should be amended to require registrants to prioritize the order in which they discuss their risk factors so that the more significant risks to the registrant are discussed first. Several commenters supported requiring registrants to prioritize the risk factors to discuss more significant risks first.[257] One commenter opposed requiring registrants to prioritize risk factors in this manner.[258] This commenter noted that many risk factors deal with evolving or uncertain circumstances that are unknown or difficult to quantify, and requiring registrants to

[239] *See Basic Inc.* v. *Levinson,* 485 U.S. 224, 231 (1988) quoting *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976). In *TSC Industries,* the Supreme Court adopted a standard for materiality in connection with proxy statement disclosure under Schedule 14A and Rule 14a–9 of the Exchange Act. 426 U.S. at 449 at n. 10. ([T]he SEC's view of the proper balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability is entitled to consideration [and] [t]he standard we adopt is supported by the SEC.'').

[240] *See Matrixx Initiatives, Inc.* v. *Siracusano,* 131 U.S. 1309, 1318 (2011) quoting *TSC Industries,* 426 U.S. at 449). In *Matrixx Initiatives,* the Court applied the materiality standard, as set forth in *TSC Industries* and *Basic.* In articulating these standards, the Supreme Court recognized that setting too low of a materiality standard for purposes of liability could cause management to ''bury shareholders in an avalanche of trivial information.'' *Id.* at 1318 (quoting *TSC Industries,* 426 U.S. at 448–449).

[241] *See* Concept Release, *supra* note 9, at 23926; *see also,* MD&A Release *supra* note 32.

[242] *See, e.g.,* 1964 Guides, *supra* note 224; 1982 Integrated Disclosure Adopting Release, *supra* note 174; and *Securities Offering Reform,* Release No. 33–8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)].

[243] *See* Concept Release, *supra* note 9, at 23956.

[244] *See, e.g.,* letters from UnitedHealth Group, CII, AGA and EEI, Better Markets, Society, BCI, Nareit, CCMC, FEI, Chevron, NYC Bar Association, CFA Institute and Nasdaq.

[245] *See, e.g.,* letters from CII, Better Markets, Society, Nareit, Chevron and Nasdaq.

[246] *See* letter from UnitedHealth Group.

[247] *See, e.g.,* letters from AGA and EEI, Society and Nasdaq.

[248] *See, e.g.,* letters from GM and PRI.

[249] *See* letter from GM. *But see* letter from Society (opposing any amendment to require risk factor prioritization on the basis that it would be unduly burdensome and conflict with the proposal to organize risk factors under relevant headings).

[250] *See, e.g.,* letters from CII, David Young, CFA Institute, and FEI.

[251] *See, e.g.,* letters from AGA and EEI, Society, BCI, NYC Bar Association, Nasdaq, and Huang.

[252] *See, e.g.,* letters from AGA and EEI and Society.

[253] *See* letter from Society.

[254] Public Law 104–67, 109 Stat. 737 (1995) codified as amended in scattered sections of 15 U.S.C.

[255] *See* letter from Huang.

[256] *See, e.g.,* letters from AGA and EEI and Society.

[257] *See, e.g.,* letters from CII, BCI and CCMC.

[258] *See* letter from Society.

evaluate and rank often equally significant and evolving risk factors will add burden, increase costs, take time and effort from other efforts, and create liability concerns based on how the factors are prioritized.

In addition, we requested comment on whether we should require registrants to explain how generic, boilerplate risk factors are material to their investors, and what, if anything, management does to address these risks. One commenter, suggesting that this would lead to more useful disclosure for investors, supported such a requirement.[259] Another commenter recommended that we require risk factor disclosure to be specific to the registrant and exclude generic statements that apply to all or most registrants.[260]

c. Final Amendment

After considering the public comments, we are adopting the amendment as proposed. Amended Item 105 will require registrants to organize their risk factor disclosure under relevant headings, in addition to the subcaptions that are currently required. The final amendments, except as described below, do not specify risk factor headings that registrants should use. As noted above, many registrants already organize their risk factor disclosure through groupings of related risk factors and the use of headings. We believe that requiring this type of organization for all registrants will improve the readability and usefulness of this disclosure. In addition, the final amendments will require registrants to present risks that could apply generally to any company or offering of securities at the end of the risk factor section under the caption ''General Risk Factors.'' We are not adopting a requirement for registrants to explain how generic, boilerplate risk factors are material and how management addresses these risks, as suggested by one commenter.[261] We believe such disclosures would be largely redundant to the current requirement under Item 105 that registrants explain how a risk affects it or the securities being offered. For similar reasons, we do not believe that additional clarification is necessary regarding the types of risks that would constitute a general risk factor, as suggested by some commenters.[262] Because the existing rule requires registrants to explain how a risk affects them, we believe registrants should be well positioned to determine the particular nature of a risk. With respect to one commenter's concern that grouping some risk factors under a ''General Risk Factor'' sub-heading could potentially disqualify this disclosure from certain statutory safe harbor protections and subject registrants to potential litigation, we note that the final amendment is solely meant to improve the organization and the effectiveness of risk factor disclosures and does not limit the ability of a registrant to include appropriate cautionary language with respect to any forward-looking statements. In our view, if a registrant includes one or more risk factors under the ''General Risk Factor'' caption, that fact alone should not affect the availability of the PSLRA safe harbor. Nevertheless, we encourage registrants to tailor their risk factor disclosures to emphasize the specific relationship of the risk to the registrant or the offering and therefore avoid the need to include the risk under the general risk heading.

We continue to believe that the final amendment will help to address the lengthy and generic nature of the risk factor disclosure presented by many registrants. We agree with commenters that stated that the amendments would make risk factor disclosure more user-friendly and improve the readability of this information.[263]

The final amendments will not require registrants to prioritize the order in which they discuss their risk factors. Although we recognize that such prioritization could be useful to users of the disclosure in certain circumstances, consistent with our goal to make the item more principles based, we believe the amendments should afford registrants flexibility to determine the order to most effectively present the material risks that make an investment in the registrant or offering speculative or risky. Accordingly, if a registrant believes it is useful or important to emphasize the relative importance of certain risks, it is free to write those risk factors and other disclosures in such a way that their relative importance is apparent. Retaining this flexibility should also help address concerns expressed by some commenters that it could be difficult to evaluate and rank often equally significant and evolving risk factors.

III. Other Matters

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

Pursuant to the Congressional Review Act,[264] the Office of Information and Regulatory Affairs has designated these amendments not a ''major rule,'' as defined by 5 U.S.C. 804(2).

IV. Economic Analysis

This section analyzes the expected economic effects of the final amendments relative to the current baseline, which consists of both the regulatory framework of disclosure requirements in existence today and the current use of such disclosure by investors. As discussed above, we are adopting amendments to modernize and simplify the description of business (Item 101), legal proceedings (Item 103), and risk factor (Item 105) disclosure requirements in Regulation S–K.[265] An important objective of the final amendments is to revise Items 101(a), 101(c), and 105 to be more principles-based. Overall, investors and registrants may benefit from the principles-based approach if the existing prescriptive requirements result in disclosure that is not material to an investment decision and is costly to provide. We acknowledge that emphasizing a principles-based approach and granting registrants more flexibility to determine what and how much disclosure about a topic to provide could result in the

[259] *See* letter from PRI.

[260] *See* letter from CFA Institute.

[261] *See* letter from PRI.

[262] *See, e.g.,* letters from AGA and EEI and Society.

[263] *See, e.g.,* letters from CII, Better Markets, Society, Nareit, Chevron, and Nasdaq.

[264] 5 U.S.C. 801 *et seq.*

[265] While Items 101, 103 and 105 have not undergone significant revisions in over thirty years, many characteristics of the registrants that provide these disclosures have changed substantially over this time period. For example, in the calendar year of 1988, the largest 500 U.S. companies in Standard & Poor's Compustat Daily Updates database had an average market capitalization of $2.42 billion, foreign income of $219.63 million, and ratio of intangible assets to market capitalization of 7.26%. The largest 100 companies had an average market capitalization of $8.75 billion, foreign income of $601.07 million, and ratio of intangible assets to market capitalization of 5.94%. In the calendar year of 2019, the largest 500 companies had an average market capitalization of $54.98 billion, foreign income of $1.47 billion, and ratio of intangible assets to market capitalization of 22.71%. The largest 100 companies had an average market capitalization of 180.78 billion, foreign income of $4.99 billion, and ratio of intangible assets to market capitalization of 22.89%. There is also significant turnover among the largest companies: Approximately 40% of top 50 companies in 1988 were still in the top 50 companies in 2019. We believe that some of the final amendments (*e.g.,* requiring the disclosure of the material effects of compliance with material government regulations, including foreign government regulations) will provide investors with information consistent with the changing nature of these registrants. We note that in the Proposing Release we referenced data as of 6/30/1988, while the current release uses data as of 12/31/1988.

elimination of some information to investors. However, we believe that the cost to investors of any such loss of information will be limited given that, under the principles-based approach reflected in the final amendments, registrants are required to provide disclosure about these topics if that disclosure is material to an understanding of the business.

We are sensitive to the costs and benefits of these amendments. The discussion below addresses the potential economic effects of the final amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition, and capital formation.[266] At the outset, we note that, where possible, we have attempted to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the final amendments. In many cases, however, we are unable to quantify the economic effects because we lack information necessary to provide a reasonable estimate.[267] For example, we are unable to quantify, with precision, the costs to investors of having to rely on alternative information sources under each disclosure item and the potential information processing cost savings that may arise from the elimination of disclosures not material to an investment decision.

A. Baseline and Affected Parties

Our baseline includes the current disclosure requirements under Items 101, 103, and 105 of Regulation S–K, which apply to registration statements, periodic reports, and certain proxy statements filed with the Commission. Thus, the parties that are likely to be affected by the final amendments include investors and other users of registration statements, periodic reports and proxy statements, such as financial analysts, as well as registrants subject to Regulation S–K.

The final amendments affect both domestic registrants and foreign private issuers[268] that file on domestic forms[269] and foreign private issuers that file on foreign registration forms.[270] We estimate that approximately 6,987 registrants that file on domestic forms[271] and 469 foreign private issuers that file on foreign registration forms will be affected by the final amendments. Among the registrants that file on domestic forms, approximately 30 percent are large accelerated filers, 18.5 percent are accelerated filers, and 51.5 percent are non-accelerated filers. In addition, we estimate that 43 percent of domestic registrants are smaller reporting companies and approximately 21.1 percent are emerging growth companies.[272]

B. Potential Costs and Benefits

In this section, we discuss the anticipated economic benefits and costs of the final amendments. We first analyze the overall economic effects of shifting toward a more principles-based approach to disclosure, which is one of the main objectives of the final amendments. We then discuss the potential costs and benefits of specific amendments.

1. Principles-Based Versus Prescriptive Requirements

Prescriptive requirements employ bright-line, quantitative or other thresholds to identify when disclosure is required, or require registrants to disclose the same types of information. Principles-based requirements, on the other hand, provide registrants with the flexibility to determine (i) whether certain information is material, and (ii) how to disclose such information.

In this release, we are amending Items 101(a), 101(c), and 105 to be more clearly principles-based.[273] Principles-based requirements may result in more or less detail than prescriptive requirements. The economic effects of replacing a prescriptive requirement with a more principles-based disclosure standard based on materiality depend on a variety of factors, including the preferences of investors, the compliance costs of producing the disclosure, and the nature of the information to be disclosed.

For certain existing disclosure requirements, shifting to a more principles-based approach could benefit registrants with no loss of investor protection because the current requirements may result in some disclosure that is not material to an investment decision and costly for registrants to provide. Elimination of disclosure that is not material could reduce compliance burdens and potentially benefit investors, to the extent it improves the readability and conciseness of the information provided and allows investors to focus on information that is material to an understanding of the registrant's business.[274] In addition, a principles-

[266] Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] require the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

[267] In response to our request for comment in the Proposing Release, no commenter provided us with data or analysis that quantified or would allow us to further quantify the economic effects of the amendments.

[268] *See supra* note 12 for the definition of foreign private issuer.

[269] The number of registrants that file on domestic forms is estimated as the number of unique registrants, identified by Central Index Key (CIK), that filed Form 10–K, or an amendment thereto, or both a Form 10–Q and a Form S–1, S–3, or S–4 with the Commission during calendar year 2019. We believe that these filers are representative of the registrants that will be primarily affected by the final amendments. For purposes of this economic analysis, these estimates do not include registrants that filed only a Securities Act registration statement during calendar year 2019, or only a Form 10–Q not preceded by a Securities Act registration statement, in order to avoid including entities, such as certain co-registrants of debt securities, which may not have an independent reporting obligation and therefore would not be affected by the amendments. We believe that most registrants that have filed a Securities Act registration statement or a Form 10–Q not preceded by a Securities Act registration statement, other than such co-registrants, would be captured by this estimate. The estimates for the percentages of smaller reporting companies, accelerated filers, large accelerated filers, and non-accelerated filers are based on the self-reported status provided by these registrants; the data was obtained by Commission staff using a computer program that analyzes SEC filings, with supplemental data from Ives Group Audit Analytics.

[270] The number of affected registrants that file foreign forms is estimated as the number of unique companies, identified by Central Index Key (CIK), that filed Forms F–1, F–3, and F–4, an amendment thereto, or a post-effective amendment to one of those forms with the Commission during calendar year 2019. *See also supra* note 12.

[271] This number includes fewer than 20 foreign registrants that file on domestic forms and approximately 100 business development companies.

[272] An ''emerging growth company'' is defined, in part, as an registrant that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year. *See* Rule 405; Rule 12b–2; 15 U.S.C. 77b(a)(19); 15 U.S.C. 78c(a)(80); and *Inflation Adjustments and Other Technical Amendments under Titles I and II of the JOBS Act,* Release No. 33–10332 (Mar. 31, 2017) [82 FR 17545 (Apr. 12, 2017)]. We based the estimate of the percentage of emerging growth companies on whether a registrant claimed emerging growth company status, as derived from Ives Group Audit Analytics data.

[273] Although Items 101(c) and Item 105 use a principles-based approach, based on comments received on prior initiatives, it appears that some registrants have interpreted these Items as imposing prescriptive requirements. *See supra* Sections II.B and II.D. Therefore, the final amendments emphasize the principles-based approach of these items.

[274] *See* Alastair Lawrence, *Individual Investors and Financial Disclosure,* 56 J. Acct. & Econ., 130 (2013). Using data on trades and portfolio positions of 78,000 households, this article shows that individuals invest more in firms with clear and

Continued

based approach may permit or encourage registrants to present more tailored information, which also may benefit investors.[275] Principles-based requirements generally would elicit disclosure that is more in line with the way the registrant's management and its board of directors monitor and assess the business and therefore (1) would be easier for registrants to prepare using existing metrics and reporting mechanisms and (2) would provide investors better insight into the decision-making process, current status, and prospects of the registrant.

On the other hand, shifting to a more principles-based approach may result in the elimination of previously prescriptive disclosure that is material to an investment decision if registrants misjudge what information is material to investors.[276] In this regard, to the extent that prescriptive requirements result in an improved mix of information, such requirements could benefit investors and may also benefit registrants by improving stock market liquidity and decreasing cost of capital.[277] Further, prescriptive standards could enhance the comparability and verifiability of information, but those benefits may be limited (or impose costs) if the specified metrics result in comparisons that are not appropriate due to differences between or among registrants.[278] We acknowledge, however, that differences between principles-based standards and prescriptive standards have often been studied in the financial reporting context. These differences may be narrower in the context of the final amendments due to the qualitative nature of the disclosures in Items 101(a), 101(c), and 105. Prescriptive requirements also may be easier to apply and therefore less costly for registrants as they involve fewer judgments than principles-based requirements.

In addition, some of the potential costs of shifting to a more principles-based approach could be mitigated by external disciplines, such as the Commission staff's filing review program and the registrant's engagement with investors.[279] In addition, registrants will remain subject to the antifraud provisions of the securities laws.[280] There also may be incentives for registrants to voluntarily disclose additional information if the benefits to registrants of reduced information asymmetry exceed the disclosure costs.

Differences between the principles-based and prescriptive approaches are likely to vary across registrants, investors, and disclosure topics. Despite potential costs associated with replacing prescriptive requirements with principles-based requirements, the shift is likely to reduce overall compliance costs because registrants will have the flexibility to determine whether certain information is material under the principles-based approach. To the extent the principles-based approach reduces compliance costs, the cost reduction should be more beneficial to smaller registrants that are financially constrained. In addition, as noted above, prescriptive requirements may create information asymmetries if investors are left to rely on disclosure of measures that are not relevant to the way a registrant's management and board of directors are operating and assessing the business. Although eliminating information that is not material should benefit all investors, it could benefit retail investors more to the extent they are less likely to have the time and resources to devote to reviewing and evaluating disclosure. At the same time, smaller registrants with less established reporting histories may be the most at risk of persistent information asymmetries if the principles-based approach results in reduction or loss of information that is material to investors. In the event of reduction or loss of information that is material (the risk of which, as noted above, is offset by mitigants including corporate internal controls and the antifraud provisions of the securities laws), retail investors in these registrants may be more negatively affected than institutional investors

concise financial disclosures. This relation is reduced for high frequency trading, financially-literate, and speculative individual investors. The article also shows that individuals' returns increase with clearer and more concise disclosures, implying such disclosures reduce individuals' relative information disadvantage. A one standard deviation increase in disclosure readability and conciseness corresponds to return increases of 91 and 58 basis points, respectively. The article acknowledges that, given the changes in financial disclosure standards and the possible advances in individual investor sophistication, the extent to which these findings, which are based on historical data from the 1990s, would differ from those today is unknown. Recent advances in information processing technology, such as machine learning for textual analysis, may also affect the generalizability of these findings.

[275] A number of academic studies have explored the use of prescriptive thresholds and materiality criteria. Many of these papers highlight a preference for principles-based materiality criteria. *See, e.g.* Eugene A. Imhoff Jr. and Jacob K. Thomas, *Economic consequences of accounting standards: The lease disclosure rule change,* 10.4 J. Acct. & Econ. 277 (1988) (providing evidence that management modifies existing lease agreements to avoid crossing bright-line rules for lease capitalization); Cheri L. Reither, *What are the best and the worst accounting standards?,* 12.3 Acct. Horizons 283 (1998) (documenting that due to the widespread abuse of bright-lines in rules for lease capitalization, SFAS No. 13 was voted the least favorite FASB standard by a group of accounting academics, regulators, and practitioners); Christopher P. Agoglia et al., *Principles-based versus rules-based accounting standards: The influence of standard precision and audit committee strength on financial reporting decisions,* 86 Acct. Rev. 747 (2011) (conducting experiments in which experienced financial statement preparers are placed in a lease classification decision context and finding that preparers applying principles-based accounting are less likely to make aggressive reporting decisions than preparers applying a more prescriptive standard and supporting the notion that a move toward principles-based accounting could result in better financial reporting); Usha Rodrigues and Mike Stegemoller, *An inconsistency in SEC disclosure requirements? The case of the ''insignificant'' private target,* 13 J. Corp. Fin. 251 (2007) (providing evidence, in the context of mergers and acquisitions, where prescriptive thresholds deviate from investor preferences). Studies highlighting a preference for prescriptive disclosure standards are discussed below. *See infra* note 14.

[276] The presence of other controls, including corporate internal controls and board oversight, likely reduces the risk that registrants will misjudge what information is material.

[277] *See, e.g.,* Christian Leuz and Peter Wysocki, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research,* 54 J. Acct. Res. 525 (2016) (surveying the empirical literature on the economic consequences of disclosure and discussing potential capital-market benefits from disclosure and reporting, such as improved market liquidity and decreased cost of capital).

[278] *See* Mark W. Nelson, *Behavioral evidence on the effects of principles-and rules-based standards,* 17 Acct. Horizons 91 (2003); and Katherine Schipper, *Principles-based accounting standards,* 17 Acct. Horizons 61 (2003) (noting potential advantages of prescriptive accounting standards, including: Increased comparability among firms, increased verifiability for auditors, and reduced litigation for firms). *See also* Randall Rentfro and Karen Hooks, *The effect of professional judgment on financial reporting comparability,* 1 J. Acct. Fin. Res. 87 (2004) (finding that comparability in financial reporting may be reduced under principles-based standards, which rely more heavily on the exercise of professional judgment, but noting that comparability may improve as financial statement preparers become more experienced and hold higher organizational rank); Andrew A. Acito et al., *The Materiality of Accounting Errors: Evidence from SEC Comment Letters,* 36 Contemp. Acct. Res. 839 (2019) (studying managers' responses to SEC inquiries about the materiality of accounting errors and finding that managers are inconsistent in their application of certain qualitative considerations and may omit certain qualitative considerations from their analysis that weigh in favor of an error's materiality). In addition, while we did not solicit comment on the submission format of the Item 101, 103, and 105 disclosures in the proposal, some commenters stated that the disclosures would be more useful to investors if they were submitted in a machine-readable format, citing comparability and searchability as among the benefits of such a format. *See* letters from CFA Institute, Better Markets, the California State Teachers' Retirement System (CalSTRS), and XBRL US (with the latter two specifically recommending the Inline XBRL format). The submission format of the Item 101, 103, and 105 disclosures is outside the scope of this rulemaking.

[279] Under Regulation FD, material information provided to any investor, for example, through investor outreach activities, would be required to be made publicly available. *See* 17 CFR 243.100 *et seq.*

[280] *See, e.g.,* Exchange Act Rule 10b–5(b) [17 CFR 240.10b–5(b)].

because obtaining information from alternative sources could involve monetary costs, such as database subscriptions, or opportunity costs, such as time spent searching for alternative sources. Retail investors may not be able or willing to incur these costs.

Across different disclosure topics, the principles-based approach may be more appropriate for topics where the relevant information tends to vary greatly across companies, because, in these situations, the more standardized prescriptive requirements are less likely to elicit information that is tailored to a specific company. A principles-based approach may also be more appropriate for disclosures that are episodic in nature, because investors may derive relatively less value from comparisons of such disclosure for a given registrant over time. In addition, registrants may derive relatively less benefit from applying a standardized prescriptive approach to episodic disclosures, which may be less amenable to routinized reporting than periodic disclosures of information that arise on a regular basis.

2. Benefits and Costs of Specific Amendments

We expect the final amendments will result in costs and benefits to registrants and investors, and we discuss those costs and benefits qualitatively, item by item, in this section. The changes to each item will affect the compliance burden for registrants in filing particular forms. Overall, we expect the net effect of the final amendments on a registrant's compliance burden to be limited. The quantitative estimates of changes in those burdens for purposes of the Paperwork Reduction Act are further discussed in Section V. As explained in the item-by-item discussion of the final amendments in this section, we expect certain aspects of the final amendments to increase compliance burdens and others to decrease the burdens. Taken together, we estimate that the final amendments are likely to result in a net decrease of between three and five burden hours per form for purposes of the Paperwork Reduction Act.[281]

i. General Development of Business (Item 101(a))

Item 101(a) requires a description of the general development of the registrant's business, such as the year in which the registrant was organized and the nature and results of any merger of the registrant or its significant subsidiaries. Some academic research has found that information required under Item 101(a) is relevant to firm value. For example, the registrant's age can, to some extent, predict its future growth rates [282] and corporate innovation.[283] Similarly, merger activities can affect shareholder value and predict future performance.[284] Given the relevance of such information to firm value, and thus investors, the effects of the final amendments to Item 101(a) on investors will depend on whether they result in more concise and material disclosures of business development information under Item 101(a).[285]

The final amendments will revise the requirements in Item 101(a) to be more clearly principles-based, requiring disclosure of information material to an understanding of the general development of the registrant's business. The shift to a more clearly principles-based approach for these requirements will give rise to the potential economic effects discussed in Section IV.B.1 above.

Currently, Item 101(a) requires registrants to describe their business development during the past five years, or such shorter period as the registrant may have engaged in business. The final amendments will eliminate the prescribed five-year timeframe for this disclosure. Eliminating this specific requirement will provide registrants with flexibility to choose a different timeframe that is more relevant in describing their business development to investors. For example, a long timeframe might be less appropriate for registrants operating in rapidly changing environments where historical information becomes irrelevant in a short period of time. Given that registrants will have the flexibility to determine the appropriate timeframe, this amendment is expected to reduce compliance costs. Investors may also benefit if the timeframe chosen by a registrant is more consistent with their preferences than the prescribed five-year timeframe, but may be burdened if the timeframe chosen by the registrant is less consistent with their preferences than the prescribed five-year timeframe.

Currently, Item 101(a) requires registrants to describe their business development in registration statements and annual reports. For filings subsequent to the initial registration statement, the final amendments to Item 101(a)(1) will allow registrants to provide only an update of this disclosure and incorporate by reference the previous discussion of the general development of its business included in the registrant's most recently filed registration statement or report containing that discussion. Together, the update and the incorporated disclosure will present a complete discussion of the general development of its business.[286] If duplicative disclosure distracts investors from other important information, the amendments may benefit investors by highlighting all of the material developments that have occurred since the most recent full discussion of the general development of the registrant's business. However, to the extent that historical information will be available through hyperlinking as opposed to being in the same filing, investors will have to spend more time to retrieve the information from another disclosure document.

Some commenters stated that the use of hyperlinks to update material developments would lead to a disjointed narrative and hamper readability.[287] Because the final amendments will allow only one hyperlink instead of multiple hyperlinks, we believe that any increase in retrieval costs for investors will be minimal. A few commenters objected to prohibiting the use of multiple

[281] *See infra* Section V.B.

[282] *See* David S. Evans, *The Relationship between Firm Growth, Size, and Age: Estimates for 100 Manufacturing Industries,* 35 J. Indus. Econ. 567 (1987) (finding that firm growth decreases with both firm size and age). *See also* Costas Arkolakis et al., *Firm Learning and Growth,* 27 Rev. Econ. Dynamics 146 (2018) (developing a theoretical model showing that firm growth rates decrease with firm age and calibrating the model using plant-level data).

[283] *See* Elena Huergo and Jordi Jaumandreu, *How Does Probability of Innovation Change with Firm Age?* 22 Small Bus. Econ. 193 (2004) (finding that, as a firm's age increases, the innovation rate diminishes and attributing this finding to the rapid innovation necessary for a firm to compete when entering a market); Alex Coad et al., *Innovation and Firm Growth: Does Firm Age Play a Role?,* 45 Res. Pol'y 387 (2016) (finding that young firms undertake riskier innovation and receive larger benefits from research and development).

[284] *See* Sara B. Moeller et al., *Wealth Destruction on a Massive Scale? A Study of Acquiring-Firm Returns in the Recent Merger Wave,* 60 J. Fin. 757 (2005) (finding that, although small gains were made in the 1980s, investors experienced negative gains from 1998 to 2001, and firms that announced acquisitions with large dollar losses performed poorly afterwards); *see also* Ran Duchin and Breno Schmidt, *Riding the Merger Wave: Uncertainty, Reduced Monitoring, and Bad Acquisitions,* 107 J. Fin. Econ. 69 (2013) (finding that the average long-term performance of acquisitions initiated during merger waves is significantly worse than those initiated at other times).

[285] Investors may benefit from more concise disclosure that facilitates their ability to focus on information material to an investment decision. *See supra* note 274.

[286] A registrant will be required to incorporate by reference the earlier disclosure into the updated filing. *See supra* Section II.A.2. We are also adopting a similar amendment to Item 101(h), which applies to smaller reporting companies.

[287] *See supra* note 37 and corresponding text.

hyperlinks.[288] We believe, however, that retrieval costs for investors may increase quickly with the number of hyperlinks because each additional hyperlink increases the risk of broken or inactive hyperlinks, and a disjointed narrative would not be reader-friendly.

While limiting registrants to only one hyperlink as opposed to multiple hyperlinks may make compliance efforts somewhat more burdensome, we do not believe this restriction will significantly change existing disclosure practices as the Commission's current rules prohibit incorporation by reference when it would render the disclosure unclear or confusing.[289] Moreover, registrants that select this option will benefit from the reduction in costs to disclose duplicative information. Finally, for those registrants who find this restriction too limiting, we believe that the costs of copying relevant disclosure from a previous filing, rather than incorporating it by reference, should be minimal.

The final amendments to Item 101(a) provide a non-exclusive list of topics that should be disclosed if material. Providing potential disclosure topics should help clarify the disclosure requirements and avoid potential confusion among registrants. Besides the topics currently included under Item 101(a), the disclosure topics in the final amendments also add material changes to a registrant's previously disclosed business strategy. Several studies have found that business strategy is a critical determinant of corporate success [290] and an essential component of business model design,[291] so investors may benefit from any increase in the disclosure of material changes to previously disclosed business strategies. A number of commenters also supported the inclusion of material changes to business strategy as a non-exclusive disclosure example.[292]

Some commenters expressed concerns that this amendment could impose costs on filers if the disclosure of ''material changes'' in business strategy reveals sensitive or proprietary corporate information.[293] One commenter suggested that a safe harbor provision should be added to avoid disclosure of sensitive information.[294] However, because the final amendments do not make the disclosure of business strategy mandatory if a registrant has not previously disclosed its business strategy and a registrant will have considerable flexibility to tailor its business strategy disclosure, the costs of revealing proprietary information that could be harmful to registrants' competitive positions should be limited.

Overall, investors and registrants may benefit from the final amendments to Item 101(a) if the existing requirements elicit disclosure that is not material to an investment decision and/or is more costly to provide. However, providing registrants with additional flexibility to determine (i) whether certain information is material, and (ii) how to disclose such information may result in the reduction or loss of information in cases in which registrants no longer disclose information material to an investment decision.

ii. Narrative Description of Business (Item 101(c))

Item 101(c) requires a narrative description of the registrant's business. The current requirement identifies twelve specific items that must be disclosed to the extent material to an understanding of the registrant's business taken as a whole. We are revising the requirements in Item 101(c) to be more clearly principles based. The final amendments require a description of the business and set forth seven non-exclusive examples of information to disclose if material to an understanding of the business. These examples include some, but not all, of the current disclosure topics required under Item 101(c) as well as some additional topics. Emphasizing a principles-based approach to Item 101(c) will give rise to the potential economic effects discussed in Section I.B.1 above. In addition, eliminating more prescriptive disclosure topics (*e.g.,* dollar amount of backlog orders believed to be firm) may diminish comparability across firms.

The disclosure topics that are retained, with some changes, as examples under the final amendments are: (1) Principal products produced and services rendered, and dependence on certain customers; (2) new products and competitive conditions; (3) sources and availability of raw materials and intellectual property; (4) business subject to renegotiation or termination of government contracts; (5) seasonality of the business; and (6) the number of persons employed. As the information required under Item 101(c) can be relevant to firm value,[295] investors and registrants will likely benefit if the examples elicit information material to an investment decision while allowing registrants to tailor the disclosure to their specific circumstances.

The final amendments will expand the existing disclosure topic regarding the number of persons employed to encompass a description of the registrant's human capital resources. This disclosure topic will require, in addition to the number of persons employed, a description of any human capital measures or objectives that the registrant focuses on in managing the business, to the extent such disclosures are material to an understanding of the registrant's business. The rule also will provide non-exclusive examples of human capital measures and objectives, such as measures or objectives that address the attraction, development, and retention of personnel.

In one meta-analysis, which reviewed 66 studies, the authors found that besides the number of employees, other human capital characteristics, including education, experience, and training, have positive effects on firm performance.[296] Another study found that turnover rates reflect human

[288] *See id.*

[289] *See* Securities Act Rule 411(e) and Exchange Act 12b–23(e).

[290] *See* Jay B. Barney, *Strategic Factor Markets: Expectations, Luck, and Business Strategy* 32 Mgmt. Sci. 1231 (1986) (suggesting that strategies focusing on creating imperfectly competitive product markets may not generate superior performance if the cost of implementing such strategies is high, and that strategic choices should flow mainly from the analysis of its antecedent unique skills and capabilities, rather than from the analysis of its competitive environment). *See also* Thomas Ritter and Hans G. Gemunden, *The Impact Of A Company's Business Strategy on Its Technological Competence, Network Competence and Innovation Success,* 57(5) J. Bus. Res. 548 (2004) (finding that a company's innovation success is positively correlated with the strength of its technology-oriented business strategy).

[291] *See* David J. Teece, *Business Models, Business Strategy and Innovation,* 43 Long Range Planning 172 (2009) (examining the significance of business models and exploring their connections with business strategy, innovation management, and economic theory). *See also* Patrick Spieth et al., *Exploring the Linkage between Business Model (&) Innovation and the Strategy of the Firm,* 46 R&D Mgmt. 403 (2016) (examining firm strategy-business model linkage and exploring the role of business model innovation as analytic perspective for identifying sources of firm performance).

[292] *See supra* note 47.

[293] *See* letters from UnitedHealth Group, Dunker, Society, DP&W and GM.

[294] *See* letter from FEI.

[295] For example, some academic research has found that the introduction of a new product increases long-term financial performance of the company and firm value. *See* Dominique Hanssens et al., *New Products, Sales Promotions, and Firm Value: The Case of the Automobile Industry,* 68 J. Marketing 142 (2004); *see also* Amil Petrin, *Quantifying the Benefits of New Products: The Case of the Minivan,* 110 J. Pol. Econ. 705 (2002). Similarly, some academic research has found that patents have a significant impact on firm-level productivity and market value. *See* Nicholas Bloom and John Van Reenen, *Patents, Real Options and Firm Performance,* 112 Econ. J. C97 (2002); Zvi Griliches, *Market Value, R&D and Patents,* 7 Econ. Letters 183 (1981).

[296] *See* T.R. Crook et al., *Does human capital matter? A meta-analysis of the relationship between human capital and firm performance,* 96 J. Applied Psychol. 443 (2011).

resource management practices.[297] These studies suggest that investors may benefit from additional information elicited by the human capital topic. Many commenters agreed that investors would benefit from such disclosure, but offered different suggestions for what that disclosure should include.[298] Registrants will incur incremental compliance costs to provide this additional information.[299] To the extent that some registrants already disclose such information, for them the incremental benefits and costs would likely be lower than if they were providing no such disclosure.[300] We recognize, however, that even for some registrants who are currently disclosing such information, the incremental compliance costs may not be trivial.

The final amendments also replace the requirement to disclose the material effects on the registrant of compliance with environmental laws with a disclosure topic that covers the material effects of compliance with material government regulations, including environmental laws. To the extent that information about compliance with government regulations affects firm value, investors may benefit from additional information about the effects of material government regulations. Registrants, however, will incur incremental compliance costs to provide this information. To the extent that many registrants already disclose such information, the incremental benefits and costs could be limited.

Some of the disclosure requirements currently contained in Item 101(c) are not included as potential topics in the revised rule.[301] To the extent that the elimination of these topics results in a loss of material information, there may be costs to investors.[302] However, we believe that any such costs would be limited given that, under the principles-based approach, the list of disclosure topics will not be exhaustive and registrants still will be required to provide disclosure about such matters if they are material to an understanding of the business.

Additionally, in an effort to consolidate working capital disclosure in one location and to avoid duplicative disclosure, the final amendments eliminate working capital practices as a disclosure topic in Item 101(c), given that this information, when material, often is elicited by MD&A disclosure requirements.[303] If duplicative disclosure distracts investors from other important information, this amendment may benefit investors by reducing repetition and facilitating more efficient information processing. However, to the extent that information on working capital practices will no longer be available in the narrative description of business required by Item 101(c), investors may have to spend more time synthesizing this information from other locations. Registrants may marginally benefit from reduced compliance costs from the elimination of duplicative disclosure.

Overall, investors and registrants may benefit from the final amendments to Item 101(c) if the revised rules result in disclosure that is more likely to be material to an investment decision and avoid disclosure that is not material and/or is costly to provide.

iii. Legal Proceedings (Item 103)

Item 103 requires disclosure of material pending legal proceedings and other relevant information about the proceedings, such as the name of the court, the date instituted, and the principal parties involved. Given that involvement in legal proceedings can affect a firm's cash flows through multiple channels, including legal fees, the cost of executives being distracted from their main operational tasks, reputational costs, and settlement costs, information required under Item 103 is relevant to firm value.[304] Therefore, investors will benefit if the final amendments to Item 103 result in more effective disclosure of material legal proceedings information.

Currently, Item 103 and U.S. GAAP, which requires disclosure of certain loss contingencies, overlap in the requirement to disclose certain information associated with legal proceedings. As a result, in order to comply with Item 103, registrants commonly repeat disclosures that are already provided elsewhere in registration statements and periodic reports. The final amendments to Item 103 encourage the use of hyperlinks or cross-references to avoid repetitive disclosure. If duplicative disclosure distracts investors from other important information, the final amendments may benefit investors by reducing repetition and facilitating more efficient information processing. However, to the extent that some information on legal proceedings will no longer be readily available under Item 103, investors may have to spend more time synthesizing this information from other locations. Nevertheless, we believe the increase in information processing cost for investors would be minimal. While registrants may incur minimal compliance costs if they choose to include hyperlinks, those costs generally would be less than the costs of disclosing duplicative information in a document.

Currently, Item 103 specifically requires disclosure of any proceedings under environmental laws to which a governmental authority is a party unless the registrant reasonably believes that the proceeding will result in monetary sanctions, exclusive of interest and costs, of less than $100,000. This bright-line threshold for environmental proceedings was adopted in 1982. The final amendment includes a modified disclosure threshold that increases the existing $100,000 threshold to $300,000 (to account for inflation), but also affords a registrant some flexibility. Specifically, the amendment will allow a registrant to select a different threshold, with an upper bound of the lesser of $1 million or one percent of its

[297] *See* Mark A. Huselid, *The Impact of Human Resource Management Practices on Turnover, Productivity, and* Corporate *Financial Performance,* 38 Acad. Mgmt. J. 635 (1995).

[298] *See supra* note 121.

[299] *See* letters from UnitedHealth Group, Nasdaq, FCLTGlobal, SHRM, GM, and FEI.

[300] *See* letters from ICEE, Hermes, CtW, ICGN, HCMC, CalPERS, NYSCRF, and NYC Comptroller.

[301] The final amendments will no longer list the following topics: Disclosure about new segments and dollar amount of backlog orders believed to be firm, in addition to working capital practices, which we discuss below.

[302] An academic study shows that acquisition of new segments has significant effects on firm productivity. The study finds that firms diversifying into a new segment experience a net reduction in productivity. Specifically, while productivity of new plants increases, incumbent plants suffer. *See* Antoinette Schoar, *The Effect of Diversification on Firm Productivity,* 62 J. Fin. 2379 (2002). Another study shows that backlog orders can predict future earnings. *See* Siva Rajgopal et al., *Does the Market Fully Appreciate the Implications of Leading Indicators for Future Earnings? Evidence from Order Backlog,* 8 Rev. Acct. Stud. 461 (2003). Based on these studies, it is reasonable to expect that information on new segments and dollar amount of backlog orders believed to be firm could be material to investors in certain circumstances.

[303] *See* letters from FEI and Chevron.

[304] Several studies also have found that the possibility of legal proceedings may affect corporate decisions, such as pricing of securities and management's information dissemination. *See, e.g.,* Michelle Lowry and Susan Shu, *Litigation Risk and IPO Underpricing,* 65 J. Fin. Econ. 309 (2002) (finding that firms with higher litigation risk underprice their IPOs by a greater amount as a form of insurance, and underpricing by a greater amount lowers expected litigation costs); and Douglas J. Skinner, *Why Firms Voluntarily Disclose Bad News?,* 32 J. Acct. Res. 38 (1994) (suggesting that because shareholders are more likely to sue over earnings announcements with large negative returns, firms have an incentive to disclose bad earnings early in order to reduce the probability of being sued and the magnitude of damages); *see also* Joel F. Houston et al., *Litigation Risk and Voluntary Disclosure: Evidence from Legal Changes,* 94 Acct. Rev. 247 (2019) (finding a positive relation between the expectation of litigation and voluntary disclosure and suggesting that earnings forecast strategies are often designed to deter litigation).

current assets, that it determines is reasonably designed to result in disclosure of material environmental proceedings. Research has found that environmental liabilities can influence certain corporate decisions related to managing environmental regulatory risk [305] and that some investors include environmental criteria in their investment strategies.[306] As discussed above, commenters' views were mixed on whether we should retain a bright-line disclosure threshold or move to a more principles-based approach.[307] Also as discussed above, environmental proceedings often can be complex from a factual and legal standpoint so a bright-line, quantitative threshold can help registrants by eliminating the need to make an assessment of whether a particular proceeding that exceeds the threshold is subject to disclosure on a principles basis. However, a single quantitative threshold that is set at a level that is designed to limit the need to make materiality judgments is likely to result in some disclosures, particularly for larger registrants that are not material. Alternatively, a materiality-based threshold would lower compliance costs for registrants by reducing the disclosure of proceedings that are not material, but also may increase the costs to registrants to assess whether the disclosure of environmental proceedings is appropriate. Because it involves a certain degree of judgment, there also may be costs associated with misapplication of a materiality-based standard. For example, depending on the facts and circumstances (including the size of a registrant) misapplication of such a standard may result in disclosure of proceedings that are not material, particularly when considered in relation to the registrant's total assets or revenues, or the non-disclosure of proceedings that are material.[308] The two-pronged approach that will be required under the final rule will benefit registrants and potentially lower their compliance costs since it includes a minimum quantitative threshold while also providing them with the flexibility to apply a more tailored disclosure threshold within a range that has an upper limit of $1 million. Under such an approach, registrants will continue to provide information on a bright-line basis using a threshold that is designed to capture at least all information that would be material to an investment or voting decision but will have the flexibility to use a disclosure threshold that is more indicative of materiality on a company-specific basis. Additionally, the two-pronged approach will reduce the risk of non-disclosure of material information, particularly for larger issuers, because disclosure will be required in all cases for any proceeding when the potential monetary sanctions exceed the lesser of $1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis. We estimate that $1 million represents approximately 0.01% of the mean current assets (0.02% of the median current assets) of companies in the S&P 500.[309] Accordingly, we expect that many larger registrants will be subject to a maximum bright-line disclosure threshold of $1 million, representing substantially less than one percent of current assets. We believe this proportionately lower threshold, which is likely to result in the disclosure of information that is not material to an investment decision, is nevertheless appropriate, as assessing the materiality of governmental monetary sanctions, even in lower amounts, may be difficult and as a result, it may be more efficient for registrants and investors to bear the costs of some degree of over-disclosure.

Since the two-pronged approach we are adopting includes quantitative thresholds that are higher than the current threshold, registrants of all sizes should benefit from reduced compliance costs. For example, Table 1 below summarizes the number of registrants that have cases in the EPA's Enforcement and Compliance History Online Database over the period 2009–2019 and provides summary statistics on the size of the monetary sanctions, in dollar terms and as a percentage of registrants' current assets. For each year, the table shows the estimated number of registrants that incurred environmental proceedings with monetary sanctions exceeding (i) $100,000, (ii) $300,000 and (iii) the lesser of $1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis.

The increase in the disclosure threshold from $100,000 to $300,000 would have resulted on average in an upper bound decrease of 30% in the number of registrants that have to report such sanctions during the period under consideration, with the median ratio of sanctions to current assets of approximately 0.12%. The use of an alternative threshold that requires disclosure when sanctions exceed the lesser of $1 million or one percent of the current assets of the registrant results in an additional average upper bound decrease of 30% in the number of registrants that have to report such sanctions during the period under consideration, with the median ratio of sanctions to current assets of approximately 0.30%.

Based only on a financial assessment of the mean (and median) total sanctions as a percentage of current assets, we would not expect these changes to result in the non-disclosure of information that would be material to an investment or voting decision. The data in Table 1 also suggests that the $100,000 threshold likely resulted in the disclosure of a substantial amount of non-material information. In addition, it further suggests that the new two-pronged approach is likely to continue to result in the disclosure of a substantial amount of non-material information, albeit less than is currently required.

[305] *See* Dean Neu et al., *Managing Public Impressions: Environmental Disclosures in Annual Reports,* 23 Acct. Org. & Soc'y 265 (1998) (using a matched-pair sample of publicly traded Canadian companies that have been subject to environmental fines and those that have not to analyze changes in pre-fine and post-fine environmental disclosure quality, and finding that environmental disclosure provides organizations with a method of managing potential discrediting events); *see also* Xin Chang et al., *Corporate Environmental Liabilities and Capital Structure* (2018), available at *https://ssrn.com/abstract=3200991* (documenting that firms with higher environmental liabilities maintain lower financial leverage ratios and suggesting that environmental liabilities and financial liabilities are substitutionary).

[306] *See* Steve Schueth, *Socially Responsible Investing in the United States,* 43 J. Bus. Ethics 189 (2003) (providing an overview of the concept and practice of socially and environmentally responsible investing, describing the investment strategies practiced in the U.S., offering explanations for its growth, and examining who chooses to invest in a socially and environmentally responsible manner). *See* also Laura Starks et al., *Corporate ESG profiles and investor horizons* (2017), available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049943* (finding that investors behave more patiently toward environmentally-responsible firms as they sell less after negative earnings surprises or poor stock returns). However, investors may derive value from characteristics of investments that are unrelated to financial performance, and these studies do not directly address whether environmental disclosures provide material information to investors.

[307] *See supra* notes 176 and 178.

[308] *See supra* note 187.

[309] This analysis uses current asset data for fiscal year 2019 from Standard & Poor's Compustat Daily Updates database.

TABLE 1—STATISTICS FOR SEC REGISTRANT CASES IN EPA'S ENFORCEMENT AND COMPLIANCE HISTORY ONLINE DATABASE (ECHO)

Year	Number of SEC registrants [310]	Number of registrants incurring sanctions [311]	Registrants paying >$100 K in total costs [312]	Registrants paying >$300 K in total costs [313]	Registrants paying the lesser of $1 mil. or 1% of current assets in total costs [314]	Mean (median) total cost	Mean (median) total cost as % of current assets
2009	9,731	75	19	15	10	$16,379,707 ($19,950)	1.2% (0%)
2010	9,003	86	17	14	10	26,920,867 (17,500)	0.1% (0%)
2011	8,680	81	30	19	14	66,758,061 (49,338)	2.0% (0%)
2012	8,277	77	31	21	11	882,259 (56,490)	0.2% (0%)
2013	7,944	61	18	14	12	27,346,304 (37,500)	18.2% (0%)
2014	7,891	78	42	30	19	30,219,344 (113,096)	3.0% (0%)
2015	7,802	71	32	18	12	17,283,790 (85,428)	4.9% (0%)
2016	7,395	64	22	16	13	41,799,497 (41,743))	2.2% (0%)
2017	7,095	56	24	18	11	647,166 (66,750)	0.1% (0%)
2018	6,920	52	11	9	5	6,037,039 (11,027)	2.2% (0%)
2019	6,793	45	19	10	8	1,079,256 (54,636)	0.1% (0%)
Pooled sample estimates						23,167,757 (41,880)	2.9% (0%)

iv. Risk Factors (Item 105)

Item 105 requires disclosure of the most significant factors that make an investment in the registrant or offering speculative or risky. Some academic research supports the notion that information currently required under Item 105 is important to investors. For example, there is evidence that risk factor disclosure by publicly traded firms is material in content.[315] There also is evidence suggesting that investors benefit from risk factor disclosures that are more specific.[316] In measuring long-run returns to IPO stocks, some studies conclude that the returns are commensurate with the risk profiles of the individual firms.[317] Together, this research supports the notion that effective disclosures of risk factors can help investors better manage their risk exposure.

The amendments to Item 105 will require a bullet point summary of the principal risk factors that is no more than two pages in the forepart of the document when the risk factor section exceeds 15 pages. If lengthy risk factor disclosure contains information that is less meaningful to investors, such as generic risks that could apply to any investment in securities, a brief summary of the risk factors should benefit investors, especially those who have less time to review and analyze registrants' disclosure, by enabling them to make more efficient investment decisions. The potential benefit of a brief summary may be limited for some registrants if they cannot disclose all material risks in a two-page summary, although all material risk factors will still be required to appear in the risk factor section. The requirement to

[310] This column counts all unique CIKs with 10-Ks and 10–K/As made available on EDGAR for the calendar year. The subset of registrants that only report 10-Qs and 10–Q/As are excluded from this count. If CIKs are re-used by another registrant during the year, the CIK will only count once.

[311] A registrant is counted once even if it has multiple ECHO cases that settle within a given year. The settlement date determines the year for a given case. The amounts from multiple cases are added together for each registrant per year to determine the number of registrants that exceeded the 100K and 300K thresholds in Table 1. Because the start date of an enforcement case is not always populated in ECHO (*e.g.,* approximately 25% of the cases that we matched to SEC registrants for the period 2009–2019 were missing a start date), we only count a case in the year when a sanction/settlement agreement was imposed/negotiated. Thus, Table 1 may exclude registrants who had an ongoing case during the period 2009–2019 that was not settled in that period. Also, enforcement cases that name the subsidiary of a registrant as a respondent or defendant instead of the registrant itself are often excluded from our counts since we do not have information on registrant subsidiaries. Similarly, since ECHO contains registrants' names and not their CIK, we match registrants with ECHO by name. Differences in names between SEC filings and ECHO may have resulted in fewer matches. ECHO is available at *https://echo.epa.gov/facilities/enforcement-case-search/results.*

[312] This number is based on the total cost for all penalties, Supplemental Environmental Projects, and compliance actions.

[313] *Id.*

[314] Data on current assets was retrieved from Compustat-CapitalIQ.

[315] *See* Todd Kravet, and Volkan Muslu, *Textual Risk Disclosures and Investors' Risk Perceptions,* 18 Rev. Acct. Stud. 1088 (2013) (finding that the increases in annual risk disclosures are associated with higher stock return volatility and trading volume around the filings). *See also* John L. Campbell et al., *The information content of mandatory risk factor disclosures in corporate filings,* 19 Rev. Acct. Stud. 396 (2014) (finding that the required disclosure of risk factors in Form 10–K filings affect market beta, stock return volatility, information asymmetry, and firm value, and that firms that face more risks disclose correspondingly more in the risk factor discussion); Allen Huang et al., *An Unintended Benefit of the Risk Factor Mandate of 2005* (2019), available at *http://dx.doi.org/10.2139/ssrn.3219712* (finding that risk factor disclosure is associated with an improved information environment).

[316] *See* Ole Kristian Hope et al., *The Benefits of Specific Risk-Factor Disclosures,* 21 Rev. Acct. Stud. 1005 (2016) (finding that the market reaction to a Form 10–K filing is positively and significantly associated with specificity and suggesting that analysts are better able to assess fundamental risk when firms' risk-factor disclosures are more specific).

[317] *See* Bjørn Eckbo and Øyvind Norli, *Liquidity Risk, Leverage, and Long-Run IPO Returns,* 11. J. Corp. Fin. 1 (2005) (constructing a portfolio of 6,000 IPO stocks and measuring their returns in order to compare them with individual risk factors). The model for risk estimation includes several quantitative measures, as well as simple characteristic-based risks of the type disclosed in Forms S–1 and 10–K. The results indicate that the returns are likely fully justified by the increased risk of the IPO firms.

prepare a risk factor summary may increase the compliance costs. For example, one commenter stated that the proposed amendments may require registrants to rank risk factors, which would increase the compliance burden.[318] Other commenters expressed concern that the proposed amendments could create litigation risks.[319] Yet another commenter asserted that a risk factor summary could be especially burdensome for smaller and pre-IPO firms that deem a wide range of information at their stage of life cycle to be material, and thus may deter them from going public.[320]

While we are cognizant of potential compliance costs associated with the preparation of a risk factor summary, such an increase should be limited due to the requirement that the summary cannot exceed two pages. The use of a risk factor summary, when the full risk factor discussion exceeds 15 pages, should make the disclosure more user friendly and improve its readability.[321] The new threshold also could incentivize registrants to limit the length of their risk factor disclosure to no more than 15 pages. Based on current disclosure practices, we estimate that a 15-page threshold will affect approximately 40 percent of registrants.[322] If registrants shorten their risk factor disclosure to avoid triggering the summary disclosure requirement, the disclosure might become less detailed. However, registrants that are providing lengthy risk factor disclosure to reduce potential litigation risks might be less likely to shorten the disclosure simply to avoid providing the summary.[323] We do not believe that the compliance costs associated with the risk factor summary of up to two pages will be so large as to affect a company's decision whether to go public.[324]

The final amendments to Item 105 also replace the requirement to discuss the ''most significant'' risks with ''material'' risks. The economic effects of the final amendment depend on the preferences of investors. If the existing ''most significant'' standard elicits too much or too little information, investors may benefit from the materiality standard emphasized in the final rules. Focusing on the risks to which investors would attach the most importance should enable them to make more efficient investment decisions. Registrants may experience increased (decreased) compliance costs if the materiality standard results in more (less) expansive disclosure than the existing ''most significant'' standard.

In addition, the final amendments revise Item 105 to require registrants to organize their risk factor disclosure under relevant headings, with generic risk factors, if disclosed, appearing at the end of the risk factor section under the caption ''General Risk Factors.'' Some academic research has found that different types of registrants disclose different types of risk factors and certain types of risk factors are more correlated with stock return volatilities and systematic risks.[325] Therefore, well-organized risk factor disclosure that gives greater prominence to material risks could benefit investors, especially those who have less time to review and analyze registrants' disclosure, by enabling them to make more efficient investment decisions. Registrants may incur additional costs to organize their risk factor disclosure. To the extent that some registrants already organize their risk factor disclosure through groupings of related risk factors and the use of headings, the compliance costs will be limited.[326]

C. Anticipated Effects on Efficiency, Competition, and Capital Formation

As discussed above, the final amendments may improve capital allocation efficiency by enabling investors to make more efficient investment decisions. For example, the final amendments may reduce search costs for certain investors by eliminating information that is not material to those investors. Given that certain investors may have less time to review and analyze registrants' disclosure,[327] elimination of such information may facilitate more efficient investment decision making. In addition, permitting registrants to omit disclosure of information when it is not material may reduce registrant compliance costs, allowing registrants to deploy resources towards more productive uses and thus encouraging capital formation. The reduction in compliance costs might be particularly beneficial for smaller and younger registrants that are resource-constrained.[328]

However, in cases in which registrants misjudge what information is material, a principles-based disclosure framework relying on registrants' determinations of the importance of information to investors could result in increased information asymmetries between registrants and investors. Such asymmetries may increase the cost of capital, reduce capital formation, and hamper efficient allocation of capital across companies. Overall, to the extent that the final amendments will eliminate disclosure that is not considered to be material, we believe these effects will be limited. Moreover, we expect this risk to be offset by mitigants, including corporate internal controls and the antifraud provisions of the securities laws.

D. Alternatives

We are amending Items 101(a), 101(c), and 105 to be more clearly principles-based. As an alternative, we considered modifying these requirements using prescriptive standards. Several commenters expressed support for more prescriptive standards.[329] For example, some commenters advocated for additional specific disclosures about environmental and foreign regulatory

[318] *See* letter from Nareit.

[319] *See* letters from FEI and Nareit.

[320] *See* letter from Society.

[321] *See supra* note 205 and accompanying text.

[322] To estimate the percentage of registrants that would be affected by a 15-page threshold, we extracted all Forms S–1, S–3, S–4, S–11, 1–A, 10, and 10–K filed with the Commission during calendar year 2018. This population consists of approximately 10,000 forms. We then excluded Forms 10–K filed by smaller reporting companies and asset-backed issuers as well as Forms 10 filed by smaller reporting companies because these registrants are not required to provide risk factor disclosure per Item 1A or Instruction J. Next, we constructed a random sample of 100 companies and calculated the length of their risk factor disclosure. The resulting page distribution had the mean of 15.26 and median of 13.5 pages. The 15-page threshold is around the 60th percentile of the distribution. Therefore, we estimate that this threshold will affect approximately 40 percent of registrants.

[323] *See* letters from FEI, Nareit, and Society.

[324] *See supra* note 220 and accompanying text (discussing commenters' concerns about litigation risk).

[325] *See* Ryan D. Israelsen, *Tell It Like It Is: Disclosed Risks and Factor Portfolios* (2014), available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504522* (using textual analysis techniques to extract a broad set of disclosed risk factors from firms' SEC filings to examine characteristics of the firms most likely to make each type of disclosure, and investigating the relation between firms' risk disclosures and their stock return volatilities and factor loadings).

[326] *See* letters from Nasdaq and Society.

[327] *See* David Hirshleifer and Siew Hong Teoh, *Limited attention, information disclosure, and financial reporting,* 36 J. Acct. & Econ. 337 (2003) (developing a theoretical model where investors have limited attention and processing power and showing that, with partially attentive investors, the means of presenting information may have an impact on stock price reactions, mis-valuation, long-run abnormal returns, and corporate decisions).

[328] We note, however, that, except for the elimination of the provision that requires smaller reporting companies to describe the development of their business during the last three years, smaller reporting companies that elect to provide the alternative business disclosure under Item 101(h) will continue to have mostly prescriptive requirements under the final amendments.

[329] *See* letters from ICGN, Public Citizen, Letter Type A, and AFL–CIO.

risks, the types and composition of employees, and business strategy.[330] A prescriptive standard could elicit additional specific disclosures, may be easier for registrants to apply, and could enhance the comparability and verifiability of information. However, not all of these disclosures will be relevant at the same level of detail for all registrants. Given that the optimal levels of disclosure for business description and risk factors, in particular, are likely to vary greatly across registrants, a more flexible principles-based approach is more likely to elicit the appropriate disclosures for these items. In addition, a prescriptive approach to a particular area of disclosure where the specified metric does not capture or does not fully capture the information likely to be material to an investment decision about a particular registrant or comparable registrants may lead investors to disproportionately rely on that metric for the registrant or as a comparative tool with respect to other registrants.

The final amendments to Item 101(a) will include a non-exclusive list of the types of information that a registrant may need to disclose. We could have included a new disclosure topic that would require, if material to an understanding of the general development of the business, disclosure of transactions and events that affect or may affect the company's operations. Given that existing MD&A disclosure requirements likely elicit similar information, including this disclosure topic could result in duplicative disclosures that would increase compliance costs for registrants without significantly improving the overall mix of information available to investors.

The final amendments to Item 101(c) will require disclosure of human capital measures or objectives, including disclosure of the number of persons employed, to the extent material to an understanding of the registrant's business. One alternative to this disclosure topic would be to remove any reference to disclosure of the number of persons employed. This alternative would be consistent with the general principles-based approach of the final amendments that eschews specificity in favor of encouraging registrants to consider the particular types of information that would be material to an understanding of their business.[331] However, such an alternative could have deprived investors of disclosure that provides them with valuable information that can be used in assessing productivity growth, compensation measures, and capital allocation.[332] Moreover, disclosure of this metric would allow investors to readily compare different registrants and assess their cost of capital and future corporate performance.[333] Therefore, retaining a specific reference to the number of employees in this disclosure topic may help registrants provide information that is material to an understanding of their business.

The final amendments also adjust for inflation the bright-line threshold for environmental proceedings in Item 103 from $100,000 to $300,000 and allow registrants to elect to use a different threshold, with an upper bound of the lesser of $1,000,000 or one percent of its current assets. As an alternative to this amendment, we considered applying only a materiality standard. On the one hand, a materiality standard might elicit disclosure that is more relevant to a registrant's operations. For example, the same dollar amount of environmental fines might have a significant impact on the cash flows of a small registrant but a marginal impact on the cash flows of a large registrant. On the other hand, some environmental proceedings can be factually and legally complex, so a bright-line threshold may provide an easy-to-apply benchmark for registrants that use it when determining whether a particular environmental proceeding should be disclosed.[334] Furthermore, the imposition of fines and sanctions may be important information for investors in assessing a registrant's overall compliance efforts, even if, depending on the size of a registrant, such fines or sanctions may be construed as not material when considered in relation to the registrant's total assets or revenues. Another alternative would be to adopt a lower or higher bright-line threshold than the one proposed. The optimal threshold depends on the preference of investors. For example, a lower bright-line threshold might be more appropriate if investors use information about environmental proceedings smaller than $300,000 to inform investment decisions.

As another alternative, we considered making similar amendments to the corresponding disclosure requirements applicable to foreign private issuers[335] and smaller reporting companies.[336] For example, we considered making the business disclosure requirements under Form 20–F, which are largely prescriptive, more principles-based, similar to those we are adopting for domestic registrants. Although current rules provide certain accommodations specific to these types of registrants (*e.g.,* scaled disclosures), they are generally more prescriptive. Amending these requirements to make them more principles-based would enable such registrants to realize the same expected benefits as other registrants by permitting them to tailor their disclosure to fit their own particular circumstances and reduce the amount of disclosure that is not material. However, such an alternative also could impose unique costs for these registrants. For example, such an approach could reduce the ability of foreign private registrants to use a single disclosure document that would be accepted in multiple jurisdictions. Similarly, a principles-based approach that requires more judgment may make it more difficult for smaller registrants with limited resources and less established reporting histories to meet their disclosure obligations and could increase the risk of persistent information asymmetries. For these reasons, and because we received limited feedback on these points, we are not adopting either of these alternatives.

V. Paperwork Reduction Act

A. Summary of the Collections of Information

Certain provisions of our rules, schedules, and forms that would be affected by the rule amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[337] The Commission published a notice requesting comment on revisions to these collections of information requirements in the Proposing Release and has submitted these requirements to the Office of Management and Budget (''OMB'') for

[330] *See, e.g.,* letter from PRI.

[331] In addition, some commenters consider that a focus on the employee number is outdated, arbitrary, and of limited use. *See supra* note 152.

[332] *See supra* note 150.

[333] *See* Frederico Belo et al., Labour Hiring, Investment, and Stock Return Predictability in the Cross Section, 122 J. Polit. Econ. 129 (2014) (finding that annual growth in employee count is associated with low cost of capital). *See also* Qin Li et al., *Employee Turnover and Firm Performance: Large-Sample Archival Evidence* (2020), available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3505626* (documenting that employee turnover is negatively associated with future financial performance).

[334] *See supra* note 177 and accompanying text.

[335] Business disclosure for foreign private issuers is governed by Part I of Form 20–F, and not by Item 101 of Regulation S–K. *See supra* note 23. The Commission amended Form 20–F in 1999 to conform it in large part to the non-financial disclosure standards endorsed by IOSCO. *See supra* note 12 and accompanying text.

[336] *See supra* note 19.

[337] 44 U.S.C. 3501 *et seq.*

review in accordance with the PRA.[338] The hours and costs associated with preparing, filing, and sending the schedules and forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the collections of information are: [339]

- ''Form S–1'' (OMB Control No. 3235–0065);
- ''Form S–3'' (OMB Control No. 3235–0073;
- ''Form S–4'' (OMB Control No. 3235–0324);
- ''Form S–11'' (OMB Control No. 3235–0067);
- ''Form F–1'' (OMB Control No. 3235–0258);
- ''Form F–3'' (OMB Control No. 3235–0256);
- ''Form F–4'' (OMB Control No. 3235–0325);
- ''Form SF–1'' (OMB Control No. 3235–0707);
- ''Form SF–3'' (OMB Control No. 3235–0690);
- ''Form 10'' (OMB Control No. 3235–0064);
- ''Form 10–K'' (OMB Control No. 3235–0063);
- ''Form 10–Q'' (OMB Control No. 3235–0070);
- ''Schedule 14A'' (OMB Control No. 3235–0059); and
- ''Schedule 14C'' (OMB Control No. 3235–0057).

The regulations, schedules, and forms listed above were adopted under the Securities Act and/or the Exchange Act. These regulations, schedules, and forms set forth the disclosure requirements for registration statements, periodic and current reports, distribution reports, and proxy and information statements filed by registrants to help investors make informed investment and voting decisions.

A description of the amendments, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the proposed amendments can be found in Section IV above.

B. Summary of Comment Letters

In the Proposing Release, the Commission requested comment on the PRA burden hour and cost estimates and the analysis used to derive such estimates. We did not receive any comments that directly addressed the PRA analysis of the proposed amendments. Several commenters, however, did provide responses to certain requests for comment that have informed some of our PRA estimates. In this regard, several commenters stated that the proposals would eliminate or reduce disclosure of redundant and unnecessary information and give registrants the flexibility to focus on information that is material.[340] These effects should also reduce the compliance burdens.

C. Summary of the Impact on Collections of Information

As discussed in more detail in the Proposing Release,[341] we derived the burden hour estimates by estimating change in paperwork burden as a result of the amendments. As discussed in Section II, we have made some changes to the proposed amendments as a result of comments received. While certain of these changes could further reduce burdens on registrants, such as not adopting as a disclosure topic under Item 101(a)(1) transactions and events that affect or may affect the company's operations, or providing a modified disclosure threshold for environmental proceedings, others may incrementally increase those burdens relative to the proposals.

Considered together, we do not expect these changes to impact our assessment of the compliance burdens of the final rule amendments for purposes of the PRA. Accordingly, we have not revised the estimates of the impact on the per hour burden for the affected forms discussed in the Proposing Release. We have, however, added Schedule 14C as an affected form, which increases the totals in PRA Tables 3 and 4.

PRA Table 1 summarizes the estimated impact of the final amendments on the paperwork burdens associated with the affected forms listed above.

[338] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[339] The paperwork burden for Regulation S–K is imposed through the forms that are subject to the requirements in this regulation and is reflected in the analysis of those forms.

[340] *See, e.g.,* letters from Society, Nasdaq, Dunker, DP&W and FEI.

[341] *See* Section VIII of the Proposing Release.

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE FINAL AMENDMENTS

Final amendments and effects	Affected forms	Estimated net effect *
Item 101(a) and Item 101(h): • More principles-based disclosure requirement, elimination of timeframe, and, for registration statements subsequent to the initial registration statement, permitting registrants to provide an update and incorporate by reference to the most recently filed full disclosure that, together with the update, would present a complete discussion of the general development of a registrant's business, would decrease the paperwork burden by reducing repetitive and immaterial information about a registrant's business development. Estimated burden decrease: 3 hours per form; and, for Schedules 14A and 14C, 0.3 hour per schedule.** • Addition of material changes to business strategy as a disclosure topic expected to increase the paperwork burden for some registrants, although such increase should be minimal, as many registrants already provide this disclosure. Estimated burden increase: 1 hour per form; and, for Schedules 14A and 14C, 0.1 hour per schedule.**	• Forms S–1, S–4, 10, 10–K. • Schedules 14A, 14C	• 2 hour net decrease in compliance burden per form. • 0.2 hour net decrease in compliance burden per schedule.
Item 101(c): • More principles-based disclosure requirement is expected to decrease the paperwork burden. Estimated burden decrease: 3 hours per form; and, for Schedules 14A and 14C, 0.3 hour per schedule.**	• Forms S–1, S–4, 10, 10–K. • Schedules 14A, 14C	• 3 hour net increase in compliance burden per form. • 0.3 hour net increase in compliance burden per schedule.
• Addition of human capital resources/measures and objectives as a disclosure topic expected to increase the paperwork burden. Estimated burden increase: 5 hours per form; and, for Schedules 14A and 14C, 0.5 hour per schedule.** • Addition of material government (and not just environmental) regulations as a disclosure topic expected to increase the paperwork burden for some registrants, although such increase is expected to be minimal as many registrants already provide such disclosure. Estimated burden increase: 1 hour per form; and, for Schedules 14A and 14C, 0.1 hour per schedule.**		
Item 103: • Expressly provide for the use of cross-references or hyperlinks is expected to decrease the paperwork burden by discouraging repetitive disclosure. Estimated burden decrease: 1 hour per form/schedule. • Raising the disclosure threshold for governmental environmental proceedings also is estimated to decrease the paperwork burden by reducing disclosure of immaterial proceedings. Estimated burden decrease: 2 hours per form/schedule.	Forms S–1, S–4, S–11, 10, 10–K, 10–Q, Schedules 14A, 14C.	3 hour net decrease in compliance burden per form/schedule
Item 105: • Summary risk factor disclosure provision could increase the paperwork burden for some registrants, although such increase is expected to be minimal as the summary would consist of a bulleted list of no more than two pages. Estimated burden increase: 1 hour per form, except no increase for Form S–11,*** and 0.67 hour increase per form for Forms 10 and 10–K.±	• Forms S–1, S–3, S–4, F–1, F–3, F–4, SF–1, SF–3. • Form S–11 • Forms 10, 10–K.	• 3 hour net decrease in compliance burden per form. • no change in compliance burden. • 2 hour net decrease in compliance burden per form.
• Summary risk factor disclosure provision could decrease the paperwork burden for other registrants to extent that it incentivizes registrants to provide streamlined risk factor disclosure focusing on the most salient risks. Estimated burden decrease: 4 hours per form, except no decrease for Form S–11,*** and 2.67 hour decrease per form for Forms 10 and 10–K, .± • "General Risk Factors" heading provision could marginally increase the paperwork burden. Estimated burden increase: 0.5 hour per form, except 0.33 hour increase per form for Forms 10 and 10–K].± • Substitution of "material" risks for "most significant" risks could marginally decrease the paperwork burden. Estimated burden decrease: 0.5 hours per form, except 0.33 hour decrease per form for Forms 10 and 10–K.±		
Total	• Forms S–1, S–4 • Forms S–3, S–11, F–1, F–3, F–4, SF–1, SF–3, and 10–Q • Form 10, 10–K • Schedules 14A and 14C.	• 5 hour net decrease per form. • 3 hour net decrease per form. • 4 hour net decrease per form. • 2.9 hour net decrease per schedule.

* Estimated effect expressed as increase or decrease of burden hours *on average* and derived from staff review of samples of relevant sections of the affected forms.

** The lower estimated average incremental burden for Schedules 14A and 14C reflects the Commission staff estimate that annually no more than 10% of these filings include Item 101 disclosures.

*** Because Form S–11 already has a summary risk factor disclosure requirement, the amendments to Item 105 are not expected to affect the compliance burden for Form S–11 registrants.

± The lower estimated average incremental burden for Forms 10 and 10–K reflects the approximate number of these forms filed by smaller reporting companies which are not required to provide Item 105 risk factor disclosure.

D. Burden and Cost Estimates of the Amendments

Below we estimate the incremental change in paperwork burdens as a result of the final amendments. These estimates represent the average burden for all registrants, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual registrants based on a number of factors, including the size and nature of their business. We do not believe that the amendments will change the number of responses to the existing collections of information; rather, we estimate that the amendments will reduce the burdens per response.

The burden reduction estimates were calculated by multiplying the number of responses by the estimated average reduction in the amount of time it would take a registrant to prepare and review the disclosures required under the amendments. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. The table below sets forth the percentage estimates we typically use for the burden allocation for each form. We also estimate that the average cost of retaining outside professionals is $400 per hour.[342]

PRA TABLE 2—STANDARD ESTIMATED BURDEN ALLOCATION FOR SPECIFIED FORMS AND SCHEDULES

Form/schedule type	Internal (percent)	Outside professionals (percent)
Forms 10–K and 10–Q, Schedules 14A and 14C	75	25
Forms S–1, S–3, S–4, S–11, F–1, F–3, F–4, SF–1, SF–3, and 10	25	75

The table below illustrates the incremental change to the total annual compliance burden of affected forms, in hours and in costs, as a result of the final amendments.

PRA TABLE 3—CALCULATION OF THE INCREMENTAL CHANGE IN BURDEN ESTIMATES OF CURRENT RESPONSES RESULTING FROM THE FINAL AMENDMENTS

Form	Number of estimated affected responses (A)[343]	Estimated burden hour reduction/ affected response (B)	Total incremental reduction in burden hours (C) = (A) × (B)[344]	Estimated reduction in internal burden hours (D) = (C) × (allocation %)	Estimated reduction in outside professional hours (E) = (C) × (allocation %)	Total reduction in outside professional costs (F) = (E) × $400
S–1	901	5	4,505	1,126	3,379	$1,351,600
S–3	1,657	3	4,971	1,243	3,729	1,491,600
S–4	551	5	2,755	689	2,066	826,400
S–11	64	3	192	48	144	57,600
F–1	63	3	189	47	142	56,800
F–3	112	3	336	84	252	100,800
F–4	39	3	117	29	88	35,200
SF–1	6	3	18	5	14	5,600
SF–3	71	3	213	53	160	64,000
10	216	4	864	216	648	259,200
10–K	8,137	4	32,548	24,411	8,137	3,254,800
10–Q	22,907	3	68,721	51,541	17,180	6,872,000
Sch. 14A	5,586	2.9	16,199	12,149	4,050	1,620,000
Sch. 14C	569	2.9	1,650	1,238	412	164,800
Total				92,879	81,739	16,160,400

The following table summarizes the requested paperwork burden, including the estimated total reporting burdens and costs, under the final amendments.

PRA TABLE 4—REQUESTED PAPERWORK BURDEN UNDER THE FINAL AMENDMENTS

Form	Current burden			Program change			Requested change in burden		
	Current annual responses (A)	Current burden hours (B)	Current cost burden (C)	Number of affected responses (D)	Reduction in company hours (E)	Reduction in professional costs (F)	Annual responses (G) = (A)	Burden hours (H) = (B) + (E)	Cost burden (I) = (C) + (F)
S–1	901	147,208	$180,319,975	901	1,126	$1,351,600	901	146,082	$178,968,375
S–3	1,657	193,626	236,198,036	1,657	1,243	1,491,600	1,657	192,383	234,706,436
S–4	551	562,465	677,378,579	551	689	826,400	551	561,776	676,552,179

[342] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing documents with the Commission.

[343] The number of estimated affected responses is based on the number of responses in the Commission's current OMB PRA filing inventory. The OMB PRA filing inventory represents a three-year average.

[344] The numbers in Columns (C), (D) and (E) have been rounded to the nearest whole number.

PRA TABLE 4—REQUESTED PAPERWORK BURDEN UNDER THE FINAL AMENDMENTS—Continued

Form	Current burden			Program change			Requested change in burden		
	Current annual responses (A)	Current burden hours (B)	Current cost burden (C)	Number of affected responses (D)	Reduction in company hours (E)	Reduction in professional costs (F)	Annual responses (G) = (A)	Burden hours (H) = (B) + (E)	Cost burden (I) = (C) + (F)
S–11	64	12,214	14,925,768	64	48	57,600	64	12,166	14,868,168
F–1	63	26,692	32,275,375	63	47	56,800	63	26,645	32,218,575
F–3	112	4,441	5,703,600	112	84	100,800	112	4,357	5,602,800
F–4	39	14,049	17,073,825	39	29	35,200	39	14,020	17,038,625
SF–1	6	2,076	2,491,200	6	5	5,600	6	2,071	2,485,600
SF–3	71	24,552	29,463,322	71	53	64,000	71	24,499	29,399,322
10	216	11,855	14,091,488	216	216	259,200	216	11,639	13,832,288
10–K	8,137	14,198,780	1,895,224,719	8,137	24,411	3,254,800	8,137	14,174,369	1,891,969,919
10–Q	22,907	3,253,411	432,290,354	22,907	51,541	6,872,000	22,907	3,201,870	425,418,354
Sch. 14A	5,586	551,101	73,480,012	5,586	12,149	1,620,000	5,586	538,952	71,860,012
Sch. 14C	569	56,356	7,514,944	569	1,238	164,800	569	55,118	7,350,144

VI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'')[345] requires an agency in promulgating rules, to consider the impact of those rules on small entities. The Commission certified in the Proposing Release, pursuant to Section 605(b) of the RFA,[346] that the proposed amendments to Items 101, 103, and 105 of Regulation S–K and related conforming amendments would not, if adopted, have a significant economic impact on a substantial number of small entities. The Commission solicited comments on its certification and received no comments.

The final amendments to Items 101, 103, and 105 will affect all small entities that file documents that must include disclosure required by these Items. However, we believe that the impact on small entities will not be significant. The primary effects of the final amendments will be to: (1) Increase a registrant's flexibility to provide disclosure regarding its business, including its general business development, so that it can tailor its disclosure to its particular circumstances; (2) eliminate or reduce disclosure about matters that are not material to an understanding of the business or to a registrant's legal proceedings; and (3) encourage risk factor disclosure that is shorter and concerns only material risks. We expect the final amendments will reduce the paperwork burden for all registrants, including small entities.[347] Although, we anticipate that the economic impact of the reduction in the paperwork burden will be modest, the reduction in the burden will be beneficial to all registrants, including small entities. Accordingly, the Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the final amendments to Items 101, 103, and 105 of Regulation S–K will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

VII. Statutory Authority

The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act, as amended, and Sections 3, 12, 13, 15, and 23(a) of the Exchange Act, as amended.

List of Subjects in 17 CFR Parts 229, 239, and 240

Reporting and recordkeeping requirements, Securities.

Text of the Amendments

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

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 1. The authority citation for part 229 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j–3, 78*l,* 78m, 78n, 78n–1, 78*o,* 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11 and 7201 *et seq.;* 18 U.S.C. 1350; Sec. 953(b) Pub. L. 111–203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112–106, 126 Stat. 310 (2012).

■ 2. Amend § 229.101 by:

■ a. Revising paragraphs (a) introductory text and (a)(1);

■ b. Redesignating paragraph (a)(2) as paragraph (a)(3);

■ c. Adding new paragraph (a)(2); and

■ d. Revising paragraph (c) and paragraph (h) introductory text.

The revisions and addition read as follows:

§ 229.101 (Item 101) Description of business.

(a) *General development of business.* Describe the general development of the business of the registrant, its subsidiaries, and any predecessor(s).

(1) In describing developments, only information material to an understanding of the general development of the business is required. Disclosure may include, but should not be limited to, the following topics:

(i) Any material changes to a previously disclosed business strategy;

(ii) The nature and effects of any material bankruptcy, receivership, or any similar proceeding with respect to the registrant or any of its significant subsidiaries;

(iii) The nature and effects of any material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries; and

(iv) The acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business.

(2) Notwithstanding the provisions of § 230.411(b) or § 240.12b–23(a) of this chapter, as applicable, a registrant may only forgo providing a full discussion of the general development of its business for a filing other than an initial registration statement if it provides an update to the general development of its business, disclosing all of the material developments that have occurred since the most recent registration statement or report that includes a full discussion of the general development of its business. In addition, the registrant must incorporate by reference, and include one active hyperlink to one registration statement or report that includes, the full discussion of the general

[345] 5 U.S.C. 601 *et seq.*

[346] 5 U.S.C. 605(b). Section 605 of the RFA allows an agency to certify a rule is not expected to have a significant economic impact on a substantial number of small entities.

[347] *See* Section V.D.

development of the registrant's business.

* * * * *

(c) *Description of business.* (1) Describe the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in the financial statements. When describing each segment, only information material to an understanding of the business taken as a whole is required. Disclosure may include, but should not be limited to, the information specified in paragraphs (c)(1)(i) through (v) of this section.

(i) Revenue-generating activities, products and/or services, and any dependence on revenue-generating activities, key products, services, product families or customers, including governmental customers;

(ii) Status of development efforts for new or enhanced products, trends in market demand and competitive conditions;

(iii) Resources material to a registrant's business, such as:

(A) Sources and availability of raw materials; and

(B) The duration and effect of all patents, trademarks, licenses, franchises, and concessions held;

(iv) A description of any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the Government; and

(v) The extent to which the business is or may be seasonal.

(2) Discuss the information specified in paragraphs (c)(2)(i) and (ii) of this section with respect to, and to the extent material to an understanding of, the registrant's business taken as a whole, except that, if the information is material to a particular segment, you should additionally identify that segment.

(i) The material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries, including the estimated capital expenditures for environmental control facilities for the current fiscal year and any other material subsequent period; and

(ii) A description of the registrant's human capital resources, including the number of persons employed by the registrant, and any human capital measures or objectives that the registrant focuses on in managing the business (such as, depending on the nature of the registrant's business and workforce, measures or objectives that address the development, attraction and retention of personnel).

* * * * *

(h) *Smaller reporting companies.* A smaller reporting company, as defined by § 229.10(f)(1), may satisfy its obligations under this Item by describing the development of its business pursuant to this paragraph (h). In describing developments under paragraphs (h)(1) through (3), information should be provided for the period of time that is material to an understanding of the general development of the business. Notwithstanding the provisions of § 230.411(b) or § 240.12b–23(a) of this chapter as applicable, a smaller reporting company may only forgo providing a full discussion of the general development of its business for a filing other than an initial registration statement if it provides an update to the general development of its business disclosing all of the material developments that have occurred since the most recent registration statement or report that includes a full discussion of the general development of its business. In addition, the smaller reporting company must incorporate by reference, and include one active hyperlink to one registration statement or report that includes, the full discussion of the general development of the registrant's business. If the smaller reporting company has not been in business for three years, provide the same information for predecessor(s) of the smaller reporting company if there are any. This business development description should include:

* * * * *

■ 3. Revise § 229.103 to read as follows:

§ 229.103 (Item 103) Legal proceedings.

(a) Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceedings and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities. Information may be provided by hyperlink or cross-reference to legal proceedings disclosure elsewhere in the document, such as in Management's Discussion & Analysis (MD&A), Risk Factors and notes to the financial statements.

(b) No information need be given under this section for proceedings:

(1) That involve negligence or other claims or actions if the business ordinarily results in such claims or actions, unless the claim or action departs from the normal kind of such claims or actions; or

(2) That involve primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis. However, if any proceeding presents in large degree the same legal or factual issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage.

(c) Notwithstanding paragraph (b) of this section, disclosure under this section shall include, but shall not be limited to:

(1) Any material bankruptcy, receivership, or similar proceeding with respect to the registrant or any of its significant subsidiaries;

(2) Any material proceedings to which any director, officer or affiliate of the registrant, any owner of record or beneficially of more than five percent of any class of voting securities of the registrant, or any associate of any such director, officer, affiliate of the registrant, or security holder is a party adverse to the registrant or any of its subsidiaries or has a material interest adverse to the registrant or any of its subsidiaries;

(3) Administrative or judicial proceedings (including proceedings which present in large degree the same issues) arising under any Federal, State, or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primarily for the purpose of protecting the environment. Such proceedings shall not be deemed ''ordinary routine litigation incidental to the business'' and shall be described if:

(i) Such proceeding is material to the business or financial condition of the registrant;

(ii) Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or

(iii) A governmental authority is a party to such proceeding and such

proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $300,000 or, at the election of the registrant, such other threshold that (A) the registrant determines is reasonably designed to result in disclosure of any such proceeding that is material to the business or financial condition is disclosed, (B) the registrant discloses (including any change thereto) in each annual and quarterly report, and (C) does not exceed the lesser of $1 million or one percent of the current assets of the registrant and its subsidiaries on a consolidated basis; provided, however, that such proceedings that are similar in nature may be grouped and described generically.

■ 4. Revise § 229.105 to read as follows:

§ 229.105 (Item 105) Risk factors.

(a) Where appropriate, provide under the caption ''Risk Factors'' a discussion of the material factors that make an investment in the registrant or offering speculative or risky. This discussion must be organized logically with relevant headings and each risk factor should be set forth under a subcaption that adequately describes the risk. The presentation of risks that could apply generically to any registrant or any offering is discouraged, but to the extent generic risk factors are presented, disclose them at the end of the risk factor section under the caption ''General Risk Factors.''

(b) Concisely explain how each risk affects the registrant or the securities being offered. If the discussion is longer than 15 pages, include in the forepart of the prospectus or annual report, as applicable, a series of concise, bulleted or numbered statements that is no more than two pages summarizing the principal factors that make an investment in the registrant or offering speculative or risky. If the risk factor discussion is included in a registration statement, it must immediately follow the summary section required by § 229.503 (Item 503 of Regulation S–K). If you do not include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on Rule 430A (§ 230.430A of this chapter). The registrant must furnish this information in plain English. See § 230.421(d) of Regulation C of this chapter.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 5. The authority citation for part 239 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m,78n, 78*o*(d), 78*o*–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37; and sec. 107, Public Law 112–106, 126 Stat. 312, unless otherwise noted.

* * * * *

■ 6. Amend Form S–4 (referenced in § 239.25) by revising paragraph (b)(3)(i) of Item 12 under Part I, Section B (''Information About the Registrant'') to read as follows:

Note: The text of Form S–4 does not, and this amendment will not, appear in the Code of Federal Regulations.

United States Securities and Exchange Commission

Washington, DC 20549

Form S–4

Registration Statement Under the Securities Act of 1933

* * * * *

Part I

Information Required in the Prospectus

* * * * *

B. Information About the Registrant

* * * * *

Item 12. Information with Respect to S–3 Registrants.

* * * * *

(b) * * *

(3) Furnish the information required by the following:

(i) Item 101(c)(1)(i) of Regulation S–K (§ 229.101(c)(1)(i) of this chapter), industry segments, key products or services;

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 7. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.;* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Public Law 111–203, 939A, 124 Stat. 1887 (2010); and secs. 503 and 602, Public Law 112–106, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 8. Amend § 240.14a—101 by revising paragraph (a) of Item 7 of Schedule 14A to read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 7. Directors and executive officers. * * *

(a) The information required by Item 103(c)(2) of Regulation S–K (§ 229.103(c)(2) of this chapter) with respect to directors and executive officers.

* * * * *

By the Commission.

Dated: August 26, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–19182 Filed 10–7–20; 8:45 am]

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Threatened Species Status for Eastern Black Rail With a Section 4(d) Rule; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2018–0057; FF09E21000 FXES11110900000 201]

RIN 1018–BD21

Endangered and Threatened Wildlife and Plants; Threatened Species Status for Eastern Black Rail With a Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine threatened species status for the eastern black rail (*Laterallus jamaicensis jamaicensis*) under the Endangered Species Act of 1973 (Act), as amended. Accordingly, we list the eastern black rail, a bird subspecies known from as many as 35 States, the District of Columbia, Puerto Rico, Canada, Brazil, and several countries in the Caribbean and Central America, as a threatened species under the Act. The effect of this regulation will be to add this subspecies to the List of Endangered and Threatened Wildlife. We also finalize a rule under the authority of section 4(d) of the Act that provides measures that are necessary and advisable to provide for the conservation of the eastern black rail. We have determined that designation of critical habitat for the eastern black rail is not prudent.

DATES: This rule is effective November 9, 2020.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* in Docket No. FWS–R4–ES–2018–0057 and at the South Carolina Ecological Services Field Office. Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection in the docket on *http://www.regulations.gov.* Comments, materials, and documentation that we considered in this rulemaking will also be available by appointment, during normal business hours at: U.S. Fish and Wildlife Service South Carolina Ecological Services Field Office, 176 Croghan Spur Road, Suite 200, Charleston, SC 29407; telephone 843–727–4707.

FOR FURTHER INFORMATION CONTACT: Tom McCoy, Field Supervisor, South Carolina Ecological Services Field Office, 176 Croghan Spur Road, Suite 200, Charleston, SC 29407; telephone 843–727–4707. 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, a species may warrant protection through listing if it is endangered or threatened throughout all or a significant portion of its range. Listing a species as an endangered or threatened species can only be completed by issuing a rule.

What this document does. This rule will list the eastern black rail (*Laterallus jamaicensis jamaicensis*) as a threatened species and provide measures under section 4(d) of the Act that are tailored to our current understanding of the conservation needs of the eastern black rail.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that habitat loss and destruction, sea level rise and tidal flooding, incompatible land management, and increasing storm intensity and frequency are the primary threats to this subspecies.

Peer review and public comment. We prepared a species status assessment report (SSA report) for the eastern black rail (Service 2019). The SSA report represents a compilation and assessment of the best scientific and commercial information available concerning the status of the eastern black rail, including the past, present, and future factors influencing the subspecies (Service 2019, entire). We solicited independent peer review of the SSA report by 10 individuals with expertise in rail biology and ecology and in species modeling; we received comments from 5 of the 10 reviewers. The reviewers were generally supportive of our approach and made suggestions and comments that strengthened our analysis. We also considered all comments and information received during the comment period. The SSA report and other materials relating to this rule can be found at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0057.

Previous Federal Actions

Please refer to the proposed listing rule for the eastern black rail (83 FR 50610) for a detailed description of previous Federal actions concerning this species.

Background

A thorough review of the taxonomy, life history, and ecology of the eastern black rail is presented in the SSA report (Service 2019, entire). Please refer to the proposed listing rule for the eastern black rail (83 FR 50610, October 9, 2018) for a summary of species information.

Summary of Biological Status and Threats

We completed a comprehensive assessment of the biological status of the eastern black rail, and prepared a report of the assessment (SSA report; Service 2019, entire), which provides a thorough account of the subspecies' overall viability. Below, we summarize the key results and conclusions of the SSA report, which can be viewed under Docket No. FWS–R4–ES–2018–0057 at *http://www.regulations.gov.*

To assess eastern black rail viability, we used the three conservation biology principles of resiliency, representation, and redundancy (together, ''the three Rs,'' (3Rs)) (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency refers to the ability of a species to withstand environmental and demographic stochasticity (for example, wet or dry years); representation refers to the ability of the species to adapt over time to long-term changes in the environment (for example, climate change); and redundancy refers to the ability of the species to withstand catastrophic events (for example, hurricanes). In general, the more redundant and resilient a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the eastern black rail's ecological requirements for survival and reproduction at the individual, population, and subspecies levels, and described the beneficial and risk factors influencing the subspecies' viability.

We delineated analysis units for the eastern black rail based on environmental variables (aquifer permeability, slope, mean precipitation, mean potential evapotranspiration, and percent sand in soil). We used 8,281 point localities from combined datasets (*i.e.,* eBird, Center for Conservation Biology, University of Oklahoma, and additional research partners) from 1980

through 2017, to delineate the analysis units for the eastern black rail. We named the analysis units using standard topographic and ecological landmarks: New England, Mid-Atlantic Coastal Plain, Appalachians, Southeast Coastal Plain, Southwest Coastal Plain, Central Lowlands, and Great Plains. Based on available data, we have concluded that the New England, Appalachians, and Central Lowlands analysis units are effectively extirpated. While these three analysis units historically did not support abundances of the eastern black rail as high as the other four analysis units, an evaluation of the current status information, including the paucity of current records, negative survey results, and the demonstrated range contraction throughout these areas, supports our conclusion that the eastern black rail is effectively extirpated from these analysis units. The remaining four analysis units, the Mid-Atlantic Coastal Plain, Southeast Coastal Plain, Southwest Coastal Plain, and Great Plains, have records of current populations of eastern black rails.

To assess resiliency, we analyzed occupancy within the analysis units through the creation of a dynamic occupancy model. We used data from repeated presence/absence surveys across the range of the eastern black rail to estimate the probability of presence at a site and related the occupancy probability to environmental covariates of interest (wettest month precipitation, temperature range, annual mean temperature, coldest month mean temperature, presence/absence of fire ants, and State identification). The lower the occupancy probability in an analysis unit, the less resiliency that analysis unit exhibits. We found the four extant analysis units (Southeast Coastal Plain, Mid-Atlantic Coastal Plain, Great Plains, and Southwest Coastal Plain) to have very low occupancy probabilities ranging from 0.099 to 0.25. The results also indicated fairly high site extinction probabilities with accompanying low site persistence.

To assess representation, we used two metrics to estimate and predict representative units that reflect the subspecies' adaptive capacity: Habitat variability and latitudinal variability. The eastern black rail exhibits adaptive potential by using similar habitat elements within different wetland types (habitat variability) within analysis units, *i.e.,* higher elevation areas within wetlands with dense vegetation, moist soils, and shallow flood depths (Eddleman *et al.* 1988, p. 463; Nadeau and Conway 2015, p. 292). Therefore, the subspecies shows a level of adaptive capacity by using different wetland types that contain the required habitat elements. Additionally, we used the metric of latitudinal variability to reflect the eastern black rail's wide range across the contiguous United States. To maintain existing adaptive capacity, it is important to have resilient populations (analysis units) that exhibit habitat variability and latitudinal variability.

To assess redundancy, we evaluated the current distribution of eastern black rail analysis units through their present-day spatial locations. To have high redundancy, the eastern black rail would need to have multiple resilient analysis units spread throughout its range.

Current Condition of Eastern Black Rail

Historically, the eastern black rail ranged across the eastern, central, and southern United States; historical records also exist from the Caribbean, Central America, Brazil, and Ontario, Canada. It occupied multiple areas of wetlands (including salt marshes, coastal prairies, and hay fields) throughout the range; approximately 90 percent of documented breeding-season occurrence records occurred at coastal locations and less than 10 percent were inland records, with more than 60 percent of the inland records occurring before 1950 (Watts 2016, entire). The eastern black rail also occupied multiple areas of wetlands within each analysis unit.

Within the northeastern United States, historical (1836–2010) records document the eastern black rail as present during breeding months from Virginia to Massachusetts, with 70 percent of historical observations (773 records) in Maryland, Delaware, and New Jersey (Watts 2016, p. 22). Maryland, Delaware, and New Jersey are considered historical strongholds for eastern black rail in this region of the United States (the Northeast) as well as across the subspecies' entire breeding range (Watts 2016, p. 22), due to the total number and frequency of observations reported over time. Virginia, New York, and Connecticut account for an additional 21 percent of the historical records (235 records) from the Northeast (Watts 2016, p. 22). Recent (2011–2016) records from the Northeast are low in number (64 records), with almost all records restricted to outer coastal habitats (Watts 2016, pp. 22, 24). The distribution of the recent records points toward a substantial southward contraction in the subspecies' range of approximately 450 kilometers (280 miles), with vacated historical sites from 33 counties extending from the Newbury marshes in Massachusetts to Ocean County, New Jersey (Watts 2016, pp. 24, 119). Further, the distribution of the recent records has become patchy along the Atlantic coast, and an evaluation of the records within the 15 counties still currently occupied suggests an almost full collapse of the eastern black rail population in the Northeast (Watts 2016, p. 24).

While the Appalachians and Central Lowlands analysis units supported less habitat for eastern black rails compared to the more coastal analysis units, interior occurrences were more common historically. Current population estimates for states with a large area occurring within the boundaries of the Appalachians analysis unit are effectively zero (Watts 2016, p. 19). Within that unit, an estimated 0 to 5 breeding pairs currently occur in Pennsylvania, and no breeding pairs are thought to occur in New York or West Virginia (Watts 2016, p. 19). Birds previously detected in the Appalachians analysis unit were found in small depressional wetlands within active pastures; other freshwater wetlands dominated by cattails, rushes, or sedges; and drainage ditches (Watts 2016, pp. 48, 74). While these wetland types still exist within the analysis unit and may support single individuals or a very low-density, scattered population (Watts 2016, pp. 48, 74), a substantial amount of this kind of habitat has been lost primarily due to the draining of freshwater wetlands for agricultural purposes. These estimates likely hold true for the interior portions of the other States within the Appalachians analysis unit (*e.g.,* Georgia, Virginia) based on few current detections. Similar losses of habitat have occurred in the Central Lowlands analysis unit, and there are currently few detections of eastern black rails across this unit. Moreover, the current detections are not consistent from year to year even when habitat remains suitable. For example, Indiana Department of Natural Resources surveys for eastern black rails at multiple sites during the period 2010–2016 yielded one detection at a single site previously known to support eastern black rails (Gillet 2017, unpublished data).

In the Chesapeake Bay region, the distribution of eastern black rail has contracted, and the counts of birds have declined. A series of systematic surveys for eastern black rails has been conducted around the Chesapeake Bay since the early 1990s (Watts 2016, pp. 59, 67). Surveys estimated 140 individuals in the 1990–1992 survey period, decreasing to 24 individuals in 2007, and only 8 individuals in 2014, a decline of over 90 percent in less than

25 years (taking into account the number of survey points; Watts 2016, p. 59; Brinker 2017, unpublished data). Of 328 points surveyed in Virginia in 2007, researchers detected 15 birds; a second round of surveys in 2014 yielded 2 detections at 134 survey points (including all survey points with positive occurrences in 2007), equating to a 67 percent decline over 7 years (corrected from Watts to take into account the number of survey points; Wilson *et al.* 2015, p. 3; Watts 2016, pp. 67, 71;).

Historically, the eastern black rail was also present during breeding months at inland and coastal locations throughout southeastern coastal States (the Southeast), a region that included North Carolina, South Carolina, Georgia, Florida, Tennessee, Mississippi, Alabama, Louisiana, and Texas (Watts 2016, pp. 75–76). Of these States, Texas, Florida, South Carolina, and North Carolina contained 89 percent of all historical observations (734 records) (Watts 2016, p. 77). The other States (Georgia, Tennessee, Mississippi, Alabama, and Louisiana) either do not have a history of supporting eastern black rails consistently or are considered to be on the peripheries of known breeding areas (Watts 2016, p. 77).

Recently, there have been 180 records of eastern black rails during the breeding season, and at a coarse view, the same 4 southeastern States that substantially supported the subspecies historically still support the subspecies (Watts 2016, pp. 77, 79). However, North Carolina shows a severe decline in the number of occupied sites, with only four properties occupied in 2014–2015, down from nine in 1992–1993 (Watts 2016, p. 80). Additional surveys in 2017 yielded no new occupied coastal sites, and no birds were detected at inland/freshwater sites from two surveys in 2018 (Watts *et al.* 2017, p. 3; Watts *et al.* 2018b, p. 3). South Carolina shows a limited distribution, with two known occupied areas (Wiest 2018, pers. comm.) and an estimated 50 to 100 breeding pairs (Watts 2016, p. 19), leaving Texas and Florida as the current strongholds for the Southeast. At the time of the 2016 coastal assessment, it was surmised that coastal Georgia may support a breeding population of unknown size (Watts 2016, pp. 93–95); however, a coastwide survey in 2017 at 409 survey points in Georgia yielded no detections of eastern black rails (Watts *et al.* 2018a, p. 3). Initial results from the 2018 field season in Georgia detected no black rails at inland or coastal locations; a total of 206 points had been visited (Watts *et al.* 2018a, p. 4). A small population in inland Georgia was tracked during the breeding season from 1991 to 2010 until the population disappeared in 2011 for unknown reasons; observed young from this population remains the only evidence of definitive breeding in the State (Watts 2016, pp. 93–94; Sykes 2018, pers. comm.). Overall, across the Atlantic and Gulf Coasts, recent observations show poor presence inland and a widespread reduction in the number of sites used across coastal habitats (Watts 2016, p. 79).

The history of the subspecies' distribution in the interior continental United States is poorly known. Historical literature indicates that a wide range of interior States were occupied by the eastern black rail, either regularly or as vagrants (Smith-Patten and Patten 2012, entire). Eastern black rails are currently vagrants (casual or accidental) in Arkansas, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, New Mexico, Ohio, and Wisconsin (Smith-Patten and Patten 2012, entire). Presently, eastern black rails are reliably located within the Arkansas River Valley of Colorado (presumed breeder in the State) and in southcentral Kansas (confirmed breeder in the State) (Smith-Patten and Patten 2012, pp. 9, 17; Butler *et al.* 2014, p. 22). In Colorado, the subspecies is encountered in spring and summer at Fort Lyon Wildlife Area, Bent's Old Fort, Oxbow State Wildlife Area, Bristol, and John Martin Reservoir State Park (Smith-Patten and Patten 2012, p. 10). Surveys conducted between April 15 and June 15, 2018, in southeastern Colorado detected at least one black rail during repeat surveys at 39 of 115 points and 17 of 66 marshes surveyed (Rossi and Runge 2018, p. 6). In Kansas, available information on the occurrence of eastern black rail suggests eight counties have confirmed breeding records, but Quivira National Wildlife Refuge (NWR) is the only known site with consistent or regular breeding activities (Thompson *et al.* 2011, p. 123). In Oklahoma, occurrence mapping suggests that this subspecies had at a maximum a patchy historical distribution throughout the State. At present, it is possible that there is not sufficient suitable habitat or numbers of birds to constitute a true breeding population in Oklahoma (Smith-Patten and Patten 2018, p. 7).

Eastern black rail analysis units currently have low to no resiliency in the contiguous United States (Service 2019, pp. 79–82). The Great Plains, Southwest Coastal Plain, and Southeast Coastal Plain analysis units have low resiliency based on the dynamic occupancy model results, which indicate very low occupancy probabilities in each modeled analysis unit: 0.25 in the Southwest Coastal Plain, 0.13 in the Great Plains, and 0.099 in the Southeast Coastal Plain. The Mid-Atlantic Coastal Plain analysis unit currently exhibits very low resiliency for the eastern black rail. It supports fewer birds and has fewer occupied habitat patches than the Southeast Coastal Plain analysis unit. The remaining three analysis units, New England, Appalachians, and Central Lowlands, currently demonstrate no resiliency. These three units historically did not support abundances of the eastern black rail as high as the other four analysis units. There are currently insufficient detections to model these units; recent detections (2011 to present) are fewer than 20 birds for each analysis unit. An evaluation of current status information yields that eastern black rails are effectively extirpated from portions of the New England, Appalachians, and Central Lowlands analysis units that were once occupied. Lastly, resiliency is unknown for the Central America and Caribbean portion of the eastern black rail's range. However, the sparsity of historical and current records, including nest records, indicates that resiliency outside of the contiguous United States is likely low. All recent sightings in Central America and the Caribbean have been of adult eastern black rails; there are no reports of nests, chicks, or juveniles.

To assess current representation, we evaluated both habitat variability and latitudinal variability. When considering habitat variability, we determined the eastern black rail has a level of adaptive potential by using similar habitats elements (*i.e.,* higher elevation areas within wetlands with dense vegetation, moist soils, and shallow flood depth) within different wetland types within analysis units. However, there may be unknown factors that influence and affect the eastern black rail's use of wetland habitat, as not all apparently suitable wetland habitat is currently occupied. While the New England, Appalachians, and Central Lowlands analysis units have experienced wetland habitat loss and fragmentation, wetland habitats continue to be present on the landscape. However, the eastern black rail is not being found in these three analysis units with any consistency or by detections representing more than single individuals. Historically, the eastern black rail had a wide distribution and exhibited latitudinal variability. Currently, as discussed above, three of

the analysis units (New England, Appalachians, and Central Lowlands) are effectively extirpated, and, therefore, this latitudinal variability (higher latitudes) has effectively been lost to the subspecies. Therefore, even though the eastern black rail still occurs at varying latitudes, we conclude that the subspecies currently has reduced representation across its range.

Despite having a wide distribution, the eastern black rail currently has low redundancy across its range. With the loss of three analysis units in upper latitudes of the range, the subspecies has reduced ability to withstand catastrophic events, such as hurricanes and tropical storms, which could impact the lower latitudinal analysis units. Given the lack of habitat connectivity, and patchy and localized distribution, it would be difficult for the subspecies to recover from a catastrophic event in one or more analysis units.

Risk Factors for Eastern Black Rail

The Act directs us to determine whether any species is an endangered species or a threatened species because of any factors affecting its continued existence. Under section 4(a)(1) of the Act, we may list a species based on (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

The mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species—such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future. We reviewed the potential risk factors (*i.e.,* threats or stressors) that are affecting the eastern black rail now and into the future. In this rule, we will discuss in detail only those threats that we conclude are driving the status and future viability of the species. The primary threats to eastern black rail are: (1) Habitat fragmentation and conversion, resulting in the loss of wetland habitats across the range (Factor A); (2) sea level rise and tidal flooding (Factors A and E); (3) land management practices (*i.e.,* incompatible fire management practices, grazing, and haying/mowing/other mechanical treatment activities) (Factors A and E); and (4) stochastic events (*e.g.,* extreme flooding, hurricanes) (Factor E). Human disturbance, such as birders using excessive playback calls of black rail vocalizations (Factor B), is also a concern for the species. Additional stressors to the species (including oil and chemical spills and environmental contaminants (Factor E); disease, specifically West Nile virus (Factor C); and predation and altered food webs resulting from invasive species (fire ants, feral pigs, nutria, mongoose, and exotic reptiles) introductions (Factor C)) are discussed in the SSA report (Service 2019, entire). However, although these additional stressors may be having localized impacts, they are not the primary drivers of the status of the subspecies, and so we do not discuss them in detail in this document. We also reviewed the conservation efforts being undertaken for the subspecies. The existing regulatory mechanisms do not address threats to the eastern black rail such that it does not warrant listing under the Act (Factor D).

Habitat Fragmentation and Conversion

The eastern black rail is a wetland-dependent bird requiring dense emergent cover (*i.e.,* vegetation) and extremely shallow water depths (typically ≤3 cm) over a portion of the wetland-upland interface to support its resource needs. Grasslands and their associated palustrine (freshwater) and estuarine wetland habitats have experienced significant loss and conversion since European settlement (Hannah *et al.* 1995, pp. 137, 151; Noss *et al.* 1995, pp. 57–76, 80–84; Bryer *et al.* 2000, p. 232). Approximately 50 percent (greater than 100 million acres) of the wetlands in the conterminous United States have been lost over the past 200 years; the primary cause of this loss was conversion for agricultural purposes (Dahl 1990, p. 9). Wetland losses for the States within the eastern black rail's historical range have been from 9 percent to 90 percent, with a mean of 52 percent (Dahl 1990, p. 6). Similarly, most of the native grassland/prairie habitats associated with eastern black rail habitat have been lost since European settlement (Sampson and Knopf 1994, pp. 418–421).

The eastern black rail also uses the transition zone (ecotone) between emergent wetlands and upland grasslands. These transitional areas are critical to eastern black rails, as they provide refugia during high-water events caused by precipitation or tidal flooding. These habitat types have also experienced significant declines over time (Sampson and Knopf 1994, pp. 418–421), with many areas within the eastern black rail's historical range losing over 90 percent of their prairie habitat. Most of this loss can be attributed to agricultural conversion (Sampson and Knopf 1994, pp. 419–420). Many of the freshwater wetlands associated with these grasslands were emergent and ephemeral in nature, and would have supported eastern black rails. For example, in Texas, between the 1950s and 1990s, 235,000 acres, or 29 percent, of freshwater wetlands within Gulf coastal prairie were converted primarily to upland agriculture and other upland land uses (Moulton *et al.* 1997, p. 5). This value does not include the numbers of upland prairie acres that were also converted.

Despite regulatory efforts to minimize the loss of wetland habitats, losses and alterations continue to occur to habitats occupied by the eastern black rail. Marshes continue to face substantial impacts from dikes, impoundments, canals, altered freshwater inflows,

erosion, relative sea level rise, tidal barriers, tropical storm events, and other natural and human-induced factors (Turner 1990, entire; Kennish 2001, entire; Adam 2002, entire; Tiner 2003, p. 513; Gedan *et al.* 2009, entire). Estuarine emergent wetland losses are mostly attributable to conversion to open water through erosion (Dahl and Stedman 2013, p. 37), while freshwater emergent wetland losses appear to be the result of development (Dahl and Stedman 2013, p. 35). Marine and estuarine wetlands along the northern Gulf of Mexico have been negatively impacted by development, including energy development and coastal storms (Dahl 2011, p. 47). Because the rail is a wetland-dependent subspecies, the loss and alteration of palustrine and estuarine wetlands and associated grassland habitats have a negative impact.

Within the range of the eastern black rail, land use in the United States has affected and continues to affect groundwater and surface water resources (Johnston 1997, entire; McGuire 2014, pp. 1–2, 7, 9; Barfield 2016, pp. 2–4; Juracek and Eng 2017, pp. 1, 11–16). The conversion of wetland habitat, largely for agricultural use, was mentioned above. However, habitat conversion and land use directly and indirectly affect water resources, largely tied to the interaction of groundwater and surface water resources (Sophocleous 2002, entire; Tiner 2003, p. 495; Glazer and Likens 2012, entire; Konikow 2015, entire; U.S. Geological Survey (USGS) 2016, unpaginated).

Where groundwater resources are hydraulically connected to surface water resources, these connections can either be unconfined (water table) or confined (springs) aquifers. In unconfined aquifers, locations can support surface features such as wetlands or riparian habitats where groundwater is located near the land surface (Haag and Lee 2010, pp. 16–19, 21–24). Lowering of groundwater through withdrawals via wells or ditches can cause wetlands to shrink or become dry. Withdrawals of confined aquifers can lead to the drying of springs and associated wetland habitats (Weber and Perry 2006, p. 1255; Metz 2011, p. 2). In the central and southcentral United States, high groundwater use, largely attributed to cropland irrigation and other human activities, may affect the long-term sustainability of water resources, including causing wetland loss (McGuire 2014, entire; Juracek 2015, entire; Juracek and Eng 2017, entire; Juracek *et al.* 2017, entire; Perkin *et al.* 2017, entire).

Human modifications to the environment have led to significant changes in vegetation. Some of these modifications include water withdrawals and the construction of levees, drainage canals, and dams. Changes to native vegetation can result in changes to the structure of the habitat (*e.g.,* conversion from emergent to scrub-shrub wetlands, wetland into upland habitat, or vice-versa), as well as the introduction of invasive plant species (*e.g., Phragmites australis;* Crain *et al.* 2009, p. 157). Given the narrow habitat preferences of the eastern black rail (*i.e.,* very shallow water and dense emergent vegetation), small changes in the plant community can easily result in habitat that is not suitable for the subspecies.

Subsidence (lowering of the earth's surface) is caused by the withdrawal of liquids from below the ground's surface, which relieves supporting hydraulic pressure of liquids by the long-term compression of unconsolidated, geologically deposited sediments, or by other geologic processes (White and Tremblay 1995, entire; Day *et al.* 2011, p. 645; Karegar *et al.* 2016, p. 3129). Localized subsidence can occur with groundwater withdrawals where withdrawal rates are greater than the aquifer recharge rates (White and Tremblay 1995, pp. 794–804; Morton *et al.* 2006, p. 271) or where liquids associated with hydrocarbon extraction have caused the lowering of ground elevations (Morton *et al.* 2006, p. 263). On the Atlantic coast, an area of rapid subsidence exists between Virginia and South Carolina, where the rate of subsidence has doubled due to increased groundwater withdrawals (Karegar *et al.* 2016, pp. 3131–3132). An extreme example of subsidence in the United States is along the Gulf of Mexico coast, where both subsurface liquid withdrawal and sediment consolidation have significant influence on coastal wetland habitats (Turner 1990, pp. 93–94, 96, 98; White and Tremblay 1995, pp. 795–804; Morton *et al.* 2006, entire). Subsidence combined with sea level rise is referred to as relative sea level rise, and the Gulf of Mexico has the highest relative sea level rise rates in the conterminous United States, leading to significant losses in wetland habitats (National Oceanic and Atmospheric Administration (NOAA) 2018, unpaginated).

Subsidence can affect the eastern black rail and its habitat in both fresh and tidal wetlands. Vegetated wetland habitats used by the eastern black rail can be converted to unvegetated open water or mudflats through drowning of vegetation or erosion from increased wave energy. Locations with higher subsidence rates can experience increased tidal flooding sooner than areas with lower subsidence rates (Sweet *et al.* 2014, pp. 10–13). The effect of increased tidal flooding will change black rail habitat over time (*i.e.,* marsh migration) but can have direct impacts on black rail reproduction when flooding occurs during the breeding season (Erwin *et al.* 2006, entire; Pol *et al.* 2010, pp. 724–728).

Extensive drainage features have been created or modified in the United States, primarily to reduce flooding to protect agricultural land or infrastructure. These include excavation of drainage ditches, channelization of rivers and streams, construction of levees and berms, tidal restrictions, and diversions of waterways. Extensive areas of Florida were channelized in an effort to drain wetlands in the early 1900s (Renken *et al.* 2005, pp. 37–56). Most, if not all, of the coastal plain in Texas contains existing drainage features that were either created or modified to reduce flooding of agricultural lands and associated communities. These features can reduce or eliminate the hydroperiod to sustain associated wetlands by removing water rapidly off the landscape (Blann *et al.* 2009, pp. 919–924). In glaciated geographies such as the Midwest, drain tiles and other methods have been used to drain wetlands to improve conditions for agricultural production (Blann *et al.* 2009, pp. 911–915). Approximately 90 percent of the salt marshes on the northeast United States coast have been ditched to control mosquitoes (Bourn and Cottam 1950, p. 15; Crain *et al.* 2009, pp. 159–161). Ditching increases the area of the marsh that is inundated as well as drained (Daiber 1986, in Crain *et al..* 2009, p. 160; Crain *et al.* 2009, p. 160).

Levees have been constructed in flood-prone areas to minimize damage to crops and local communities. Levees can modify the duration, intensity, and frequencies of hydroperiods associated with riparian and tidal wetlands and thus change the nature and quality of wetland habitat, including that used by marsh-dependent species (Walker *et al.* 1987, pp. 197–198; Bryant and Chabreck 1998, p. 421; Kuhn *et al.* 1999, p. 624; Kennish 2001, p. 734; Adam 2002, p. 46). They also facilitate the movement patterns of mesopredators and improve their access to wetland habitats (Frey and Conover 2006, pp. 1115–1118). Navigation channels and their management have had extensive impacts to tidal wetlands (*e.g.,* in

Louisiana). These channels can modify the vegetation community of associated wetlands and can increase the frequency of extreme high tide or high flow events by providing a more direct connection to the influencing water body (Turner 1990, pp. 97–98; Bass and Turner 1997, pp. 901–902; Kennish 2001, pp. 734–737). Tidal restrictions, such as water control structures, bridges, and culverts built for the purposes of flood protection, restricting salt water intrusion, and modification of vegetation, have also affected coastal salt marshes.

All of these alterations to drainage affect the hydrology, sediment and nutrient transport, and salinities of wetland habitats used by the eastern black rail, which in turn affect the habitat's composition and structure. These changes can lead to instability in the duration and intensity of hydroperiods, affect associated vegetation communities, and impact the ability of marsh habitats to adapt to changing conditions. This situation affects the ability of the habitat to support populations of the eastern black rail, by exposing eastern black rails to unsuitable water regimes or converted habitats.

Sea Level Rise and Tidal Flooding

Representative concentration pathways (RCPs) are the current set of scenarios used for generating projections of climate change; for further discussion, please see the SSA report (Service 2019, entire). Recent studies project global mean sea level rise to occur within the range of 0.35 to 0.95 meters (m) (1.14 to 3.11 feet (ft)) for RCP 4.5, and within the range of 0.5 to 1.3 m (1.64 to 4.27 ft) for RCP 8.5, by 2100 (Sweet *et al.* 2017b, p. 13). The Northeast Atlantic and western Gulf of Mexico coasts are projected to have amplified relative sea level rise greater than the global average under almost all future sea level rise scenarios through 2100 (Sweet *et al.* 2017b, p. 43).

Sea level rise will amplify coastal flooding associated with both high tide floods and storm surge (Buchanan *et al.* 2017, p. 6). High tide flooding currently has a negative impact on coastal ecosystems, and annual occurrences of high tide flooding have increased five- to ten-fold since the 1960s (Reidmiller *et al.* 2018, p. 728). In addition, extreme coastal flood events are projected to increase in frequency and duration, and the annual number of days impacted by nuisance flooding is increasing, along the Atlantic and Gulf Coasts (Sweet *et al.* 2017b, p. 23). Storm surges from tropical storms will travel farther inland.

Along the Texas Gulf Coast, relative sea level rise is twice as large as the global average (Reidmiller *et al.* 2018, p. 969). Over the past 100 years, local sea level rise has been between 12.7 and 43.2 cm (5 to 17 in), resulting in an average loss of 73 hectares (180 acres) of coastline per year, and future sea level rise is projected to be higher than the global average (Runkle *et al.* 2017b, p. 4; Reidmiller *et al.* 2018, p. 972). In South Carolina, sea level has risen by 3.3 cm (1.3 in) per decade, nearly double the global average, and the number of tidal flood days has increased (Runkle *et al.* 2017c, p. 4). Projected sea level rise for South Carolina is higher than the global average, with some projections indicating sea level rise of 1.2 m (3.9 ft) by 2100 (Runkle *et al.* 2017c, p. 4). The number of tidal flood days are projected to increase and are large under both high and low emissions scenarios (Runkle *et al.* 2017c, p. 4). Similarly, in Florida, sea level rise has resulted in an increased number of tidal flooding days, which are projected to increase into the future (Runkle *et al.* 2017a, p. 4).

Even with sea level rise, some tidal wetlands may persist at slightly higher elevations (*i.e.,* ''in place'') for a few decades, depending on whether plant primary productivity and soil accretion (which involves multiple factors such as plant growth and decomposition rates, buildup of organic matter, and deposition of sediment) can keep pace with the rate of sea level rise, thus avoiding ''drowning'' (Kirwan *et al.* 2016, entire). Under all future projections, however, the rate of sea level rise increases over time (Sweet *et al.* 2017a, pp. 342–345). A global analysis found that in many locations salt marsh elevation change did not keep pace with sea level rise in the last century and even less so in the past two decades, and concluded that the rate of sea level rise in most areas will overwhelm the capacity of salt marshes to persist (Crosby *et al.* 2016, entire). Under this analysis, based on RCP 4.5 and RCP 8.5 scenarios and assuming continuation of the average rate of current accretion, projected marsh drowning along the Atlantic coast at late century (2081–2100) ranges from about 75 to 90 percent (Crosby *et al.* 2016, p. 96, figure 2). The accretion balance (reported accretion rate minus local sea level rise) is negative for all analyzed sites in the Louisiana Gulf Coast and for all but one site in the mid-Atlantic area (figures 3c and 3d in Crosby *et al.* 2016, p. 97); both of these areas are part of the range of the eastern black rail.

Sea level rise will reduce the availability of suitable habitat for the eastern black rail and overwhelm habitat persistence. Sea level rise and its effects (*e.g.,* increased flooding and inundation, salt water intrusion) may affect the persistence of coastal or wetland plant species that provide habitat for the eastern black rail (Warren and Niering 1993, p. 96; Morris *et al.* 2002, p. 2876). Increased high tide flooding from sea level rise, as well as the increase in the intensity and frequency of flooding events, will further impact habitat and directly impact eastern black rails through nest destruction and egg loss (Sweet *et al.* 2017b, pp. 35–44).

Land Management Practices (Fire Management, Haying, Mowing, and Other Mechanical Treatment Activities, and Grazing)

Fire Management

Fire suppression has been detrimental to habitats used by the eastern black rail by allowing encroachment of woody plants. Without fire or alternate methods of disturbing grassland and emergent wetland vegetation such as mowing or rotational grazing, the amount of preferred habitat for eastern black rails is expected to continue to decrease in some regions due to encroachment by woody vegetation, such as coastal Texas (Grace *et al.* 2005, p. 39). Therefore, prescribed (controlled) fire is one tool to maintain and restore habitat for this subspecies at the desired seral stage (intermediate stages of ecological succession).

While fire is needed for the maintenance of seral stages for multiple rail species, the timing and frequency of the burns, as well as the specific vegetation types targeted, can lead to undesirable effects on rail habitats in some cases (Eddleman *et al.* 1988, pp. 464–465). Burning salt marshes during drought or while the marshes are not flooded can result in root damage to valuable cover plants (Nyman and Chabreck 1995, p. 138). Controlled burning of peat, or accumulated organic litter, when marshes are dry has resulted in marsh conversion to open water due to the loss of peat soils. Variations in soil type supporting the same plant species may lead to differing recovery times post-burn, and therefore potentially unanticipated delays in the recovery of black rail habitat (McAtee et al. 1979, p. 375). Simply shifting the season of burn may alter plant species dominance and the associated structure available to the eastern black rail, as is seen with spring fire conversion of chairmaker's bulrush (*Schoenoplectus americanus*) to salt meadow cordgrass

(*Spartina patens*) (Nyman and Chabreck 1995, p. 135).

Prescribed fire at any time of the year may result in mortality to adult and juvenile birds, as well as eggs and chicks during the breeding season. Fall and winter burns are more likely to avoid reproductive season impacts (Nyman and Chabreck 1995, p. 138). When burning is needed during the nesting season (for example, brush control), loss of eggs and chicks can be reduced by limiting the proportion of eastern black rail habitat to be burned within a management boundary. Incorporating additional best management practices (BMPs) such as leaving unburned refugia within a controlled burn and planning burn rotations so that adjacent suitable habitat is present to accommodate these rails post-burn, are important at all times of the year to reduce mortality of birds.

Fire pattern can have profound effects on birds. Controlled burns can result in indirect rail mortality, as avian predators attracted to smoke are able to capture rails escaping these fires (Grace *et al.* 2005, p. 6). Because eastern black rails typically prefer concealment rather than flight to escape threats, the birds may attempt to escape to areas not affected by fire, such as wetter areas or adjacent areas not under immediate threat. Ring, expansive, or rapidly moving fires are therefore not conducive to rail survival (Grace *et al.* 2005, p. 9; Legare *et al.* 1998, p. 114). On the other hand, controlled burns designed to include unburned patches of cover (refugia) may positively influence eastern black rail survival. For example, in Florida, a mosaic of unburned vegetation patches (refugia) 0.1 to 2.0 ac in size facilitated eastern black rail survival during a 1,600-ac controlled burn during the late summer, whereas a controlled burn of a 2,400-ac marsh during the winter resulted in direct mortality of 34 eastern black rails when refugia areas were not provided (Legare *et al.* 1998, p. 114; Legare 2018, pers. comm.). Prescribed fires that include patches of unburned habitat (refugia) scattered throughout provide escape cover for wildlife, including, but not limited to, eastern black rails (Legare *et al.* 1998, p. 114). Unburned strips of vegetation bordering the inside perimeters of burn units also are believed helpful as escape cover from both fire and avian predators (Grace *et al.* 2005, p. 35). Coastal marshes that are burned in staggered rotations to create a mosaic of different seral stages or are burned less frequently will continue to provide cover for marsh species, such as the eastern black rail (Block *et al.* 2016, p. 16).

Haying, Mowing, and Other Mechanical Treatment Activities

Haying, mowing, and other mechanical treatment activities are used throughout the range of the eastern black rail. Mechanical treatment activities maintain grasslands by reducing woody vegetation encroachment, which may provide suitable habitat for eastern black rails. However, these practices can have detrimental impacts to wildlife when used too frequently or at the wrong time of year (Beintema and Muskens 1987, p. 755; Bollinger *et al.* 1990, p. 148; Arbeiter *et al.* 2017, pp. 554–566). For example, at Quivira NWR in Kansas, haying at a frequency of once or twice per year resulted in no occupancy of hayed habitats by eastern black rails during the following year (Kane 2011, pp. 31–33). Further, haying or mowing timed to avoid sensitive stages of the life cycle (nesting and molt period) would be less detrimental to eastern black rails (Kane 2011, p. 33). Eastern black rails reproduce from approximately mid-March through September across a latitudinal gradient, and mechanical treatment activities during this time period disturbs eastern black rail adults and can potentially crush eggs and chicks. As with fire, when mechanical treatment activities are alternated to allow mosaics of treated and untreated habitat at all times, the site can continue to support cover-dependent wildlife (Tyler *et al.* 1998, pp. 45–49; Kleijn *et al.* 2010, pp. 476, 484; Arbeiter *et al.* 2017, pp. 562–566).

Grazing

Grazing, predominately by cattle, occurs on public and private lands throughout the range of the eastern black rail. Because eastern black rails occupy drier areas in wetlands and require dense cover, these birds are believed to be more susceptible to grazing impacts than other rallids (Eddleman *et al.* 1988, p. 463). Based on current knowledge of grazing and eastern black rail occupancy, the specific timing, duration, and intensity of grazing will result in varying impacts to the eastern black rail and its habitat. Light-to-moderate grazing may be compatible with eastern black rail occupancy under certain conditions, while intensive or heavy grazing is likely to have negative effects on eastern black rails and the quality of their habitat, specifically if the dense overhead cover that the bird requires is removed. It may benefit black rail habitat (or at least not be detrimental) when herbaceous plant production is stimulated (Allen-Diaz *et al.* 2004, p. 147) and the necessary overhead cover is maintained. In Kansas, eastern black rails were documented in habitats receiving rotational grazing during the nesting season that preserved vegetation canopy cover (Kane 2011, pp. 33–34). Black rails occur in habitats receiving light-to-moderate grazing (*i.e.,* Kane 2011; Richmond *et al.* 2012; Tolliver 2017). These results suggest that such grazing is an option for providing disturbance, which may promote black rail occupancy. However, cattle grazing at high intensities may not favor black rail occupancy, as heavy grazing or overgrazing reduces the wetland vegetation canopy cover (Richmond *et al.* 2010, p. 92).

In addition to the loss of vegetation cover and height (Chabreck 1968, p. 56; Whyte and Cain 1981, p. 66; Kirby *et al.* 1986, p. 496; Yeargan 2001, p. 87; Martin 2003, p. 22), grazing may also have direct negative effects on eastern black rails by livestock disturbing nesting birds or trampling birds and nests (Beintema and Muskens 1987, p. 755; Eddleman *et al.* 1988, p. 463; Jensen *et al.* 1990, pp. 73–74; Durham and Afton 2003, p. 438; Mandema *et al.* 2013, pp. 412–415). Heavy disturbance from grazing can also lead to a decline in eastern black rail habitat quality through soil erosion (Walker and Heitschmidt 1986, pp. 428, 430; Warren *et al.* 1986a, p. 486; Weltz and Wood 1986, p. 263), decreased sediment accumulation and increased soil compaction (Andresen *et al.* 1990, p. 146; Esselink *et al.* 2002, p. 27), diminished water infiltration (Warren *et al.* 1986b, p. 500), and increased salinities eventually leading to habitat conversion (Esselink *et al.* 2002, p. 28).

Stochastic Events (Extreme Weather Events)

Extreme weather effects, such as storms associated with frontal boundaries or tropical disturbances, can also directly affect eastern black rail survival and reproduction, and can result in direct mortality. Tropical storms and hurricanes are projected to increase in intensity and precipitation rates along the North Atlantic coast and Gulf Coast (Bender *et al.* 2010, p. 458; Kossin *et al.* 2017, pp. 259–260). The frequency of Category 4 and 5 tropical storms is predicted to increase despite an overall decrease in the number of disturbances (Bender *et al.* 2010, pp. 457–458). Storms of increased intensity, which will have stronger winds, higher storm surge, and increased flooding, cause significant damage to coastal habitats by destroying vegetation and

food sources, as well as resulting in direct mortality of birds. For example, Hurricane Harvey flooded San Bernard NWR in Texas with storm surge, which was followed by runoff flooding from extreme rainfall. This saltmarsh, occupied by eastern black rails, was inundated for several weeks (Woodrow 2017, pers. comm.). Increases in storm frequency, coupled with sea level rise, may result in increased predation exposure of adults and juveniles if they emerge from their preferred habitat of dense vegetation (Takekawa *et al.* 2006, p. 184). Observations show predation upon California black rails during high tides when the birds had minimal vegetation cover in the flooded marsh (Evens and Page 1986, p. 108).

Weather extremes associated with climate change can have direct effects on the eastern black rail, leading to reduced survival of eggs, chicks, and adults. Indirect effects on the eastern black rail are likely to occur through a variety of means, including long-term degradation of both inland and coastal wetland habitats. Other indirect effects may include loss of forage base of wetland-dependent organisms. Warmer and drier conditions will most likely reduce overall habitat quality for the eastern black rail. Because eastern black rails tolerate a narrow range of water levels and variation within those water levels, drying as a result of extended droughts may result in habitat becoming unsuitable, either on a permanent or temporary basis (Watts 2016, p. 120). Extreme drought or flooding conditions may also decrease bird fitness or reproductive success by reducing the availability of the invertebrate prey base (Hands *et al.* 1989, p. 5; Davidson 1992, p. 129). Lower rates of successful reproduction and recruitment lead to further overall declines in population abundance and resiliency to withstand stochastic events such as extreme weather events. The vulnerability of the eastern black rail to the effects of climate change depends on the degree to which the subspecies is susceptible to, and unable to cope with, adverse environmental changes due to long-term weather trends and more extreme weather events.

Human Disturbance

Human disturbance can stress wildlife, resulting in changes in distribution, behavior, demography, and population size (Gill 2007, p. 10). Activities such as birding and hiking, have been shown to disturb breeding and nesting birds. Disturbance may result in nest abandonment, increased predation, and decreased reproductive success, and in behavioral changes in non-breeding birds. Singing activity of breeding male birds declined in sites that experienced human intrusion, although the response varied among species and level of intrusion (Gutzwiller *et al.* 1994, p. 35). At the Tishomingo NWR in Oklahoma, recreational disturbances of migratory waterbirds accounted for 87 percent of all disturbances (followed by natural disturbances (10 percent) and unknown disturbances (3 percent)) (Schummer and Eddleman 2003, p. 789).

Many birders strive to add rare birds to their ''life list,'' a list of every bird species identified within a birder's lifetime. Locations of rare birds are often posted online on local birding forums or eBird, leading to an increased number of people visiting the location in an attempt to see or hear the bird. Due to its rarity, the eastern black rail is highly sought after by birders (Beans and Niles 2003, p. 96). Devoted birders may go out of their way to add an eastern black rail to their life list (McClain 2016, unpaginated). The efforts of birders to locate and identify rare birds, such as the eastern black rail, can have both positive and negative impacts on the bird and its habitat. Birders play an especially important role in contributing to citizen science efforts, such as the eBird online database, and have helped further our understanding of species' distributions and avian migration ecology in crucial ways (Sullivan *et al.* 2014, entire). Birders have provided valuable location information for eastern black rails that might have otherwise gone undetected and have made these records publicly available (see eBird's black rail account; eBird 2017, unpaginated).

While amateur and professional birding have made important contributions to our understanding of rare species like the eastern black rail, some birders may be more likely to pursue a sighting of a rare bird, as they may perceive the benefits of observing the bird to outweigh the impacts to the bird (Bireline 2005, pp. 55–57). As a result, methods may be employed to increase the likelihood of observing a rare bird, including the use of vocalized calls or audio recordings, as is the case for eastern black rails, or approaching birds in order to get a sighting (Beans and Niles 2003, p. 96; Bireline 2005, p. 55). These methods have the potential to disturb nesting birds or trample nests or eggs, and may lead to increased predation (Beans and Niles 2003, p. 96).

With the prevalence of smartphones, the use of playback calls has increased as recordings of birds are readily available on the internet, and birding websites and geographic site managers (State, Federal, or nongovernmental organizations) often provide guidance on the use of playback calls (Sibley 2001, unpaginated). The American Birding Association's Code of Birding Ethics encourages limited use of recordings and other methods of attracting birds, and recommends that birders never use such methods in heavily birded areas or for attracting any species that is endangered, threatened, of special concern, or rare in the local area (American Birding Association 2018, unpaginated). While most birders likely follow these ethical guidelines, using playback calls of eastern black rail vocalizations in attempts to elicit responses from the birds and potentially lure them into view is commonly done outside of formal eastern black rail surveys (eBird 2017, unpaginated). Due to the rarity of the eastern black rail, a few cases of trespassing are known from people looking for the bird (*e.g.,* Kerlinger and Wiedner 1990, p. 62). Trespassing has been documented on private lands and in areas on public lands specifically closed to the public to protect nesting eastern black rails (Hand 2017, pers. comm.; Roth 2018, pers. comm.). Trespassing may not only disturb the bird, but can also result in trampling of the bird's habitat, as well as of eggs and nests. Some State resource managers and researchers have expressed concern that releasing locations of eastern black rail detections may increase human disturbance and harassment of the subspecies. The potential for human disturbance varies by site and is likely less of an issue for areas that are remote and difficult to access.

Synergistic Effects

It is likely that several stressors are acting synergistically or additively on the subspecies. The combination of multiple stressors may be more harmful than a single stressor acting alone. For the eastern black rail, a combination of stressors result in habitat loss, reduced survival, reduced productivity, and other negative impacts on the subspecies. Sea level rise, coupled with increased tidal flooding, results in the loss of the high marsh habitat required by the subspecies. Land management activities, such as prescribed burning, that are conducted without maintaining dense overhead cover or providing refugia in eastern black rail habitat will further exacerbate impacts. If these combined stressors occur too often within and across generations, they will limit the ability of the subspecies to maintain occupancy at habitat sites, which may become lost or unsuitable for the subspecies and limit its ability to

colonize other previously occupied sites or new sites. For example, tidal marshes in Dorchester County, Maryland, in the Chesapeake Bay (specifically the areas of Blackwater NWR and Elliott Island) served as one of the most well-known former strongholds for the eastern black rail (Watts 2016, p. 22). These marshes have and continue to experience marsh erosion from sea level rise, prolonged flooding, a lack of a sufficient sediment supply, and land subsidence, as well as habitat destruction from nutria (*Myocastor coypus;* now eradicated) and establishment of the invasive common reed (*Phragmites australis*). On Elliott Island, high decadal counts of eastern black rails have declined from the hundreds in the 1950s to no birds detected in recent years (from 2012–2015 the peak count was a single bird, and no birds were detected in 2016) (Watts 2016, pp. 61–62).

Regulations and Conservation Efforts

Federal Protections

The Migratory Bird Treaty Act of 1918 (MBTA; 16 U.S.C. 703 *et seq.*) provides specific protection for the eastern black rail, which is a migratory bird under the statute. The MBTA makes it illegal, unless permitted by Federal regulation, ''by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, [or] any part, nest, or egg of any such bird . . . '' (16 U.S.C. 703(a)). Through issuance of permits for scientific collecting of migratory birds, the Service ensures that best practices are implemented for the careful capture and handling of eastern black rails during banding operations and other research activities. However, the December 22, 2017, Solicitor's Opinion, Opinion M–37050, concludes that consistent with the text, history, and purpose of the MBTA, the statute's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to direct and affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs. Therefore, take of an eastern black rail, its chicks, or its eggs that is incidental to another lawful activity does not violate the MBTA. Furthermore, the MBTA does not address the major stressors affecting the eastern black rail, which include habitat alteration and sea level rise. Given that only intentional take is prohibited under the MBTA and the habitat-based stressors to the black rail are not regulated, this law does not provide sufficient substantive protections to the eastern black rail.

Section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) and section 10 of the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. 403) are intended to protect jurisdictional wetlands from excavation and filling activities. The U.S. Army Corps of Engineers (USACE), in conjunction with the U.S. Environmental Protection Agency, administers permits that require avoidance, minimization, and compensation for projects affecting wetlands. Projects that cannot avoid impacts to wetlands must compensate for their impacts through a restoration enhancement or preservation action for the equivalent functional loss. Mitigation banks are often used, in which actions at a specific location compensate for impacts in a considerably wider service area. However, the wetland types affected are not always the same types that are restored or enhanced, and there is considerable uncertainty that current mitigation practices would support the presence of black rails.

State Protections

The black rail is listed as endangered under State law by seven States within the subspecies' range: Delaware, Illinois, Indiana, Maryland, New Jersey, New York, and Virginia. The species was formerly listed as endangered in Connecticut, but was considered extirpated during the last listing review based on extant data and was subsequently delisted. Protections are afforded to wildlife listed as either endangered or threatened by a State, but those protections vary by State. Although we have no information as to the effectiveness of these State regulations as they pertain to the conservation of the eastern black rail, one benefit of being State-listed is to bring heightened public awareness of the bird's existence.

In Delaware, the importation, transportation, possession, or sale of any endangered species or parts of endangered species is prohibited, except under license or permit (title 7 of the Delaware Code, sections 601–605). Illinois also prohibits the possession, take, transport, selling, and purchasing, or giving, of a listed species, and allows incidental taking only upon approval of a conservation plan (Illinois Compiled Statutes, chapter 520, sections 10/1–10/11). Indiana prohibits any form of possession of listed species, including taking, transporting, purchasing, or selling, except by permit (title 14 of the Indiana Code, article 22, chapter 34, sections 1–16 (I.C. 14–22–34–1 through 16)). Listed species may be removed, captured, or destroyed only if the species is causing property damage or is a danger to human health (I.C. 14–22–34–16).

Similar prohibitions on the possession of a listed species in any form, except by permit or license, are in effect in Maryland (Code of Maryland, Natural Resources, section 10–2A–01–09), New Jersey (title 23 of the New Jersey Statutes, sections 2A–1 to 2A–15), New York (New York's Environmental Conservation Law, article 11, title 5, section 11–0535; title 6 of the New York Codes, Rules and Regulations, chapter I, part 182, sections 182.1–182.16), and Virginia (Code of Virginia, title 29.1, section 29.1, sections 563–570 (29.1–563–570)). Violations of these statutes typically are considered misdemeanors, generally resulting in fines or forfeiture of the species or parts of the species and the equipment used to take the species. Some States also have provisions for nongame wildlife and habitat preservation programs (*e.g.,* title 7 of the Delaware Code, sections 201–204; Code of Maryland, Natural Resources, section 1–705). For example, in Maryland, the State Chesapeake Bay and Endangered Species Fund (Code of Maryland, Natural Resources, section 1–705) provides funds to promote the conservation, propagation, and habitat protection of nongame, threatened, or endangered species.

Black rail is listed as a ''species in need of conservation'' in Kansas, which requires conservation measures to attempt to keep the species from becoming a State-listed endangered or threatened species (Kansas Department of Wildlife, Parks and Tourism 2018, unpaginated). Black rail also is listed as a species of ''special concern'' in North Carolina and requires monitoring (North Carolina Wildlife Resources Commission 2014, p. 6). The species is identified as a ''species of greatest conservation need'' in 19 State wildlife action plans as of 2015 (USGS 2017, unpaginated). However, no specific conservation measures for black rail are associated with these listings, and most are unlikely to address habitat alteration or sea level rise.

Other Conservation Efforts

The Atlantic Coast Joint Venture (ACJV) recently decided to focus efforts on coastal marsh habitat and adopted three flagship species, one being the

eastern black rail, to direct conservation attention in this habitat. As part of this initiative, the ACJV-led Black Rail Working Group (BLRA WG) has drafted population goals for the eastern black rail and is drafting a Black Rail Conservation Plan (ACJV BLRA WG 2018, 2019, entire). An initial workshop to start development of the Conservation Plan took place in October 2018. Workshop participants identified five highest priority strategies to conserve the species in the Atlantic Flyway: (1) Create new habitat, (2) promote improved impoundment management, (3) develop and promote black rail-friendly fire best management practices, (4) develop and promote black rail-friendly agricultural practices, and (5) develop a landowner assurances program (ACJV BLRA WG 2019, entire). The Conservation Plan is expected to be completed in 2020. ACJV staff are also in the early stages of coordinating several other black rail-specific projects, namely, a species distribution map and an adaptive management tool. In addition, staff are working with partners on a Salt Marsh Bird Conservation Plan, which identifies stressors to Atlantic Coast tidal marshes and the efforts needed to conserve these habitats to maintain bird populations (ACJV 2019, entire). A draft of the plan has been developed, and a final plan is expected late 2019.

The Gulf Coast Joint Venture (GCJV) has had the eastern black rail listed as a priority species since 2007 (GCJV 2005, unpaginated). As a priority species, the black rail is provided consideration during the review of North American Wetland Conservation grant applications (Vermillion 2018, pers. comm.). Although detailed planning for the eastern black rail is not yet complete, the subspecies is considered in coastal marsh habitat delivery efforts discussed by GCJV Initiative Teams. Eastern black rails are believed to benefit from a plethora of coastal marsh habitat delivery efforts of GCJV partners, including projects authorized under the North American Wetland Conservation Act (16 U.S.C. 4401 *et seq.*), the Coastal Wetlands Planning, Protection and Restoration Act (16 U.S.C. 3951 *et seq.*), and the Service's Coastal Program, as well as management actions on State and Federal refuges and wildlife management areas. Eastern black rails will benefit when projects conserve, enhance, or restore suitable wetland habitat and BMPs, such as the use of prescribed burns and brush-clearing activities, are employed to account for the subspecies.

In November 2016, the Texas Parks and Wildlife Department (TPWD), in partnership with the Texas Comptroller's Office, initiated the Texas Black Rail Working Group (Shackelford 2018, pers. comm.). The main purpose of the group is to provide a forum for collaboration between researchers and stakeholders to share information about what is known about the species, identify information needs, and support conservation actions. The group has held two in-person meetings thus far: January 10, 2017, and August 9–10, 2018, and produced two newsletters and a conservation planning report (Horndeski and Shackelford 2017, entire; Horndeski 2018a, 2018b, entire).

Future Scenarios

As discussed above, we define viability as the ability of a species to sustain populations in the wild over time. To help address uncertainty associated with the degree and extent of potential future stressors and their impacts on the eastern black rail's needs, we applied the 3Rs using five plausible future scenarios. We devised these five scenarios by identifying information on the primary stressors anticipated to affect the subspecies into the future: Habitat loss, sea level rise, groundwater loss, and incompatible land management practices. These scenarios represent a realistic range of plausible future scenarios for the eastern black rail.

We used the results of our occupancy model to create a dynamic site-occupancy, projection model that allowed us to explore future conditions under these scenarios for the Mid-Atlantic, Great Plains, Southeast Coastal Plain, and Southwest Coastal Plain analysis units. We did not project future scenarios for the New England, Appalachian, or Central Lowlands analysis units because, as discussed earlier in this document, we consider these analysis units to be currently effectively extirpated and do not anticipate that this situation will change in the future. Our projection model incorporated functions to account for changes in habitat condition (positive and negative) and habitat loss over time. The habitat loss function was a simple reduction in the total number of possible eastern black rail sites at each time step in the simulation by a randomly drawn percentage that was specified under different scenarios to represent habitat loss due to development or sea level rise. We used the change in ''developed'' land cover from the National Land Cover Database (Homer *et al.* 2015, entire) to derive an annual rate of change in each region, and we used NOAA climate change and sea level rise projections to estimate probable coastal marsh habitat loss rates; storm surge was not modeled directly (Parris *et al.* 2012, entire; Sweet *et al.* 2017b, entire). In the Great Plains analysis unit, we used ground water loss rates, instead of sea level rise data, to represent permanent habitat loss in the region. The overall groundwater depletion rate was based on the average over 108 years (1900–2008) (Konikow 2013, entire).

Our five scenarios reflected differing levels of sea level rise and land management, and the combined effects of both. These future scenarios forecast site occupancy for the eastern black rail out to 2100, with time steps at 2043 and 2068 (25 and 50 years from present, respectively). Each scenario evaluates the response of the eastern black rail to changes in three primary risks we identified for the subspecies: Habitat loss, sea level rise, and land management (grazing, fire, and haying). The trends of urban development and agricultural development remain the same, *i.e.,* follow the current trend, for all five scenarios. We ran 5,000 replicates of the model for each scenario. For a detailed discussion of the projection model methodology and the five scenarios, please refer to the SSA report (Service 2019, entire).

The model predicted declines in all analysis units across all five plausible future scenarios. Specifically, they predicted a high probability of complete extinction for all four analysis units under all five scenarios by 2068. The model predicted that, depending on the scenario, the Southeast Coastal Plain and Mid-Atlantic Coastal Plain analysis units would reach complete extinction between 35 and 50 years from the present; the Great Plains analysis unit would reach complete extinction between 15 to 25 years from the present; and the Southwest Coastal Plain analysis unit would reach complete extinction between 45 to 50 years from the present. Most predicted occupancy declines were driven by habitat loss rates that were input into each scenario. The model results exhibited little sensitivity to changes in the habitat quality components in the simulations for the range of values that we explored. For a detailed discussion of the model results for the five scenarios, please refer to the SSA report (Service 2019, entire).

Under our future scenarios, the Mid-Atlantic Coastal Plain, Great Plains, Southwest Coastal Plain, and Southeast Coastal Plain analysis units generally exhibited a consistent downward trend in the proportion of sites remaining

occupied after the first approximately 25 years for all scenarios. Given that most of the predicted declines in eastern black rail occupancy were driven by habitat loss rates, and future projections of habitat loss are expected to continue and be exacerbated by sea level rise or groundwater loss, resiliency of the four remaining analysis units is expected to decline further. We expect all eastern black rail analysis units to have no resiliency by 2068, as all are likely to be extirpated by that time. We have no reason to expect the resiliency of eastern black rail outside the contiguous United States to improve in such a manner that will substantially contribute to its viability within the contiguous U.S. portion of the subspecies' range. Limited historical and current data, including nest records, indicate that resiliency outside of the contiguous United States will continue to be low into the future, or decline if habitat loss or other threats continue to impact these areas.

We evaluated representation by analyzing the latitudinal variability and habitat variability of the eastern black rail. Under our future scenarios, the Great Plains analysis unit is projected to be extinct within the next 15 to 25 years, which will result in the loss of that higher latitudinal representative unit for the subspecies. In addition, the three remaining analysis units (Mid-Atlantic Coastal Plain, Southwest Coastal Plain, and Southeast Coastal Plain) are predicted to decline and reach extinction within the next 50 years. Thus, the subspecies' representation will continue to decline.

The eastern black rail will have very limited redundancy in the future. The Great Plains analysis unit will likely be extirpated in 15 to 25 years, leading to further reduction in redundancy and resulting in only coastal populations of the eastern black rail remaining. Having only coastal analysis units remaining (and with even lower resiliency than at present) will further limit the ability of the eastern black rail to withstand catastrophic events, such as flooding from hurricanes and tropical storms.

Please refer to the SSA report (Service 2019, entire) for a more detailed discussion of our evaluation of the biological status of the eastern black rail, the influences that may affect its continued existence, and the modeling efforts undertaken to further inform our analysis.

Summary of Changes From the Proposed Rule

This final rule incorporates changes to our proposed rule based on the comments we received, as discussed below in the Summary of Comments and Recommendations. Based on these comments, we also incorporated as appropriate new information into our SSA report, including updated survey information from Colorado, North Carolina, and Georgia. Small, nonsubstantive changes and corrections were made throughout the document in response to comments. However, the information we received during the public comment period on the proposed rule did not change our determination that the eastern black rail is a threatened species. The information also did not cause us to revise our determination that designation of critical habitat for the eastern black rail is not prudent.

We received substantive comments on the proposed 4(d) rule and have made changes to this rule as a result of the public comments received. Below is a summary of substantive changes made to the final listing rule and 4(d) rule:

- Based on information received on South Dakota, we removed it from the list of States where eastern black rail is considered a vagrant.
- In the preamble to the 4(d) rule, we provided a description of ''dense overhead cover'' for the eastern black rail and identified three methods of assessing this cover.
- In the preamble to the 4(d) rule, we defined a ''management boundary'' to include individual landholdings, such as a National Wildlife Refuge boundary, or as being formed through landscape-level agreements across landholdings of different or contiguous ownerships.
- In the 4(d) rule and its preamble, we removed the seasonal restrictions and provided clarification on the BMPs identified under the fire management activities. Based on the comments received, we removed the prohibition of prescribed burn activities when these activities take place during the nesting, brooding, and post-breeding flightless molt period. We recognize the importance of using prescribed fire as a management tool for restoring and maintaining habitats on public and private lands and realize that, in order to meet specific management goals, flexibility is needed with regard to the timing of prescribed fire application. For example, a prescribed burn during the growing season may be necessary to target invasive vegetation. We also acknowledge that prescribed burns conducted at any time of the year that do not provide for escape routes and refugia may result in negative impacts to eastern black rails. Under the final 4(d) rule, incidental take of eastern black rails resulting from prescribed fires is prohibited unless BMPs that minimize negative effects of the prescribed burn on the eastern black rail are employed and a portion of occupied dense cover for the rail is maintained within management boundaries.

We received comments requesting that we provide more information or clarification on the BMPs to use when conducting prescribed burns in eastern black rail habitat. We received feedback on the BMPs from fire practitioners within the Service who have experience managing for prescribed fire within eastern black rail habitat. We determined that at least 50 percent of the eastern black rail habitat within the management boundary should provide dense overhead cover required by the species within one calendar year, and we revised the 4(d) preamble and rule accordingly.

In order to accommodate smaller landholdings, we are excepting landholdings smaller than 640 acres from maintaining 50 percent of eastern black rail habitat in any given calendar year, as we realize it could be challenging to manage for this percentage on small parcels of land. We clarified examples of tactics that can be used to provide unburned refugia and escape routes for the eastern black rail and identified that unburned refugia patches should be no smaller than 100 square feet.

- In the 4(d) preamble and rule, we clarified the exception for the haying, mowing, and other mechanical treatment activities as to existing infrastructure that may be included in the exception. We clarified that existing infrastructure includes existing firebreaks, roads, rights-of-way, levees, dikes, fence lines, airfields, and surface water irrigation infrastructure (*e.g.,* head gates, ditches, canals, water control structures and culverts).
- In the 4(d) preamble and rule, we added an exception for incidental take that results from mechanical treatment activities that are done during the nesting or brooding periods with the purpose of controlling woody encroachment or other invasive plant species to restore degraded habitat.
- In the 4(d) rule and preamble, we removed the reference to ''intensive or heavy grazing'' in the prohibition. Based on a review of public comments, the terms ''light,'' ''moderate,'' and ''heavy'' grazing caused confusion. Eastern black rails may be found in grazed areas as long as dense overhead cover remains to provide them with suitable habitat. Therefore, grazing densities should maintain the dense overhead cover required by the eastern black rail and allow for the long-term maintenance of habitat conditions required by the subspecies. Because eastern black rails

require this dense overhead cover year-round, and not just during the nesting, brood-rearing, or flightless molt period, we removed the seasonal restriction on grazing activities. The final 4(d) rule prohibits incidental take resulting from only those grazing activities on public lands, either individually or cumulatively with other land management activities, that do not maintain the dense overhead cover required by the subspecies in at least 50 percent of eastern black rail habitat.

• We added a prohibition to the 4(d) rule that prohibits incidental take of the eastern black rail that results from long-term or permanent conversion, fragmentation, and damage of persistent emergent wetland habitat and the contiguous wetland-upland transition zone to other habitat types or land uses. We received public comments requesting that we consider prohibiting activities, such as road construction, residential, commercial, and industrial development, commercial development, and oil and natural gas exploration and extraction, including seismic lines, as these may have negative impacts on the eastern black rail and its habitat. In our SSA report and proposed and final rule for the eastern black rail, we identified habitat loss and fragmentation as an ongoing and future threat to the subspecies. We agree that protecting the persistent emergent wetland habitat and contiguous wetland-upland transition zone is necessary and advisable for the conservation of the eastern black rail.

• We added an exception to the 4(d) rule for incidental take of eastern black rails that may result from prescribed burns, grazing activities, and mechanical treatment activities that take place in existing moist soil management units or prior converted croplands, such as impoundments for rice or other cereal grains. We received public comments requesting that we consider an exception for these types of units. Some individual managed wetland units have an established history of intensive vegetation and soil management, which may include burning during the growing season on an annual or nearly annual basis (*e.g.,* moist soil management). In contrast to emergent wetlands, these wetland units have established objectives to maintain unvegetated (*e.g.,* mudflat), sparsely vegetated, and/or primarily annual plant communities that may not provide vegetative cover during a substantial portion of the growing season.

• We added an exception to the 4(d) rule for incidental take that may result from efforts to control wildfires and an exception for incidental take resulting from the establishment of new firebreaks (for example, to protect wildlands or manmade infrastructure) and new fence lines. Both of these activities allow for management that will benefit the conservation of the eastern black rail and its habitat, as well as provide for public safety.

Summary of Comments and Recommendations

In the proposed rule published on October 9, 2018 (83 FR 50610), we requested that all interested parties submit written comments on the proposal by December 10, 2018. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. A newspaper notice inviting general public comments was published in the USA Today on October 15, 2018. We did not receive any requests for a public hearing. All substantive information provided during the comment period has either been incorporated directly into the SSA report or this final determination or addressed below.

Peer Reviewer Comments

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from knowledgeable individuals with scientific expertise that included familiarity with the eastern black rail and its habitat, biological needs, and threats. During development of the SSA report, we reached out to 10 peer reviewers and received responses from 5. We reviewed all comments received from the peer reviewers for substantive issues and new information regarding the eastern black rail. All comments were incorporated into the SSA report prior to the proposed rule. The reviewers were generally supportive of our approach and made suggestions and comments that strengthened our analysis. Peer reviewer comments are addressed in the following summary and incorporated into the SSA report and this final rule as appropriate.

1. *Comment:* One peer reviewer suggested we include additional discussion on the functional aspects of slope and hydrology in our Habitat Description provided in the SSA report. The commenter stated that this section focused almost entirely on floristics and the section would benefit from more discussion of habitat structure.

Response: The Habitat Description section describes the floristic communities associated with the presence of eastern black rails. These floristic communities have associated relationships with slope and hydrology, which may vary across the range of the species. We have updated the SSA to include more information on habitat structure, including slope and hydrology in eastern black rail habitat.

2. *Comment:* One peer reviewer requested that we add a summary of the information on the rapid declines of eastern black rail populations.

Response: We have added this information to chapter 2 of the SSA report.

3. *Comment:* One peer reviewer requested that we add a figure to show the analysis units where the eastern black rail is considered extirpated.

Response: We include a map in the SSA report that identifies the five analysis units. In the report's text, we identify the three analysis units that we consider to be effectively extirpated: New England, Appalachians, and Central Lowlands due to recent low numbers of detections and documented extirpations from previously occupied areas.

4. *Comment:* One peer reviewer requested that we provide a 'minimum number' of eastern black rails in the analysis units. This reviewer stated that it would highlight how dire the situation is for this subspecies across all of its range. The reviewer noted that the subspecies has been extirpated from a large percentage of its range and has declined by over 90 percent in areas that were former strongholds.

Response: We added a table to the SSA report that provides population estimates (reported as the number of breeding pairs) for eastern black rail in the northeast and southeast United States. We also provided additional discussion in chapter 2 of the SSA report on population declines.

5. *Comment:* One peer reviewer requested that we provide a more detailed description of the projection model and the data that drive the model.

Response: We expanded the discussion in the SSA report and the Appendices.

6. *Comment:* One peer reviewer commented that the current condition analysis underestimated the range of habitat the eastern black rail has used and will accept. According to the reviewer, eastern black rails have historically nested in a range of situations along the coast and inland that are connected by some physical characteristics. The peer reviewer stated that most of the recent survey data came from coastal marshes, which represents a subset of what the species has used, and so may underestimate resiliency.

Response: We respectfully disagree with this comment. The eastern black

rail has a very small home range. There is currently substantial habitat available that is not being used at locations where we know the bird is present. The fact that habitats are not being fully used indicates that there is a lack of ''resiliency'' for the population under current conditions. The limiting factor does not appear to be habitat. Further, our current condition analysis was informed by our analysis units, which were developed using data from South Carolina, Florida, Texas, and Kansas.

7. *Comment:* One peer reviewer commented that the eastern black rail has historically shown a pattern of colonization that puts it in the pioneer category, that is, it can take advantage of habitat patches that are ephemeral. While the eastern black rail may require a narrow niche in terms of vegetation structure and hydrology, it does appear capable of finding locations that have these preferred habitat characteristics.

Response: We added a discussion of this adaptive potential into the SSA report in chapter 4.

8. *Comment:* One peer reviewer noted that some eastern black rails are migratory, but acknowledged that this cannot really be incorporated into a dynamic occupancy model. However, the reviewer suggested we note this in our discussion of the model.

Response: We agree that some eastern black rails are migratory. However, we note that we are trying to understand how populations might change and it is likely that individual birds would breed in the same place. Eastern black rails that reside in northern latitudes migrate and overwinter at locations further south (Butler 2017). Since little is known about migration behavior and site fidelity of migrants, migration is not considered a factor in these analyses.

9. *Comment:* One peer reviewer asked why we used slope as a covariate in the development of our analysis units and whether we considered using elevation.

Response: The variation in elevation was very small, and we did not have enough information on elevation to find a relationship. In essence, the variables were colinear and elevation varied by little if at all. Slope, however, while colinear with elevation, had a wide range of values. In the end, elevation was not a useful variable for the analysis.

10. *Comment:* One peer reviewer identified a dataset from North Carolina that provides data on eastern black rails from the historical 'high use' part of the State, as well as two datasets from Maryland and New Jersey, and suggested we consider incorporating these data into our dynamic occupancy model to inform the analysis of the Mid-Atlantic analysis unit. A second peer reviewer also identified the Maryland dataset and asked why these data were not incorporated into the dynamic occupancy model.

Response: Our occupancy analyses used to evaluate current condition required at least two consecutive years of survey data; therefore, the Maryland survey data were not used in our model, as these data were not collected in successive years. However, we used the Maryland dataset to calculate psi (detection) and occupancy for a single season and incorporated this information into our SSA report. These data were from the same sites surveyed three times over ~25 years (Brinker 2014, unpublished data). The Maryland sites saw a decline in estimated occupancy from ~0.25 to 0.03, giving credence to the inference that occupancy has declined for eastern black rails in the Mid-Atlantic Coastal Plain analysis unit. Similarly, the New Jersey and North Carolina datasets referred to by the commenter did not have successive years of surveys; however, the contemporary State data were used in the development of our analysis units (the data were insufficient for the dynamic occupancy analysis).

11. *Comment:* One peer reviewer noted that when developing the covariate analysis we do not have the high-resolution data, such as water depth data that has a resolution of 1 centimeter or vegetation data associated with the hydrology, that would provide the resolution really needed for this species and produce meaningful insights.

Response: We did not get these types of data (*e.g.,* water depth or vegetation) from available reports. In fact, we often had to use remotely-sensed information to help inform the model. The covariates might be considered coarse given that these variables had to be remotely sensed; however, these data were not collected during the studies across all sites, so this was the best available information. It should be noted that water depth is weather dependent and can change at any time, so we do not believe that a more resolute data set of ±1 centimeter would be meaningful. It is reasonable to desire higher resolution, *i.e.,* vegetation, in order to enhance our understanding; however, we conclude that the results are meaningful. We do note in our current condition occupancy analysis that the occupancy data indicated only the null model (*i.e.,* a model with no covariates) or a simple, year-specific model was the best model or equally as good. However, the occupancy and extinction risk analyses were useful, even if we cannot predict at a local scale why any individual site might disappear.

12. *Comment:* One peer reviewer asked how the occupancy modeling results were influenced by the selection of the survey data inputted into the model. For example, how would the results differ if survey points were used from areas that lacked black rails as opposed to locations where black rails are known to occur?

Response: Our assessment of current condition and future condition is based on the occupancy, colonization, and extirpation estimates from the repeated survey data, which rely on adequate site selection for black rail surveys in order for the results to be useful in making inferences about current and future population status. Improper site selection could introduce negative bias on model estimates (*i.e.,* decrease occupancy, decrease colonization) and thus lead to pessimistic assessment of current and future status. However, these survey points were specifically selected to target black rail habitat and sites where black rails had been previously observed. Surveyors used the best available information on black rail habitat preferences and set their survey points accordingly.

13. *Comment:* One peer reviewer noted that the datasets used in the dynamic occupancy model were based on point-count networks. As noted in the SSA report, the availability of such surveys is limited for the eastern black rail. The peer reviewer suggests an occupancy analysis based on marsh patches, rather than point counts, as it would allow for longer time series and a greater geographic area for analysis.

Response: In order to undertake an occupancy analysis based on marsh patches, we would need to come up with a definition of what constituted a patch, and these would likely not be equal in size across the range of the bird. Points have a distinct spatial definition that is repeatable. Additionally, we followed the National Marshbird Monitoring Plan, which uses a point-count approach. While developing an analysis based on marsh patches may allow for the use of longer time series and larger geographic areas, there would be an associated incorporation of error through defining marsh patches and extrapolation. The approach used directly relies on survey results, and, given the limited number of observations, using patches would have resulted in more temporal samples but fewer point samples.

14. *Comment:* One peer reviewer commented that land cover, vegetation type, land-use/modification, extent of

hydrologic disruption, or percentage change in wetland area may be more suitable variables to use in the projection model to predict extinction and colonization probability of eastern black rails.

Response: Other analysis already available showed that temperature was an important covariate. We included temperature to reflect those existing analyses. Precipitation was used because it was colinear with wetland water depth and wetland spatial extent for this species. Some of these variables were used in the projection modeling, as well. Assumptions of both models were clearly articulated in the SSA report.

15. *Comment:* One peer reviewer stated that the definition of a site is missing. This peer reviewer commented that the site-occupancy projection model does not consider site isolation, which limits eastern black rail colonization, and site size, which is a factor related to extinction.

Response: The definition of ''site'' was added to both the data analysis portion of the Appendix and to the simulation modeling portion (in the SSA report). The projection model was not spatially explicit; adding site isolation could potentially increase extinction risk at a local site and reduce colonization.

16. *Comment:* One peer reviewer requested clarification on how occupancy and resilience were related and if we were equating occupancy with resiliency.

Response: Given data availability, eastern black rail resiliency was estimated using the probability of occupancy at the analysis unit-level. Resiliency describes the ability of a population to withstand stochastic disturbance. Stochastic events are those arising from random factors such as weather, flooding, or fire. Resiliency is positively related to population size and growth rate and may be influenced by connectivity among populations. Generally speaking, populations need enough individuals, within habitat patches of adequate area and quality, to maintain survival and reproduction in spite of disturbance. Resiliency is measured using metrics that describe analysis unit condition and habitat; in the case of the eastern black rail, we used occupancy within the analysis units to assess resiliency.

17. *Comment:* One peer reviewer asked what would happen to our assessment of viability if our assessment had included types of habitat that eastern black rails can use that have not been sampled, such as the types of sites where black rails are found in California or the Front Range of Colorado.

Response: The projection models are entirely dependent on the data used to estimate occupancy and extinction dynamics. Our assessment included habitat types such as those found in California or Colorado (*i.e.,* inland palustrine marshes). The values we used to project future conditions used regional rates of wetland loss where available for emergent wetlands and did not distinguish between emergent wetland types.

Federal Agency Comments

18. *Comment:* A Federal agency recommended including the following on the list of mowing and mechanical treatment activity exemptions in the 4(d) rule as they are unlikely to occur in suitable eastern black rail habitat: Permanently flooded areas/open water exceeding [*e.g.,* less than 6 cm]; paved areas; cropland (*i.e.,* areas planted to annual row crops, such as corn and soybeans including hay in rotation); forest; and pasture or areas mowed, hayed, or grazed too frequently or intensively to allow development of dense emergent wetland vegetation.

Response: Incidental take associated with activities in habitats not suitable for the eastern black rail is not prohibited. While there is a chance that an individual eastern black rail may be present in such non-suitable habitats, it is the intent of this rule to focus the prohibitions in areas where eastern black rail occupancy is likely and where eastern black rails are present. Therefore, we are not adding a list of unsuitable habitats to the list of exceptions for haying, mowing, and other mechanical treatment activities because it is not necessary.

19. *Comment:* A Federal agency requested that we provide, in the exemptions section of the 4(d) rule, a list of land uses or habitat types where the eastern black rail is likely to be present.

Response: Section 2.4.2 of the SSA report describes the vegetation associations used by the eastern black rail. For more specific information, we encourage interested parties to contact the local Service field office.

20. *Comment:* One Federal agency commented that BMPs should aim to discourage eastern black rail occupancy, as opposed to limiting exemptions when infrastructure and human health or safety is the sole concern.

Response: We did not include measures to discourage eastern black rail occupancy, as these types of activities would not promote conservation of the species.

21. *Comment:* A Federal agency asked that the Service provide seasonal windows corresponding to the critical time periods during which activities are prohibited under the 4(d) rule.

Response: We revised the 4(d) rule to allow the use of prescribed fire and grazing during any time of year. Incidental take resulting from haying, mowing and other mechanical treatment activities is prohibited, with exceptions, in persistent emergent wetlands during the nesting and brood-rearing periods. We have provided additional information on critical time periods for the eastern black rail in the SSA report (Service 2019, entire).

22. *Comment:* One Federal agency commented that a blanket restriction on burning during the natural fire season in South Florida may reduce habitat suitability for other threatened and endangered species. One commenter recommended that the 4(d) rule exempt take of birds in South Florida that results from all prescribed fire being undertaken for all natural resource management, in recognition of the fact that fire is a natural and integral component of managing the ecosystems upon which black rails and countless other species occupy.

Response: Under the final 4(d) rule, incidental take of eastern black rails due to prescribed fire is prohibited unless BMPs that minimize negative effects of the prescribed burn on the eastern black rail are employed. If these practices are followed, prescribed burning is permissible year-round under the 4(d) rule. This is similar to recovery efforts for fire-adapted threatened and endangered species such as the Florida grasshopper sparrow, which involve precautions designed to limit mortality of eggs and chicks due to prescribed fire activities. The identified practices are necessary and advisable for the conservation of the eastern black rail and, if followed, should minimize take of the eastern black rail and allow for population growth and maintenance. The 4(d) rule provides land managers the flexibility to address habitat management goals while maintaining suitable habitat for eastern black rails.

23. *Comment:* One Federal agency commented that we should focus on the vegetative conditions desired when using prescribed fire for the eastern black rail rather than the methods and techniques used.

Response: Most grassland and marshland habitats are maintained through a disturbance regime with natural and anthropogenic fires being a primary disturbance agent. Survey results and field observations indicate that habitat is currently available that would support the eastern black rail but is unoccupied. Therefore, measures that

minimize mortality and improve survival are important if populations are expected to grow and spread to available habitats. For these reasons, we determined that the 4(d) rule must address methods and techniques used, as we find that this is necessary and advisable to provide for the conservation of the eastern black rail. The preamble of the 4(d) rule does discuss the dense overhead cover required by the eastern black rail and provides three examples of how to measure this cover.

24. *Comment:* One Federal agency and one State requested that activities to control nuisance and/or invasive wildlife, *e.g.,* hazing or pyrotechnics at airports, aerial shooting of feral swine, beaver and nutria trapping, and removal of beaver dams, be added to the exceptions from prohibitions.

Response: Incidental take of eastern black rails that results from activities to control nuisance and/or invasive wildlife is not prohibited by the 4(d) rule and, therefore, does not need to be listed under the exceptions from prohibitions. These activities include pyrotechnics at airports, aerial shooting of feral swine, beaver and nutria trapping, and removal of beaver dams.

State Comments

Listing

25. *Comment:* Three States and two public commenters expressed concerns regarding the limited information surrounding the species' and management needs overall, as well as in the SSA analysis and the listing and 4(d) rules. Commenters either requested that listing of the eastern black rail be delayed, or stated that a listing determination could not be made until more data were collected on the species.

Response: We are required to make our determination based on the best scientific and commercial data available at the time of our rulemaking, except in cases where the Secretary finds that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination. In such a case, under section 4(b)(6)(B)(i) of the Act, the Secretary may extend the 1-year period to make a final determination by up to 6 months for the purposes of soliciting additional data. In this case, we did not extend our final determination on the listing status of the eastern black rail because we determined that there was no substantial disagreement regarding the sufficiency or accuracy of the available threats information. We considered the best scientific and commercial data available regarding the eastern black rail to evaluate its potential status under the Act. We solicited peer review of our evaluation of the available data, and our peer reviewers supported our analysis. That said, science is a cumulative process, and the body of knowledge is ever-growing. In light of this, the Service will always take new research into consideration. If such research supports amendment or revision of this rule in the future, the Service will modify the rule consistent with the Act.

26. *Comment:* One State stated that there is little evidence to suggest eastern black rails can be reliably found at any location in Kansas other than Quivira National Wildlife Refuge. Another commenter stated that there is little evidence to suggest eastern black rails can be reliably found at Cheyenne Bottoms. Both commenters requested that the final rule reflect this information.

Response: We reviewed the best available information on the occurrences of eastern black rail in Kansas. This information indicates that eight counties have confirmed breeding records in Kansas, but Quivira National Wildlife Refuge is the only known site with consistent or regular breeding activities (Thompson *et al.* 2011, p. 123). We have revised the SSA report accordingly.

27. *Comment:* One State commenter stated that the single accepted record for South Dakota was rejected by the South Dakota Rare Bird Records Committee; therefore, no verified occurrence records of the subspecies occur in South Dakota.

Response: The reference to South Dakota has been removed from the final listing rule and from the corresponding sentence in the SSA.

28. *Comment:* One State and one other commenter stated that eastern black rail estimates for Texas are underestimates and public and private lands have ample area for eastern black rail. One commenter stated that the listing of the eastern black rail should be limited to the portions of the range where decline has been documented. This commenter stated that the species is declining in other parts of the range but is not imperiled on the Texas Gulf Coast. One commenter stated that the SSA used only Watts' data on subspecies abundance in Texas and excluded that provided by Tolliver (2017). This commenter also stated that eastern black rail estimates for Texas are underestimates, commenting that because the Texas coast is largely privately owned with sites managed similarly as described in Tolliver (2017), it is safe to assume that the Texas population of eastern black rails is higher than suggested in the SSA report.

Response: We analyzed occurrence records from Watts (2016), Smith-Patten and Patten (2012), and eBird, as well as from formal black rail surveys (*e.g.,* Tolliver 2017) in the SSA. The best available science as detailed in the SSA report documents 300–5,830 black rails known to exist along the Texas Gulf Coast (Tolliver *et al.* 2017). These estimates were made prior to Hurricane Harvey, which flooded vast areas of Texas coastal marshes for several weeks. Accordingly, we recognize that the estimates in Tolliver *et al.* (2017) may overestimate the current numbers of eastern black rails on the Texas coast in the protected areas that were surveyed. However, the occupancy rates provided by Tolliver *et al.* (2019) were obtained from sites known to be dependable for the species and data were collected by trained observers. The low occupancy rates indicate that not all available habitat is being used because so few individuals remain; these populations are not at density-dependent levels, *i.e.,* the habitat is not full or at carrying capacity. Note that the Tolliver *et al.* (2017) report stated that, while the researchers did extrapolate abundance of birds at survey points to perceived habitat available within the study sites, they cautioned against viewing this information as hard estimates of population size due to inherent flaws in making broad-scale extrapolations of this type. Site occupancy modeling detailed in the SSA projects that this species will disappear without human intervention. While this species may exist at undocumented locations on the Texas Gulf Coast, we have received no records of large numbers of previously undocumented eastern black rails for this portion of the range and have no scientific basis for assuming that they are present. Further, while there may be habitat on private lands outside of conservation lands that do support black rails, we have no data to indicate that the amount of suitable habitat on private lands is significant, nor was data that supports this claim provided during the public comment period.

It would not be appropriate to assume that the public lands evaluated by Tolliver 2017 and private lands are managed the same and that the population estimates for Texas are actually higher than what is suggested in the SSA report. While habitat can be assessed through remote sensing methods, its quality is extremely difficult to assess using this method. The quality of the habitat (dense overhead herbaceous cover) is necessary to support eastern black rail occupancy.

No data support the assumption that areas outside of those studied by Tolliver 2017 (and Tolliver *et al.* 2017 and 2019) support similar numbers of rails.

Decisions under the Act cannot be made on a State-by-State basis, but at the species, subspecies, or distinct population segment (DPS) level. For the eastern black rail, we have determined that the subspecies warrants listing as a threatened species throughout its range based on current threats and how those threats are likely to impact the subspecies into the future.

29. *Comment:* Several States and other commenters stated that the eastern black rail geographic range should include only areas where the species occurs regularly (annually or near annually), and should avoid identifying jurisdictions (*e.g.,* States) where eastern black rail is considered to be a vagrant. One State noted that the Service does not explain or provide justification as to why it accepted several additional reports as ''credible'' in Nebraska even though previous authors (Bray *et al.* 1986, Sharpe *et al.* 2001, Smith-Patten and Patten 2012, Silcock and Jorgensen 2018) and the Nebraska Ornithological Union Records Committee rejected most of these records and deemed them unacceptable, and that only records accepted by the State rare bird committee should be used. The State commenters specifically requested removal of entire States or large portions of their States, and requested that listing of the eastern black rail not confer any requirements for any Federal or State agency or private landowners in those areas. Commenters also recommended that the final rule rely only on accepted and verified records of eastern black rail when determining the species' range, in particular for migratory birds that breed in the interior United States.

Response: In both the proposed and final rules, we have defined the eastern black rail's range based on the best available data; however, we recognize that scientific understanding of this species' range will likely continue to improve over time. We recognize that Nebraska has limited detections of eastern black rails and the small likelihood that Nebraska holds any breeding populations. The Service may define a species' range using State boundaries or other geographically appropriate scale. How range is defined depends on characteristics of the species' biology and how it is listed (*i.e.,* as species/subspecies or a DPS). A species' or subspecies' range is typically described at the State or country scale.

We defined the eastern black rail's range based on the data from reliable published scientific literature, submitted manuscripts, species' experts, and occurrence data. Range descriptions do not imply any limitations on the application of the prohibitions in the Act or implementing rules. Such prohibitions apply to all individuals of the species, *wherever found* [emphasis added]. Therefore, whether a specific State or geographic area is included or excluded from the textual description or maps of the eastern black rail's range, the subspecies would be protected under the Act wherever it may be found, for as long as it remains listed. Further, the Act protects individuals of the species wherever they occur, regardless if they are considered vagrant in their occurrence. Conversely, if the species is not present in areas within the range states, no protections or restrictions would apply to those areas.

30. *Comment:* One State commented that invasive species such as nonnative *Phragmites* and nutria should be identified as threats to the eastern black rail.

Response: Our SSA report for the eastern black rail discusses the impacts of invasive species, including nonnative plants and nutria, on the eastern black rail. See Service 2019 (chapter 3).

31. *Comment:* One State commented that human disturbance is not a significant threat in North Carolina due to the remote nature of the habitat and the bird's nocturnal habits.

Response: The comment is noted; however, the evaluation of threats for this subspecies were done both at the analysis unit and the range-wide scale and reflect evidence that human disturbance can and does impact eastern black rail.

32. *Comment:* One State commented that the Service should consider the use of DPSs given the broad range of the eastern black rail and differences in potential threats, habitat types, and life cycles (migratory versus non-migratory) to those populations.

Response: The petition to list the eastern black rail requested that we consider whether listing is warranted for the species. In conducting status reviews, we generally follow a step-wise process where we begin with a range-wide evaluation, and only consider the status of other listable entities if the species does not warrant listing range-wide. Furthermore, the Service is to exercise its authority with regard to DPSs ''sparingly and only when the biological evidence indicates that such action is warranted'' (Senate Report 151, 96th Congress, 1st Session). For the eastern black rail, we have determined that the subspecies warrants listing as a threatened species throughout its range, so there was no need to identify or list a DPS.

Species Status Assessment (SSA)

33. *Comment:* Two States and several public commenters provided additional information concerning the historical and current status, range, distribution, and population size of the eastern black rail within the contiguous United States.

Response: In our SSA report, we have updated the Historical and Current Range and Distribution section to reflect additional information for Colorado, Delaware, Georgia, Maryland, and North Carolina.

34. *Comment:* Two States and one public commenter stated that there is a scarcity of data used for the Great Plains Analysis Unit in the SSA. One commenter stated that using general marshbird survey data from Kansas is not appropriate.

Response: The best available scientific and commercial information for this species was used to inform extinction probabilities. Data from black rail-specific surveys were not available for the Great Plains Analysis Unit; therefore, the general marshbird survey data from Kansas, which include eastern black rail detections, represent the best available scientific information. The general marshbird dataset was sufficient for occupancy modeling to be completed for this analysis unit. Further, the occupancy probabilities appeared to be well estimated since the standard error estimates for most parameters were less than the estimated mean (*i.e.,* the coefficient of variations are less than 1.0).

35. *Comment:* Two States encouraged the Service to apply more critical scrutiny to historical observations of eastern black rail that are used in the SSA, especially those from the interior portion of the range, and only include verified and substantial observations.

Response: The SSA report summarizes several past assessments, including Watts (2016) and Smith-Patten and Patten (2012), and identifies how those reports classified the eastern black rail. In collecting data points from different sources to assess the eastern black rail across its entire contiguous United States range, we went through a rigorous process to ensure validity of these data. We assessed datasets using different criteria for the analysis unit and occupancy modeling (occupancy modeling is described in section 4.2 of the SSA report). Latitude and longitude data provided by each research group and State wildlife agency was cross-checked with site identification codes. We visually assessed the proximity of points with identical site identification

codes by entering the points' latitude and longitude in the open-source geographic information systems program QGIS (QGIS Development Team 2009, unpaginated). We considered eastern black rail occurrences that occurred within a 200–250-meter radius within a season as a single occurrence (presence point) at a single site in a single year. The radius was applied to the data points to remove spatial autocorrelation to provide a robust dataset for the occupancy modeling. Each point was identified by a unique identification number rather than specific locality for all analyses to ensure privacy of the data.

36. *Comment:* One State suggested that the Service consider how survey effort or methodology might have influenced the figures on page 25 of the SSA.

Response: The figures used to describe the county-level occurrences were slightly modified from Watts (2016) based on more recent survey results. The county-level maps illustrate occurrence and are not intended to illustrate abundance. These maps did not need to be adjusted for survey effort or differing methodologies, as occurrence is not a measure of abundance. Survey effort for eastern black rails has actually increased over the last decade based on protocols developed by Conway (2011) and others for secretive marsh birds as well as an increased interest in secretive marsh bird conservation. Despite the increase in surveys, documented occurrences of eastern black rail continue to decrease in most States.

Critical Habitat

37. *Comment:* One State commented that if critical habitat is designated, it would be beneficial if it provides protection for extensive high marsh area but does not preclude beneficial management activities. Another State commented that any critical habitat designation must be based on the best available science and consider sea level rise, marsh habitat types, and tidal regimes. Several other States, and one organization, recommended that we not designate critical habitat for the eastern black rail.

Response: As discussed below (see Comment 39 and Critical Habitat), we have determined that designation of critical habitat would not be prudent for the eastern black rail.

38. *Comment:* We received comments from three States, one organization, and one other commenter recommending that we work with eBird to add eastern black rail to the sensitive species list.

Response: On May 3, 2019, the Service sent a letter to the Project Leader for eBird requesting that the eastern black rail be designated as a Sensitive Species in eBird. On May 23, 2019, we received a response from eBird indicating that eBird designated the eastern black rail as a Sensitive Species.

39. *Comment:* One State and several public commenters disagreed with the Service's determination that critical habitat is not prudent, or otherwise suggested that we reconsider this determination. Four commenters supported our not prudent determination. Comments in opposition to our not prudent determination were largely based on the potential benefits of designating critical habitat and skepticism that increased risk and harm to the eastern black rail would occur with designation, as birders already know the types of habitat occupied by eastern black rails and can locate remaining populations. One commenter stated that a critical habitat designation would provide added assurances to private and public land managers. One commenter requested designating all known occupied habitat as critical habitat as well as considering designating additional areas for habitat restoration and inland migration.

Response: We recognize that designation of critical habitat can provide benefits to listed species; however, for the eastern black rail, increased threats caused by designation outweigh the benefits (see 83 FR 50627–50628, October 9, 2018, for further discussion). We do not dispute the arguments of the commenters who suggested that birders may have enough information to be able to locate eastern black rail populations, particularly given the use of social media. We acknowledge that general location information is provided within the rule, and more specific location information can be found through other sources. However, we maintain that designation of critical habitat would more widely publicize known occupied locations of the eastern black rail and its essential habitat, thereby exacerbating the threat of disturbance, habitat destruction, or other harm from humans.

4(d) Rule

40. *Comment:* One State and another commenter requested that the 4(d) rule include a definition of ''present'' as well as specifics regarding timing, frequency, and methodology of surveys. The State also requested that the rule describe the details of survey methods. One State and another commenter questioned whether there is an accepted survey protocol for the eastern black rail. One State requested including in the 4(d) rule a monitoring requirement that at a minimum establishes presence/absence of the subspecies within the affected area prior to burning during the nesting or molt period.

Response: Eastern black rails are considered present when they are detected using visual, aural, or other means of detection. The Service will be providing guidance on survey methodology acceptable and appropriate for determining presence. However, these will not be included in the final 4(d) rule because methods may change as technology advances and methods to detect presence are significantly different than those used to determine other biological variables such as estimates of abundance or population size. Researchers are in the early stages of assessing the current survey protocols used for black rails and will be investigating the feasibility of developing a single standardized or semi-standardized survey protocol. Until the survey protocol assessment is completed,we recommend that surveyors use the survey methods currently employed by their State wildlife agency for black rails (*e.g.,* Watts *et al.* 2017). Many States use a protocol specific for black rails that has been modified from the Standardized North American Marsh Bird Monitoring Protocol (Conway 2011). The Service and partners are reviewing existing protocols and will be providing in the future additional recommended methods to assess absence/presence.

41. *Comment:* One State commented that it was unclear if properties located outside of eastern black rail habitat are exempt from the habitat management restrictions. Four States and several other commenters requested that the 4(d) rule apply only in areas where eastern black rails are known to occur and breed regularly. One State suggested the 4(d) rule should be applied only to wetlands that support or are reasonably likely to support breeding or wintering eastern black rails. One State asked the Service to reconsider the requirement in the 4(d) rule that interior States comply with BMPs outside of the reproductive period when black rails are not present. Another State commented that the prohibitions should not apply to northern interior States when the eastern black rail is not seasonally present. One commenter suggested that the 4(d) rule apply only to areas where eastern black rails have been documented within the past 5 years. One commenter requested the Service consider regional application of the 4(d) rule, as opposed to a range-wide application of the prohibitions. One

commenter responded that land management practices should receive prohibitions only on public lands where eastern black rails have been seen or heard within the previous 10 days and fire should receive prohibitions only when relative humidity is <20% and wind speed is >20 mph. This commenter stated that prohibitions should not apply across the entire range.

Response: The prohibitions and exceptions to the prohibitions identified in the 4(d) rule are considered necessary and advisable for the conservation of the eastern black rail. The activities identified in the 4(d) rule may result in incidental take of the bird if they are conducted in areas where the bird is present. These activities may take place across the range of the bird and are not limited to one specific geographic area or specific areas where eastern black rails regularly occur and breed. Therefore, the prohibitions and exceptions to the prohibitions that may result in incidental take of the eastern black rail apply across the range of the bird. If eastern black rails do not occur in an area that an activity, such as prescribed fire or mechanical treatment, is taking place, then no eastern black rails would be in a position to be taken; thus, the take prohibitions do not apply. If suitable habitat is present and eastern black rails may occur in the area, we recommend that surveys be conducted to inform the presence of eastern black rails, and we will provide future guidance on survey methodology. If habitat is unsuitable for the eastern black rail, such as forested areas or row crops, it is unlikely they will occur there. We are not limiting the 4(d) rule to locations where the eastern black rail has been seen or heard only within the previous 10 days; because the eastern black rail is a secretive bird, this measure may not provide enough protection to ensure that the species is not taken. We do not find that the prohibitions should apply only when relative humidity is less than 20 percent and wind speed is greater than 20 mph, as these conditions will vary across the range of the species and such a restriction will not support conservation of the species.

42. *Comment:* One State commented that restrictions under the 4(d) rule for the eastern black rail would reduce the State's ability to manage for the mottled duck. One commenter disagreed that mowing, disking, or other brush-clearing activities would have a measurable impact on eastern black rail recruitment and survival. The commenter also stated that these tools are essential wetland management tools for the mottled duck.

Response: There is considerable overlap between nesting habitat for eastern black rail and mottled ducks along the Gulf Coast. Mottled ducks, like the eastern black rail, use tall grass and require cover (Stutzenbaker 1988, pp. 72–81). Peak nesting for the mottled duck occurs in March, April, and May on the upper Texas Gulf Coast, but birds may nest January through August (Stutzenbaker 1988, p. 70). As this species requires approximately a month between initiation of egg-laying and hatching (Bielefeld *et al.* 2010, unpaginated), disruptions to nesting activity early in the season have the potential to greatly delay brood production following re-nesting attempts.

Mottled ducks and other species of migratory birds may benefit from less burning activity during their peak nesting months. Either absence of grazing or the presence of light-intensity grazing is beneficial to mottled duck nesting habitat, while heavy grazing is not beneficial (Stutzenbaker 1988, pp. 72–81; Durham and Afton 2003, p. 440). As the 4(d) rule for eastern black rail does not restrict grazing at any period during the year as long as the grazing activity supports the maintenance of appropriate dense overhead cover, we anticipate no conflicts between grazing activities designed to manage mottled duck nesting habitat and eastern black rail habitat. Mechanical treatment activities are prohibited during the nesting and brooding season for the eastern black rail, and this prohibition will avoid incidental take of eastern black rails (via nest destruction and chick mortality) and will likely benefit nesting mottled ducks, as well. The 4(d) rule does not prohibit prescribed burns within (or outside) the sensitive period. The 4(d) rule enables the use of land management tools, such as prescribed burns and mechanical treatment activities, for waterfowl management and may also have positive impacts on the mottled duck.

43. *Comment:* We were advised by one State, the Central Flyway Council, and three other commenters that prescribed fire, grazing, and haying, mowing, and mechanical treatment activities are needed to conserve eastern black rails and their habitat and are not incompatible with eastern black rails. One commenter said that land management practices are not detrimental to the species.

Response: Prescribed fire, grazing, haying, mowing, and mechanical treatment activities are positive techniques that can enhance and maintain eastern black rail habitat. However, any of these techniques may be used in a manner that will result in loss of eastern black rail individuals and reproductive potential. Throughout the SSA report (Service 2018 and Service 2019) and the proposed listing rule (83 FR 50610, October 9, 2018), the Service does not treat prescribed fire, grazing, haying, mowing, or mechanical treatment activities as incompatible land management practices. Please see sections 3.4.1–3.4.3 of the SSA report, where we review these management actions in a thorough fashion and pages 50618–50619 of the proposed rule, where we identify both the benefits and potential concerns to consider when using these practices: For example, if a prescribed fire does not ensure refugia are maintained for the subspecies or if grazing activities remove the dense overhead cover required by the eastern black rail. While active management is needed to maintain habitat for the eastern black rail and other species, incidental take associated with these activities should not prevent local population growth and recruitment in order to have an overall beneficial effect for the species. The final 4(d) rule allows for flexibility in applying prescribed burns, grazing, and haying, mowing and other mechanical treatment activities while also providing measures that are necessary and advisable to conserve the eastern black rail.

44. *Comment:* One State requested that the Service include current and relevant BMPs for each 4(d) rule prohibition, such as the Saltmarsh Conservation Business Plan, the Black Rail Conservation Plan, and State Wildlife Action Plans. The State requested that if no BMPs exist, we include a provision that supports the future development of BMPs.

Response: The 4(d) rule includes guidelines for land management actions, such as prescribed burns and grazing activities. It does not refer to the specific conservation plans identified by the commenter, as some of these may be in draft form at the time of this rule and may be revised in the future, and others may not have specific BMPs that are tied to the activities identified in the 4(d) rule. However, we encourage the continued development of these plans, as they will also provide for the conservation of the eastern black rail.

45. *Comment:* One State commented that seasonal prohibitions may affect their ability to manage conservation lands and suggested the restrictions be reduced by 4 to 6 weeks in the spring and 2 weeks in the fall.

Response: The Service agrees with the comment and has revised the prohibitions in the 4(d) rule to remove the seasonal restrictions for prescribed

burns and grazing. As modified, these prohibitions still promote habitat management activities while also conserving the eastern black rail.

46. *Comment:* One State commented that a more reasonable timeframe of the beginning of the nesting season in Oklahoma and Kansas would be mid to late May. The State also commented that several of the records currently classified as evidence of probable nesting are more likely to be of migrants. One State requested guidance as to when eastern black rails initiate the breeding, nesting, and molting period across North Carolina, as this will help facilitate fire planning.

Response: The Service appreciates the comments and recognizes that there is latitudinal variability with the nesting, brooding, and flightless molt periods across the range of the eastern black rail. We have expanded our discussion of the timing of the breeding, nesting, and molting period in the SSA report (Service 2019).

47. *Comment:* One State commented that the 4(d) rule proposed to apply broad management prohibitions on various forms of wetland management, and expressed concern that it would not be able to adequately manage its wetlands under the proposed 4(d) rule.

Response: The Service has modified the 4(d) rule to provide flexibility to land managers while also ensuring the rule is necessary and advisable for the conservation of the eastern black rail. Seasonal constraints are minimized as long as a portion of dense cover habitat is maintained. Exceptions are also included for specific types of wetland management operations, such as mechanical treatment of woody vegetation in degraded habitat and moist soil unit management activities.

48. *Comment:* Three States and one commenter requested more flexibility in prescribed fire timing and scale than contained in the proposed rule. One commenter requested greater specificity as to the time of year that prescribed fire may take place in the various regions where the eastern black rail is distributed. One commenter interpreted the 4(d) rule as prohibiting the use of all fire. Another commenter commented that the fire prohibitions in the proposed rule would take away or limit use of prescribed burning. Three States and eight other commenters stated that the 4(d) rule should allow growing season fire, citing concerns for brush control and their ability to meet habitat management goals. They also commented that prohibitions during the growing season would limit their ability to provide and maintain habitat for eastern black rail and other species due to timing restrictions, impacted burn return intervals, and ignition restrictions. One of these commenters also suggested that fire should be allowed year round. One State commented that the time period of the prohibitions in the 4(d) rule conflicts with management for other species of conservation concern, such as the Florida grasshopper sparrow and the bald eagle. For example, growing season fires are important to reduce woody encroachment and maintain habitat for the Florida grasshopper sparrow. Also, reducing woody encroachment in dry prairie and its embedded marshes also maintains the open conditions needed by the Federally-listed crested caracara and State-designated threatened Florida sandhill crane.

Response: Under the final 4(d) rule, fire is allowed year-round within a framework designed to promote eastern black rail population growth and maintenance at the site level. We agree that brush encroachment is a concern for eastern black rail habitat management. We revised the 4(d) rule to allow incidental take of eastern black rails resulting from prescribed fires throughout the year, as long as identified practices are followed. Employing these practices will minimize incidental take of eastern black rails and provide for long-term habitat needs for the eastern black rail and other cover-dependent species. Under the practices identified in the 4(d) rule, practitioners should ensure that habitat always remains to provide for eastern black rail population growth and maintenance at the site level. Under the 4(d) rule, burning within one calendar year within a management boundary of any ownership should leave in place at least 50 percent of the dense overhead cover habitat available for eastern black rails. This practice will reduce mortality while still allowing for fire application throughout the year.

The conditions described in the rule allow site managers to maintain a mosaic of seral stages on their managed landscape that support many different species that may have slightly different needs including the eastern black rail. The 4(d) rule does not assign burn return intervals; rather, this is left to the discretion of the site manager. Ignition tactics, rates of spread, and flame lengths should allow for wildlife escape routes and avoid trapping birds in a fire. The 4(d) rule provides guidelines for burning using techniques that do not trap and kill eastern black rails. The 4(d) rule also includes guidelines for providing refugia during prescribed fires for this subspecies.

49. *Comment:* One State commented that the SSA identified a possible risk of increased frequent wildfires as a result of increased drought or lightning strikes. The State commented that the 4(d) rule should be revised to encourage prescribed fire at times that would reduce the potential for catastrophic, unplanned fires.

Response: We have revised the 4(d) rule to remove the seasonal restrictions on prescribed burns. The 4(d) rule allows incidental take resulting from prescribed fires throughout the year, as long as identified practices are followed. Reducing the potential for catastrophic unplanned fires can still be achieved by employing controlled fires where eastern black rails are present. This strategy also allows maintenance of needed habitat that promotes population maintenance and growth for eastern black rail.

50. *Comment:* One State and one public commenter commented that burn return intervals were not identified for their region or would be affected by the 4(d) rule.

Response: The Service has modified the 4(d) rule to allow prescribed fire to take place any time during the year when using practices that minimize the take of eastern black rails. Fire return frequencies in areas known to support eastern black rails should be infrequent to a degree that suitable habitat is available for several years to breeding individuals and yet frequent enough to maintain suitable eastern black rail habitat. These fire return frequencies may vary across the species' range and, therefore, should be determined by site managers.

51. *Comment:* The Central Flyway Council and one commenter requested more information as to how fire prohibitions apply during the nonbreeding season for States with migratory populations such as Colorado, Kansas, and Oklahoma. One State commented that the fire prohibitions should not apply to northern interior States during the nonbreeding season when eastern black rails are not there. One State commenter commented that restricting prescribed fire to the winter season may increase risk, including predation risk, to eastern black rails in Florida.

Response: The Service has modified the 4(d) rule to allow prescribed fire to take place any time during the year when practices that minimize the take of eastern black rails are used. This provision includes retaining habitat in untreated areas that supports the dense overhead cover required by the eastern black rail. This approach allows managers to continue habitat

management efforts important to the eastern black rail while supporting its life-cycle needs. The fire prohibition in the 4(d) rule does not apply during the nonbreeding season to areas that only support eastern black rails during the breeding season, as there would not be incidental take of the bird. However, we encourage land managers to maintain suitable habitat for the eastern black rail in known breeding areas if the area does undergo fire treatment during the nonbreeding season.

52. *Comment:* One State commented that the BMPs outlined in the proposed 4(d) rule may conflict with wildfire risk mitigation and may not work in coastal marsh settings. The commenter requested technical assistance from the Service to continue to meet obligations to mitigate wildfire risk for coastal communities in a way that aligns with the spirit and intent of the ESA protections for the eastern black rail.

Response: The 4(d) prohibition and identified BMPs on prescribed fire were constructed with input from prescribed fire professionals throughout the range of the subspecies, including four regions of the Service. These personnel found the prohibitions realistic and clearly constructed from a fire professional's perspective. The Service will gladly provide technical assistance in implementing the 4(d) rule upon request.

53. *Comment:* One State commenter advised that eastern black rails use fire dependent habitats and these habitats require an appropriate amount of fire to maintain. One State commenter advised that fire planning should provide critical cover for the breeding season and consider fire impacts to the invertebrate prey base. More information is needed on overwintering and stopover use of mid-Atlantic marshes where fire is used outside the breeding seasons in order to assess impacts during these time periods.

Response: We agree that habitats occupied by the eastern black rail are fire dependent and may require fire to maintain them (for further discussion, please see the SSA report, section 3.4 (Service 2019)). The 4(d) rule has been modified to ensure that birds are provided sufficient habitat that provides suitable overhead cover during the year for the breeding and non-breeding season. The Service agrees that more research and study will improve our knowledge and understanding of the eastern black rail.

54. *Comment:* One State requested clarity on prescribed fire refugia size.

Response: In the final 4(d) rule, we have clarified the minimal refugia size and the amount of area within a prescribed fire unit for unburned refugia. As outlined below, unburned patches should be no smaller than 100 square feet.

55. *Comment:* One State commented that the eastern black rail is documented to re-nest after the loss of an early nest and that the loss of an early nest may reduce, but not preclude, successful annual recruitment. The State commented that, therefore, a failure to apply fire with the appropriate seasonal considerations will result in the eventual loss of the habitat necessary for breeding.

Response: Eastern black rails can re-nest after nest failure. However, for many species of birds including some rallids, re-nesting attempts are less productive than the initial nesting effort. Additionally, displaced adults would have to relocate to untreated sites and establish new territories after a fire. The 4(d) rule allows prescribed fire during the breeding season of the eastern black rail, while ensuring at least half of nesting habitat is untreated and available for established nesting adults and for birds displaced by prescribed fire events, *i.e.,* areas supporting dense overhead cover are maintained. The 4(d) rule allows site managers to maintain a mosaic of seral stages on their managed landscape that support many different species that may have slightly different needs, including the eastern black rail. This approach allows managers to continue habitat management efforts important to the eastern black rail while supporting its life-cycle needs.

56. *Comment:* One State commented that, if heavy grazing results in the degradation of known black rail habitat on public lands, the 4(d) rule should include a provision that includes a no-net-loss habitat restoration/mitigation requirement.

Response: We have revised the 4(d) rule to remove the terms ''light to moderate grazing'' and ''heavy grazing.'' The rule prohibits incidental take that results from grazing activities on public lands that occur on eastern black rail habitat and, that individually or cumulatively with other land management practices, do not maintain at least 50 percent of eastern black rail habitat, *i.e.,* dense overhead cover, in any given calendar year within a management boundary.

57. *Comment:* One State requested that all grazing activities, regardless of intensity, conducted on public lands should include a monitoring requirement prior to the initiation of grazing and after grazing has occurred. The purpose of the before and after monitoring is to confirm the presence/absence of the subspecies within the affected area and to help establish the costs and benefits of grazing on local eastern black rail populations.

Response: Public land site managers may use any of a wide range of methods to assess and evaluate site conditions. These can include pre- and post-treatment assessments of relevant information such as black rail presence/absence or occupancy, or plant species composition and structure. This is a key aspect of Strategic Habitat Conservation Planning (*https://www.fws.gov/science/doc/SHCFactSheet1008pdf.pdf*), which provides continual feedback on the effectiveness of any conservation action. We are not including a monitoring requirement in the 4(d) rule because the methods and techniques may change over time based on improved knowledge.

58. *Comment:* One State commented that grazing can be a very effective means of removing invasive plant species. The State commented that if survey efforts for eastern black rails increase beyond the traditional salt marsh habitats in the region, eastern black rails may be discovered in areas like bog turtle wetlands where grazing is the most efficient and effective tool to control invasive plant species and maintain freshwater habitats.

Response: We recognize that grazing can be used as a management tool. The rule allows for the use of grazing as a tool as long as at least 50 percent of eastern black rail habitat, *i.e.,* dense overhead cover, is maintained within management boundaries in any given calendar year.

59. *Comment:* One State commenter advised that there is no evidence that properly managed cattle would result in take or deleterious impacts to the eastern black rail. They further stated that excessive grazing would be detrimental but rarely occurs on the Texas coast due to its highly productive conditions. They added that herbivory of muskrat, snow goose, and cattle benefits the system that includes eastern black rail habitat, citing Miller *et al.* 1996 and Bhattacharjee *et al.* 2007.

Response: We agree that take of or deleterious impacts to the eastern black rail would not be expected from properly maintained grazing activities that maintain dense overhead cover for the bird. However, we disagree that detrimental effects of excessive grazing are offset by highly productive conditions in Texas. While herbivory may promote diversity, it does not always lead to benefits for all species of wildlife, including the eastern black rail. At a Texas refuge, Miller *et al.* (1996) found that herbivory by geese

and cattle can lead to mudflat and open water habitats and loss of emergent marsh and recommended the removal of cattle from sensitive areas (p. 474). In a separate salt marsh in Galveston County, Texas, two studies found that total vegetative cover was significantly reduced by grazing (Yeargan 2001, entire; Martin 2003, entire). In addition, both found that the greatest grazing impacts occurred at higher elevations in upper marshes. In Louisiana marshes, the destruction of chairmaker's bulrush (*Scirpus olneyi*) due to heavy grazing has been documented (Chabreck 1968, entire). Diversity of plants increased to pre-disturbance conditions after a multiple-year period of deferred disturbance (Bhattacharjee *et al.* 2007, p. 23). They recommended that grazing and or fire may be used as a disturbance mechanism if the resulting condition is a desired management goal (p. 23). They do not describe disturbance as being beneficial but rather a method to exert a change in the vegetation community.

60. *Comment:* One State suggested that the grazing prohibition from mid-March through September 30 contained in the 4(d) rule may not fit all cases. This State suggested that the Service consider a shorter prohibition on grazing, coupled with BMPs. For example, cattle stocking densities that closely match historical, natural grazing densities as determined by the Natural Resources Conservation Service likely could be used throughout the year without significant detrimental impacts to the eastern black rail and would likely provide a net benefit. Another State asked that the Service consider eliminating the restriction of ''intensive or heavy grazing should be avoided between mid-March and September 30th'' or at least provide further details as to how regionally specific grazing recommendations will be defined throughout the eastern black rail's range.

Response: We have revised the 4(d) rule to allow for grazing year-round as long as at least 50 percent of eastern black rail habitat, *i.e.,* dense overhead cover, is maintained in any given calendar year. Generally, favorable grazing intensity leaves overhead cover intact within eastern black rail habitat. Because of differences in plant communities and climate within and between regions of the species' range, it is not possible to assign specific stocking densities in terms of grazing animal density for a specific site within the 4(d) rule. Cover targets and assessment methods will be provided in guidance documents, and site managers will be responsible for managing grazing densities.

61. *Comment:* One State asked that the 4(d) rule define ''public lands'' and clarify which public lands will be subject to the grazing prohibition in the 4(d) rule.

Response: Public lands covered by this prohibition are those lands under governmental management whose intended purpose is to conserve wildlife and/or natural habitats for the general public. This definition includes Federal, State, and locally managed lands. Public lands whose intended purpose may be recreational sports, (*e.g.,* soccer, baseball, etc.), operational management, or other civic purposes are not subject to the rule.

62. *Comment:* One State and one commenter indicated that although grazers may trample nests, eggs, young chicks, or incubating adults, it seems unlikely that adult or older juveniles would be easily trampled under light to moderate grazing.

Response: We agree that trampling of adult birds may happen less frequently at lighter stocking densities. The primary concern with grazing is the removal of dense overhead cover that this subspecies requires for nesting and to avoid predation.

63. *Comment:* Two States and a Federal agency requested that we define intense, heavy, moderate, and light grazing. One commenter requested that we define 'intensive or heavy grazing' in terms of Animal Unit Months.

Response: The prohibition of incidental take associated with grazing activities in the 4(d) rule has been revised and applies only to grazing activities on public lands that do not support the maintenance of at least 50 percent of appropriate dense overhead cover habitat for the eastern black rail in any given calendar year. Favorable grazing intensity leaves overhead cover intact within eastern black rail habitat. Because of differences in plant communities and climate within and between regions, it is not possible to assign specific stocking densities in terms of grazing animal density for a specific site within the 4(d) rule. Cover targets and assessment methods will be provided in guidance documents, and site managers will be responsible for managing grazing densities.

64. *Comment:* One State commented that if grazing, mowing, and haying are used in moderation and under BMPs, these practices could also be used to create better eastern black rail habitat.

Response: We agree that some land management practices can be used to enhance habitat required by the species. The species prefers wet grasslands and emergent marshes that are dominated by herbaceous vegetation. These habitats often require some level of disturbance to reset their successional stage, and this disturbance may be achieved from grazing, mowing, or haying activities.

65. *Comment:* One State requested more flexibility in mechanical treatment timing and scale than contained in the proposed 4(d) rule. Multiple commenters requested that we clarify or expand the exception for incidental take of eastern black rails that results from mowing, haying, or other mechanical treatment activities that are conducted during the brooding or nesting period and are maintenance activities to ensure safety or operational needs of existing infrastructure. One commenter requested clarity regarding exceptions to the rule associated with maintenance of existing rights-of-way for electric and other transmission corridors such as pipelines as well as their respective structures such as pump stations or transfer stations. One commenter requested that maintenance of irrigation infrastructure be excepted from the 4(d) rule. One commenter requested that we except maintenance, safety, and operational needs associated with existing electric infrastructure from prohibitions.

Response: We recognize haying, mowing or other mechanical treatment activities may need to be used for maintenance requirements to ensure safety and operational needs for existing infrastructure, and these activities may need to take place during the nesting or brooding periods. We added exceptions to the final 4(d) rule for incidental take resulting from mechanical treatment activities that occur during the nesting and brooding periods, and that are maintenance requirements to ensure safety and operational needs of existing infrastructure. These include maintenance of existing firebreaks, roads, rights-of-way, levees, dikes, fence lines, airfields, and surface water irrigation infrastructure (*e.g.,* head gates, ditches, canals, water control structures, and culverts). Also excepted is incidental take resulting from mechanical treatment activities done during the nesting or brooding periods with the purpose of controlling woody encroachment or other invasive plant species to restore degraded habitat for eastern black rails. Mechanical treatment activities outside of the nesting and brooding period are not prohibited. We find that this approach addresses infrastructure and habitat maintenance needs while promoting eastern black rail population growth and maintenance at the site level.

66. *Comment:* One State requested management flexibility to manage wetlands for a variety of species as well

as to conserve important late-successional cattail and bulrush habitats for black rails. Cattail management is critical to open up monotypic cattail marshes, and a variety of techniques are needed in different seasons. This State uses mowing, mechanical treatment, and herbicide treatment in early summer through winter.

Response: The incidental take prohibition for mowing and mechanical treatment activities has been modified to apply only during the nesting and brood-rearing period. This provision should provide ample opportunity in late summer to early fall to treat cattail and bulrush marshes and reset their seral stage. The use of herbicides is not prohibited under the 4(d) rule.

67. *Comment:* Two States and two commenters opposed the timing restrictions for haying, mowing, and other mechanical treatment activities. One State requested more flexibility in the timing. One commenter did not feel that this activity will have measurable impacts on eastern black rail recruitment and survival.

Response: Several exceptions to the rule apply to the haying, mowing, and other mechanical treatment activities that may occur during the brooding or nesting season, including maintenance of existing infrastructure and control of woody encroachment. The impact of these activities on grassland and marshland nesting birds has been well documented (see discussion in the SSA report (Service 2019)). Incidental take of eastern black rails from mowing, haying, and other mechanical treatment activities that take place outside of the brooding or nesting season is not prohibited. However, where prohibitions apply, it is important to recognize that the loss of eggs or chicks affects recruitment into and growth of the population. Population recruitment and growth are crucial to the recovery of the subspecies.

68. *Comment:* One State suggested that we add a requirement for monitoring prior to the initiation of mechanical treatment activities to determine if the eastern black rail is present.

Response: The determination of whether eastern black rails are present is the responsibility of those undertaking the activity. A variety of methods may be used to assess whether the eastern black rail is present. The Service will be providing guidance and recommendations on different methods to determine the presence of eastern black rails.

69. *Comment:* One State and two commenters indicated that prohibitions in the proposed rule may prevent control of nonnative plant species, such as *Phragmites,* and thus may impact eastern black rail habitat and its recovery.

Response: We added an exception to the rule to allow incidental take of eastern black rails that result from mowing, haying, and other mechanical treatment activities during the brooding or nesting season, that occurs during the control of woody encroachment and other invasive plant species to restore degraded habitat. Incidental take of eastern black rails from mowing, haying, and other mechanical treatment activities that take place outside of the brooding or nesting season is not prohibited.

70. *Comment:* One State and three commenters suggested that we did not fully consider the impacts of development (such as urbanization, construction, or oil and gas activities) and other activities that result in the loss of suitable habitat for the eastern black rail. These comments requested that we consider additional provisions in our 4(d) rule to address activities that result in the loss or degradation of eastern black rail habitat.

Response: We appreciate these comments and have included a prohibition in the 4(d) rule that prohibits incidental take resulting from long-term or permanent damage, fragmentation, or conversion of persistent emergent wetlands and the contiguous wetland-upland transition zone to other habitat types (such as open water) or land uses that do not support eastern black rail.

71. *Comment:* One State and one commenter questioned why the Service did not propose prohibitions under the 4(d) rule that addressed sea level rise and tidal flooding.

Response: Although sea level rise and tidal flooding are threats to the eastern black rail's habitat, we cannot tie these activities to one specific regulated entity. Prohibiting take incidental to an otherwise lawful activity, such as prescribed fire, allows the Service to identify an entity that is conducting the activity (*e.g.,* a Refuge conducting a prescribed burn) and regulate this entity through the prohibitions and exceptions in the 4(d) rule. Prohibiting take of eastern black rails incidental to tidal flooding or sea level rise would not allow us to regulate an identified entity. Therefore, addressing the threats of sea level rise and tidal flooding are outside the scope of this 4(d) rule.

72. *Comment:* One State commenter requested that several habitat management activities be excepted from incidental take. These included prescribed fire between October 1 through April 15, water level management within impoundments, control of invasive plants using herbicides and/or mechanical means, removal of sediments from existing structures, and restoration activities under USACE Nationwide Permit (NWP) 27.

Response: The Service has revised the 4(d) rule to allow prescribed fire anytime during the year as long as best practices as outlined in the rule are used. The Service has also excepted from the prohibitions of the rule existing moist soil unit management sites, invasive species control activities, and maintenance of existing water infrastructure. However, activities and projects that are eligible for NWP 27 may or may not have adverse impacts on the eastern black rail. Therefore, activities under NWP 27 are not categorically excepted under the 4(d) rule. Each individual activity must be evaluated to determine whether the prohibitions and exceptions under the rule apply.

73. *Comment:* One State requested that the Service consider how the 4(d) rule would impact the ability to employ known management methods that benefit eastern black rail habitat and support functional ecosystems. Restrictions should not unduly impact the ability to test habitat creation/restoration methods in an adaptive management framework, especially given our large knowledge gaps for this secretive species.

Response: The Service has modified the 4(d) rule to accommodate habitat management activities that limit incidental take of the bird and maintain wetland habitat for the eastern black rail and other wildlife species. Land managers will maintain flexibility under the 4(d) rule to conduct activities that support functional ecosystems, while also minimizing take of the eastern black rail. Land managers may pilot habitat creation and restoration methods in the future. If these activities have a Federal nexus, the land manager will be required to consult with the Service on the activity, as is required by section 7 of the Act.

74. *Comment:* One State was concerned that the creation of wetlines as an alternative to firebreaks will not be allowed under the 4(d) rule.

Response: Maintenance of existing firebreaks and the establishment of new firebreaks are excepted under the 4(d) rule. This exception includes temporary breaks in the form of wetlines or compaction lines.

75. *Comment:* One State commented that moist soil management is important on public and private lands for recovery

and that impoundments may help with marsh migration management.

Response: In the 4(d) rule, incidental take resulting from mechanical treatment activities in existing moist soil management units is excepted.

76. *Comment:* One State requested that airfields be added to the list of existing infrastructure under the exceptions from prohibitions for incidental take resulting from haying, mowing, or other mechanical treatment activities.

Response: We agree and have added airfields to the list of existing infrastructure excepted from the prohibitions of the 4(d) rule.

77. *Comment:* One State commenter requested that mosquito surveillance and larvicide and adulticide applications be excepted. Another commenter requested that public health mosquito control applications be excepted from the 4(d) rule.

Response: Incidental take of eastern black rails resulting from these activities is not prohibited under the 4(d) rule, so an exception is not needed.

78. *Comment:* One State requested reassurance that prohibitions in the 4(d) rule will not hinder coastal restoration work, particularly with the current inability to fully delineate locations of high marsh in the bird's range.

Response: The Service recognizes the importance of coastal restoration efforts and that these activities may prove beneficial to the eastern black rail. Coastal restoration projects may have both temporary and permanent effects on eastern black rails. While not all coastal restoration projects benefit the eastern black rail, some do and can support recovery of the species. The Service recognizes the challenges facing this species and will not arbitrarily hinder restoration activities that may benefit the eastern black rail and its habitat. See Comment 79 for section 7 requirements.

79. *Comment:* One State and one public commenter requested clarification regarding their section 7 responsibilities under the Act. One commenter asked which public lands will be required to complete section 7 consultation.

Response: Section 7(a)(2) of the Act requires all Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service. This requirement does not change when a 4(d) rule is implemented. In accordance with our regulations found at 50 CFR 402.14 and the Services' Consultation Handbook, it is the action agency's responsibility to determine whether any action ''may affect'' listed species or critical habitat, and if it may, additional consultation is required. Therefore, when an action agency determines its proposed action will not affect a listed species, no further consultation with the Service is required. If the species will not be exposed directly or indirectly to the proposed action or any resulting environmental changes, an agency should conclude ''no effect'' and document the finding; this completes the section 7 process. For example, if suitable habitat is not present in the action area and the project does not otherwise present a risk to the species, an action agency can conclude ''no effect'' and document their finding.

When an action agency determines its proposed action ''may affect'' a listed species, all standard consultation procedures apply unless a programmatic consultation approach is developed. For example, if an action is anticipated to result in adverse effects (regardless of whether the effects will result in prohibited or excepted take) to the species, formal consultation is required. While the basic consultation procedures apply, any resulting biological opinions are different in that there are no incidental take statements or associated reasonable and prudent measures and terms and conditions for forms of take that are not prohibited by the 4(d) rule.

80. *Comment:* One State commented that the 4(d) rule would negatively affect eastern black rail conservation by being a disincentive for more research.

Response: When this final rule is effective, there are several mechanisms to allow for research for the eastern black rail. In accordance with our regulations found at 50 CFR 17.32(a), we may issue a permit for any activity otherwise prohibited with regard to threatened wildlife; permits issued under this section must be for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or special purposes consistent with the Act. Further, any employee or agent of the Service, of the National Marine Fisheries Service, or of a State conservation agency that is operating a conservation program for the eastern black rail pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his agency for such purposes, may, when acting in the course of his official duties, take eastern black rails. We anticipate that the listing of the eastern black rail will necessitate further research that generates knowledge needed to conserve the species, and we encourage States and other partners to continue with research efforts that contribute to conservation.

81. *Comment:* The Central Flyway Council and one public commenter stated that the Service should fund additional research and explore options to avoid limiting future research as a result of the 4(d) rule.

Response: Research that is conducted for the purpose of recovery of a species is an activity that can be authorized under section 10 of the Act, normally referred to as a recovery permit, or can be conducted by certain State conservation agencies by virtue of their authority under section 6 of the Act. Additional research will be important for recovery of the eastern black rail, and thus the Service will continue to support such actions.

Public Comments

Listing

82. *Comment:* A commenter stated that the literature has knowledge gaps regarding how black rails and their habitat are affected by management practices and how agencies should proceed with management in different geographic regions.

Response: Current literature, graduate research projects, and project reports have consistently concluded that eastern black rail occupancy increases with increasing overhead cover (see Kane 2011, Butler *et al.* 2015, Tolliver *et al.* 2019). Land management actions that do not leave overhead cover in place for eastern black rail and ensure that such cover is always present within a land management boundary, may impact the bird. During the breeding season, actions that remove overhead cover or destroy nests will impact egg and chick survival. As more research on eastern black rails and management impacts is completed, our understanding of this issue will continue to expand; however, our rule is based on the best available science.

83. *Comment:* A commenter asked how relevant scientific data from the Texas Gulf Coast were used in making the listing recommendation.

Response: The Service employed an active outreach effort soliciting any information regarding the eastern black rail. This effort took place at the initiation (July 2017) of and during the development of the SSA. This effort included letter requests for information as well as verbal requests at various times throughout the process; requests

were made to Federal agencies, State conservation and land management agencies, national Convention on International Trade in Endangered Species of Wild Fauna and Flora authorities, universities, non-governmental conservation organizations, and species experts. The data we obtained relative to Texas included books, scientific publications, dissertations and theses, governmental documents, personal interviews, survey datasheets and websites that house information. These sources of information were reviewed and used to inform the SSA analysis and report. See **ADDRESSES**, above, for information regarding how to access the materials used in preparing the rule or to review the Literature Cited of the SSA report (Service 2019).

84. *Comment:* One commenter stated that listing will cause excessive management problems to private landowners in Louisiana. One commenter stated that the listing of the eastern black rail will affect agriculture and that these effects should be taken into consideration.

Response: For listing actions, the Act requires that we make determinations ''solely on the basis of the best available scientific and commercial data available'' (16 U.S.C. 1533(b)(1)(A)). The Act does not allow us to consider the impacts of listing on economics or human activities, whether over the short term, long term, or cumulatively. Therefore, we may not consider information concerning economic or management impacts when making listing determinations. It should be noted that Louisiana has few documented occurrences of eastern black rail and these occurrences are concentrated in and around southwest Louisiana (Johnson and Lehman 2019b, entire). With such limited occurrences, we do not anticipate the listing rule will have a widespread impact on agriculture or private landowners. Further, our 4(d) rule excepts incidental take of eastern black rails from activities in existing moist soil management units or prior converted croplands (*e.g.,* impoundments for rice or other cereal grain production).

85. *Comment:* Two commenters questioned the quality of information used in decision-making, and whether adequate surveys exist to inform the listing decision.

Response: In accordance with section 4 of the Act, we are required to determine whether a species warrants listing on the basis of the best scientific and commercial data available at the time we make our determination. Further, our Policy on Information Standards under the 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 (*www.fws.gov/informationquality/*), provide criteria and guidance, and establish procedures 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 determining whether a species warrants listing as an endangered or threatened species.

Primary or original information sources are those that are closest to the subject being studied, as opposed to those that cite, comment on, or build upon primary sources. However, the Act and our regulations do not require us to use only peer-reviewed literature, but instead they require us to use the ''best scientific and commercial data available'' in a listing determination. We use information from many different sources, including articles in peer-reviewed journals, scientific status surveys and studies completed by qualified individuals, Master's thesis research that has been reviewed but not published in a journal, other unpublished governmental and nongovernmental reports, reports prepared by industry, personal communication about management or other relevant topics, conservation plans developed by States and counties, biological assessments, other unpublished materials, experts' opinions or personal knowledge, and other sources. We have relied on published articles, unpublished research, digital data publicly available on the internet, and the expert opinion of subject biologists to make a final listing determination for the eastern black rail.

We collected and used data from eBird (these records included historical records, observations from birders, and survey-collected data through 2017). The Center for Conservation Biology dataset provided an integrated dataset for U.S. coastal states, including surveys, literature, and museum records; these data are through 2016. The University of Oklahoma—Oklahoma Biological Survey dataset provided a similar integrated dataset of the interior United States through 2012. Sixteen research groups and States provide monitoring and inventory datasets with records through 2017. We also received updated survey information from some sources, including several States between the proposed and final rules.

Also, in accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited peer review from knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. Additionally, we requested comments or information from other concerned governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties concerning the proposed rule. Comments and information we received helped inform this final rule.

86. *Comment:* One commenter suggested it would help to support a listing recommendation if we were able to differentiate our analysis units based on genetic information and genetic differences among eastern black rail populations.

Response: We agree that genetic information on the eastern black rail would help inform our understanding of this subspecies. However, at the time of the listing, genetic information on the eastern black rail was not available. We are required to make our listing determinations on the best available scientific and commercial data at the time the determination is made (see response to Comment 93, above).

87. *Comment:* Two commenters stated their views that the species should be listed as endangered.

Response: We do not find that the eastern black rail is currently in danger of extinction throughout its range. Although the eastern black rail has experienced reductions in its numbers and seen a range contraction, this subspecies is still relatively widespread in terms of its geographic extent. The current condition of the subspecies still provides for resiliency, redundancy, and representation such that it is not currently at risk of extinction throughout its range (see Determination section). The commenters did not provide any new information regarding threats to the eastern black rail or its current status that was not already considered in the SSA report or proposed rule. One commenter cited the proposed rule and SSA report to support their argument of listing the eastern black rail as an endangered species. With no new information to consider, our conclusion regarding the status of the eastern black rail remains the same.

SSA Report

88. *Comment:* Two commenters stated that we did not consult Tolliver (2017) or Tolliver *et al.* (2019) (referred to as Tolliver 2018 and Tolliver *et al.* 2018 in comment letters) in the **Federal Register** document and/or in the Species Status Assessment. Three commenters stated eastern black rail colonization is not affected by fire and recruitment increases in recently burned areas. Commenters cited Tolliver (2018) as a supporting document.

Response: We referenced Tolliver (2017) in the **Federal Register** document for the proposed listing and in the Species Status Assessment Version 1.2. Tolliver *et al.* (2019) was first published online October 15, 2018, and in print on January 13, 2019, both occurring after the publication of the proposed listing rule (9 October 2018) and completion of SSA Version 1.2 (June 2018). Tolliver *et al.* (2019) is the peer-reviewed journal article based on Tolliver's 2017 master's thesis. In addition, there is Tolliver *et al.* (2017), which is a final performance report for a grant submitted to TPWD. We consulted the two existing documents generated by Tolliver during our preparation of the SSA Version 1.2 (Tolliver 2017 and Tolliver *et al.* 2017) and have updated SSA Version 1.3 to reflect the new Tolliver publication (Tolliver *et al.* 2019).

The effects of fire frequency or intensity were not considered by Tolliver *et al.* (2019, p. 322). Further, they state that some of the survey points used in their study were found on boundaries between burned and unburned management units. This finding leads to uncertainty regarding the accuracy of treatment (fire or grazing) assignments to vocalizing eastern black rails for the data analysis in their paper. They recommend that future studies include fire intensity, frequency, and an assessment of the influence of point placement (within units or between them) when assessing occupancy and abundance. When summarizing their conclusions or formulating their abstract, they do not relay any information about fire effects on the population states examined; instead they emphasize their findings of cover dependence for this species. While the authors speculated on colonization and recruitment following fire, their data treatment did not allow them to draw firm conclusions from their analyses. Therefore, we do not agree with the commenters' statements that recently burned areas are found to support recruitment increases and that colonization is not affected by fire, as these statements are contrary to the Tolliver *et al.* (2019) findings that this species is most abundant in densely vegetated grasslands.

89. *Comment:* One commenter stated that the Service did not quantify occupancy in New England and presumed low resiliency and low representation. The commenter states that Watts contradicts this presumption.

Response: Information presented by Watts (2016, p. 19) shows recent estimates of zero breeding pairs for Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York. He also shows range contractions in the Northeast in figures 5 and 6, which present maps of Northeast counties with all (1836–2016) and current (2011–2016) credible records of eastern black rails during the breeding period (pp. 21 and 23). In 2015, the State of Connecticut concluded that the black rail was extirpated from the State and removed the species from the State's endangered species list. This information supports our conclusions of low resiliency and low representation for the New England Analysis Unit.

90. *Comment:* A commenter claims Watts' estimates of eastern black rail are guesses rather than estimates, and guesses are not good science.

Response: Watts used the best information available to estimate eastern black rail population size on a state-by-state basis. The estimates are the result of a critical assessment of the most recent information available on the subspecies in each state, including the results of targeted black rail surveys and of general marshbird surveys, knowledge of available habitat, and consultation with state ornithologists and other marshbird experts (Watts 2016, p. 4–10). While the estimates were not quantitatively derived, the approach is appropriate and thorough for compiling and summarizing all diverse sources of information available on the status and distribution of the eastern black rail for the geographical areas covered by the report.

91. *Comment:* One commenter remarked on the occurrence of eastern black rail outside of the contiguous United States, stating that there is no known record of black rail for Barbados. The bird has ventured on rare occasions as far south as Antigua and Guadeloupe, but not Barbados.

Response: In our SSA report, we have updated the Historical and Current Range and Distribution section to state that there are no known records of eastern black rail for Barbados and rare records for Antigua and Guadeloupe.

92. *Comment:* One commenter stated that differences in two time points can be due to simple stochastic processes rather than true trends. The commenter stated that one needs at least three data points to infer trends.

Response: This concern was addressed by the dynamic occupancy modeling techniques that we used. While, in general, the commenter is correct that the changes over two observation periods can be stochastic; dynamic occupancy modeling approach accounts for this and uses multiple sites and detection probability to estimate colonization and extinction. Three or more data points will result in more precise estimates, but the modeling framework allows us to use data from just two.

93. *Comment:* One commenter stated that claiming a change from 15 detections on 328 survey points in 2007 to 2 detections on 135 survey points in 2014 is an 85 percent decline is incorrect, because the claim does not account for survey effort.

Response: The correct value should be a decline of 68 percent since the number of survey points had changed between 2007 and 2014. This value has been updated in the rule and the SSA report.

94. *Comment:* One commenter stated that the Service did not examine trends in true abundance when examining the status of the eastern black rail. The commenter stated that the Service only used changes in raw numbers of counted rails to estimate trends.

Response: There are no statistically valid abundance estimates for assessing trend over time over the full range of the species. Some data might be useful for assessing localized trends, but we could not use those local trends to infer population trend across the entire range of the species. The standard required by the ESA is the best available scientific and commercial information available, and that standard is what was used for the analysis.

95. *Comment:* One commenter stated that the Service did not account for variations in call rate or for detection probabilities in the data used.

Response: Our models estimated detectability and accounted for variability over space and time. In addition, we tried to relate those probabilities to covariates; however, no covariates were useful predictors of detection probability.

96. *Comment:* A commenter questioned how occupancy is used to predict long-term persistence.

Response: The specific procedure for determining extinction risk to analysis units is laid out in the SSA, specifically chapters 4 and 5 and appendices A and B. We took locations of known occupancy and assessed how

environmental variables at those locations would influence that known occupancy location's ability to support eastern black rails over time (persistence). We used probabilistic distributions based on different rates of change (wetland loss rates, relative sea level rise projections, land management practices, etc.) and projected these rates for each environmental variable. These rates of change included a range of scenarios that evaluated habitat availability and quality with regard to the eastern black rail.

97. *Comment:* One commenter requested clarification on the terms ''resiliency, redundancy, and representation (3Rs)'' and how these were applied in our SSA analysis. This commenter indicated there was apparently overlap between the three terms. The commenter also asked for clarity on how low, very low, and no resiliency are defined in the SSA report. This same commenter stated that the Service had only evaluated occupancy to inform our 3Rs analysis.

Response: In general, resiliency reflects the ability of populations to withstand stochastic variation, such as random fluctuations in demographic rates. Redundancy reflects the species' ability to withstand catastrophic events, such as a hurricane or oil spill, and representation reflects a species' adaptive capacity. In a practical sense there is often overlap in resiliency, redundancy, and representation in the Species Status Assessment process. For eastern black rail, resiliency was measured at the analysis unit scale for this subspecies, in part, because of the difficulty in establishing true population boundaries. The Service used two metrics to estimate and predict representative units that reflect the subspecies' adaptive capacity: (1) Habitat variability and (2) latitudinal variability. There was no information related to genetic diversity to inform adaptive capacity for the subspecies. As the commenter noted, we did suggest overlap in resiliency and representation because, as noted in the SSA, to maintain existing adaptive capacity, it is important to have resilient populations (analysis units) that exhibit habitat variability and latitudinal variability. While typically we think of redundancy as the number and distribution of populations within representation units, because of the difficulty in delineating populations, analysis units are the only scale at which we can reflect the subspecies' ability to withstand stochastic events. In general, species (and subspecies) that are well-distributed across their historical range are considered less susceptible to extinction and more likely to be viable than species confined to a small portion of their range (Carroll et al. 2010, entire; Redford et al. 2011, entire). Occupancy analysis informed both the 3Rs and extinction probability for the subspecies. We have added further discussion in the SSA report to provide clarification on how we applied the 3Rs.

98. *Comment:* One commenter stated that our future projections of habitat loss for eastern black rail are flawed because the model assumed a 10 percent loss rate of habitat per year, and there would not be any habitat left in 10 years.

Response: This comment reflects a misunderstanding about the loss function used in the model. The loss rate was not an absolute loss rate of 10 percent per year. It was a 10 percent loss of remaining habitat available each year, so the rate actually decreases over time. It is a decay curve not a linear decay. In our future scenario modeling, we incorporated functions to account for habitat quality and possible habitat loss over time. The habitat loss function was a simple reduction in the total number of possible black rail sites at each time step in the simulation by a randomly drawn percentage (a beta distributed random variable) that was specified under different simulation scenarios to represent habitat loss due to development (urbanization) or sea level rise. We used the change in ''developed'' land cover from NLCD data to derive an annual rate of change in each region and we used NOAA climate change and sea level rise predictions to estimate probable coastal marsh habitat loss rates. In the Great Plain AU, groundwater loss rates were used, instead of sea level rise data, to represent permanent non-urbanization habitat loss in the region.

99. *Comment:* One commenter stated that our future projections of habitat loss for eastern black rail are flawed because we assumed that the rate of marsh loss due to sea level rise will be greater than the rate of marsh creation. This commenter also stated we assumed sea level rise will only destroy marsh and provided citations for relevant literature supporting net increases in tidal marsh over time.

Response: We recognize that there are scientific differences of opinion on many aspects of climate change, including the role of natural variability in climate and the uncertainties involved with climate change projections and how local ecosystems may respond, such as tidal marsh responses to sea level rise. We relied on synthesis documents (*e.g.,* Parris *et al.* 2012; Sweet *et al.* 2017; Runkle *et al.* 2017a, 2017b, 2017c; Reidmiller *et al.* 2018) that present the consensus view of a very large number of experts on climate change, including sea level rise, from around the world. Additionally, we relied on downscaled sea level rise projections (Sweet *et al.* 2017).

We recognize the salt marsh elevation in some locations may be able to keep pace with sea level rise (*e.g.,* Kirwan *et al.* 2016, Raabe and Stumpf 2016, Schieder *et al.* 2018); however, the rate of sea level rise in many areas will overwhelm the capacity of salt marshes to persist (Crosby *et al.* 2016), and marsh migration will not be possible where hardened shorelines exist (Torio and Chmura 2013). We have found that these latter reports, as well as the scientific papers used in those reports or resulting from those reports, represent the best available scientific information we can use to inform our decision and have relied upon them and provided citations within our analysis. Overall, sea level rise is projected to lead to substantial losses of salt marsh habitat, and new salt marsh creation is not expected to keep pace.

100. *Comment:* One commenter stated that a study done by the Texas Comptroller's Office suggests that the black rail has a stronghold along the Upper Coast of Texas, especially in Chambers and Jefferson Counties. The commenter stated that with nearly 160,000 acres of Federal and State-owned property in Chambers and Jefferson Counties that is prime black rail habitat, it stands to reason that the population in that area could change the listing determination.

Response: The study, supported by the Texas Comptroller of Public Accounts and the TPWD, estimated that during 2015 there were between 183 and 2,414 eastern black rails present at Anahuac NWR (Tolliver *et al.* 2017, p. 18). The refuge is approximately 34,000 acres (13,759 hectares) in size; however, the refuge area estimated to support eastern black rails was between 11,345 to 15,716 acres (4,591 to 6,360 hectares) (Tolliver *et al.* 2017, p. 18). This area is roughly 33 to 46 percent of the refuge, demonstrating that not all 160,000 acres of conservation lands in Chambers and Jefferson Counties would necessarily support eastern black rails. It is not appropriate to presume that eastern black rails are present and supported by all 160,000 acres. Surveys to estimate habitat occupancy indicate very low occupancy rates for this species. This finding means that the available habitat is not fully occupied by the species due to their low numbers. See Comments 28 and 96 for additional discussion.

101. *Comment:* One commenter asked how altering land management practices during the nesting and molting period will increase population numbers.

Response: When numbers within a population are very low, changes in management that affect survival of both young and adults can have significant effects on population numbers because each adult's reproductive potential and nest survival matter more to overall population dynamics. This scenario is often best thought of in the extinction vortex paradigm (Gilpin and Soule 1986, entire; Fagan and Holmes 2006, entire) where the loss of every individual can have a substantial impact on the population.

102. *Comment:* A commenter stated that potential threats resulting from mosquito control activities are speculative and should be considered alongside the threats mosquitos pose to humans and wildlife.

Response: For listing actions, section 4(a)(1) of the Act requires that we determine whether any species is an endangered species or threatened species because of any of the following factors that affect the species, including: The present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence. It does not allow us to consider such information as the threats mosquitoes pose to humans and wildlife. At this time, there is no information regarding the impacts of pesticides used for mosquito control on the eastern black rail.

103. *Comment:* One commenter stated that there is a difference in agricultural pesticide application and mosquito control methodologies and that product application parameters and conclusions drawn in the SSA report regarding pesticides do not apply to mosquito control products. The comment states that permethrin, a product commonly used in aerial adult mosquito control applications is considered low toxicity to birds and cites a 2009 fact sheet from the National Pesticide Information Center.

Response: The SSA report discusses pesticide use to control mosquitoes and its potential impacts to the prey base of eastern black rail. The SSA report does not assert that permethrin is causing a direct effect on the eastern black rail; however, it does identify as a concern the widespread use of pesticides to control mosquitoes in marshes that are used by eastern black rails and the potential impacts of these chemicals to the prey base of the subspecies.

104. *Comment:* One commenter stated that there is no evidence to support mosquitocide impacts to the eastern black rail or to their trophic structure effects.

Response: The SSA concluded that ''while there are hotspots for environmental contaminants, there is no evidence of specific threats that might affect the subspecies and demonstrate a population level response. Indirect effects to eastern black rails such as impacts to forage base from certain pesticides require further study.'' The conclusion drawn relates to all contaminants, not just mosquitocide, which was only referenced with regard to the fact that it might affect prey (see previous comment); however, the conclusion drawn was that there was no evidence of a specific threat that might affect the subspecies.

105. *Comment:* One commenter questioned why the Service did not consider oil and gas exploration and extraction, including seismic exploration, as a threat to eastern black rails.

Response: Section 3.1 (Habitat Fragmentation and Conversion) of the SSA report discusses the status and trend information for wetlands. While not explicit, these trends of wetland conversion include impacts of oil and gas activities. Additional information was added to Section 3.3 (Altered Hydrology) regarding specific types of activities associated with oil and gas development that modify hydrology and exacerbate wetland conversion or loss. Further, we revised the 4(d) rule to prohibit incidental take resulting from long-term or permanent habitat conversion that captures permanent damage to habitat where eastern black rails are present, which would include oil and gas activities. In addition, all jurisdictional wetlands affected by such activities are already covered under existing regulations. Public land site managers may negotiate the terms of access (including timing, the use of monitors, and equipment to be operated as well as other specifics) and damage concerns ahead of seismic activity or any other related access. They may also arrange compensatory actions for damages of any kind agreed to in advance of project initiation. The managers of public lands often do not own the mineral rights beneath their boundaries and in those cases may not deny access to the owners of those rights.

106. *Comment:* One commenter stated that our statements about the possible negative effects on eastern black rail from flooding caused by Hurricane Harvey are speculation and not fact, and asked that we acknowledge this sentiment.

Response: The SSA report and the proposed rule referenced Hurricane Harvey's aftermath to illustrate that flooding during hurricane events may be prolonged and extensive and impact the subspecies. Extensive flooding from Hurricane Harvey was documented at occupied sites of eastern black rail across the Texas coast, and thus we do not consider the hurricane's effects as speculative.

107. *Comment:* A commenter recommended that the Service provide additional guidelines for determining what human activities and behaviors in suitable habitat are threats to this subspecies. Two commenters provided suggestions for restoration or recovery efforts for the eastern black rail. For example, one commenter asked that we consider the impact of invasive species, such as feral swine and nutria, to eastern black rail recovery. One commenter requested additional guidelines be developed on appropriate human activity and behaviors within eastern black rail habitat.

Response: We will consider additional guidelines in developing a recovery plan or any potential future consultation guidelines for the subspecies.

Critical Habitat

108. *Comment:* One commenter from the American Mosquito Control Association provided information on how the designation of critical habitat would compromise mosquito control measures and negatively impact public health.

Response: We are not designating critical habitat for the eastern black rail (see Comments 37–39 above and Critical Habitat discussion below).

109. *Comment:* Several commenters suggested that the Service designate critical habitat for the eastern black rail and focus on cooperative educational efforts for the eastern black rail among birders, States, and non-governmental partners, such as State ornithological societies. One commenter stated that these efforts could help maximize citizen science value while minimizing disturbance. Commenters indicated that birders contribute significantly to understanding the distribution of the eastern black rail.

Response: The Service recognizes the important contributions birders have made to our understanding of bird species, including the eastern black rail. Even though we are not designating critical habitat, we intend to incorporate

education efforts and outreach information to a variety of stakeholders as a component of the recovery plan for this species.

4(d) Rule

110. *Comment:* One commenter responded that departures from traditional ranch burning and grazing in place for hundreds of years (along the Gulf Coast) could adversely affect plants, animals, elevations and so on. The commenter also said that the 4(d) rule risks damages to healthy grasslands used by other species.

Response: The evolution of the plants, animals, and the ecology of the habitats within the eastern black rail's range took place over a much more extended period of time than the timeframe being referenced by the commenter and without the presence of fenced domestic cattle or modern fire management. Stambaugh's (2014) literature review compiles the results of historical fire regime research and suggests that most coastal habitat in Texas used by the eastern black rail may have burned naturally as infrequently as once every 11 to 15 years. The authors summarize that burn intervals for most of Texas spanned 1 to 12 years. The 4(d) rule allows for up to 50 percent of available eastern black rail habitat to be burned in any given calendar year such that the other 50 percent of habitat within the management boundary remains present on the landscape and suitable for eastern black rails. This provision allows for maintenance of eastern black rail habitat, as well as population growth and maintenance. The 4(d) rule does not prohibit grazing, which is an important habitat management tool that stimulates herbaceous plant production and may help maintain the necessary overhead vegetation cover for eastern black rails and other native species, as long as dense overhead cover is maintained for the eastern black rail in at least 50 percent of the habitat. Grazing activities that maintain dense overhead cover are allowed during all times of year on suitable occupied eastern black rail habitat on public lands, and grazing activities on private lands are unaffected. We do not expect the 4(d) grazing prohibition to result in adverse impacts to plants, animals, and elevations, since grazing is not restricted at any time.

111. *Comment:* One commenter expressed concerns that fire prohibitions threaten communities.

Response: The construction of new firebreaks, and the maintenance of existing ones, are excepted in the 4(d) rule, as are responses to wildfire.

112. *Comment:* One commenter advised that prescribed fire plans should be specific to location and supported by the best possible science.

Response: We agree that fire plans should be specific to location and have endeavored to keep the practices outlined in the 4(d) rule general enough to allow site managers to determine the appropriate techniques that will enable them to conserve eastern black rails and their habitats. We have used information from fire experts and land managers as well as experts in the behavior of eastern black rails in revising the 4(d) rule to provide what is necessary and advisable for the conservation of the eastern black rail while also providing flexibility for land managers.

113. *Comment:* One commenter recommended encouraging prescribed fire application in the fall rather than the spring and that the Service should provide financial incentives to do so.

Response: The Service has modified the 4(d) rule to allow prescribed fire to take place any time during the year when using practices that minimize the take of eastern black rails. Further, the Service, as well as the U.S. Department of Agriculture's Natural Resources Conservation Service, already have in place several programs that provide financial and technical support to private landowners interested in actions that support fish and wildlife resources. In addition, some State Fish and Wildlife agencies also provide wildlife-related technical assistance to private landowners.

114. *Comment:* Two commenters said that the Service ignored positive burn and grazing effects in its assessment of these activities, which promote eastern black rails in Texas. A second commenter stated that the Service ignored positive burn and grazing effects (as reported in Kane 2011 and other studies) in its assessment of these activities.

Response: The Service presented the best available science on the effects of various land management practices on eastern black rail occurrence, highlighting the known favorable and unfavorable approaches for each one. Please see section 3.4.1 of the SSA for the discussion on fire effects, which includes Kane's findings. For a discussion of grazing effects (including Kane's findings), please see section 3.4.3 of the SSA. Although the Texas population estimates suggest that more eastern black rails are present there than in other portions of the range, all predictive modeling indicates that eastern black rails will be extirpated from Texas and the rest of its U.S. range before 2100 without human intervention. Therefore, we cannot conclude that land management practices that result in the removal or destruction of eastern black rail habitat have not taken a toll on a formerly much larger population in Texas, or in other parts of the range. We have revised the 4(d) rule to provide greater flexibility to land managers with the use of BMPs that are designed to promote population growth and maintenance of eastern black rails at the site level.

115. *Comment:* Two commenters stated there is no proof in peer-reviewed literature or otherwise that fire causes direct or indirect mortality to eastern black rails. One commenter stated that Legare 1998 was just a conference abstract with no way to validate its validity. Others stated that Grace *et al.* 2005 provided no evidence of direct mortality to rails from prescribed fire. One commenter asked to clarify why fast fires produce rail mortality and why this is significant.

Response: The Service has sufficient evidence documenting the threat of fire mortality due to ignition and burn patterns that do not provide refugia or that trap eastern black rails between fire fronts. Photographic proof of the eastern black rail mortality detailed in Legare's abstract was made available by the author to the Service during preparation of the SSA. This photograph accompanied by follow-up conversations with the author was accepted as evidence of direct mortality of eastern black rail from a prescribed fire event. We have incorporated this photograph into the SSA report. The fact that the Legare *et al.* (1998) abstract appears in conference proceedings and not peer-reviewed literature has no bearing on the existence of this mortality event. Entrapment issues during this fire event led to bird mortality and the National Wildlife Refuge where this event occurred has since modified their burning practices to avoid and minimize wildlife entrapment. The Refuge identified in this abstract now employs slow-moving fires and takes the maximum amount of time to burn, employs flanking fires, and divided their burn units into smaller units after the large mortality event (now burning half or a third of what they used to) (Legare 2019, pers. comm.). The recommendation is also provided by Grace *et al.* (2005, entire), is based on fundamental evidence, and is reasonable. A fast fire can lead to rail mortality when the fire spreads quickly enough to overcome individual birds attempting to escape it, or through asphyxiation. With regard to significance, when numbers within a

population are very low, changes in management that affect survival of both young and adults can have significant effects on population numbers because each adult's reproductive potential and nest survival matter more to overall population dynamics. This is often best thought of in the extinction vortex paradigm (Gilpin and Soule 1986, entire; Fagan and Holmes 2006, entire) where the loss of every individual can have substantial impact on the population.

116. *Comment:* One commenter supported the use of prescribed fire as a management tool and relayed that natural fires would have included fast-moving perimeter fires. The commenter also cited several references (Van't Hul *et al.* 1997 and Rogers *et al.* 2013) to support limited detrimental impacts of prescribed burns to certain bird species.

Response: The Service has modified the rule to allow prescribed fire to take place any time during the year while retaining habitat in untreated areas that supports dense overhead cover required by the eastern black rail. This approach allows managers to continue habitat management efforts important to the eastern black rail while supporting its life cycle needs. While historical fires may have been perimeter fires, historical conditions (abundant habitat and multiple population sources) no longer exist across the range of the eastern black rail and, therefore, the effects of these types of fires may have greater negative impacts today than they would have historically. It is important for fire managers to minimize the negative impacts to wildlife through the use of ignition tactics and timing. The papers referenced by the commenter did not evaluate the direct or indirect mortality associated with prescribed fire but instead studied habitat use. For example, Van't Hul *et al.* 1997 found that the bird species studied returned to pre-burn levels after 2 years, with the exception of the sedge wren. The sedge wren is similar to the eastern black rail in that it requires dense herbaceous cover. The revised rule supports activities that provide for dense overhead cover required by the eastern black rail.

117. *Comment:* One commenter, citing McKee and Grace (2012), stated that fire prohibitions will lessen fire opportunities which in turn will lead to subsidence and diminished marsh health and greater impacts from sea level rise. The commenter advised against blanket restrictions for a wide-ranging species.

Response: We do not find that an increased rate of subsidence will result from the prohibitions on prescribed fire outlined in the 4(d) rule. Subsidence is a sinking of the landscape that occurs due to changes in or collapse of the subsurface layers of the earth; shifting of underground mines; or the extraction of underground fluids like water or oil (Geology.com 2019; USGS 2000). However, it is possible that various human acts can cause a net loss in elevation over time or offset losses due to subsidence or other factors. McKee and Grace (2012) state that prescribed burning of *Spartina patens* may decrease elevation losses by roughly 1 mm/year at McFaddin National Wildlife Refuge; however, their work at McFaddin and Blackwater NWRs involved sites that were subsiding and in poor sediment supply. This research has not been extended to other marshes, and the authors state that their results are not applicable to other marshes outside the Texas Chenier Plains Complex NWR or Blackwater NWR, as other marshes will vary in sediment supply, geologic setting, and disturbances from other factors. The study also calls for further research, as the net loss of elevation relative to fire regime is still not well understood (McKee and Grace 2012, p. 42). Where eastern black rails are present, burning may be done year round within guidelines designed to ensure habitat is always available and that the population growth and maintenance of this species is supported. In addition, incidental take of eastern black rails from otherwise prohibited activities can be exempted through either section 7 or section 10 of the Act.

118. *Comment:* One commenter stated that the proposed 4(d) rule would end all summer grazing on public lands.

Response: The 4(d) rule does not end grazing on public lands. It has been further modified since the proposed version was released for comment, so that grazing will be allowed on public lands as long as the dense overhead cover required by the subspecies is maintained in at least 50 percent of the eastern black rail habitat within a management boundary.

119. *Comment:* One commenter stated grazing is a useful tool and should be allowed on both private and public lands. Two commenters suggested that public lands with an approved grazing plan be allowed to continue grazing, as prescribed grazing can be an important habitat management tool. One commenter stated that ''properly managed cattle'' are not detrimental to eastern black rails.

Response: We agree that grazing can be a useful management tool for resetting the seral stage to maintain suitable habitat for eastern black rail. These types of grazing activities can be used as part of an ownership boundary's overall plan to promote eastern black rail population growth and maintenance. The final 4(d) rule allows grazing on public lands as long as 50 percent of eastern black rail habitat, *i.e.,* the dense overhead cover required by the eastern black rail, is maintained. We encourage land managers who use grazing in areas with eastern black rails to consider implementing a grazing plan that will ensure that dense overhead cover is maintained for the species.

120. *Comment:* One person reported that grazing (buffalo) and fire are part of Salt Bayou Plan, which restores habitat on the upper Texas Coast in Chambers County.

Response: The Salt Bayou Watershed Restoration Plan (2013) does not identify the use of grazing or prescribed fire as actions to restore the watershed.

121. *Comment:* One commenter stated that grazing programs funded or permitted through the U.S. Department of Agriculture would be affected outside of public lands and would result in harmful changes to private land use practices.

Response: The grazing prohibition in the 4(d) rule does not apply to private lands. As discussed in Comment 79, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service. This requirement does not change when a 4(d) rule is implemented.

122. *Comment:* One commenter stated that Kane (2011) shows the negative impacts of mowing or haying during sensitive seasons but is not sufficiently comprehensive to demonstrate the effects of not mowing or haying within seasons, across seasons, or across habitat types. The commenter recommended that the study be replicated throughout the species' range so that it is certain these results are not localized or correlated to the Kane study site.

Response: We agree that more research and study of the eastern black rail will improve our knowledge and understanding of the subspecies.

123. *Comment:* One commenter stated that he owned mineral rights under a Refuge and that the 4(d) rule would have devastating effects on oil and gas exploration and cause harm to families relying on this income.

Response: The 4(d) rule does not prohibit oil and gas activities or mineral extraction within the range of the eastern black rail. Incidental take resulting from activities that result in long-term or permanent conversion, fragmentation, or damage to persistent emergent wetland habitat and the contiguous wetland-upland transition zone to other habitat types or land uses is prohibited under the 4(d) rule. However, entities have other means to have take excepted, such as section 10 permits or section 7 incidental take authorization. The rule extends exemptions for maintenance of existing infrastructure. Entities engaging in oil and gas activities within jurisdictional wetlands, or in settings that are addressed by existing regulations, will be required to complete the same permitting process already in place prior to initiating work. Further, any activity that has a Federal nexus, that is an action that is authorized, funded, or carried out by a Federal agency, and may affect the eastern black rail, will require consultation with the Service. However, section 7 consultation requirements are triggered by the listing of a species and not a 4(d) rule.

124. *Comment:* One commenter requested that we include a prohibition to reduce the risk of predation by cats.

Response: The impacts of feral and/or free-ranging domestic cats on wildlife has been well documented. These exotic felines can become problematic at the localized level and depress local wildlife populations. Our review of threats faced by the subspecies considered practices that could possibly affect substantial numbers of birds and influence population maintenance and growth. We did not find that the risk of predation by cats is a threat such that we should regulate incidental take of this activity under our 4(d) rule.

125. *Comment:* One commenter requested that new rights-of-way projects be excepted.

Response: New rights-of-way projects will be required to consider their effects on the species; they are not excepted under the 4(d) rule. New rights-of-way may be planned in areas of currently occupied habitat and their construction may result in the take of eastern black rails. Therefore, we are not excepting new rights-of-way projects under the 4(d) rule.

Recovery

126. *Comment:* Three commenters stated that an approved Recovery Plan should precede efforts to list the species.

Response: According to the requirements in the Act, species are listed prior to the initiation of recovery planning. Recovery actions will be decided upon during recovery planning. We are working on a recovery outline that will be made publically available within 30 days of the publication of this final rule. Additionally, a recovery plan and strategy will be developed with input from our conservation partners including States, Federal agencies, private and public landowners, and non-governmental organizations. The Service has already begun working on the development of a Black Rail Conservation Plan with the Atlantic Flyway branch of the Black Rail Working Group, coordinated by the Atlantic Coast Joint Venture. The Plan outlines five priority strategies for black rail recovery and conservation on the Atlantic Coast of the United States and the Gulf Coast of peninsular Florida. The Service has also participated in preliminary conservation planning with the Texas Black Rail Working Group, led by the Texas Parks and Wildlife Department in partnership with the Texas Comptroller's Office. Planning documents from these efforts will be foundational to the recovery strategy that is developed over the next two to three years.

Determination of Eastern Black Rail Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of ''endangered species'' or ''threatened species.'' The Act defines an ''endangered species'' as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a ''threatened species'' as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether a species meets the definition of ''endangered species'' or ''threatened species'' because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the subspecies and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we summarize our findings below. We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the eastern black rail. When viewing historical occurrences on the State level compared to what is known of present distribution, the range contraction (from Massachusetts to New Jersey) and site abandonment (patchy coastal distribution) noted by Watts (2016, entire) appear to be occurring throughout the eastern United States. Over the past 10 to 20 years, reports indicate that populations have declined by 75 percent or greater. North of South Carolina, occupancy has declined by 64 percent and the number of birds detected has declined by 89 percent, equating to a 9.2 percent annual rate of decline (Watts 2016, p. 1).

In relative terms, regional strongholds still exist for this subspecies; however, the best available scientific data suggest that the remaining strongholds support a relatively small total population size, *i.e.,* an estimated 1,299 individuals on the upper Texas coast within specific protected areas prior to Hurricane Harvey, and an estimated 355 to 815 breeding pairs on the Atlantic Coast from New Jersey to Florida (including the Gulf Coast of Florida) prior to multiple major hurricanes. There are no current population estimates from the interior States (Colorado, Kansas, or Oklahoma), although there are consistent populations of eastern black rails at Quivira NWR in Kansas and at least four sites in Colorado where the subspecies is encountered in the spring and summer. We have no information to indicate that the eastern black rail is present in large numbers in the Caribbean, Central America, or Brazil.

Based on our review of the available science, we identified the current threats to eastern black rail. Habitat loss and degradation (Factor A) as a result of sea level rise along the coast and ground and surface water withdrawals are having a negative impact on the eastern black rail now and will continue to impact this subspecies into the future. Incompatible land management techniques (Factor E), such as the application of prescribed fire, haying, mowing, and grazing, have negative impacts on the bird and its habitat, especially when conducted at sensitive times, such as the breeding season or the flightless molt period. Stochastic events (Factor E), such as flood events and hurricanes, can have significant impacts on populations and the subspecies' habitat. For example, the impacts of Hurricane Harvey on the Texas coastal populations of eastern black rail likely caused direct mortality

as well as short-term habitat loss, as the hurricane occurred during the flightless molt period and resulted in the habitat being flooded for an extended period of time. Human disturbance (Factor B) to the eastern black rail occurs throughout the bird's range and is driven by the bird's rarity and interest by the birding community to add this bird to individual life lists.

As we consider the future risk factors to the eastern black rail, we recognize that a complex interaction of factors have synergistic effects on the subspecies as a whole. In coastal areas, sea level rise, as well as increasing storm frequency and intensity and increased flood events (which are both associated with high tides and storms), will have both direct and indirect effects on the subspecies. Extensive patches of high marsh required for breeding are projected to be lost or converted to low marsh or open water as a result of sea level rise. Demand for groundwater is increasing, which will reduce soil moisture and surface water, and thus negatively impact wetland habitat. We expect to see localized subsidence, which can occur when groundwater withdrawal rates are greater than the aquifer recharge rates. Also, warmer and drier conditions (associated with projected drought increases) will reduce overall habitat quality for the eastern black rail. Further, incompatible land management (such as fire application and grazing) will continue to negatively impact the subspecies throughout its range, especially if done during the breeding season or flightless molt period.

These stressors contribute to the subspecies' occupancy at sites and thus its population numbers. Some stressors have already resulted in permanent or long-term habitat loss, such as the historical conversion of habitat to agriculture, while other factors may only affect sites temporarily, such as a fire or annually reduced precipitation. Even local but too frequent intermittent stressors, such as unusual high tides or prescribed fire, can cause reproductive failure or adult mortality, respectively, and thus reduce eastern black rail occupancy at a site and the ability of a site to allow for successful reproduction of individuals to recolonize available sites elsewhere. While these intermittent stressors allow for recolonization at sites, recolonization is based on productivity at other sites within a generational timescale for the subspecies. If these stressors, combined, occur too often within and across generations, they limit the ability of the subspecies to maintain occupancy at habitat sites and also limit its ability to colonize other previously occupied sites or new sites.

It is likely that several of these stressors are acting synergistically on the subspecies. Sea level changes, together with increasing peak tide events and higher peak flood events, wetland subsidence, past wetland filling and wetland draining, and incompatible land management (*e.g.,* prescribed fire and grazing), all limit the ability of the eastern black rail to persist in place or to shift to newly lightly flooded, ''just-right'' areas as existing habitats are impacted. These interacting threats all conspire to limit the ability of this subspecies to maintain and expand populations now and in the foreseeable future.

Although the eastern black rail has experienced reductions in its numbers and seen a range contraction, this subspecies is still relatively widespread in terms of its geographic extent. It continues to maintain a level of representation in four analysis units, which demonstrates continued latitudinal variability across its range. These four analysis units are spread throughout most of the subspecies' range, providing for some level of redundancy. Though the resiliency in the four currently occupied analysis units is low, Florida and Texas remain strongholds for the subspecies in the Southeast and Southwest. The current condition of the subspecies still provides for resiliency, redundancy, and representation such that it is not at risk of extinction now throughout its range.

However, our estimates of future resiliency, redundancy, and representation for the eastern black rail are further reduced from the current condition, consistent with this analysis of future threats. Currently, three analysis units are effectively extirpated, and four analysis units that continue to support populations of the eastern black rail all have low levels of resiliency. Given the projected future decreases in resiliency for these four analysis units, the eastern black rail will become more vulnerable to extirpation from ongoing threats, consequently resulting in concurrent losses in representation and redundancy. The range of plausible future scenarios of the eastern black rail all predict extirpation for all four analysis units by mid-century (2068) with the Great Plains analysis units potentially becoming extirpated within 15 to 25 years (depending on the scenario). In short, our analysis of the subspecies' current and future conditions show that the population and habitat factors used to determine the resiliency, representation, and redundancy for the subspecies will continue to decline so that it is likely to become in danger of extinction throughout its range within the foreseeable future.

Our implementing regulations at 50 CFR 424.11(d) set forth a framework within which we evaluate the foreseeable future on a case-by-case basis. The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. The foreseeable future extends only so far as the predictions about the future are reliable. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. In the same way, a ''reliable prediction'' is also meant in a non-technical, ordinary sense and not necessarily in a statistical sense. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics.

In cases where the available data allow for quantitative modeling or projections, the time horizon for such analyses does not necessarily dictate what constitutes the ''foreseeable future'' or set the specific threshold for determining when a species may be in danger of extinction. Rather, the foreseeable future can extend only as far as the Service can reasonably explain reliance on the available data to formulate a reliable prediction and avoid reliance on assumption, speculation, or preconception. Regardless of the type of data available underlying the Service's analysis, the key to any analysis is a clear articulation of the facts, the rationale, and conclusions regarding foreseeability.

We identify the foreseeable future for the eastern black rail to be 25 to 50 years from the present. We consider 25 to 50 years ''foreseeable'' in this case because this timeframe includes projections from our modeling efforts and takes into account the threats acting upon the eastern black rail and its habitat and how we consider the eastern black rail will respond to these threats in the future. For all five plausible scenarios, all analysis units exhibited a consistent downward trend in the proportion of sites remaining occupied after the first 25 years (by 2043), with extirpation for all analysis units by 2068. The Great Plains analysis unit is predicted to be extirpated by 2043. Given that future projections of habitat loss are expected to continue and be exacerbated by sea level rise and tidal flooding, resiliency

of the four remaining analysis units is expected to decline further over the next 25 to 50 years.

We find that the eastern black rail is likely to become endangered throughout all of its range within the foreseeable future. It is facing threats across its range that have led to reduced resiliency, redundancy, and representation, and we expect the subspecies to continue to decline into the future. Thus, after assessing the best available information, we conclude that the eastern black rail is not currently in danger of extinction, but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Everson*), vacated the aspect of the 2014 Significant Portion of its Range Policy (SPR Policy) (79 FR 37578) that provided that the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and, (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Everson,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). As discussed above and in our SSA report, there are little to no data to evaluate resiliency for the Central America and Caribbean portion of the eastern black rail's range. For the purposes of considering portions of the eastern black rail's range, we reviewed the analysis units we identified in the SSA report. Three of the analysis units we evaluated—Appalachians, Central Lowlands, and New England—are effectively extirpated. These three units historically did not support abundances of eastern black rail as high as the other four analysis units and an evaluation of current status information yielded that the species is effectively extirpated from the portions of these units that were once occupied. We did not consider these three analysis units in our future scenario modeling, as we do not anticipate that these units will contribute to the future viability of the eastern black rail. Accordingly, when conducting our analysis to determine whether the species may be in danger of extinction in a significant portion of its range, we consider these portions to be lost historical range. Consistent with our SPR Policy, we do not base a determination to list a species on the status (extirpated) of the species in lost historical range. We already take into account the effects that the loss of these three units have on the current and future viability of the eastern black rail in our determination. As articulated in our SPR Policy, we conclude that this consideration is sufficient to account for the effects of loss of historical range, *i.e.,* the Appalachians, Central Lowlands, and New England analysis units, when evaluating the current status of the eastern black rail, and a specific consideration of whether lost historical range constitutes a significant portion of the range is not necessary.

We then considered the current status of the remaining analysis units—the Great Plains, Mid-Atlantic Coastal Plain, Southeast Coastal Plain, and Southwest Coastal Plain—to determine if any portion may be in danger of extinction now. We evaluated the Mid-Atlantic Coastal Plain and Southeast Coastal Plain as one portion, because we used the results from the Southeast Coastal Plain to help infer the current resiliency of the Mid-Atlantic Coastal Plain, these analysis units are adjacent to one another along the Atlantic coast, and we suspect that the birds within the Mid-Atlantic Coastal Plain overwinter in the Southeast Coastal Plain.

As discussed in our SSA report and above, the eastern black rail's current distribution is patchy across the range of the species. Our occupancy model results indicated that eastern black rail analysis units currently have low to very low resiliency across these portions based on the occupancy model results (Service 2019, pp. 94–95). The Mid-Atlantic Coastal Plain currently exhibits very low resiliency for eastern black rail as it supports fewer birds and occupied habitat patches than the Southeast Coastal Plain. Current estimates for the Mid-Atlantic and Southeast Coastal Plain (*i.e.,* New Jersey to Florida) are 355–815 breeding pairs (Watts 2016, p.19). The uncertainty surrounding these estimates varies from low to moderate; there is moderate uncertainty for states with more extensive marshes that preclude full survey coverage (*e.g.,* New Jersey, Maryland; Watts 2016, pp. 19, 54, 64). South Carolina shows a limited distribution with two known occupied areas and an estimated 50–100 breeding pairs (Watts, 2016, p. 19). In Florida, birds are found in inland and coastal habitats on both the Atlantic and Gulf Coasts and the state is estimated to support between 200–500 breeding pairs (Watts, 2016, p. 19). Florida is considered the stronghold of this portion, although the eastern black rail remains distributed along the Atlantic Coast (in the Mid-Atlantic and Southeast Coastal Plain).

The Southwest Coastal Plain also has a stronghold of birds, with an estimated 1,299 individuals on the upper Texas coast within specific protected areas prior to Hurricane Harvey (Tolliver et al. 2017, p. 18). The remaining Gulf Coast states support few to no birds during the breeding season. Alabama and Mississippi had a population estimate of zero breeding pairs and Louisiana supported an estimated zero to ten breeding pairs in 2016 (Watts, 2016, p. 19). However, recent first-time surveys conducted in Louisiana during the breeding and non-breeding seasons in 2017 and 2018 detected eastern black rails at 21 of 152 survey points (Johnson and Lehman, 2019b, p. 6), confirming a small year-round population in the state.

In the Great Plains analysis unit there are no current population estimates from the interior States still known to support the species (*i.e.,* Colorado and Kansas), but there are consistently detected populations of eastern black rails at a site in Kansas and along the Arkansas River Basin in southeastern Colorado. In 2018, the first formal repeat surveys were completed for the species in southeastern Colorado during the breeding season (Rossi and Runge 2018, entire). Surveys detected at least one black rail at 39 of 115 points and 17 of 66 marshes surveyed (Rossi and Runge 2018, p. 6). Detection probability estimates for dusk and night surveys were 0.413 (95% CI = 0.176 − 0.698) and 0.552 (95% CI = 0.329 − 0.756), respectfully, and the mean probability of eastern black rail occupancy (the probability that a site was occupied) in core habitat was 0.792 (95% CI = 0.562 − 0.919) (Rossi and Runge 2018, p. 6–7). The 2018 detection and occupancy estimates for eastern black rails in Colorado are higher than those recently estimated for the upper Texas coast

(Tolliver et al. 2019, entire), the species' stronghold in the Southwest Coastal Plain analysis unit.

When determining whether a species is endangered in any portion, there is often a temporal aspect of the analysis. We consider whether the species is presently on the brink of extinction, as opposed to likely to become so in the foreseeable future. This species faces significant habitat loss and conversion from different drivers, including development pressure, groundwater extraction, incompatible land management practices, and impacts from climate change (*i.e.,* changes in temperature and precipitation events, sea level rise, and increases in tidal flooding). Most of the predicted declines in eastern black rail occupancy modeled in the SSA report were driven by habitat loss rates. Future projections of habitat loss are expected to continue and be exacerbated by sea level rise and other drivers. While the extent and severity of the major threats vary across the four remaining analysis units—the Great Plains, Mid-Atlantic Coastal Plain, Southeast Coastal Plain, and Southwest Coastal Plain—the species is likely to become an endangered species within the foreseeable future, 25 to 50 years from the present, and is not in danger of extinction now. The Southwest Coastal Plain analysis unit had the longest predicted time to potential extirpation, between 45 to 50 years from the present, while the Southeast Coastal Plain and the Mid-Atlantic Coastal Plain analysis units' predicted time to probable extirpation is between 35 and 50 years from present depending on the scenario.

The Great Plains analysis unit had the shortest time to potential extirpation, forecasting between 15 to 25 years from the present depending on the scenario. However, we determined the one scenario resulting in extirpation within 15 years is a worst-case scenario and is unlikely to be an accurate representation of the species viability in that portion. As noted above, there are no current population estimates from Great Plains analysis unit, but there are consistently detected populations of eastern black rails at a site in Kansas and along the Arkansas River Basin in southeastern Colorado. At the time of the SSA projection analysis, replicated survey data for Colorado were unavailable and data from Kansas (Hands 2009, entire) were used to represent the Great Plains analysis unit. While the Kansas dataset was from a survey for all secretive marshbirds and not a black rail-specific survey, the dataset included eastern black rail detections and represented the best available scientific information at the time of the SSA analysis. However, more recent surveys indicate a higher occupancy rate for portions of the Great Plains (Rossi and Runge 2018, entire).

Given our review of the current condition of the eastern black rail, the additional information from the 2018 surveys in the Great Plains, and our future projection models, we conclude that, while the species is likely to become in danger of extinction within each of these portions within the foreseeable future, we do not find that these portions are in danger of extinction now. Thus, there are no portions of the species' range where the species has a different status from its range-wide status. Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best available scientific and commercial information indicates that the eastern black rail meets the definition of a threatened species. Therefore, we are listing the eastern black rail as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies; private organizations; and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from the Lists of Endangered and Threatened Wildlife and Plants (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our website (*http://www.fws.gov/endangered*), or from our South Carolina Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Following publication of this final listing rule, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the U.S. States and territories of Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Virginia, U.S. Virgin Islands, and West Virginia would be eligible for Federal funds to implement management actions that promote the protection or recovery of the eastern black rail. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants*.

Please let us know if you are interested in participating in recovery efforts for this subspecies. Additionally, we invite you to submit any new information on this subspecies whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the eastern black rail's habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the U.S. Fish and Wildlife Service and National Park Service; issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; and construction and maintenance of roads or highways by the Federal Highway Administration.

Final 4(d) Rule

Background

Section 4(d) of the Act states that the ''Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation'' of species listed as threatened. The U.S. Supreme Court has noted that very similar statutory language demonstrates a large degree of deference' to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.'' Additionally, section 4(d) of the Act states that the Secretary ''may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants.'' Thus, regulations promulgated under section 4(d) of the Act provide the Secretary with wide latitude of discretion to select appropriate provisions tailored to the specific conservation needs of the threatened species. The statute grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have approved rules developed under section 4(d) that include a taking prohibition for threatened wildlife, or include a limited taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also approved 4(d) rules that do not address all of the threats a species faces (*see State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species,'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

The Service has developed a species-specific 4(d) rule that is designed to address the eastern black rail's specific threats and conservation needs. Although the statute does not require the Service to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the eastern black rail. As discussed under the Determination section, the Service has concluded that the eastern black rail is at risk of extinction within the foreseeable future due to continued wetland habitat loss, sea level changes, increasing storm frequency and intensity and increased flood events (which are both associated with high tides and storms), wetland subsidence, and land management practices (*e.g.,* incompatible prescribed fire, grazing, and mechanical treatment activities). The provisions of this 4(d) rule would promote conservation of the eastern black rail by encouraging management of the landscape in ways that meet both land management considerations and the conservation needs of the eastern black rail. The provisions of this rule are one of many tools that the Service would use to promote the conservation of the eastern black rail.

Provisions of the 4(d) Rule

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. As discussed under the Summary of Biological Status and Threats (above), multiple factors are affecting the status of the eastern black rail. A range of activities have the potential to impact the eastern black rail, including fire management, grazing, mechanical treatment activities, and long-term or permanent conversion, fragmentation, and damage of persistent emergent wetland habitat and the contiguous wetland-upland transition zone to other habitat types or land uses. Regulating incidental take from these activities would help preserve the species' remaining populations and decrease

synergistic, negative effects from other stressors.

A major goal of the 4(d) rule is to minimize incidental take and to maintain the dense overhead cover that the subspecies needs. For the purposes of this rule, we define dense overhead cover as cover that exists in excess of the height of an eastern black rail, and is assessed from above in terms of herbaceous persistent emergent wetland plant cover (as defined by Cowardin et al. 1979, p. 20) versus non-vegetative cover of the ground, including bare ground itself. Eastern black rails typically occupy areas with overhead cover that permits little or no view of bare ground. This type of cover has been assessed by three different means for eastern black rails: (1) The visual estimate of overhead cover in a 50-m radius centered upon the point of interest (*e.g.,* Roach and Barrett 2015, Tolliver et al. 2019); (2) a 10-cm graduated pole accompanied by percent cover estimates (Wiens pole; *e.g.,* Kane 2011, Butler et al. 2015); and (3) a Robel pole and percent cover or plant density estimates (*e.g.,* Butler et al. 2015, Rossi and Runge 2018, Haverland 2019). The latter two protocols included both vertical and horizontal assessments of cover. Roach and Barrett, Tolliver, Haverland, and Butler worked in *Spartina*-dominated estuarine wetlands, whereas Kane and Rossi and Runge worked in inland palustrine marshes. Plant height is generally ≤1 m in coastal habitats, but can be taller in occupied cattail and bulrush marshes (*e.g.,* Legare and Eddleman 2001, p. 170; Culver and Lemly 2013, pp. 316–318).

Under this 4(d) rule, incidental take resulting from fire management activities, grazing activities, and haying, mowing, and other mechanical treatment activities would be prohibited unless otherwise noted. Regardless of management tool, be it mowing, haying, other mechanical treatment activities, fire, or grazing, within a management boundary, a minimum of 50 percent of habitat (*i.e.,* dense overhead cover) required by the eastern black rail should be maintained in any given calendar year. For example, if a single management boundary conducts burning and mechanical treatment activities, the cumulative treatment should not exceed 50 percent of total eastern black rail habitat within the boundary. We discourage disproportionately applying land management treatments to habitats during the breeding season because this will limit population growth and recruitment. Management boundaries can include individual landholdings, *e.g.,* a National Wildlife Refuge boundary, or be formed through landscape-level agreements across landholdings of different but contiguous ownerships.

Fire Management Activities

Prescribed fire is an essential management tool for re-initialization of vegetative succession and seral sequencing for restoring and maintaining habitats on public and private lands, which is important to ensure suitable habitat for maintaining populations of the eastern black rail. Wildland fire occurrence from both natural and human ignition sources can occur any time of the year across much of the eastern black rail's distribution. Eastern black rails can survive fires that slowly progress in a way where individuals can move ahead of the flames and when areas of unburned refugia are available. Refugia can include wetter areas with emergent vegetation, areas with natural or created firebreaks, or areas not conducive to burning (*e.g.,* wet or green areas in a burn unit). These refugia provide escape from the prescribed fire and predators. Prescribed fires that are conducted with large, fast-moving flame fronts and lines of fire merging into each other may result in trapping eastern black rails that may be killed directly by fire or indirectly through asphyxiation.

While the application of prescribed fire may temporarily affect breeding success of individual eastern black rails, periodic burning supports appropriate seral stages and other beneficial features of the habitat conditions necessary for this species. Fire return frequencies in areas known to support eastern black rails should be infrequent to a degree that suitable habitat is available for several years to breeding individuals and yet frequent enough to maintain suitable eastern black rail habitat. These fire return frequencies may vary across the species' range and, therefore, should be determined by site managers. Fire regimes should provide a broad range of habitat conditions, such as adequate breeding habitat and overhead cover, to support completion of the life cycle of individuals and that, overall, provide for population maintenance and growth. Strategies to accomplish this objective should minimize incidental take of eggs and chicks, where possible. If the prescribed fire occurs during the breeding and nesting season, adults that lose eggs and chicks would have the opportunity to re-nest in unaffected areas. Certain prescribed fire practices can result in unnecessary mortality of eastern black rail during both the breeding and non-breeding season.

The 4(d) rule prohibits incidental take of eastern black rails resulting from prescribed fires throughout the year, unless the practices described below, which would minimize incidental take of eastern black rails and provide for long-term habitat needs for the eastern black rail and other cover-dependent species, are followed. Practices include:

- Regardless of the size of the area under management with prescribed fire, a broad range of habitat conditions should be maintained by burning on a rotational basis, which supports black rail population maintenance and growth. In any given calendar year, at least 50 percent of eastern black rail habitat within a management boundary should be maintained in order to provide the dense overhead cover required by the subspecies. This percentage does not apply to landholdings smaller than 640 acres.
- Where eastern black rail are present, the application of prescribed fire uses tactics that provide unburned refugia allowing birds to survive a fire (*e.g.,* using short flanking, backing fires, or similar approaches). Prescribed fire is applied under fuel and weather conditions (*e.g.,* soil moisture and/or relative humidity) that are most likely to result in patchy persistence of unburned habitat to serve as refugia as well as provide dense overhead cover for protection from aerial predators. For each burn unit, as an objective approximately 10 percent of the burn unit should be distributed as small dispersed patches of unburned area. Unburned patches should be no smaller than 100 square feet. In addition to refugia dispersed in the interior of a burn unit, leaving unburned habitat along unit edges (such as those available on the outward side of roadside borrow ditches) may provide additional refugia for birds to shelter in prior to dispersing to adjacent suitable habitat.
- Ignition tactics, rates of spread, and flame lengths should allow for wildlife escape routes and avoid trapping birds in a fire. The application of prescribed fire should avoid fires, such as ring and strip head fires, that have long, unbroken boundaries and/or that come together in a short period of time and which consume essentially all vegetation and prevent black rails from escaping a fire. If aerial ignition is the chosen tool, ignitions should be conducted in such a way that large, fast-moving fires are avoided. Special precautions should be taken when using aerial ignition, and using short flanking fires into prevailing wind to slow the rate of spread is recommended.

For landholdings smaller than 640 acres, we are excepting these areas from

the practice to provide dense overhead cover in 50 percent of the eastern black rail habitat within the management boundary. The selection of 640 acres as a lower limit is based on the feasibility of meeting the percentage requirement on smaller land holdings. In many States where eastern black rails may occur, roads are often used as firebreaks and often form the perimeter of a ''section'' or square mile, *i.e.,* 640 acres. Smaller land holdings may find achieving the percentage requirement difficult or infeasible and possibly unsafe. It is unlikely that all small land holdings within a geographic area that supports eastern black rails would be treated with prescribed fire at the same time. Further, other nearby land holdings may support eastern black rails where habitat is present.

This provision of the 4(d) rule for fire management activities would promote conservation of the eastern black rail by encouraging continued management of the landscape in ways that meet management needs while simultaneously ensuring the continued survival and propagation of the eastern black rail and by providing suitable habitat.

Haying, Mowing, and Other Mechanical Treatment Activities

Haying and mowing can maintain eastern black rail habitat by reducing woody vegetation encroachment. Mechanical treatment activities include disking (using a disk, harrow, or other tractor-drawn implement) and brush clearing (using a variety of tools that may be attached to a tractor or a stand-alone device). While these practices can be used to enhance eastern black rail habitat, the timing and manner of implementation can impact recruitment and survival.

Haying, mowing, and mechanical treatment activities in persistent emergent wetlands should be avoided during the nesting and brood-rearing periods where eastern black rails are present. We define persistent, emergent wetlands as areas where persistent emergent plants (*i.e.,* erect, rooted, herbaceous hydrophytes, excluding mosses and lichens, that normally remain standing at least until the beginning of the next growing season) are the tallest life form with at least 30 percent areal coverage (Cowardin *et al.* 1979, pp. 11, 19–20). Persistent, emergent vegetation are typically perennial hydrophytic plants (*e.g., Spartina* sp., *Juncus* sp., *Scirpus* sp., *Typha* sp., *Phragmites* sp., *Zizaniopsis* sp., etc.; Federal Geographic Data Committee 2013, p. 33) that form dense stands and provide overhead cover and primary nesting substrate for black rail and other secretive marsh birds. For more information on emergent wetlands, please visit the Service's National Wetlands Inventory website: *https://www.fws.gov/wetlands/*.

Haying, mowing, and mechanical treatment activities in persistent emergent wetlands that take place during critical time periods for eastern black rail (*i.e.,* nest construction, egg-laying, incubation, and parental care) can potentially lead to disturbance of nesting birds; destruction of nests; and mortality of eggs, chicks, juveniles, and adults. We recognize that there is latitudinal variability of these life-history events across the range of the eastern black rail. For example, in Texas, eastern black rails begin to nest in March, whereas in Kansas and Colorado nesting begins in May. Therefore, the timing of prohibitions would coincide with when the eastern black rail is using the habitat for nesting and brood-rearing.

We recognize haying, mowing, or other mechanical treatment activities may need to be used for maintenance requirements to ensure safety and operational needs for existing infrastructure, and we understand that these maintenance activities may need to take place during the nesting or brooding periods. These include maintenance of existing firebreaks, roads, rights-of-way, levees, dikes, fence lines, airfields, and surface water irrigation infrastructure (*e.g.,* head gates, ditches, canals, water control structures and culverts). Incidental take resulting from these activities are an exception to this prohibition.

We also except incidental take that results from mechanical treatment activities that are done during the nesting or brooding periods with the purpose of controlling woody encroachment or other invasive plant species to restore degraded habitat. It is unlikely that eastern black rails will be occupying areas of unsuitable habitat, and mechanical treatment activities to remove woody vegetation or other invasive plant species may help restore habitat and allow for eastern black rail use in the future. Invasive species (both native [*e.g., Baccharis halimifolia*] and nonnative [*e.g., Phragmites australis, Triadica sebifera*]) have played a role by converting emergent systems into shrub- or tree-dominated landscapes or monocultures. Given the narrow habitat preferences of the eastern black rail, *i.e.,* very shallow water and dense emergent vegetation, small changes in plant community structure from woody encroachment or other invasive plant species can quickly result in unsuitable habitat for the eastern black rail.

We do not prohibit incidental take from mowing, haying, or other mechanical treatment activities outside of the nesting or brood-rearing periods. However, we encourage land managers to employ voluntary BMPs outside of these time periods in emergent wetlands with eastern black rails present. BMPs for haying, mowing, and mechanical treatment activities include avoiding treatment of more than 50 percent of a contiguous block of habitat resources in emergent wetlands where eastern black rails are present; providing untreated (*i.e.,* unmown or avoided) areas that provide refugia for species dependent on dense overhead vegetative cover, such as the eastern black rail, during years when treatments are conducted; and using temporary markers to identify where birds occur so that these areas may be avoided.

This provision of the 4(d) rule for haying, mowing, and other mechanical treatment activities in persistent emergent wetlands would promote conservation of the eastern black rail by prohibiting incidental take of eastern black rail during the nesting and brood-rearing period.

Grazing Activities

Based on current knowledge of grazing and eastern black rail occupancy, the specific timing, duration, and intensity of grazing will result in varying impacts to the eastern black rail and its habitat. Either no grazing or light-to-moderate grazing may be compatible with eastern black rail occupancy under certain conditions, while intensive or heavy grazing is likely to have negative effects on eastern black rails and the quality of their habitat. Intensive or heavy grazing may lead to the removal of required dense overhead cover, as well as disturbance of nesting birds and possible destruction of nests and mortality of eggs and chicks due to trampling. Grazing densities should maintain the dense overhead cover required by the eastern black rail and allow for the long-term maintenance of habitat conditions required by the eastern black rail.

Grazing practices support other land use purposes and management goals, including resetting of grassland and marsh seral stages necessary to support habitat needs of various species. Grazing (such as short duration grazing) is sometimes used to delay seral stage succession as a surrogate for prescribed fire.

We are limiting this prohibition to public lands whose intended purpose is wildlife and/or habitat conservation,

given our knowledge of where grazing activities and the presence of eastern black rails overlap. The rationale for this approach is based on several factors. First, applying the prohibition to these public ownerships that have been established for wildlife or habitat conservation provides clarity to land managers who presently employ grazing as a management tool and to land managers who may consider using grazing as a management tool at a future date. Further, the Service and its Federal and State partners have significant efforts working with private landowners who conduct grazing activities on their lands to support conservation of other listed and at-risk wildlife species. For example, the Partners for Fish and Wildlife Program is working with private landowners on Attwater's prairie chicken recovery in Texas. Preliminary results suggest that land management activities at this site, which include grazing prescriptions, may also support eastern black rails. These efforts provide public and private land managers with strategies and approaches that will support conservation and recovery of the eastern black rail. Although we are not proposing to prohibit incidental take resulting from grazing that maintains dense overhead cover, we recommend that land managers follow voluntary practices to support conservation of the eastern black rail and associated habitat. Voluntary practices to avoid negative impacts to the eastern black rail from grazing activities include the use of fences to exclude grazing from habitat where eastern black rails are present, and rotational grazing practices so that a mosaic pattern of cover density is present across fenced tracts of land.

The rule prohibits incidental take resulting from grazing activities on public lands that, individually or cumulatively with other land management practices, do not maintain at least 50 percent of eastern black rail habitat, *i.e.,* dense overhead cover, in any given calendar year within a management boundary. This provision of the 4(d) rule for grazing activities would promote conservation of the eastern black rail by encouraging land managers to continue managing the landscape in ways that meet their needs while simultaneously providing suitable habitat for the eastern black rail. We encourage the use of rotational and deferred grazing practices in an effort to reduce the duration of disturbance/impacts to eastern black rails and their habitat.

Long-Term or Permanent Conversion, Fragmentation, and Damage of Persistent Emergent Wetland Habitat and Contiguous Wetland-Upland Transition Zone to Other Habitat Types or Land Uses

The eastern black rail is a wetland-dependent bird requiring dense overhead cover and soils that are moist to saturated (occasionally dry) and interspersed with or adjacent to very shallow water (typically ≤3 cm) to support its resource needs. Eastern black rails occur across an elevational gradient that lies between low marsh and uplands. Their location across this gradient may vary depending on hydrologic conditions. The wetland-upland transition zone is a narrow band of habitat where wetlands and uplands intersect and contains vegetation types from both ecotones and are important to provide refugia during flooding events and minimize the risk of predation (Evens and Page 1986). For activities planned within the wetland-upland transition zone, we encourage you to contact the local Ecological Services Field Office (*http://www.fws.gov/offices*) to help evaluate the potential for take of eastern black rail.

Although conservation measures to protect wetlands have resulted in meaningful decreases in the rate of wetland habitat loss, loss of emergent wetlands continues (Service 2019, entire). The most recent wetlands status and trends report indicates that estuarine emergent wetland losses are mostly attributable to conversion to open water through erosion (Dahl and Stedman 2013, p. 37), while freshwater emergent wetland losses appear to be the result of development (Dahl and Stedman 2013, p. 35). While we cannot prohibit incidental take that may result from the effects of climate change, such as sea level rise or erosion, we can ensure that incidental take of eastern black rails that results from conversion or fragmentation of wetlands and the contiguous wetland-upland transition zone outside of natural community shifts (*e.g.,* due to wet and dry cycles), to other habitat types or land uses is prohibited. Conversion of this type may result from development and construction activities or from vehicular access when such access results in a permanent or long-term conversion or damage of the habitat. For example, track equipment or equipment with amphibious tires may leave behind ruts or depressions that exist permanently or for the long term.

This prohibition addresses public comments received requesting that the Service include measures to address impacts from infrastructure development and construction activities in eastern black rail habitat.

Other Forms of Take

This 4(d) rule provides for the conservation of the eastern black rail by prohibiting the following activities, except as otherwise authorized or permitted: Importing or exporting; purposeful take; possession and other acts with unlawfully taken specimens; delivering, receiving, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce. We extend the Act's section 9(a)(1)(A) and 9(a)(1)(D)–(F) prohibitions to the eastern black rail throughout its range.

We may issue permits to carry out otherwise prohibited activities involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

The Service recognizes the special and unique relationship with our state natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, would be able to conduct activities designed to conserve the eastern black rail that may result in otherwise prohibited take without additional authorization.

Other Exceptions to Prohibitions

We recognize that some individual managed wetland units have an established history of intensive vegetation and soil management, which may include burning, during the growing season on an annual or nearly annual basis (*e.g.,* moist soil management). In contrast to the definition of persistent emergent wetlands provided above, these wetland units have established objectives to maintain unvegetated (*e.g.,* mudflat), sparsely vegetated, and/or primarily annual plant communities that may not provide vegetative cover during a substantial portion of the growing season. For example, prior converted croplands that support active production of rice and other cereal grains do not provide suitable habitat for eastern black rail and are, therefore, excepted. These and other wetland units with established management practices to provide habitat conditions other than those described in our definition of persistent emergent wetlands are an exception to this prohibition.

We are excepting incidental take resulting from actions taken to control wildfires. There are also incidental take exceptions for construction of new firebreaks (for example, to protect wildlands or manmade infrastructure) and fence lines, as these are needed when management units are subdivided or new property is acquired. Both of these activities allow for improved targeted management that benefits the habitat needs of eastern black rails and provide for public safety.

Nothing in this 4(d) rule changes in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the eastern black rail. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service. We ask the public, particularly State agencies and other interested stakeholders that may be affected by the 4(d) rule, to contact us regarding additional guidance and methods that the Service could provide or use, respectively, to streamline the implementation of this 4(d) rule (see **ADDRESSES**, 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.

Conservation, as defined at 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. Such designation does not allow the government or public to access private lands. Such designation does not 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 consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

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.

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 designate critical habitat at the time the species is determined to be endangered or threatened. 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.

In the proposed listing rule (83 FR 50610, October 9, 2018), we determined that designation of critical habitat for the eastern black rail would not be prudent. However, we invited public comment and requested information on the threats of taking or other human activity, particularly by birders, on the eastern black rail and its habitat, and the extent to which designation might

increase those threats, as well as the possible benefits of critical habitat designation to the eastern black rail.

During the comment period, we did not receive any substantive comments, or any comments that would require us to change the not prudent determination or our rationale for it (see 83 FR 50627–50628). Therefore, we restate our conclusion that the designation of critical habitat is not prudent, in accordance with 50 CFR 424.12(a)(1), because the eastern black rail and its habitat face a threat by overzealous birders, and designation can reasonably be expected to increase the degree of these threats to the subspecies and its habitat by making location information more readily available.

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act, need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

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. Although we have no records of the eastern black rail occurring on tribal lands, the range of the eastern black rail overlaps with tribal lands. At the time of the proposed rule, we contacted Tribal leaders and Natural Resource Coordinators for those Tribes residing within the subspecies' range. We did not receive any comments on the proposed rule from these Tribes.

References Cited

A complete list of references cited in this rule is available on the internet at *http://www.regulations.gov* in Docket No. FWS–R4–ES–2018–0057 and upon request from the South Carolina Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Species Assessment Team, U.S. Fish and Wildlife Service.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we 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. Amend § 17.11(h) by adding an entry for ''Rail, eastern black'' to the List of Endangered and Threatened Wildlife in alphabetical order under BIRDS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
BIRDS				
*	*	*	*	*
Rail, eastern black	*Laterallus jamaicensis jamaicensis.*	Wherever found	T	85 FR [INSERT ***FEDERAL REGISTER*** PAGE WHERE THE DOCUMENT BEGINS], 10/8/2020; 50 CFR 17.41(f).[4d]
*	*	*	*	*

* * * * *

■ 3. Amend § 17.41 by adding paragraph (f) to read as follows:

§ 17.41 Special rules—birds.

* * * * *

(f) Eastern black rail (*Laterallus jamaicensis jamaicensis*).

(1) *Prohibitions.* The following activities with the eastern black rail are prohibited:

(i) Purposeful take, including capture, handling, or other activities.

(ii) Incidental take resulting from the following activities:

(A) Prescribed burn activities, unless best management practices that minimize negative effects of the prescribed burn on the eastern black rail are employed. Best management practices include:

(*1*) Regardless of the size of the area under management with prescribed fire, a broad range of habitat conditions should be maintained by burning on a rotational basis, which supports black rail population maintenance and growth. In any given calendar year, at least 50 percent of the eastern black rail habitat within the management boundary should be maintained in order to provide the dense overhead cover required by the subspecies. Management boundaries can include individual landholdings, *e.g.,* a National Wildlife Refuge boundary, or be formed through landscape-level agreements across landholdings of different but contiguous ownerships. This percentage does not

apply to landholdings smaller than 640 acres.

(*2*) Where eastern black rail are present, the application of prescribed fire uses tactics that provide unburned refugia allowing birds to survive a fire (*e.g.,* using short flanking, backing fires, or similar approaches). Prescribed fire is applied under fuel and weather conditions (*e.g.,* soil moisture and/or relative humidity) that are most likely to result in patchy persistence of unburned habitat to serve as refugia from fire and predators.

(*3*) Ignition tactics, rates of spread, and flame lengths should allow for wildlife escape routes to avoid trapping birds in a fire. The application of prescribed fire should avoid fires, such as ring and strip head fires, that have long, unbroken boundaries and/or that come together in a short period of time and that consume essentially all vegetation and prevent black rails from escaping a fire. If aerial ignition is the chosen tool, ignitions should be conducted in such a way that large, fast-moving fires are avoided.

(B) Mowing, haying, and other mechanical treatment activities in persistent emergent wetlands when the activity occurs during the nesting or brooding periods, except in accordance with paragraph (f)(2)(iii) of this section.

(C) Grazing activities on public lands that occur on eastern black rail habitat and, that individually or cumulatively with other land management practices, do not maintain at least 50 percent of eastern black rail habitat, *i.e.,* dense overhead cover, in any given calendar year within a management boundary.

(D) Long-term or permanent damage, fragmentation, or conversion of persistent emergent wetlands and the contiguous wetland-upland transition zone to other habitat types (such as open water) or land uses that do not support eastern black rail.

(iii) Possession and other acts with unlawfully taken eastern black rails. It is unlawful to possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any eastern black rail that was taken in violation of section 9(a)(1)(B) and (C) of the Act or State laws.

(iv) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(v) Possess and conduct other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(vi) Engage in interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(vii) Sell or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(2) *Exceptions from prohibitions.*

(i) All of the provisions of § 17.32 apply to the eastern black rail.

(ii) Any employee or agent of the Service, of the National Marine Fisheries Service, or of a State conservation agency that is operating a conservation program for the eastern black rail pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his agency for such purposes, may, when acting in the course of his official duties, take eastern black rails.

(iii) Incidental take resulting from haying, mowing, or other mechanical treatment activities in persistent emergent wetlands that occur during the nesting and brooding periods is allowed if those activities:

(A) Are maintenance requirements to ensure safety and operational needs, including maintaining existing infrastructure such as firebreaks, roads, rights-of-way, levees, dikes, fence lines, airfields, and surface water irrigation infrastructure (*e.g.,* head gates, ditches, canals, water control structures, and culverts); or

(B) Occur during the control of woody encroachment and other invasive plant species to restore degraded habitat.

(iv) Incidental take resulting from actions taken to control wildfires is allowed.

(v) Incidental take resulting from the establishment of new firebreaks (for example, to protect wildlands or manmade infrastructure) and new fence lines is allowed.

(vi) Incidental take resulting from prescribed burns, grazing, and mowing or other mechanical treatment activities in existing moist soil management units or prior converted croplands (*e.g.,* impoundments for rice or other cereal grain production) is allowed.

Aurelia Skipwith,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020–19661 Filed 10–7–20; 8:45 am]

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Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Threatened Species Status for Coastal Distinct Population Segment of the Pacific Marten With a Section 4(d) Rule; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2018–0076; FF09E21000 FXES11110900000 201]

RIN 1018–BD19

Endangered and Threatened Wildlife and Plants; Threatened Species Status for Coastal Distinct Population Segment of the Pacific Marten With a Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine threatened species status under the Endangered Species Act of 1973 (Act), as amended, for the coastal distinct population segment (DPS) of Pacific marten (*Martes caurina*), a small mammal from coastal California and Oregon. We also issue final regulations that are necessary and advisable to provide for the conservation of this DPS under section 4(d) of the Act (a ''4(d) rule''). This final rule extends the Act's protections to the coastal DPS of Pacific marten, subject to the 4(d) rule's exceptions.

DATES: This rule is effective November 9, 2020.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* under Docket No. FWS–R8–ES–2018–0076. Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov* under Docket No. FWS–R8–ES–2018–0076.

FOR FURTHER INFORMATION CONTACT: Dan Everson, Field Supervisor, U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office (see **ADDRESSES**). 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 Endangered Species Act, a species may warrant protection through listing if it is endangered or threatened throughout all or a significant portion of its range. Listing a species as an endangered or threatened species can only be completed by issuing a rule. Further, under the Endangered Species Act, any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable.

What this document does. This rule lists the coastal distinct population segment (DPS) of Pacific marten (*Martes caurina*) as a threatened species under the Endangered Species Act. This document also finalizes a rule under the authority of section 4(d) of the Act that provides measures that are necessary and advisable to provide for the conservation of the coastal DPS of Pacific marten.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the coastal DPS of the Pacific marten is likely to become in danger of extinction within the foreseeable future primarily due to habitat loss (including fragmentation) and associated changes in habitat quality and distribution.

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. In this case, we have found that the designation of critical habitat for the coastal DPS of Pacific marten is not determinable at this time.

Peer review and public comment. During the proposed rule stage, we sought the expert opinions of 8 peer reviewers and 3 technical experts regarding the species status assessment report. We received responses from 4 specialists, which informed our determination. We also considered all comments and information received from the public during the comment period.

Previous Federal Actions

On October 9, 2018, we published a proposed rule in the **Federal Register** (83 FR 50574) to list the coastal DPS of Pacific marten (coastal marten) as a threatened species under the Act (16 U.S.C. 1531 *et seq.*). Our proposed rule included a proposed 4(d) rule for the coastal marten. Please refer to that proposed rule for a detailed description of previous Federal actions concerning this DPS, which we refer to as a ''species'' in this rule, in accordance with the Act's definition of ''species'' at 16 U.S.C. 1532(16).

Summary of Changes From the Proposed Rule

In preparing this final rule, we reviewed and fully considered comments from the public on the proposed rule. We did not make any substantive changes to this final rule after consideration of the comments we received. We did update the Species Status Assessment (SSA) report (to version 2.1) based on comments and some additional information provided, as follows: (1) We made many small, nonsubstantive clarifications and corrections throughout the SSA report, including ensuring consistency, providing details about data sources used, and updating references; and (2) we included additional information we received regarding observations of the coastal marten, hypothesized historical range of the coastal marten, and more detailed life-history data for the species. We also updated our discussion of predators and the influence of vegetation management on their use of areas occupied by the coastal marten. However, the information we received during the comment period for the proposed rule did not change our previous analysis of the magnitude or severity of threats facing the species.

In addition, as a result of Federal, State, and public comment, we have added clarifying language, improved our rationale, revised our preamble discussion of the 4(d) rule, incorporated more specifics into the 4(d) rule itself, and added information on management or cleanup activities in response to public comments (see Final Rule Issued Under Section 4(d) of the Act). The commenters stated that additional detail or examples would help them better understand the forest management activities excepted by the 4(d) rule. Other comments requested that we add additional 4(d) exceptions regarding State employees or agents and activities for cleanup of disturbed habitat. In response, we added clarifying language as follows: (1) Added an exception for activities conducted in accordance with a permit issued under 50 CFR 17.32; (2) revised the exception and gave examples of forestry management activities to potentially reduce the risk or severity of wildfire (see § 17.40(s)(2)(ii) below); (3) clarified the use of State Natural Communities Conservation Plan or State Safe Harbor Agreements ((see § 17.40(s)(2)(iii) below); (4) added examples of forestry management activities which promote the conservation needs of the coastal marten (see § 17.40(s)(2)(iv) below); (5)

added an exception for removal of toxicants and cleanup of coastal marten habitat (see § 17.40(s)(2)(v) below); and (6) added an exception for activities conducted by State conservation agency employees or agents that conserve coastal marten (see § 17.40(s)(2)(vi) below).

We also considered the recent Oregon Fish and Wildlife Commission decision and associated rule by the Oregon Department of Fish and Wildlife (ODFW) banning trapping of marten west of I–5 in Oregon, which includes the coastal DPS. Although this new ODFW regulation is expected to reduce marten mortality in the Oregon portion of the DPS, trapping was considered as one of several threats coastal marten faced, and it occurred at a low level (on average, less than 1 marten harvested per year over the past 28 years). We considered banning of trapping in one of our future scenarios (scenario 2) generated in the coastal marten SSA, and it did not result in any projected improvement in population resiliency for any of the Oregon populations (Service 2019, pp. 104–105). Hence, while banning trapping of martens in the coastal DPS will reduce marten mortality, there are still substantial threats to the DPS. We do not expect this change in management to improve the status of the coastal marten to the point that it does not meet the definition of a threatened species under the Act.

Supporting Documents

A species status assessment (SSA) team prepared an SSA report for the species. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. The SSA report underwent independent peer review by scientists with expertise in carnivore biology, habitat management, and stressors (factors negatively affecting the species) to the species.

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 sought peer review of the SSA report. The Service sent the SSA report to eight independent peer reviewers and received two responses. The purpose of peer review is to ensure that our listing determinations and 4(d) rules are based on scientifically sound data, assumptions, and analyses. The peer reviewers have expertise that includes familiarity with the coastal marten and its habitat, biological needs, and threats. In addition, we sent the SSA report to three technical experts to review specific aspects and use of scientific information therein. We received responses from two of the technical experts.

I. Final Listing Determination

Background

On June 23, 2014, we published a notice in the **Federal Register** (79 FR 35509) that summarized the taxonomic classification of the subspecies (based on current genetic information) and indicated our intent to conduct an evaluation of a potential DPS of martens in coastal Oregon and coastal northern California relative to the full species classification level. On April 7, 2015, we published a DPS analysis (80 FR 18742) concluding that Pacific martens in coastal Oregon and northern coastal California were both discrete and significant to the taxon to which it belongs, and constituted a listable entity referred to collectively as the ''coastal DPS of the Pacific marten.'' This document and the associated SSA reflect our analysis of that DPS. A recent publication evaluating Pacific marten genetics indicates that coastal Oregon and northern coastal California marten populations likely represent a single subspecies, the Humboldt marten (*M. c. humboldtensis*) (Schwartz *et al.* 2020, p. 11). Although our listable entity may be a subspecies based on this evaluation, the DPS analysis for coastal marten as described above remains valid for the purposes of this rule.

The coastal marten is a medium-sized carnivore that historically occurred throughout the coastal forests of northwestern California and Oregon. The coastal marten has a long and narrow body type typical of the mustelid family (*e.g.,* weasels, minks, otters, and fishers), generally with brown fur overall, but with distinctive coloration on the throat and upper chest that varies from orange to yellow to cream. The coastal marten has large and distinctly triangular ears and a bushy tail. Its lifespan is usually less than 5 years. The coastal marten feeds mainly on small mammals, but also consumes birds, insects, and fruits. Coastal martens tend to select older forest stands (*e.g.,* late-successional, old-growth, large-conifer, mature, late-seral, structurally complex forests), or forests that have old-forest characteristics such as old and large trees, multiple canopy layers, snags, downed logs and other decay elements, dense understory development, and biologically complex structure and composition.

Please refer to the October 9, 2018, proposed rule (83 FR 50574) and the species status assessment (SSA) report (Service 2019, entire) for a full summary of species information. Both documents are available at *http://www.regulations.gov* under Docket No. FWS–R8–ES–2018–0076, and on the Arcata Fish and Wildlife Office's website at *https://www.fws.gov/arcata/.*

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an ''endangered species'' or a ''threatened species.'' The Act defines an endangered species as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether any species is an ''endangered species'' or a ''threatened species'' because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the

action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Our proposed rule described ''foreseeable future'' as the extent to which we can reasonably rely on predictions about the future in making determinations about the future conservation status of the species. The Service since codified its understanding of foreseeable future in 50 CFR 424.11(d) (84 FR 45020). In those regulations, we explain the term ''foreseeable future'' extends only so far into the future as the Service can reasonably determine that both the future threats and the species' responses to those threats are likely. The Service will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Service need not identify the foreseeable future in terms of a specific period of time. These regulations did not significantly modify the Service's interpretation; rather they codified a framework that sets forth how the Service will determine what constitutes the foreseeable future based on our long-standing practice. Accordingly, though the regulations do not apply to the final rule for the coastal DPS of the Pacific marten because it was proposed prior to their effective date, they do not change the Service's assessment of foreseeable future for the coastal DPS of the Pacific marten as contained in our proposed rule and in this final rule.

Analytical Framework

The SSA report documents the results of our comprehensive biological status review for the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be listed as an endangered or threatened species under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–R8–ES–2018–0076, and on the Arcata Fish and Wildlife Office's website at *https://www.fws.gov/arcata/.*

To assess the species' viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. This process used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

Summary of Biological Status and Threats

Our assessment evaluated the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. It was based upon the best available scientific and commercial data, including the SSA report (Service 2019, entire), and the expert opinion of the SSA team members. Please refer to chapter 3 of the SSA report (Service 2019, pp. 36–71) for a more detailed discussion of the factors affecting the coastal marten. The following is a summary of the key results and conclusions from the SSA report.

The coastal marten historically ranged throughout coastal Oregon and coastal northern California, but the species has not recently been detected throughout much of the historical range, despite extensive surveys. The coastal marten currently exists in four small populations (fewer than 100 individuals each) in Oregon and California, and is absent from the northern and southern

ends of its historical range. The current range is approximately 7 percent of its known historical range. The coastal marten has been extirpated from Sonoma and Mendocino Counties, California, and occupies small portions of Humboldt, Del Norte, and Siskiyou Counties. In Oregon, coastal martens have been largely extirpated from much of the inland counties within the historical range and are known to currently occur in portions of Coos, Curry, Josephine, Douglas, Lane, and Lincoln Counties, Oregon.

We have assessed the coastal marten's levels of resiliency, redundancy, and representation currently and into the future by first ranking the condition of each population. We ranked the four populations into three categories (high, moderate, and low) based on key population factors and habitat elements. We used three between-population factors (least-cost path distance, filters, and number of populations in proximity) and four within-population factors (population size, available male home ranges, available female home ranges, and proportion of habitat subject to high predation risk). Least-cost path distance describes the distance a coastal marten must travel for dispersal needs in order to reach the next closest population. Filters are barriers to this movement and can be either natural or manmade, such as large rivers or highways. This analysis provided condition categories to describe the resiliency of each population. A summary of this analysis is provided in table 4.3 of the SSA report (Service 2019, p. 96).

Maintaining representation in the form of genetic or ecological diversity is important to maintain the coastal marten's capacity to adapt to future environmental changes. We consider the coastal marten to have representation in the form of two different ecological settings. Some animals are adapted to the shore pine (*Pinus contorta*) forests found in coastal margins and dune ecosystems, and others are adapted to late-seral forest and serpentine ridges. One population represents the shore pine ecological setting, and three represent the forest and serpentine ecological settings. Genetic variation between populations is unknown at this time, as no studies have been conducted to determine the degree of genetic variation between the four populations.

The coastal marten needs to have multiple resilient populations distributed throughout its range to provide for redundancy. The more populations, and the wider the distribution of those populations, the more redundancy the species exhibits. Based on the distributions of current verifiable coastal marten detections and adjacent suitable habitat, we identified four extant population areas (EPAs) within coastal Oregon and northern coastal California:

(1) Central Coastal Oregon EPA;
(2) Southern Coastal Oregon EPA;
(3) Oregon–California Border EPA; and
(4) Northern Coastal California EPA.

Additional detections of coastal martens have occurred outside of the current EPAs, but they did not meet the criteria of a population (most likely, they represent transient individuals in search of new territories) according to methods used in the Humboldt Marten Conservation Strategy and Assessment (Slauson *et al.* 2019, pp. 72–73), a synthesis of literature on marten ecology developed by the Humboldt Marten Conservation Group. This group is made up of State, Federal, Tribal, private, and nongovernmental organizations in coastal Oregon and northwestern California to conserve and manage coastal martens.

Our analysis of the past, current, and future influences on what the coastal marten needs for long-term viability revealed that two factors pose the largest risk to future viability of the species. These risks are primarily related to habitat loss and associated changes in habitat quality and distribution (including habitat fragmentation) (Factor A) and include: (1) A decrease in connectivity between populations; and (2) habitat conversion from that suitable for coastal martens to that suitable for generalist predators and competitors, thereby potentially increasing interactions and subsequent coastal marten injury, mortality, or predation. These factors are all influenced by vegetation management, wildfire, and changing climate.

Predation of coastal martens (Factor B) may be affected by changes in forest composition, potentially increasing predator habitat and increasing coastal marten vulnerability to predation. Bobcats are the coastal marten's predominant predator, with predation accounting for 41 percent of mortalities documented in one study. Bobcats prefer regenerating harvested stands less than 30 years old, and are nearly absent from older forests, the preferred habitat used by coastal marten. Coastal martens are vulnerable to predation and increased competition in habitats that have been subject to either high- or moderate-severity fires or intensive logging in the last 40 years where these events remove the structural characteristics of the landscape that provide escape cover and are important to coastal marten viability (canopy cover, shrub cover, etc.). These older forests have declined substantially from historical amounts: Older forests historically encompassed greater than 75 percent of the coastal California area, 50 percent of the Klamath and Siskiyou region in northern California and southwest Oregon, and 25 to 85 percent of the Oregon Coast Range. Estimates of the remaining older forests in the redwood region, Oregon Coast Range, and Klamath–Siskiyou region are around 5, 20, and 38 percent, respectively, of what occurred historically.

In addition to timber harvest activities, wildfires also destroy or remove forested habitat and occur regularly throughout the range of the coastal marten outside the coastal dunes population. Between 2000 and 2014, approximately 17 percent of the suitable coastal marten habitat in the north coastal California population burned. In 1987, in the California–Oregon border population area, roughly 12 percent of suitable habitat burned in the Longwood Fire. Substantial amounts of habitat occupied by the coastal marten have the potential to burn at varying severities in single wildfire events or over a few years. The effects from climate change are projected to result in longer wildfire seasons, producing more frequent and larger wildfires. Wildfires large enough to totally encompass all or most of all four individual population areas are already occurring throughout the range of the coastal marten and are expected to increase in frequency, raising concern over the resiliency of at least the three southern coastal marten population areas, which have been most affected by recent fires and are in a fire regime particularly vulnerable to future fires.

Dispersal is the means by which coastal marten populations maintain and expand their distribution. Successful dispersal is assisted by having suitable habitat between patches occupied by the species. Connectivity of habitat between populations allows for the coastal marten to maintain or expand population size and distribution. A resilient coastal marten population would have suitable habitat maintained between populations that provides important habitat for key prey, abundant daily resting sites, and a distance between populations that is within the range of an average coastal marten dispersal distance. Neither of the Oregon populations has functional connectivity to any other population and if a stochastic or catastrophic event eliminated either of these two populations, natural recolonization from the California populations would not be

feasible. The two California populations have connectivity to one another, but not to the Oregon populations.

In addition to being mostly isolated, all four populations are relatively small and face other threats in addition to habitat loss. Since 1980, 19 mortalities of coastal martens caused by vehicles (Factor E) have been documented, all in Oregon and mostly along U.S. Highway 101. We expect that some unknown amount of coastal marten roadkill goes undetected, so this is likely an underestimate of the number of coastal martens killed by cars. Exposure to rodenticides (Factor E), through direct ingestion or the consumption of exposed prey, has been documented in coastal martens. This exposure has lethal and sub-lethal effects on other mammal species, and similar effects are expected for coastal martens. Illegal cannabis cultivation sites on public, tribal, and private forest lands are implicated as the likely source of these rodenticides in the California and Southern Oregon populations. In a similar carnivore species (fisher (*Pekania pennanti*)), 85 percent of carcasses tested were exposed to rodenticides, with the exposure in 13 percent being the direct cause of death.

Certain diseases (Factor C) are also a concern to coastal martens including canine distemper viruses (CDV), rabies viruses, parvoviruses, and the protozoan (single-celled organism) *Toxoplasma gondii.* We acknowledge that there has been limited testing of coastal martens for the presence of pathogens or exposure to pathogens, but exposure levels and ultimate effect on populations are difficult to document until an outbreak is actually observed. While larger populations might display a mass mortality as a result of disease infections, extinction or extirpation is rare. With population sizes estimated at fewer than 100 each for all four coastal marten populations, an outbreak in an individual population puts it at a higher risk for extirpation.

The coastal marten faces a variety of threats including loss of habitat, threats from wildfire, and increased predation risk. These risks play a large role in the resiliency and future viability of the coastal marten. Given the lack of connectivity between populations, availability of suitable habitat, and increases in predation within the populations, we forecasted in the SSA report what the coastal marten may have in terms of resiliency, redundancy, and representation under three plausible future scenarios. All three scenarios were forecast out over the next 15, 30, and 60 years. A range of timeframes with a multitude of possible scenarios allows us to create a ''risk profile'' for the coastal marten and its viability into the future. Scenario 1 evaluates the future condition of the coastal marten if there is no change in trends in threats to the populations from what exists today, while the other two scenarios evaluate the response of the species to increases or decreases in the major factors that are influencing coastal marten viability. While we do not expect every condition for each scenario to be realized, we are using these scenarios to bound the range of possibilities. Scenarios 2 and 3 are considered the ''outside bounds'' for the range of potential plausible future conditions. For each scenario, we describe the stressors that would occur in each population. We use the best available science to predict trends in future stressors (timber harvest, wildfire, effects of climate change, etc.). Data availability varies across States and populations. Where data on future trends are not available, we look to past trends and evaluate if it is reasonable to assume these trends will continue. The results of the analysis of resiliency in our plausible future scenarios are described in further detail in the SSA report and summarized in table 5.1 of the SSA report (Service 2019, p. 104).

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. Our assessment of the current and future conditions encompasses and incorporates the threats individually and cumulatively. Our current and future condition assessment is iterative because it accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Summary of Comments and Recommendations

On October 9, 2018, we published in the **Federal Register** a proposed rule (83 FR 50574) to list the coastal marten as a threatened species and adopt a 4(d) rule for the coastal marten, which applies the prohibitions and provisions of section 9(a)(1) of the Act to the species with certain, specific exceptions. We requested that all interested parties submit written comments on the proposed rule by December 10, 2018. We also contacted appropriate Federal and State agencies, scientific experts and organizations, tribal entities, and other interested parties, and invited them to comment on the proposed rule. Notices inviting the public to comment were published in newspapers across the areas where the species is believed to occur. We did not receive any requests for a public hearing. All substantive information provided to us during the comment period is incorporated directly into this final rule, has been used to clarify the information in our SSA report, or is addressed (by topic) below.

We reviewed all the comments we received from the peer and technical reviewers for substantive issues and new information regarding the coastal marten and its habitat contained in the SSA report. We addressed peer reviewer comments in the final SSA and this rule as appropriate. We include a summary of the peer review comments below.

Peer Review Comments

As discussed in Supporting Documents above, we received comments from two peer reviewers and two technical experts. We reviewed all comments we received from the reviewers for substantive issues and new information regarding the information contained in the SSA report. The peer and technical reviewers generally concurred with our methods used to determine, and conclusions drawn from the available information regarding, the status of coastal marten populations and their biology in California and Oregon. In some cases, they provided additional information, clarifications, and suggestions to improve the final SSA report. The reviewers also provided or corrected references we cited in our SSA report. The additional details and information provided, which have been incorporated into the current SSA report and this final listing rule, did not substantially alter any of our conclusions, including those concerning population resiliency, and current and future conditions.

In addition, we also received comments on the proposed listing and 4(d) rule during the open comment period. Below, we categorize the comments and our responses by Federal, State, Tribal, and public comments.

Federal Agency Comments

Comment 1: The U.S. Forest Service (USFS) encouraged the Service to

develop additional 4(d) exceptions to include a more diverse set of management activities that are more consistent with coastal marten conservation (*e.g.,* road closures and removal to increase habitat security, restoration to increase habitat connectivity).

Our Response: We have added clarifying language, improved our rationale, and incorporated more specific information into the 4(d) rule, as well as added an additional exception related to clean up of toxicants and other chemicals from forested areas. The 4(d) rule exceptions may include potential road closures and restoration efforts if they are consistent with conservation of the coastal marten and included in a finalized Service approved conservation plan or strategy. Please see our discussions under Summary of Changes From the Proposed Rule, above, and Final Rule Issued Under Section 4(d) of the Act, below.

Comment 2: The USFS highlighted work in the Oregon Dunes National Recreation Area (Oregon Dunes NRA) to increase understanding of the central coastal Oregon coastal marten population that occupies the shore pine ecosystem in the recreation area. They also noted a collaborative of local landowners, small businesses, the environmental community, and off-highway vehicle users that formed several years back to restore the dunes ecosystem and maintain the area for recreational use. The USFS suggests that working with this group may be a key component for successful recovery of the coastal marten, and that support for recovery of the species is more likely when communities choose to support the efforts rather than being limited by regulations.

Our Response: We agree that working with local stakeholders to develop support and ownership for species recovery is key for successful implementation of the Act, and, as is our practice for listed species, we have and will continue to work with government and nongovernmental entities to recover the coastal marten.

State Comments

Comment 3: The California Department of Fish and Wildlife (CDFW) suggested that the Service identify, either within the 4(d) rule or within a supplemental habitat management guide, the key structural features important to marten and their prey for planning and risk analysis prior to finalizing the listing rule. CDFW states that such clarification or guide would inform land managers and the Service of the suite of essential and preferred elements to analyze and conserve in a wildfire reduction program, while maintaining marten resiliency of large populations capable of withstanding stochastic events.

Our Response: We have added clarifying language, improved our rationale, and incorporated more specific information into the 4(d) rule. Please see our discussions under Summary of Changes From the Proposed Rule, above, and Final Rule Issued Under Section 4(d) of the Act, below. In addition, the SSA report for the coastal marten identifies those key structural features important to the species. We are also working with our Federal and State wildlife agency partners in California and Oregon, as well as other land management entities, to develop various mechanisms (including those identified by the CDFW) to assist in conservation of the coastal marten and its habitat.

Comment 4: CDFW raised a concern that a wide range of forest management activities could be interpreted to fall under the proposed 4(d) rule because these activities typically include the reduction of fire risk as a goal even when reductions are incidental to the production of timber for economic reasons. CDFW recommends aligning the rule with existing laws governing the approval and exception of certain activities designed to reduce wildfire fuels. Specifically, CDFW recommends limiting the application of the 4(d) rule in California to projects consistent with large-scale strategic fuel reduction projects carried out or overseen by land management agencies (Cal Fire, USFS, State and Federal Parks, etc.) and Fire Safe Councils, and only to those activities that fall within the following exceptions, prescriptions, and limitations described in the California Forest Practice Rules (CA FPR): Forest fire prevention exceptions that allow for: (1) Elimination of vertical and horizontal fuel continuity provided certain conditions are met; (2) removal of dead and dying trees provided certain conditions are met; (3) removal of fuels within 150 feet of legally permitted structures and within 300 feet of habitable structures provided certain conditions are met; and (4) fuelbreak/defensible space prescription that allows for removal of trees or other vegetation to create a shaded fuelbreak or defensible space.

Our Response: We have revised the exceptions listed in the 4(d) rule, and added explanatory language to clarify our intent and to more explicitly describe specific actions subject to this rule. Please see our discussions under Summary of Changes From the Proposed Rule, above, and Final Rule Issued Under Section 4(d) of the Act, below.

Comment 5: For the portion of the 4(d) rule that excepts take prohibitions for forest management activities in State-approved plans or agreements, CDFW pointed out that if the Service uses this rule to rely on the State safe harbor agreement (State SHA) to avoid ''take'' of a federally listed species, the distinction between State and Federal definitions may be important in considering how the State SHA meets the intended purpose of Federal protection under the Act. CDFW stated that the definition of ''take'' under California Code (section 86) is narrower in scope than is ''take'' under the Federal Endangered Species Act. While both Federal and State SHAs allow for incidental take of a species, it is unclear whether a State SHA is consistent with Federal SHA definitions.

Our Response: We are not relying on existing State SHAs, or other State-approved plans or agreements addressed in the 4(d) rule, to avoid take of a federally listed species, nor for such plans to meet the intended purpose of Federal protection under the Act. Rather, we are relying on these types of plans to serve their intended purpose of improving overall habitat conditions, which will result in a conservation benefit to the coastal marten. We recognize that implementation of such State-approved plans may result in some short-term or small level of localized negative effects to coastal martens or their habitat, but also that the success of these plans in improving habitat conditions may subsequently contribute to the long-term viability of the species. As such, we are identifying that take that occurs as a result of these plans would be an exception to those actions prohibited under section 9 of the Act.

Comment 6: CDFW recommends defining ''conservation needs of the coastal marten,'' as phrased in the 4(d) rule, to ensure that excepted activities will contribute to the recruitment or conservation of high-quality coastal marten habitat. CDFW stated that one option is to establish, within this rule, large tree structure density targets, shrub layer species composition and coverage targets, and landscape-scale habitat composition targets to be used by land managers and Service biologists when developing and evaluating management activities that may be covered by the 4(d) rule.

Our Response: We have revised the exceptions listed in the 4(d) rule; added explanatory language, including specific

examples of activities designed to promote, retain, or restore suitable coastal marten habitat; and more explicitly described, to clarify intent, specific actions subject to the 4(d) rule. Coastal martens use a variety of habitats, and it would be inappropriate to establish, in the 4(d) rule, habitat composition targets for the variety of habitats they occupy. We encourage land managers to work cooperatively with the Service to develop conservation plans or strategies that are consistent with the needs of the coastal marten.

Comment 7: CDFW recommends defining ''Federal or State plans,'' as phrased in the 4(d) rule, and clarifying the process for determining consistency of such plans. As an example, CDFW stated it is not clear if this provision would apply to California timber harvest plans (THP), non-industrial timber management plans (NTMP), program timber harvest plans (PTHP), and exceptions reviewed and approved by CalFire. Ensuring that these plans rise to the level of ''consistent with the conservation needs of coastal marten'' would require a case-by-case review. CDFW stated that if this was the Service's intent, an outline in the rule would be helpful to address whether a consultation with the Service is required to determine whether proposed activities will conserve suitable habitat. CDFW stated that without consultation, additive effects could result, which may lead to significant impacts not intended by the rule. Alternatively, the rule could state that THPs, NTMPs, and PTHPs are not included unless they are part of a larger plan to improve habitat for coastal martens.

Our Response: We have revised the exceptions listed in the 4(d) rule, and added explanatory language, to clarify our intent and to more explicitly describe specific actions subject to this rule. The revised language identifies only State approved NCCPs and State SHAs that address and authorize State take under CESA and does not discuss or include Federal plans. However, activities that may be conducted by Federal entities if found to be beneficial to the conservation of the coastal marten and is included as part of a Service approved conservation strategy or plan would fall under an exception in the 4(d) rule. In development of the 4(d) rule, we identified those prohibitions and exceptions which would focus on conservation of the coastal marten and its habitat. We purposefully did not include exceptions for THPs, NTHPs, and PTHPs per se due to their general broad nature and their focus on timber harvest rather than habitat management and conservation which would benefit the coastal marten. As a result, the mere submittal, or State approval, of a timber harvest plan will not meet any of the section 9(a)(1) prohibition exceptions listed in the 4(d) rule (see Regulation Promulgation, below). However, some measures in timber harvest plans may qualify for exception under the 4(d) rule if those activities are designed for reducing the risk or severity of wildfire or are consistent with finalized coastal marten conservation plans or strategies for which the Service has determined that such plans or strategies would be consistent with conservation strategies for the coastal marten. Please see our discussions under Summary of Changes From the Proposed Rule, above, and Final Rule Issued Under Section 4(d) of the Act, below.

Comment 8: With respect to our description of the conservation benefit of the proposed 4(d) rule, CDFW generally agreed that a tradeoff between short-term impacts and long-term habitat improvement may be necessary for the conservation and recovery of the coastal marten. However, they believe that each proposed project should be weighed carefully to ensure that short-term impacts do not accumulate to levels that would further threaten the persistence of the species. CDFW recommends establishing a system with identified minimum habitat distribution and population size thresholds to track the cumulative effect of excepted management activities and to verify suitable habitat and population thresholds are not exceeded in the pursuit of long-term benefits. CDFW stated that special emphasis should be given to Conservation Emphasis Areas, as identified in the Humboldt marten conservation assessment and strategy (Slauson *et al.* 2019, entire), because they have the greatest potential to meet overall conservation goals, and are also the areas where short-term impacts have the greatest potential to preclude long-term recovery. CDFW recommended that projects in these areas should receive specific review to ensure management actions resulting in ''minimal and temporary harm,'' as stated in the proposed 4(d) rule, are beneficial and consistent with the Conservation Emphasis Area goals.

Our Response: We appreciate the CDFW comments on tracking and focusing conservation efforts for the coastal marten through the implementation of the 4(d) rule and agree that there is a tradeoff between short-term impacts and long-term benefits to habitat depending on the type of activity. We are in the process of developing such or similar tracking methods suggested by the commenter through our section 7 consultation process. Activities on Federal lands or requiring Federal permitting or authorization will be subject to section 7 consultation requirements under the Act for federally listed species. In addition, once critical habitat is established, we would evaluate potential effects of Federal project activities on areas designated as critical habitat. With respect to guidance, the SSA report for the coastal marten and the proposed and final critical habitat rules once developed will describe the physical or biological features for the coastal marten, as well as any special management that should occur in critical habitat units. If landowners have questions or need further assistance, we strongly encourage them to contact their local U.S. Fish and Wildlife Service office; contact information is available from the person listed under **FOR FURTHER INFORMATION CONTACT**, above.

Comment 9: CDFW noted that the proposed 4(d) rule objective of maintaining ''complex tree and shrub conditions needed to support persistence'' is a broad condition not defined in the rule and could be interpreted as contradictory. As an example, CDFW stated that a project may focus on a single component (increasing shrub complexity) by, or in concert with, removing the other entity (large, overstory trees or retention trees from past harvest). CDFW stated that this could be counterproductive to maintaining or promoting coastal marten habitat. CDFW recommended that it would be helpful to provide guidance on the range of desirable coastal marten habitat conditions on managed landscapes.

Our Response: We have revised the exceptions listed in the 4(d) rule, and added explanatory language, to clarify our intent and to more explicitly describe specific actions subject to this rule. Specifically, we added the following examples: Forestry management activities that promote, retain, or restore suitable coastal marten habitat that increase percent canopy cover, percent ericaceous shrub cover, and denning and resting structures. See also response to *Comment 7.* Please see our discussions under Summary of Changes From the Proposed Rule, above, and Final Rule Issued Under Section 4(d) of the Act, below.

Comment 10: The Oregon Department of Fish and Wildlife (ODFW) listed several conservation measures underway that should be considered in our determination. These include: (1) ODFW, through the Oregon Fish and Wildlife Commission, is in a rulemaking

process to restrict trapping of coastal marten west of Interstate 5 (note: This action was a possible occurrence in Scenario 2 of the SSA report that suggested a population improvement through threat reduction); (2) ODFW is working on a connectivity analysis for multiple species, including the coastal marten, to help identify areas for habitat restoration or protection; (3) Federal agencies are currently implementing fuels-reduction efforts on Federal forests across the coastal marten's range to decrease wildfire impact, frequency, and intensity; and (4) ODFW has capitalized on renewed interest in the coastal marten by acquiring funds and establishing partnerships to expand monitoring efforts, with the intent of gaining information that will guide the management and restoration of coastal marten.

Our Response: With respect to conservation measure (1), we acknowledge the recent decision (September 2019) by the Oregon Fish and Wildlife Commission (OFWC) to ban marten trapping in the DPS (OFWC 2019, entire) (also see *Comment 43*). Regarding conservation measure (2), we commend the ODFW for their proactive work on martens in the coastal DPS; while their connectivity analysis, when completed, will help inform recovery actions for martens, it is not sufficient to reduce the threats to a level where we can determine that listing the coastal marten DPS is no longer warranted. With respect to conservation measure (3), we evaluated the impact of wildfire and fuels reduction efforts currently in place in our threats analysis, and have included such measures to reduce the impact of wildfire in our 4(d) rule's exceptions. Finally, as to conservation measure (4), we appreciate our partnership with ODFW and look forward to continuing our joint efforts in working towards coastal marten conservation.

Tribal Comments

We solicited information from and met with members of the Yurok Tribe regarding the proposed listing of the coastal marten. We also sent the draft SSA report to the Yurok Tribe; the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; the Coquille Indian Tribe; the Cow Creek Band of Umpqua Tribe of Indians; the Confederated Tribes of Grand Ronde; and the Confederated Tribes of Siletz Indians for comment. We did not receive comments on the proposed rule from any tribal entities.

Public Comments

4(d) Rule

Comment 11: Two commenters requested that forest practices conducted under the Oregon Forest Practices Act and its implementing regulations be included under the 4(d) rule. One of these commenters also requested that activities certified by third-party forest sustainability systems (*e.g.,* Sustainable Forestry Initiative) be excepted from take prohibitions under the 4(d) rule.

Our Response: We did not specifically identify the Oregon Forest Practices Act (OFPA) as a mechanism for excepting activities from section 9(a)(1) prohibitions as actions undertaken through the OFPA may include additional activities outside our intended scope of the 4(d) rule. The commenters did not provide specific forestry practices that should be considered for exception under the 4(d) rule; however, our 4(d) rule does provide that certain forestry management activities that are for the purpose of reducing the risk or severity of wildfire may be excepted from the section 9(a)(1) prohibitions, as described in 50 CFR 17.40(s)(2)(ii), and this may include actions conducted under the Oregon Forest Practice Act if those activities meet the descriptions in our 4(d) rule.

Regarding third-party forest sustainability certifications, the commenter did not provide specific application and subsequent conservation benefits these certifications would provide to coastal martens. As a result, we could not evaluate the commenter's request. However, the exception under 50 CFR 17.40(s)(2)(iv) (see Regulation Promulgation, below) allows for forest management activities consistent with the conservation needs of the coastal marten developed in finalized conservation plans and strategies that are determined by the Service to be consistent with conservation strategies for the coastal marten.

Comment 12: One commenter suggested that the willingness of private landowners to implement a full suite of additional conservation measures, such as environmental research and site-specific conservation plans, should also be recognized by the Service as ''activities consistent with formal approved conservation plans or strategies,'' as described in our proposed 4(d) rule.

Our Response: We concur with the commenter and recognize private landowner activities furthering conservation of the coastal marten as important. Such activities would be reviewed under the applicable exceptions of the 4(d) rule, and the Service will determine if the activity is consistent with conservation strategies for the coastal marten, and thus qualifies as an exception under the 4(d) rule.

Comment 13: One commenter stated that the 4(d) rule is vague and will be difficult to apply because it is based on language subject to interpretation. Another commenter believed more clarity was needed on specific activities not covered by the 4(d) rule and raised several questions about how it should be interpreted.

Our Response: We have revised the exceptions listed in the 4(d) rule, and added explanatory language, to clarify our intent and to more explicitly describe specific actions subject to the 4(d) rule.

Comment 14: One commenter stated that rather than using vague and confusing language in a 4(d) rule to except landowners from take, we should have landowners use the Act's existing regulatory framework and develop habitat conservation plans (HCPs) or other mechanisms under section 10 of the Act. The commenter stated that an HCP would provide a more tailored and particularized look at the individual circumstances of the landowner and of the species' use of their land.

Our Response: To improve clarity and avoid confusion, we have revised the exceptions listed in the 4(d) rule, and added explanatory language to clarify our intent and to more explicitly describe specific actions subject to the 4(d) rule. In our 4(d) rule, we provide specific exceptions from take for those forestry management activities such as fuels reduction and other vegetation management to assist in preventing catastrophic wildfire or are consistent with conservation strategies for the coastal marten through State or Service approved plans. Landscape planning efforts such as HCPs are large scale conservation efforts developed to conserve sensitive species and their habitats while providing long term planning assurances and consistency. Although we agree with the commenter that HCPs are a valuable conservation tool, they are not the only tool available for conservation and recovery of a threatened species. We determined that by specifically providing exceptions from take for a few specific activities which overall provide benefits for the coastal marten and its habitat, we can further conservation of the coastal marten.

Applicants conducting activities that may cause incidental take of coastal

martens as a result of any activity not described in our 4(d) rule may seek an HCP and a permit under section 10(a) of the Act, or consultation under section 7 of the Act if there is a Federal nexus.

Comment 15: One commenter stated that a broader 4(d) rule may provide landowners incentive to retain forests (as opposed to converting forest land to other land uses) and to participate in cooperative conservation measures.

Our Response: One of the reasons we issue 4(d) rules is to incentivize positive conservation actions and streamline the regulatory process for land managers. Our 4(d) rule for the coastal marten is just one of many tools we use to accomplish conservation. Although a broader 4(d) rule may allow for additional actions to take place without significant regulatory oversight, we have determined that such a strategy would not be necessary or advisable for conservation of the coastal marten. We conclude that broadening the 4(d) rule will not result in a benefit to the species, and may increase its likelihood of becoming an endangered species.

We strongly encourage landowners working with the Service to cooperatively develop conservation measures for the coastal marten. In both Oregon and California, the Service has already begun working with Federal, State, and nongovernmental forest managers to develop a conservation strategy that would meet the requirements of the final 4(d) rule (50 CFR 17.40(s)(2)(iii and iv)) (see Regulation Promulgation, below).

Comment 16: One commenter stated that the Service's authority to issue 4(d) rules is narrowly confined by the definition of ''conservation,'' which the Act defines as the use of *all* [emphasis added by the commenter] methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided are no longer necessary. The commenter points to the Service's policy of extending all the section 9 prohibitions of endangered species to threatened species (50 CFR 17.31(a)), which, according to the commenter, means the Service found that the best way to ''conserve'' threatened species is to apply all prohibitions afforded to endangered species. The commenter concluded that, if the Service decides to depart from this practice, then the Service must otherwise ''provide for the conservation of the species.''

Our Response: We have determined to extend all the section 9 prohibitions of an endangered species to the coastal marten, with certain specific exceptions, in order specifically to provide for the conservation of the species. The exceptions in the 4(d) rule were identified as actions that will assist in potentially reducing the risk of largescale wildfire, as well as other State or Service approved measures that are consistent with conservation strategies for the coastal marten. We have determined that such exceptions will benefit the overall conservation of the species.

Comment 17: One commenter stated that the portion of the 4(d) rule referring to State-approved plans or agreements that cover the coastal marten and are approved by CDFW is a special exception for Green Diamond Resource Company because they are the only large industrial timberland owner in the range that has obtained such an approved agreement with CDFW. The commenter believes the agreement fails to provide meaningful benefits to coastal martens and is insufficient to conserve the coastal marten as required under the Act. The commenter raised several issues with the agreement, including the reliance on translocation when it is unknown if translocation is feasible, changes to the company's wildlife tree retention program that do not allow trees to become old and complex, designating a ''marten habitat reserve'' in an area that was already unavailable for harvesting, and espousing agreement benefits that are already in place.

Our Response: We are not intending that the conservation of the coastal marten be achieved solely through the implementation of the State issued Green Diamond SHA. Conservation of the species, as required under the Act, will depend on a variety of recovery actions over time. In addition, although the Green Diamond SHA currently is the only CDFW-approved plan in place for the coastal marten, we anticipate additional plans to be developed by other entities in the future. We have revised the 4(d) to specifically except only those forestry management activities included in a plan or agreement for lands covered by NCCPs or State SHAs that address and authorize take of coastal marten as a covered species and which have been approved by the CDFW under the California Endangered Species Act. The Green Diamond SHA allows for certain forestry management activities conducted on their lands that are reasonably expected to provide a net conservation benefit for the coastal marten. The Green Diamond SHA provides aspects of habitat retention and wildfire management which will benefit the coastal marten. However, we also understand that the Green Diamond SHA does not provide for all aspects of coastal marten conservation. Any activities outside those described in the plan would not be included within the 4(d) exceptions as they would not be part of a CDFW-approved plan or agreement as described in 50 CFR 17.40(s)(2)(iii)

The Act provides a broad and flexible framework to facilitate conservation with a variety of stakeholders through various means. Working with our State resource agency partners in implementing conservation is one of many ways we work with, leverage, and expand our existing network of conservation partnerships to produce effective conservation practices and conservation strategies on the ground for all endangered or threatened species and their habitats. Working and collaborating with our State wildlife agency partners, tribes, private landowners, non-governmental organizations, and Federal partners to achieve on-the-ground conservation for endangered or threatened species and habitats will lead to greater conservation than if done independently. It is only through our inclusive efforts with the conservation community that we can collectively protect our shared resources.

Comment 18: One commenter pointed out that the Service did not cover the coastal marten under the habitat conservation plan with Green Diamond Resource Company (Green Diamond), wherein the company attempted to cover the same prescriptions currently in place in the Green Diamond safe harbor agreement (SHA) (see *Comment 17*). The commenter stated that the Service rejected the inclusion of coastal martens because of insufficient information available to consider the range of effects. The commenter questioned how the Service could conclude that the SHA would promote the conservation of the species if the prescribed management in the HCP was too uncertain to meet HCP issuance criteria. The commenter stated that, although the legal standard for issuing an incidental take permit (the Service needs to find the HCP minimizes and mitigates take to the maximum extent practicable) differs from issuing a 4(d) rule (covered actions must provide for the conservation of the species), the practical result of the 4(d) rule will forgive all taking of coastal marten by Green Diamond.

Our Response: The commenter is correct that the coastal marten is not a covered species in the Green Diamond HCP. However, since the implementation of the Green Diamond HCP, a conservation strategy has been

developed (Slauson *et al.* 2019, entire) that outlines a three-pronged conservation strategy for the coastal marten and its habitat. The first two prongs of this strategy seek to: (1) Protect existing populations and currently suitable habitat, and (2) reestablish coastal marten populations where currently suitable habitat is inaccessible owing to existing dispersal barriers. Green Diamond and CDFW have developed a State SHA that is reasonably expected to provide a net conservation benefit for the coastal marten on Green Diamond lands for certain activities. The Green Diamond SHA is authorized under the CESA, and addresses, in part, the first and second prongs of the strategy. The Green Diamond SHA accomplishes this by implementing certain coastal marten habitat management and assisted dispersal commitments including funding, monitoring, and adaptive management (see CDFW 2018, entire). Moreover, the State SHA includes measures that were not originally included in the HCP, including financial and technical assistance for assisted dispersal. Accordingly, the State SHA provides additional protections for the coastal marten beyond those contained in the Green Diamond HCP. The commenter's statement that the practical result of the 4(d) exception of the State SHA would allow Green Diamond any manner of take is not correct because the 4(d) rule sets out specific and limited exceptions to the section 9 prohibition on take; as applicable to this comment, forestry management activities may be exempted from the take prohibition if included in a plan or agreement for lands covered by a NCCP or State SHA that addresses and authorizes State take of coastal marten as a covered species and is approved by the CDFW under CESA.

Comment 19: One commenter stated the Service failed to provide an adequate rationale for the 4(d) rule. The commenter stated that the Service's rationale that the exception of forestry management activities will, ''encourage active forest management that creates and maintains the complex tree and shrub conditions needed to support the persistence of marten populations'' would not occur under the Green Diamond SHA (see *Comments 17* and *18*). The commenter stated that management under the Green Diamond SHA prevents the development of suitable complex tree conditions and shrub layer because it will lower the age class of forests outside of riparian reserves. The commenter also stated that those riparian reserves were already protected prior to the State SHA and therefore the State SHA does not provide additional conservation for the coastal marten. The commenter further stated that the Service also claims that by excepting some forest management activities from take prohibitions, ''these provisions can encourage cooperation . . . in implementing conservation measures that will maintain or enhance habitat and expand the population,'' yet provides no explanation of how excepting take would encourage better behavior.

Our Response: We have determined that the measures identified in the 4(d) rule are necessary and advisable for conservation of the coastal marten. The provisions of the 4(d) rule for coastal marten will promote conservation of the species and its habitat by encouraging management of the landscape in ways that allow land management considerations while meeting the conservation needs of the coastal marten. This is accomplished by applying all the prohibitions for an endangered species, except as otherwise authorized or permitted. The long-term viability of the coastal marten, as with many wildlife species, is directly tied to the condition of its habitat. As described in our analysis of the species' status, one of the primary driving threats to the coastal marten's continued viability is the destruction of its habitat from catastrophic wildfires. The potential for an increase in frequency and severity of these catastrophic wildfires from the effects of climate change subsequently increases the risk to the species posed by this threat. We have determined that actions taken by forest management entities in the range of the coastal marten for the purpose of reducing the risk or severity of catastrophic wildfires, or conducting forestry management activities covered by California-approved SHAs or NCCPs, even if these actions may result in some short-term or small level of localized negative effect to coastal martens, will further the goal of reducing the likelihood of the species from becoming an endangered species, and will also likely contribute to its conservation and long-term viability. We have added clarifying language, improved our rationale, and incorporated more specifics into the 4(d) rule. Additionally, we removed the language within the preamble of the 4(d) rule that states, ''These provisions can encourage cooperation . . . in implementing conservation measures that will maintain or enhance habitat and expand the population.'' Please see our discussions under Summary of Changes From the Proposed Rule, above.

Comment 20: One commenter stated that in order to issue a 4(d) rule the Service must adhere to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and complete internal section 7 consultation under the Act, and that failure to conduct these activities is a violation of NEPA and the Act.

Our Response: The courts have ruled that NEPA does not apply to listing decisions under section 4(a) of the Act, nor to 4(d) rules issued concurrent with listing (see *Pacific Legal Foundation* v. *Andrus,* 657 F.2d 829 (6th Cir. 1981); and *Center for Biological Diversity* v. *U.S. Fish and Wildlife Service,* No. 04–4324, 2005 WL 2000928, at *12 (N.D. Cal. Aug. 19, 2005). In addition, the Service has determined that section 7 does not apply to the promulgation of 4(d) rules. Under the Act, we are to base listing decisions on the best available scientific and commercial information. If a species warrants listing under the Act based on a review of the best available scientific and commercial information, the Service must list the species, if not precluded by other higher priority listing actions. In other words, the Service does not have discretion to not list a species in consideration of other information, including the results of a section 7 analysis. This 4(d) rule is being promulgated concurrent with the listing of the species, and by extension, is therefore also not subject to section 7 consultation requirements. Further, the Service's determination that a 4(d) rule is necessary and advisable to provide for conservation of the species necessarily subsumes a determination that the rule will not jeopardize the species or adversely modify its critical habitat.

Comment 21: One commenter supported the 4(d) rule but stated its benefits were primarily afforded to non-Federal activities because the consultation requirements of section 7 for Federal activities remain in place. The commenter requested that we except Federal activities from section 7 consultation if they are consistent with the 4(d) rule, as it is well within the Service's general rulemaking authority under the Act.

Our Response: The overall intent of any 4(d) rule is to develop protective regulations necessary and advisable for the conservation of the species, not necessarily to provide regulatory ''benefits'' to any Federal entity. The 4(d) rule for the coastal marten applies all the prohibitions and provisions for the protection of endangered wildlife under section 9(a)(1) of the Act, with the exception of certain activities that we

have determined are not likely to be primary drivers of the species' status, and which are likely to provide an overall conservation benefit by reducing wildfire impact, providing for habitat management, and allowing clean-up of contaminated habitat. Under section 7(a)(2) of the Act, Federal agencies, in consultation with the Service, must insure that their action, viewed against the aggregate effects of everything that has led to the species' current status and the cumulative effects of non-federal activities that are likely to affect the species in the future, is not likely to jeopardize the continued existence of the species. However, section 7 consultations for actions that are not prohibited by a 4(d) rule should be streamlined, as any action that we determine is compatible with the conservation of the species in a 4(d) rule should not result in jeopardy to the species.

Comment 22: More than 2,500 commenters, submitting the same or similar comment letters, stated that the 4(d) rule is insufficient to ensure the coastal marten's survival and will condemn the coastal marten to extinction because it largely excepts ''State logging plans'' (timber harvest plans), even though logging has been the main driver of the marten's decline. Another 190 comments by email, submitting the same or similar text, stated that the proposed 4(d) rule excepts from section 9 prohibitions the very things that have brought coastal martens to the point where they should be listed as endangered under the Act.

Our Response: The 4(d) rule does not specifically identify or except timber harvest plans (including THPs, NTHPs, and PTHPs) per se due to their general broad nature and their focus on timber harvest rather than habitat management and conservation that would benefit the coastal marten. As a result, the mere submittal, or State approval, of a timber harvest plan will not meet any of the section 9(a)(1) prohibition exceptions listed in the 4(d) rule (see Regulation Promulgation, below). However, some measures in timber harvest plans may qualify for exception under the 4(d) rule if those activities are designed for reducing the risk or severity of wildfire or are consistent with finalized coastal marten conservation plans or strategies for which the Service has determined that such plans or strategies would be consistent with conservation strategies for the coastal marten.

As for the remaining comments on the proposed 4(d) rule, we have excepted certain activities from take that would reduce habitat loss through fire, or that would occur subject to a plan or agreement covered by a NCCP or State Safe Harbor Agreement approved by CDFW under the authority of CESA, or forestry management activities consistent with marten conservation that are also consistent with finalized conservation plans or strategies for which the Service has determined that meeting such plans or strategies would be consistent with marten conservation strategies. We conclude that these activities meet the standards set out in the 4(d) rule and in addressing the stressors of fire and timber harvest that could could result in habitat loss for the coastal marten.

Comment 23: One commenter stated that the 4(d) rule is overly broad and lacks conservation measures to protect the marten from jeopardy. The commenter stated that the protections afforded to endangered species by the Act are necessary to protect the coastal marten because State regulations are not protective of the species, and are pushing the species towards extinction. The commenter raised concerns that the State of Oregon's authorizations of forestry practices, which allow the use of strychnine and other poisons, are not compatible with marten conservation. The commenter concludes that a 4(d) rule that would except State-approved logging plans is not adequately protective and will not provide for the survival and recovery of the coastal marten.

Our Response: Under the 4(d) rule, State-approved logging plans are not excepted from section 9(a)(1) prohibitions (see our responses to *Comments 11* and *22*). The exception under 50 CFR 17.40(s)(2)(iii) (see Regulation Promulgation, below) is specific to agreements approved by the CDFW under the authority of the CESA. Oregon does not have analogous agreement instruments under its Endangered Species Act; hence, there is not a similar exception in Oregon. The exception at 50 CFR 17.40(s)(2)(iv) (see Regulation Promulgation, below) applies to forest management activities consistent with marten conservation needs, and any forest management activity must be consistent with finalized conservation plans or strategies which the Service has determined is consistent with the conservation strategies of the coastal marten.

Comment 24: One commenter stated that a 4(d) rule for the marten is not needed, but should the Service proceed with one, it must include enforceable protective conservation measures to ensure the marten is not lost in the few areas where it persists. The commenter stated that conservation measures should prohibit logging within extant coastal marten population areas and curtail clear-cut logging and similar logging activities in mature forests between existing coastal marten population areas to facilitate habitat development. The commenter stated that projects that leave shelter trees or resting structures in an otherwise inhospitable landscape would not meet the definition of conservation measures. The commenter stated that Federal lands alone cannot provide enough habitat to ensure marten viability without connectivity on private and State lands.

Our Response: Without a 4(d) rule for the coastal marten, the species would have no protective regulations in effect. By applying all the prohibitions and provisions of section 9(a)(1) of the Act, which are the same for endangered species, to the coastal marten, except for certain forest management activities associated with: (1) Wildfire management activities intended to reduce the risk or severity of wildfire; (2) State NCCPs or SHAs approved by CDFW under CESA; (3) finalized plans or strategies consistent with conservation needs of the coastal marten and which are Service approved for coastal marten; and (4) removal of toxicants consistent with conservation of the coastal marten, the 4(d) rule includes protective measures to ensure the coastal marten and its habitat is conserved. The 9(a)(1) prohibitions mean that any activity apart from those excepted in this 4(d) rule that would result in take of the marten, such as those examples described by the commenter, would be unlawful. The exceptions outlined in the 4(d) rule are not ownership specific and are not intended to rely on just Federal lands or on Federal agency conservation actions; the exceptions would apply to those entities that have appropriate plans in place across the landscape that provide for management and are designed to reduce the risk of coastal marten habitat loss. We conclude that allowing these specific activities under the conditions described in the 4(d) rule would promote conservation of the species and its habitat.

Comment 25: One commenter urged the Service to condition any listing of the marten with measures such as a 4(d) rule that would allow and promote continued and expanded vegetation management in the Oregon Dunes National Recreation Area (NRA) that is necessary to control invasion by both native and nonnative plants that are rapidly colonizing and eliminating unique elements of this ecosystem. The commenter believes the Service must

consider the long-term risk to the broader dunes ecosystem, including marten and other at-risk organisms residing there, and allow invasive plant control intended to protect and/or restore sites. The commenter believes slowing or stopping these efforts at this time risks irreversible loss of the dunes and the diverse habitats associated with them.

Our Response: Portions of the Oregon Dunes NRA provide nearly all of the coastal shore pine habitat known to be used by coastal martens in the central coastal Oregon population. Activities associated with removal of shore pine habitat that is used by coastal marten in restoration of dune habitat are not part of the 4(d) exceptions. Conservation of the shore pine ecosystem is important for the conservation of the coastal marten. We are in conference, under section 7 of the Act, with the Oregon Dunes NRA on the impacts of implementing the Oregon Dunes Restoration Project on the coastal marten population. We will continue with section 7 consultation after listing becomes final, working with the agencies managing the Oregon Dunes NRA to help meet the project objectives while also meeting the conservation needs of the marten and ensuring the project does not jeopardize the species. As a result of the section 7 consultation efforts, any restoration efforts associated with the Oregon Dunes NRA will also take into consideration conservation of the coastal marten and its shore pine habitat within the area.

Existing Regulatory and Conservation Actions

Comment 26: One commenter encouraged the Service to consider not only the threats, but also the existing conservation measures in place to conserve coastal martens, including the Northwest Forest Plan, Redwood National Park management, listing status in California and associated CESA regulations, and the Green Diamond Resource Company SHA for coastal martens in California.

Our Response: In the SSA report, we describe the current resiliency of the coastal marten. Our conclusions on current resiliency for the coastal marten took into consideration the existing conservation actions as well as any regulatory mechanisms being implemented to conserve habitat used by the species.

Comment 27: One Board of County Commissioners and two nongovernmental organizations pointed out that we did not address existing State and Federal regulatory mechanisms that provide substantial conservation benefits to coastal martens. Coastal martens are listed under the CESA, and take of coastal martens is negligible in Oregon. The commenters stated that other regulatory mechanisms are in place, such as the Northwest Forest Plan (NWFP), Oregon Dunes management plans, and Oregon land use laws that provide protection for coastal martens and need to be considered in a listing determination. One commenter pointed out specific aspects of the NWFP that we noted in the SSA report as providing benefits to coastal martens, including habitat recruitment that would contribute to coastal marten population connectivity, as well as reduced levels of timber harvest compared to non-Federal forests. The commenter stated that the prohibition of take of coastal martens as a listed species under the CESA is not addressed in terms of its reduction of threat levels to coastal martens, at least in California. The commenters believe that these mechanisms, as well as ODFW management programs, research efforts, and initiation of rulemaking to ban coastal marten trapping, are either adequate to the degree that listing the coastal DPS is not warranted, or need to be fully and robustly considered before a listing decision is made.

Our Response: We agree with the comments regarding the benefits of State and Federal regulatory mechanisms for the conservation of listed species. For the coastal marten, we took into account Federal, State, and Tribal regulatory mechanisms and conservation measures when determining the Federal listing status of the DPS and have concluded that even with the existing regulatory mechanisms in place, the coastal marten still needs protections under the Act. See Determination of Coastal Marten Status, below, for our review of existing regulatory mechanisms.

Comment 28: Three commenters stated that the Service did not fully consider existing regulatory mechanisms because we inadequately addressed the potential ban on coastal marten trapping in Oregon.

Our Response: At the time of our proposed listing rule for the coastal marten (83 FR 50574; October 9, 2018), the State of Oregon had not yet proposed or finalized restrictions on trapping in the State. We have revised this final rule to incorporate the latest status of ODFW's rulemaking effort to ban harvest of coastal martens by trapping in western Oregon. However, although trapping is considered a threat to the coastal marten, trapping is not considered one of the main drivers leading toward our determination of threatened status for the species, but is considered along with all other threats cumulatively affecting the species.

Comment 29: Two commenters stated that the Service did not fully consider existing regulatory mechanisms because we inadequately addressed the effect of legalization of cannabis on coastal marten exposure to anticoagulant rodenticides. One of the commenters further stated that cannabis growers in California are required to apply pesticides in accordance with U.S. Environmental Protection Agency (U.S. EPA)-approved labeling, as well as State and local permitting requirements. The commenters stated that these requirements would result in a reduced incidence of unlawful cannabis growing and pesticide application, thereby reducing the threats from this activity on the species.

Our Response: We discuss legalization of cannabis and its effects on anticoagulant rodenticide exposure to coastal martens in our SSA report (Service 2018, pp. 48–49; Service 2019, pp. 39–42). However, it is unclear at this time as to how legalization will influence the use of anticoagulant rodenticides or other toxicants and subsequent coastal marten exposures, especially with respect to illegal cannabis grow sites. The commenter seems to assume that regulation of legalized cannabis cultivation has reduced the amount of unlawful cannabis cultivation and unlawful use of pesticides. However, the commenter provides no information to support that assumption.

We have no information to indicate that legalization of cannabis cultivation will reduce ''black market'' activities and associated grow sites, or how local regulations and zoning ordinances for cannabis cultivation on private lands will alter the number of illegal grows on public land (Owley 2018, pp. 1713–1714). There is no indication illegal growing has decreased with legalization of cannabis; continued lack of enforcement, as well as financial advantages over legally registered businesses, allow illegal underground operations to thrive (Bureau of Cannabis Control California 2018, pp. 28, 30). In fact, legalization may increase ''black market'' sales in other States, thereby increasing illegal grows to meet demand (Hughes 2017, entire).

Although cannabis growers are required to apply pesticides in accordance with U.S. EPA-approved labeling requirements, no pesticides are currently registered by the U.S. EPA for application on cannabis, because the U.S. EPA cannot recognize cannabis as a legal crop due to its status as a federally controlled substance. Unless

exempt from registration requirements, use of a pesticide on a crop for which it is not registered is illegal. Yet tests of cannabis products grown by the cannabis industry reveal the presence of pesticides applied contrary to their registered label, including 71 percent of cannabis flowers grown for medical marijuana in Oregon (Voelker and Holmes 2015, pp. 7–8; Sandler *et al.* 2019, pp. 41–42). None of the pesticides tested were rodenticides, but the assertion that cannabis legalization has reduced the unlawful use of pesticides appears to be unfounded.

Moreover, legalization of cannabis cultivation may have increased the number of grow sites in some areas. Within the DPS counties in Oregon, over 2,000 legal operations have been permitted (Oregon Liquor Control Commission (OLCC) 2019, unpaginated); this number is in addition to existing illegal grow sites, which may not diminish as a result of legalized cultivation. Associated rodenticide use on the permitted grow sites is difficult to determine, and, as far as we know, has not been assessed.

Hence, we stand by our conclusion that the threat of coastal marten exposure to rodenticides remains, and it is uncertain as to whether cannabis legalization will decrease the threat to coastal martens by toxicant exposure.

Distinct Population Segment

Comment 30: The Douglas County Board of Commissioners stated that designation of the DPS is arbitrary and capricious, basing this conclusion on the premise that if there is no contemporary or historical biogeographic barrier to the interaction between coastal marten populations in Oregon and coastal marten populations in California (citing Slauson *et al.* 2009), then there similarly is no reason to conclude that the coastal population as a whole in California and Oregon cannot interact with the rest of the *M. caurina* taxon in Oregon or elsewhere in North America (see *Comment 31*).

Our Response: Contemporary or historical biogeographic barriers are only one of multiple factors we consider when determining whether a population meets the standards for designation as a DPS. Under our DPS Policy (Service 1996), a population segment of a vertebrate taxon must be both discrete and significant to the taxon to which it belongs. The commenter is referring to the discreteness portion of the policy, which we address here. A population segment may be considered discrete if it satisfies either of two conditions. The condition relevant to this comment states that the population segment is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation. We articulate our position in detail in our April 7, 2015, 12-month finding (80 FR 18742, pp. 18744–18746). In short, we found substantial genetic differences between the coastal marten population (combined coastal Oregon and California) and other populations of Pacific martens, indicating that they are markedly separated from each other and providing evidence of a long-standing geographic separation. Although some low degree of introgression indicates occasional past movement of individuals between coastal and inland marten populations, evidence suggests this was an infrequent occurrence. Further, recently published results of a genetic evaluation of the Pacific marten indicate that coastal Oregon and coastal California marten populations likely represent a single subspecies (Schwartz *et al.* 2020, p. 11). Consequently, the coastal marten may actually be a subspecies, which is also a listable entity under section 3(16) of the Act.

Comment 31: As a follow up to *Comment 30,* the same commenter stated that researchers (Dawson *et al.* 2017, entire) provided further evidence that our DPS determination was arbitrary and capricious. Specifically, the commenter believes this publication continues to reflect a wider range for *Martes americana caurina,* providing a context not only for characterizing the genetics of *M. a. caurina* and *M. a. humboldtensis,* but also providing a context for the Federal listing status of *M. a. caurina* relative to its wider range rather than just the Oregon and California coastal populations.

Our Response: It appears the commenter has misapplied the results of Dawson *et al.* (2017) for the coastal marten. First, the commenter incorrectly labels the two currently designated subspecies as belonging to the American marten species (*Martes americana*) when in fact they belong to the Pacific marten species (*M. caurina*), as supported by recent data (Dawson and Cook 2012, p. 35; Dawson *et al.* 2017, p. 716). Consequently, the correct nomenclature for these two subspecies is *M. c. caurina* and *M. c. humboldtensis,* not *M. a. caurina* and *M. a. humboldtensis.* In that light, Dawson *et al.* (2017, pp. 721, 724) further supports our DPS designation because they determined that American marten populations exhibit greater genetic variability among populations and greater geographic distribution of individual genetic haplotypes than do Pacific martens, indicating American marten populations are more similar to each other than are Pacific marten populations. Because Dawson *et al.* conclusions support a determination that the Pacific marten is a different entity than the American marten, the status of the American marten is not relevant to this determination.

Comment 32: The Douglas County Board of Commissioners stated that we assumed that the three coastal marten populations identified in the SSA report were in decline and that we based this assumption on a reduction in the number of coastal martens trapped and anecdotal observations of road-killed coastal martens. They believe these records may not provide scientific evidence to support a declining population. In addition, the commenters believe that a more robust survey effort in the Oregon Coast Range would likely result in finding additional populations of coastal martens. Finally, they conclude that in order for the Service to make a finding on the listing status of the coastal marten, we must first determine the size and extent of the current population(s).

Our Response: The best available scientific information for the coastal marten does not allow us to determine the exact number of individuals and population sizes. However, we did not intend our discussion of trapping and anecdotal records in our analysis to be used to demonstrate that coastal martens are declining in trend. The only available population estimates are a single recent estimate for the central coastal Oregon population published in 2018, and two estimates for the northern coastal California population, one from 2008 and a subsequent estimate in 2012 that estimated fewer coastal martens than in 2008. Without additional information, it is not clear whether the decreased population estimate for the northern coastal California population represents a true long-term population decline, a short-term decline in response to a stochastic event such as a weather event or disease outbreak, or natural variation. Our only conclusion specific to a coastal marten population trend was our finding that the distribution of the coastal marten and its habitat has substantially declined from its historical range.

We do not feel that a more robust survey effort in coastal Oregon would result in discovering additional populations of coastal martens. Central and southern coastal Oregon was surveyed systematically in 2014 and 2015 with 348 sample units (908 survey

stations), which was the largest carnivore survey done in Oregon up to that time (Moriarty *et al.* 2016, pp. 72, 76–77). The authors surveyed 70 percent of the coastal marten's historical range in Oregon; they acknowledged that while their survey methodology may have missed individuals, they were unlikely to miss a thriving, sizeable population of coastal martens. Hence, published research indicates additional coastal marten populations do not currently occur in central and southern coastal Oregon. Apparently suitable marten habitat occurs in northern coastal Oregon, some of which has since been surveyed with no detections. Further surveys in this area would be desirable to settle questions about coastal marten distribution along the north coast. However, even if a coastal marten population were found in northern coastal Oregon, it would still be an isolated population removed from the remainder of the taxon, with low likelihood of genetic intermixing with populations to the south.

The commenter believes that the Service must determine the current population (we assume they mean population size) and quantify what represents a population that needs protection under the Act. To determine population size requires a census, which is rarely done for wild animal populations, and then usually only when the population is extremely small and survey methodology can reliably detect all individuals. Instead, we rely on population estimates, which have inherent variability. As noted above, we have three empirical estimates for coastal martens, and alone they tell us little about current population trends of coastal martens. The commenter seems to believe that without quantitative data, we must refrain from making a decision on the listing status of a species. However, upon receiving a petition to list a species, the Act and our regulations require us to make our determination solely on the basis of the best scientific and commercial data available. Hence, we have used the population estimate and distribution data combined with other available data on coastal martens to inform our analysis in the SSA report to assess the viability of the coastal marten. This assessment of the biological information, along with the threats facing the species or its habitat, was used to inform the Service in making a listing determination for the coastal marten.

Comment 33: One commenter questioned the accuracy of the historical range and its use in deriving the DPS boundary, stating that the historic range is a coarse boundary and that no genetic data have been used to confirm its validity southeast of the Klamath River. In addition, the commenter states that the occurrence of the Humboldt (*Martes caurina humboldtensis*) and Sierran (*M. c. sierra*) subspecies in the same wilderness area with no discernable barriers creates confusion and raises questions about the discreteness of the DPS.

Our Response: Additional genetic information would be useful in further defining the boundary of the DPS. We used the best available information to determine where to most accurately capture the DPS boundary (Grinnell and Dixon 1926, p, 415; Bailey 1936, p. 296; Grinnell *et al.* 1937, pp. 190, 207, 209; Zielinski and Golightly 1996, p. 115; Zielinski *et al.* 2001, p. 480; Slauson *et al.* 2019, entire) (see section 4.1, Historical Range and Distribution, of the SSA report; Service 2019, pp. 73–75). In addition, a DPS may be considered discrete if it is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation. Complete separation is not necessary under our DPS policy. Given this definition of discreteness and the most recently available genetic analysis, we continue to assert that the coastal marten meets the definition of, and qualifies as a valid, DPS under our policy. This conclusion is further supported by recent information that the coastal marten may be a valid subspecies of the Pacific marten (Schwartz *et al.* 2020, p. 11).

Forest Management

Comment 34: Several commenters raised concerns regarding forest management. One commenter stated that we automatically correlated forest management with habitat loss (83 FR 50574, October 9, 2018, p. 50577). In addition, they believed that we need to acknowledge that coastal martens exist across a range of habitat and management conditions, including intensively managed forests. They stated that we further need to acknowledge that coastal martens use a variety of habitat types (*e.g.,* young forests with abundant shrub cover in the central Oregon coast population) and should not be singly focused on a specific habitat type, specifically old forest, as preferential for coastal martens (83 FR 50574, October 9, 2018, pp. 50575–50576). As an example, one of the commenters referenced a comparison of coastal marten survival between unharvested reserves and a clear-cut landscape (Payer and Harrison 1999). The commenter states that the study found no differences in survival for coastal marten in the two landscapes.

Our Response: Coastal martens exist across a range of habitat and management conditions, and we acknowledge the coastal marten's use of serpentine and shore pine vegetation types, contrasting them with the older forest stands used elsewhere in the study area (Service 2018, pp. 34–35). We also acknowledge the coastal marten's use of intensively managed forests, although research indicates that coastal martens still need a high proportion of older forest or serpentine habitat at the home range and landscape scale (Service 2018, pp. 36–40). Payer and Harrison (1999, pp. 43–44) also acknowledge this, noting that coastal marten densities were higher in reserve landscapes, and that in areas managed as industrial forest landscapes, coastal martens positioned their home ranges in areas with more mature forest habitat and less in recently clear-cut forests.

We did not automatically correlate forest management with habitat loss. In the referenced page of the October 9, 2018, proposed rule (83 FR 50577), we note that habitat loss has and continues to be influenced by wildfire, vegetation management, and a changing climate, but we do not maintain that all forest management results in habitat loss, or similarly, that all wildfire or climate change effects will result in habitat loss.

Comment 35: One commenter states that the Service should recognize that managed forest landscapes are dynamic through space and time, with recent harvest units interspersed across landscapes with younger or mature forest stands and retention buffers. In addition, the commenter states that modern forest practice regulations, such as the Oregon Forest Practices Act (OFPA) provide, at the landscape level, forests that produce a mixture of old and large trees, multiple canopy layers, snags and other decay elements, understory development, and biologically complex structure and composition. The commenter believes these structural attributes complement late-successional conditions often associated with public forests.

Our Response: Managed forest landscapes are dynamic with shifting mosaics of forest stand ages, and that forest practice regulations require retention of some forest structural components. However, the quantity and scale of these components, as required in the OFPA, does not necessarily result in suitable coastal marten habitat, and may have resulted in a landscape that

has increased competition and predation pressures on coastal martens. While the OFPA requires retention of certain types of vegetation and structure at the landscape scale, coastal martens respond to threats at smaller scales including home-range and stand scales where this mixture of elements necessary for survival are not always present.

Comment 36: One commenter stated that vegetation management is not a threat, per se, because recent experience suggests that timber harvest and coastal marten occupancy are not mutually exclusive. The commenter believes there is no definitive research that shows coastal martens do not use younger forest stands on managed lands, and in fact, coastal martens are found in managed forests. The commenter states that the frequency, extent, and quality of timber harvesting varies greatly across the DPS with varying adverse and even beneficial effects, and some forest management provides coastal marten habitat and contradicts blanket assertions that younger forests are a threat to coastal martens. The commenter also asserts that the Service did not adequately address how managed forests provide suitable habitat for coastal martens and how these forests function to connect coastal marten populations.

Our Response: Definitive research is not available that shows coastal martens do not use younger forest stands on managed lands. We have acknowledged the coastal marten's use of intensively managed forest landscapes (see our response to *Comments 34*), and find that the degree to which timber harvest will affect coastal marten habitat may vary greatly with the magnitude, intensity, frequency, and other site-specific and landscape conditions. We acknowledge some of these effects in the SSA report (Service 2019, pp. 61–62). However, multiple studies show the importance of mature and old forests to coastal martens. Coastal marten densities are higher in reserve landscapes, and in areas managed as industrial forest landscapes, coastal martens position their home ranges in areas with more mature forest habitat and less in recently clear-cut forests (Payer and Harrison 1999, pp. 43–44; Thompson *et al.* 2012, p. 228; Service 2018, p. 61).

Habitat and Habitat Modeling

Comment 37: Two commenters stated that the habitat model used in the SSA report was insufficient, and raised multiple technical issues regarding its development and applicability. They believe that more effort is needed to assess potential predicted coastal marten habitat.

Our Response: The SSA report (Service 2019, pp. 84–86) acknowledges limitations with the coastal marten habitat model used, particularly its application in Oregon. However, while we agree that more improved habitat modeling for the species would be useful, we are required to make our listing determinations on the best scientific and commercial data available at the time of listing. While the commenters pointed out limitations with the model, they did not provide an alternative to the information resulting from the model. One of the commenters suggested we consider an independent analysis similar to what was done for northern spotted owls (Davis *et al.* 2016, entire). To account for the limitations of the model developed by researchers, we adjusted certain aspects of the model such as elevation and removed areas where the species is known not to occur. As a result, we consider the modeling as described in the SSA to be an appropriate tool for assisting to determine the distribution of habitat and conservation status of the coastal marten. Although we are pursuing additional modeling to better represent coastal marten habitat in Oregon, such a model is not yet available. Until it is, we are relying on the existing habitat modeling used in the SSA report as the best available data, while still acknowledging the limitations of its application in Oregon.

Comment 38: One commenter felt that the habitat model used in the proposed rule likely underestimates habitat suitability for the coastal marten and should be updated to include seral stages in addition to the Old Growth Structure Index (OGSI) to evaluate connectivity of habitats used in the Service's least cost path modeling analysis that was used to evaluate population resiliency in the SSA report. The commenter states that given that coastal martens clearly occupy and reproduce on managed lands, these younger forests should be incorporated into a least cost path model, which may provide a much different assessment of connectivity.

Our Response: We acknowledge the limitations with the coastal marten habitat model used and took those limitations into consideration in determining the status of the coastal marten. While there is evidence that coastal martens use a variety of habitats, there is no evidence that younger seral stages would improve the model fit or provide the necessary elements required for dispersal. While we are aware that coastal martens occur on and reproduce in managed forests, multiple studies of martens across North America show the importance of mature and old forests to martens in general (Thompson *et al.* 2012, p. 228), and the coastal marten model performed best when using OGSI. Further, the Service's least cost model did identify connectivity across managed lands and currently remains the best available data to use to evaluate connectivity.

Comment 39: One commenter stated that the SSA report and proposed rule regarding understory shrub associations with both managed and unmanaged forests do not reflect the uncertainty in the science. The commenter provides information indicating that vegetation associations, including understory shrub layers, can be highly variable within the coastal marten's range and it is not clear that past or present forest management activities have substantially altered, or will substantially alter, vegetation associations in a manner that will limit habitat suitability for the species.

Our Response: While we agree with the commenter that understory shrub layers can be highly variable within the range of the coastal marten, and that landscapes managed for timber harvest, depending on frequency, intensity, and extent of activities, may provide some level of understory shrub habitat for the coastal marten, the best available literature indicates that coastal martens select habitat that has a dense understory shrub layer (Andruskiw *et al.* 2008, pp. 2275–2277; Slauson and Zielinski 2009, pp. 39–42; Eriksson 2016, pp. 19–23). These areas provide food and prey resources for coastal martens and provide cover from predators. Dense understory shrub layers, used by coastal martens for breeding, are most often found outside of areas subject to timber harvest activities.

Listing Status

Comment 40: Two commenters stated that we should list the coastal marten as endangered rather than threatened. One commenter based that opinion on researchers' estimates of the coastal marten total population of fewer than 500 animals. The other commenter based their opinion on a variety of factors, including a population of fewer than 400 animals; the coastal marten's extirpation from 93 percent of its range, with 72 percent of mature forest logged, leaving coastal martens in isolated, remnant populations; increased threats to isolated populations; human-caused mortalities in the central coastal Oregon population resulting in a 99 percent risk of population extirpation within 30

years (Linnell *et al.* 2018); suitable habitat conditions in central and northern coastal Oregon being so curtailed as to only be capable of supporting a single population (Slauson *et al.* 2018 [2019]); increased threats specifically to the California population; and California's listing of the coastal marten as endangered under the CESA.

Our Response: The Act defines an endangered species as any species which is in danger of extinction throughout all or a significant portion of its range (section 3(6)), and a threatened species as any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (section 3(20)). Although smaller populations are often more at risk of extinction than larger populations, whether a population meets the definition of endangered or threatened under the Act is not solely limited to population size, and varies by species and circumstance. Vulnerability to extinction is a complex interplay between the species' existing condition, including population size, the types and timing of threats and their interactions and magnitude, and how populations respond or are expected to respond to those threats.

We took into consideration the factors identified by the commenter (*i.e.,* small, isolated, populations; human-caused mortalities) in our determination of threatened status. We also reviewed the literature cited by the commenter, which references coastal marten population persistence and habitat conditions in Oregon (Linnell *et al.* 2018; Slauson *et al.* 2018 [2019]). We find that Linnell *et al.* (2018) gives a range of modeled outcomes regarding persistence of the single population analyzed by the researchers and that the modeled outcome depends on population size and number of human-caused mortalities (Linnell *et al.* 2018, pp. 14–15). The statement by the commenter points to the smallest potential population (20 individuals) having the highest human-caused mortalities (3 mortalities) per year. The commenter also points to trapping in Oregon as being part of the reason for increased human-caused mortalities. With trapping of the coastal marten now being banned by Oregon, the threat from trapping taking coastal martens has been greatly reduced, thereby making this ''worst-case'' scenario less likely.

Regarding the commenter's reference to Slauson *et al.* 2018 (published February 2019), we acknowledge that the existing populations of coastal marten are isolated and small, and that habitat conditions in some cases are limiting. However, the conclusion made by the researchers that habitat is limited in central and northern coastal Oregon is based on modeled habitat that in some cases does not reflect the areas actually being used by the coastal marten. For example, the model does not take into consideration lower elevation areas that are being used by the coastal marten.

The commenter stated that the CDFW's determination of endangered status under the CESA was reason to conclude federally endangered status under the Act. Comparing the analysis conducted by the CDFW determining that the coastal marten should be considered endangered under the CESA to that of the Service's threatened determination is not appropriate. The CDFW determination does not take into consideration Oregon populations. In our analysis of the best available commercial and scientific information, we determined that the coastal marten is not in danger of extinction (*i.e.,* ''endangered''), but is likely to become an endangered species within the foreseeable future (''threatened'') based on the timing of threats acting on the species and its habitat. See Determination of Coastal Marten Status, below.

Comment 41: One Board of County Commissioners stated that it is inappropriate for the Service to list the coastal marten as threatened because we know very little about the actual prevalence of the species due to limited and inadequate surveying effort and data.

Our Response: We are required to make listing determinations based on the best scientific and commercial information available. Since 2014, extensive coastal marten surveys have been conducted encompassing more than 70 percent of the coastal marten's predicted historical range in Oregon, including survey stations in Lincoln, Benton, Lane, Douglas, Coos, Curry, and Josephine Counties (Moriarty *et al.* 2016, pp 72–73). Extensive surveys for coastal marten have also been conducted in California (Service 2018, p. 82). Although the survey methodology may have resulted in some individuals being missed in some locations, the existing survey protocol was unlikely to miss a ''thriving, sizable population'' of coastal martens (Moriarty *et al.* 2016, p. 77).

Comment 42: One commenter encouraged the Service to consider the positive impacts that private timberlands have on coastal martens, including restricted public access that reduces the risk of illegal activities such as illegal cannabis cultivation sites and associated toxicants, reduced road traffic and associated road mortalities, and reduced trapping pressures. They concluded that managed timberlands contribute to a lessened risk of mortality from these factors.

Our Response: While some of the stressors may be reduced on managed timberlands, or other ownerships for that matter, we still look at the cumulative effect of all stressors and conservation actions addressing them collectively across the DPS to assess their effects on coastal martens and determine the DPS' listing status. Based on our consideration of the five listing factors, we find that the current condition of the coastal marten still provides for enough resiliency, redundancy, and representation within the four existing populations; however, the threats from wildfire and habitat loss, exacerbated by small population size, are expected to manifest in a decline of the species' status into the future. The association of specific threats to specific ownerships, geographic locations, or other conditions will be important in recovery planning and developing conservation strategies for the coastal marten.

Comment 43: One commenter requested that the Service ''emergency list'' the coastal marten because of the ongoing coastal marten trapping season on Federal lands. The commenter stated that recent research on coastal martens in the central coastal Oregon population concluded that human-caused mortality of two to three coastal martens per year in this area could extirpate this population within 30 years. The commenter stated that continued trapping clearly meets the statutory definition of jeopardy and should be halted immediately. The commenter postulated that the Service has the authority to end trapping of coastal martens on Federal lands by enacting emergency protection for the coastal marten under the Act while the Federal listing is in process.

Our Response: Although trapping has been identified as a threat to coastal martens, we did not consider this threat to be a driver for determining if the coastal marten should be listed as an endangered or threatened species. We considered trapping to be part of the cumulative threats facing the species. Our analysis of the threat from trapping indicated that, on average, less than one animal has been lost annually over the last 28 years due to trapping. Additionally, there have been no legally trapped or harvested coastal martens in Oregon since 2014. Further, on September 13, 2019, the Oregon Fish and Wildlife Commission banned trapping coastal martens in areas where

it is known to occur in Oregon, which includes Federal lands (OFWC 2019, entire). As a result, we do not consider trapping impacts to be as severe as characterized by the commenter, and with the new restrictions, we do not consider trapping a threat to the viability of the coastal marten and as a result not a condition for emergency listing under section 4(b)(7) of the Act.

Comment 44: One commenter, concerned with the central coastal Oregon population and its associated habitat located within the Oregon Dunes ecosystem, suggested that the coastal marten in this area should not be listed because coastal marten and habitat in this area are already adequately protected under existing Federal law and regulations, and because a listing will add a complex, time-consuming procedural consultation hurdle that will slow and/or limit critical and time-sensitive habitat protection and restoration work in the Oregon Dunes. The commenter stated that this would likely result in the following immediate and long-term detrimental effects to the broader dunes ecosystem, which supports other rare, at-risk, and listed species: (1) Risk to maintenance of high-quality coastal marten habitat conditions in this area; (2) threat to the long-term persistence of values for which the Oregon Dunes NRA was established; and (3) associated negative economic effects on surrounding communities. In addition, the commenter stated that other listed or rare species depend on the restoration of the Oregon dunes, including the threatened western snowy plover (*Charadrius alexandrinus nivosus*), and several rare plants and invertebrates.

The commenter went on to recognize the work of the Oregon Dunes Restoration Collaborative (ODRC), which was formed to increase engagement of local communities and coordinate efforts to significantly expand protection and restoration of the dunes. The commenter stated that there are limited resources for the ODRC to complete restoration work, and the commenter believes additional administrative procedures associated with listing the coastal marten, or slowing the process, will be burdensome and likely result in loss of public interest and support for restoration. In addition, the commenter stated that the coastal marten and its habitat are already adequately protected under the National Forest Management Act, and because it is a candidate species under the Act and is on the Regional Forester's (USFS) sensitive species list.

Our Response: Based on our assessment of the threats facing the coastal marten as well as conservation measures, management, and regulatory mechanisms in place, we have determined that the coastal marten meets the definition of a threatened species under the Act. We are working with the USFS and stakeholders such as ODRC on management of the Oregon Dunes NRA. We agree that working with land managers and local stakeholders to develop support and ownership for species recovery is key for successful implementation of the Act, and, as is our practice for listed species, we will work with government and nongovernmental entities as we work to recover the coastal marten.

Off-Highway Vehicle Recreation

Comment 45: One commenter stated that coastal martens co-exist with off-highway vehicle (OHV) activities that occur in the Oregon Dunes NRA. They stated that if the coastal marten is listed, then listing should not limit the ability to recreate in the area in designated riding routes.

Our Response: Habitat use of the Oregon Dunes NRA by coastal marten is mostly within forested areas not used by recreational OHV enthusiasts, and we did not identify OHV activities as a threat to the coastal marten. Consequently, we find it unlikely that listing the coastal marten as threatened will significantly impact OHV use within the area. We will continue to work with our Federal and State partners regarding conservation of coastal marten and its habitat with the Oregon Dunes NRA.

Population Status

Comment 46: Three commenters stated that additional coastal marten locations in southern Oregon, not considered in the SSA report or the proposed rule to list the coastal marten, suggest the possibility of increased redundancy and resiliency. One of these commenters stated that this suggests the coastal marten is not likely to become endangered in the foreseeable future. Specifically, two new locations were found in near-coastal forests, suggesting redundancy with the central coastal Oregon population, although there is no information on the number of individuals in this area. The commenters stated that between the southern coastal Oregon population and the Oregon-California border population, two new coastal marten locations were found near detections from 1997 and 2001, suggesting increased connectivity between these two populations.

Our Response: We have reviewed the occurrence information the commenter provided and incorporated this information as appropriate into our analysis of the status of the coastal marten. Although the new detections are encouraging, they do not lead us to believe that redundancy or resiliency has increased to the level that listing is not warranted. None of the detections meet our ruleset for delineating additional coastal marten population areas, nor are the detections close enough to existing population areas to be subsumed by them, again according to our ruleset (Service 2019, pp. 75, 82). It is difficult to determine whether the two coastal marten detections located between the southern coastal Oregon population and the Oregon-California border population suggest increased connectivity. Again, there are not enough locations within proximity of each other to derive a separate population; if there were, such a population area would provide for additional connectivity between populations and improve the overall resiliency of the coastal marten (Service 2019, pp. 94–95). However, there is not sufficient evidence to conclude whether these two detections represent: (1) Coastal marten connectivity between the two extant populations (either as individuals or over multiple generations); (2) coastal marten reestablishment in their historical range; or (3) remnant individuals from a once existing population. The best available data suggest that these detections do not represent a separate population, because the survey methodology, while it may have missed individual coastal martens, was unlikely to miss a sizable population (Moriarty *et al.* 2016, p. 77).

Comment 47: Three commenters stated that their beliefs the number of individuals in the northern coastal California population is larger than estimated in the SSA report due to flawed survey methodology and analysis methods. The commenters believe the estimate does not reflect recent coastal marten captures of a third or more of the population size outside of the population area, which provide evidence that coastal martens occur outside of the area bounded in the SSA report and that there is a potential for a larger population size. The commenters also state that the population estimate does not reflect available coastal marten habitat and that coastal marten detections south of this population and within the DPS may also be Humboldt martens and that they should be included in the population estimate.

Our Response: We based our determination of population estimates on the best scientific and commercial information available and do not consider the survey methodology or analysis methods for population estimates to be flawed. The population estimates were not intended to reflect available marten habitat but instead to capture what we know about current population numbers and their distribution. Coastal marten suitable habitat was analyzed and is reflected in tables 4.2 and 4.3 of the SSA report under the number of available male and female home ranges. We are not aware of any verifiable marten detections south of the northern coastal California population and within the DPS other than a few detections in Prairie Creek Redwoods State Park (PCRSP). At the time of publication of the proposed rule (October 9, 2018), there were two detections in PCRSP, with three additional detections since that time. We decided to not include these detections within the northern coastal California population because they were separated from the extant populations by more than 5 kilometers and there were only two individuals at the time of publication of the proposed rule (October 9, 2018) (see section 4.2 of the SSA report for further explanation of extant population areas [EPAs]). We have determined that the increase in detections to five is still an insignificant number and thus we still do not include them in our analysis of the status of this population. The information in our SSA report was peer reviewed by knowledgeable species experts. These experts agreed with our characterizations of populations and distribution, and concurred with our determination of the species' DPS, which coincides with a subspecies determination for the taxon. The commenters did not provide any substantial information to support their comments regarding population size and distribution.

Predation and Competition

Comment 48: Four commenters questioned our statement in the proposed rule (83 FR 50574, 50577, October 9, 2018) that predation of martens has increased due to changes in forest composition. In the absence of historical and empirical data indicating changes in predation rates, one commenter suggested this should be presented only as a potential hypothesis.

Our Response: Data are lacking to definitively conclude that predation of coastal martens in the DPS has increased. Our statement was based on our observation that areas subject to timber harvest are usually more open and provide less cover from predators than areas with higher shrub density, downed logs, and standing snags. We have modified the language in our SSA report and this rule to state that the increase in predation may be linked to changes in forest composition but that this increase may be hypothetical.

Comment 49: Three commenters questioned our conclusion in the proposed rule that viability risks to coastal martens, ''are primarily related to habitat loss and associated changes in habitat quality and distribution and include: (1) A decrease in connectivity between populations; and (2) habitat conversion from that suitable for martens to that suitable for generalist predators and competitors, thereby increasing potential interactions and subsequent marten injury, mortality, or predation. The factors are all influenced by vegetation management, wildfire, and changing climate'' (83 FR at 50577, October 9, 2018). The commenters believe that we phrased these conclusions as factual when there is uncertainty around a decrease in connectivity, an increase in bobcats associated with changes in forest composition, whether bobcats are the predominant coastal marten predators across the coastal marten's range, whether bobcats prefer stands less than 30 years old, and what constitutes coastal marten habitat. The commenters also stated that the Service should not rely on an inference drawn from mortality observations on a small coastal marten population without any control or historical point of reference to support a conclusion that vegetation management leads to predation that is a relatively worse threat to the coastal marten than would otherwise exist.

Our Response: Regarding population connectivity, the commenters did not provide any information to support their statements on population connectivity for coastal martens. However, based on Zielinski *et al.* 2001 (p. 486), we have concluded that the coastal martens' historical range has been reduced. This research indicates that the species has been extirpated from a significant part of its range and that coastal martens may be sensitive to forest fragmentation, given marten sensitivity elsewhere in North America. Based on this information, survey efforts, and habitat modeling, we conclude that connectivity between coastal marten populations has been reduced, especially between Oregon populations, limiting the species' overall resiliency.

Regarding statements relating to predators and increased predation, some of the commenters provided technical information regarding the other uncertainties around the influence of vegetation management on predators, and their subsequent effect on coastal martens. Although the commenters raised concerns with the local, unpublished works that indicated bobcats are the primary coastal marten predator and are associated with younger forests, our suggestion that increased forest fragmentation or reduced canopy cover increases predation risk by coastal martens is consistent with marten research elsewhere in North America (as cited in Service 2019, pp. 43–44, or as provided by the commenter [*e.g.,* Joyce 2018, p. 126]). Moreover, the commenters provided no information to the contrary. Regardless, we have revised our description regarding the certainty of predation and its potential increase within the SSA report and this final rule to clarify that it is difficult to determine at this time if the rate of predation on marten has increased compared to historical levels and that further information is needed to determine if predation is increasing and how predation rates correspond to habitat fragmentation.

Significant Portion of the Range

Comment 50: One commenter stated the Service erred in failing to evaluate whether the coastal marten is endangered in a significant portion of its range. They postulated that by not doing this evaluation, the Service violated the Act and the decision to list as threatened is arbitrary and capricious. The commenter stated that the Service's position that a ''significant portion of the range'' analysis is not warranted because the coastal marten already qualified for listing contradicts the letter and intent of Congress and the Act. Hence, the commenter believes the Service must complete a significant portion of the range analysis.

Our Response: Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020), vacated the aspect of the 2014 Significant Portion of its Range Policy that provided that the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we evaluated whether the coastal marten is endangered in a significant portion of its range—that is, whether

there is any portion of the species' range for which both (1) the portion is significant; and, (2) the species is in danger of extinction in that portion. See *Status Throughout a Significant Portion of Its Range.*

Comment 51: One commenter stated that Humboldt [coastal] martens are in danger of extinction in the central coastal Oregon population area, that this constitutes a significant portion of their range, and thus the species should be listed rangewide as endangered. They believe this population is significant, surviving in a unique ecological setting of shrubby shore pine habitat, and represents the northernmost extent of the species' range. They state that the species is at risk of extinction, threatened by trapping, vehicle mortality, small population size, population isolation, stochastic events, and impending habitat loss due to restoration activities in the Oregon Dunes NRA. The commenter states that researchers (Linnell *et al.* 2018) concluded that the population has as much as a 99 percent risk of extirpation within 30 years with two to three annual human-caused mortalities. In addition, the commenter stated that the SSA report demonstrates the population is not only significant, but also gravely endangered, given that all three future scenarios result in the population remaining in a low resiliency condition. Hence, the commenter believe the coastal marten should be listed as endangered rangewide because it is endangered in a significant portion of its range in central coastal Oregon. The commenter went on to apply much of the same rationale for listing as endangered in the rest of Oregon and California citing additional loss from logging, wildfire, and rodenticides. Further, the commenter stated that the CDFW concluded that some of these similar threats were the basis for their determination listing the species as endangered in the State under CESA. As a result, the commenter concluded that the coastal marten should be listed as endangered rangewide.

Our Response: The commenter does not present any new information regarding the timing or severity of threats facing the coastal marten which we have not already considered in our current threatened determination. We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the coastal marten. The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' A thorough analysis and discussion of the threats that may impact the coastal marten are included in the final SSA report (Service 2019, entire) associated with this document, and we applied those threats to the statutory listing criteria to which they apply. We considered whether the coastal marten is presently in danger of extinction and determined that proposing endangered status is not appropriate. While threats are currently acting on the species and many of those threats are expected to continue into the future, we did not find that the species is currently in danger of extinction throughout all of its range. With four populations occurring across the range of the species, the current condition of the species still provides for enough resiliency, redundancy, and representation such that it is not currently in danger of extinction but may become so in the future. Furthermore, we considered whether the species was in danger of extinction throughout a significant portion of its range, and determined that it is not because the threats acting on the species were uniform and there were no concentration of threats leading us to believe that any one area may be endangered. See *Comment 40,* above, for additional response.

Species Status Assessment

Comment 52: One Board of County Commissioner pointed out discrepancies between version 1.1 of the coastal marten SSA report and version 2.0 of the SSA report, stating that there was no reasoned explanation provided for the ''rushed amendments'' to the SSA report within the span of a month. They stated the SSA report process should be a much more open and public process. They considered the revisions and additions ''hasty'' and believed the changes were arbitrary and capricious.

Our Response: Our SSA report is the biological document upon which our listing determination is based. Species status assessments are peer-reviewed, as well as reviewed by technical experts and our State, Federal, and Tribal partners. Changes between version 1.1 and version 2.0 of the coastal marten SSA report were mainly reflective of substantive comments from our peer reviewers, technical experts, and government partner reviewers. We further solicited public comment on the SSA report when the proposed listing determination was published in the **Federal Register** (83 FR 50574; October 9, 2018), and we incorporated substantive comments in the 2019 version of the SSA report (Service 2019, entire).

Determination of Coastal Marten Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of ''endangered species'' or ''threatened species.'' The Act defines an ''endangered species'' as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a ''threatened species'' as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The Act requires that we determine whether a species meets the definition of ''endangered species'' or ''threatened species'' because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In determining whether a species meets the definition of an endangered or threatened species, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts.

In conducting our status assessment of the coastal marten, we evaluated all identified threats under the section 4(a)(1) factors and assessed how the cumulative impact of all threats combined are acting on the viability of the coastal marten as a whole. We used the best available information as summarized in our Draft SSA and Final SSA reports, information received from peer review and comments on the 2018 proposed listing rule (83 FR 50574), as well as our most recent analysis summarized herein to gauge the magnitude of each individual threat on the coastal marten. We then assessed how those effects combined and may be ameliorated by any existing regulatory

mechanisms or conservation efforts and how that will impact the coastal marten's future viability. This included effects from both habitat-based and direct mortality-based threats and what those combined effects will mean to the future condition of the DPS. Depending on the scope and degree of each of the threats and how they cumulatively combine, these threats can be of particular concern where populations are small and isolated, as is the case for the coastal marten.

The loss of habitat and habitat patch size in the future across the range of the coastal marten is exposing coastal martens to increased threats from direct mortality and decreased habitat availability and increased fragmentation, resulting in low resiliency and reduced viability for the coastal marten as a whole. Based on our analysis, we find the cumulative impact of all identified threats on the coastal marten, especially habitat loss and fragmentation due to high-severity wildfire (Factor A) and vegetation management (Factor A) (noting that the threats are exacerbated by changing climate conditions and thus also play a role under Factor E), will act upon the coastal marten to such a degree that the DPS is likely to become endangered in the foreseeable future. The existing regulatory mechanisms (Factor D) and current conservation efforts are not addressing these threats to the level that will likely preclude the coastal marten from becoming an endangered species in the foreseeable future.

Status Evaluation

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the coastal marten. A thorough analysis and discussion of the threats that are affecting the coastal marten are included in the final SSA report (Service 2019, entire) associated with this document.

A large proportion of the area where coastal marten occurs is on Federal or State land that has various regulatory mechanisms in place to manage forested habitat (Factor D). However, coastal marten populations continue to be small and isolated, and habitat connecting populations is often degraded or fragmented despite regulatory mechanisms in place for forestry management practices in both California and Oregon. The current status of coastal marten habitat is, in part, an artifact of silvicultural practices and wildfires that reset the successional forest stage and structure favoring early successional habitat components which may lack the appropriate cover or structure preferred by the coastal marten for foraging, resting, or denning. The late-successional associated structures or habitat preferred by coastal martens will most likely require several decades of appropriate forest and species management to reduce habitat fragmentation, increase population numbers and distribution, and achieve the forest structure that will assist in restoring the natural ecology of this ecosystem for this species and connect the existing fragmented habitats. Although the coastal marten can use and cross areas of lesser habitat value (containing less cover and structure) within these fragmented habitats, the management prescriptions provided through the various regulatory mechanisms are, in some instances, not likely alleviating or addressing the future threat of continued habitat loss, habitat fragmentation, or disturbance from wildfire to coastal marten. Remedies to address such impacts are multi-decadal, are not logistically easy to implement, may be expensive to address, and may meet social resistance. Therefore, we have determined that, while existing regulatory mechanisms enable land managers within the DPS to ameliorate to some extent the identified threats to the coastal marten, the existing regulatory mechanisms, although being implemented as designed, do not completely address the identified threats to adversely impact habitat for the coastal marten. As a result, we do not consider that the regulatory mechanisms in place, in and of themselves, alleviate the need for listing the coastal marten as a threatened species.

During the public comment period for the proposed rule (83 FR 50574; October 9, 2018), we received comments from the public stating that the coastal marten should receive an endangered status determination, based on the timing and magnitude of threats facing the coastal marten. The DPS does not meet the Act's definition of an endangered species. The current conditions of the coastal marten, as assessed in the SSA report, show extant coastal marten populations in four areas (EPAs) across its range, including large areas of occupied habitat in Oregon and California. The best available data do not indicate a declining trend in abundance, and it is likely that the low abundance (and, therefore, low resiliency) indicated in our analysis is partly due to the species being difficult to detect. While threats are currently acting on the species and many of those threats are expected to continue into the future, with four populations occurring across the range of the species, the current condition of the coastal marten still provides for enough resiliency, redundancy, and representation such that it is not currently in danger of extinction. Therefore, we do not find that the species meets the definition of an endangered species under the Act. Our analysis and determination on whether the coastal marten meets the definition of a threatened species is outlined below. A threatened species is any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Foreseeable Future

In order to determine if the coastal marten is a threatened species under the Act, we must first determine what the foreseeable future timeframe is for the species. The term foreseeable future extends only so far into the future as we can reasonably determine that both the future threats and the marten's responses to those threats are likely according to 50 CFR 424.11(d). As stated above, the coastal marten faces a variety of threats including loss of habitat, wildfire, and increased predation risk (see Summary of Biological Status and Threats). These threats play a large role in the coastal marten's resiliency and future viability. Future conditions and future threat analysis is particularly challenging for the coastal marten, because one of the major threats facing the species and its habitat (wildfire) is unpredictable as to exactly when it may occur and to what extent it may impact the species. In addition, the timeframe of regeneration of habitat of the appropriate age class and structure needed for the coastal marten after a wildfire or habitat removal can be decadal in nature. In our SSA, we identified several timeframes based on the information available on threats and future habitat and environmental conditions for the species. Our future scenario analysis forecast the likely coastal marten viability over the next 15, 30, and 60 years, depending on the threat and information available about its future condition and impacts (see Future Condition, Service 2019, pp. 97–109). In cases where future trends in threats were not available, we looked to past frequency and severity of the threat and projected that into the future. As a result, based on the information available on potential future conditions, we selected the extent of the foreseeable future for the coastal marten to be approximately 60 years. This timeframe allows for multiple generations of coastal marten to occur and accounts for some development and reestablishment

of appropriate structural habitat conditions and takes into consideration wildfire return intervals. Looking out past this time period, the predictability of threats (especially wildfire) would lose their capacity to be meaningful.

Estimates of future resiliency, redundancy, and representation for the coastal marten are low. As discussed in detail in the SSA report, the species faces a variety of threats including loss and fragmentation of habitat (Factor A) due to wildfire, timber harvest, and vegetation management. In addition, collisions with vehicles (Factor E) and rodenticides (Factor E) are all impacting coastal marten individuals, and the threat of disease (Factor C) carries the risk of further reducing populations. Changes in vegetation composition and distribution from large-scale wildfire and timber harvest activities may also make coastal martens more susceptible to predation (Factor C) from larger carnivores. These threats, which are expected to be exacerbated by the species' small and isolated populations (Factor E) and the effects of climate change (Factor E), were central to our assessment of the future viability of the coastal marten. In our analysis of the factors affecting this species, we found no evidence that the existing regulatory mechanisms (Factor D) are contributing to declines in the species' status, nor do they alleviate the need for listing.

Given current and future decreases in resiliency, populations will become more vulnerable to extirpation from stochastic events, in turn, resulting in concurrent losses in representation and redundancy. All three scenarios presented in the SSA report as representative of plausible future scenarios create conditions where the coastal marten would not have enough resiliency, redundancy, or representation to sustain populations over time. While determining the probability of each scenario was not possible with the available data, the entire range of future risk revealed by the three plausible scenarios showed that the species would likely continue to lose resiliency, redundancy, and representation throughout its range in all scenarios.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we have found that the loss of habitat, threats to individuals, and lack of connectivity between populations will continue to impact the coastal marten despite conservation efforts. Further, the population and habitat factors used to determine the resiliency, representation, and redundancy for coastal marten will continue to decline into the future. Thus, after assessing the best available information, we conclude that the coastal marten is not currently in danger of extinction, but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Everson*), vacated the aspect of the 2014 Significant Portion of its Range Policy that provided that the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and, (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Everson,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for the coastal marten, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.

For the coastal marten, we considered whether the threats are geographically concentrated in any portion of the species' range at a biologically meaningful scale. The threats, which are discussed further in the SSA report, include: Loss of habitat and modification due to wildfire, timber harvest, and vegetation management (Factor A); trapping (Factor B); disease and predation (Factor C); collisions with vehicles (Factor E); rodenticides (Factor E); and the effects of climate change (Factor E). These threats are expected to be exacerbated by the species' small and isolated populations (Factor E). These threats, including their cumulative effects, were central to our assessment of the future viability of the coastal marten. From the threats facing the coastal marten, we have determined that habitat loss and modification, predation, and the effects of climate change in the context of having small and isolated populations are the driving threats leading to the species' threatened status. These threats can have large impacts on habitat availability and condition and lead to direct or indirect impacts on the species. Distribution of these threats is, for the most part, uniform across the known populations. We found no concentration of threats in any portion of the coastal marten's range at a biologically meaningful scale. Thus, there are no portions of the species' range where the species has a different status from its rangewide status. Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior*, No. 16–cv–01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best scientific and commercial information available indicates that the coastal DPS of the Pacific marten meets the Act's definition of a threatened species. Therefore, we are listing the coastal DPS of the Pacific marten as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The

protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning consists of preparing draft and final recovery plans, beginning with the development of a recovery outline and making it available to the public within 30 days of a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our website (*http://www.fws.gov/endangered*).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Following publication of this final rule, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of California and Oregon will be eligible for Federal funds to implement management actions that promote the protection or recovery of the coastal marten. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**, above).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Several Federal agency actions that occur within the species' habitat may require consultation as described in the preceding paragraph. These actions include management and any other landscape-altering activities on lands administered by the Service and the Department of the Interior's Bureau of Indian Affairs, Bureau of Land Management, and National Park Service and the Department of Agriculture's U.S. Forest Service; issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; and construction and maintenance of roads or highways by the Department of Transportation's Federal Highway Administration or the California Department of Transportation or Oregon Department of Transportation.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a final listing on proposed and ongoing activities within the range of a listed species. The discussion below regarding protective regulations under section 4(d) of the Act complies with our policy.

II. Final Rule Issued Under Section 4(d) of the Act

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the ''Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation'' of species listed as threatened. The U.S. Supreme Court has noted that statutory language like ''necessary and advisable'' demonstrates a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592 (1988)). Conservation is defined in the Act to mean ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.'' Additionally, the second sentence of section 4(d) of the Act states that the Secretary ''may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants.'' Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife, or include a limited taking prohibition (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S.

Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising its authority under section 4(d), the Service has developed a rule that is designed to address the coastal marten's specific threats and conservation needs. Although the statute does not require the Service to make a ''necessary and advisable'' finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the coastal marten. As discussed above under Summary of Biological Status and Threats, the Service has concluded that the coastal marten is likely to become in danger of extinction within the foreseeable future primarily due to habitat loss (including fragmentation) and associated changes in habitat quality and distribution. Under this 4(d) rule for the coastal marten, except as described and explained below, all prohibitions and provisions that apply to endangered wildlife under section 9(a)(1) of the Act will apply to the coastal marten. Applying these section 9(a)(1) prohibitions will help minimize threats that could cause further declines in the status of the species. The provisions of this 4(d) rule will promote conservation of the coastal marten by encouraging management of the landscape in ways that meet both land management considerations and the conservation needs of the DPS. The provisions of this rule are one of many tools that the Service will use to promote the conservation of the coastal marten.

Provisions of the 4(d) Rule

This 4(d) rule will provide for the conservation of the coastal marten by prohibiting the following activities, except as otherwise authorized or permitted: Import or export; take; possession and other acts with unlawfully taken specimens; delivery, receipt, transportation, or shipment in interstate or foreign commerce in the course of commercial activity; or sale or offer for sale in interstate or foreign commerce. These prohibitions mimic those prohibitions afforded to endangered species under section 9(a)(1) of the Act.

In addition to the prohibited activities identified above, we also provide for exceptions to those prohibitions for certain activities as described below.

We note that the long-term viability of the coastal marten, as with many wildlife species, is intimately tied to the condition of its habitat. As described in our analysis of the species' status, one of the primary driving threats to the coastal marten's continued viability is the destruction of its habitat from catastrophic wildfires. The potential for an increase in frequency and severity of these catastrophic wildfires from the effects of climate change subsequently increases the risk to the species posed by this threat. We have determined that actions taken by forest management entities in the range of the coastal marten for the purpose of reducing the risk or severity of catastrophic wildfires, even if these actions may result in some short-term or small level of localized negative effect to coastal martens, will further the goal of reducing the likelihood of the species from becoming an endangered species, and will also likely contribute to its conservation and long-term viability. Therefore, these actions are excepted from the section 9(a)(1) prohibitions.

We also recognize that there are other actions undertaken by forest management entities, such as the CDFW under the authority of the CESA, where the intended purpose of the action is not the reduction of catastrophic wildfire risk, but to improve overall habitat conditions for coastal marten. We realize that these actions may also result in some short-term or small level of localized negative effects to coastal martens or their habitat. However, we acknowledge that these types of actions are often undertaken through inclusion in NCCPs or State SHAs, which are approved by the CDFW under the authority of the CESA, and that these plans and agreements address identified effects to the coastal marten (a CESA-listed species). We have determined that actions under such State approved plans or agreements will adequately reduce or offset any negative effects to the coastal marten so that they will not result in a further decline of the species; therefore, we are excepting them from the section 9(a)(1) prohibitions in the 4(d) rule.

In addition, we note that there are activities undertaken by forest management entities that are consistent with the conservation needs of coastal marten and include activities consistent with finalized conservation plans, or strategies for the coastal marten and for which the Service has explicitly determined that meeting such plans or strategies, or portions thereof, would be consistent with the conservation needs of the coastal marten. While we recognize the potential that these types of actions may result in some small level of localized disturbance or temporary negative effects to coastal martens or their habitat, these conservation efforts will improve overall habitat conditions or contribute to the species' overall long-term viability and we have excepted them from section 9(a)(1) prohibitions in the 4(d) rule.

Toxicants, especially anticoagulant rodenticides, are recognized as a threat to the closely related fisher, and have been detected in coastal martens and other non-target predators within the historical range of the coastal marten. Illegal cannabis cultivation sites are considered a likely source. When these sites are found, they often require reclamation (waste cleanup and removal of fertilizers, pesticides, and other chemicals that were left behind). Cleanup of these sites may involve activities that may cause localized, short-term disturbance to coastal martens (*e.g.,* helicopters or off-road vehicles), as well as potential removal of some habitat structures valuable to coastal martens (*e.g.,* removal of hazard trees that may be a suitable den site in order to allow helicopter access). However, the removal of known rodenticides and other chemicals that can have long-term effects on coastal martens, their prey, and the surrounding environment is encouraged and is considered to have a long-term beneficial contribution to coastal marten resiliency. Hence, short-term disturbances or small-scale habitat loss associated with rodenticide removal are excepted from the section 9(a)(1) prohibitions in the 4(d) rule.

We recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in

implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, will be able to conduct activities designed to conserve the coastal marten that may result in otherwise prohibited take without additional authorization.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

Therefore, as explained above, we are issuing protective regulations under section 4(d) of the Act, in which all the prohibitions and provisions that apply to endangered wildlife under section 9(a)(1) of the Act, with the exceptions outlined below, apply to the coastal marten:

(1) Activities which are conducted in accordance with a permit issued by the Service under 50 CFR 17.32. These include actions for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the Act. Such permits may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time.

(2) Forest management activities for the purposes of reducing the risk or severity of wildfire. These activities may include fuels reduction projects, firebreaks, and wildfire firefighting activities. Fuels reduction projects include forest management practices such as those that treat vertical and horizontal (ladder) fuels in an effort to reduce continuity between understory and the overstory vegetation and the potential for crown fires, removal of fuels within 150 feet of legally permitted structures and within 300 feet of habitable structures, or implementation of Fuelbreak/Defensible Space Prescriptions which allow for removal of trees or other vegetation to create a shaded fuelbreak along roads or other natural features, or create defensible space.

(3) Forestry management activities included in a plan or agreement for lands covered by a Natural Communities Conservation Plan or State Safe Harbor Agreement that addresses and authorizes State take of coastal marten as a covered species and is approved by the California Department of Fish and Wildlife under the authority of the California Endangered Species Act.

(4) Forestry management activities, approved by the Service, under finalized conservation plans or strategies, that are consistent with the conservation needs of the coastal marten (includes activities that promote, retain, or restore suitable coastal marten habitat, increase percent canopy cover, increase percent ericaceous shrub cover, and denning and resting structures). These activities must be consistent with conservation plans or strategies which identify coastal marten conservation prescriptions or compliance and for which the Service has determined that meeting such plans or strategies, or portions thereof, would be consistent with conservation of the coastal marten.

(5) Activities to remove toxicants and other chemicals consistent with conservation strategies for coastal marten. Such activities include management or cleanup activities that remove toxicants and other chemicals from forested areas, for which the Service has determined that such activities to remove toxicants and other chemicals would be consistent with conservation strategies for coastal marten. Cleanup of these sites may involve activities that may cause localized, short-term disturbance to coastal martens, as well as require limited removal of some habitat structures valuable to coastal martens (*e.g.,* hazard trees that may be a suitable den site).

(6) Activities conducted by any qualified employee or agent of a State conservation agency which is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, and who will be able to conduct activities designed to conserve the coastal marten that may result in otherwise prohibited take for wildlife without additional authorization.

While we are providing these exceptions to the prohibitions and provisions of section 9(a)(1), we clarify that all Federal agencies (including the Service) that fund, permit, or carry out the activities described above will still need to ensure, in consultation with the Service (including intra-Service consultation when appropriate), that the activities are not likely to jeopardize the continued existence of the species. Private entities who undertake any actions other than those described in the exceptions above that may result in adverse effects to the coastal marten, when there is no associated Federal nexus to the action, may wish to seek an incidental take permit from the Service before proceeding with the activity.

Nothing in this 4(d) rule will change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the coastal marten. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service.

III. Critical Habitat Prudency and Determinability

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. In this final rule, we affirm the determinations we made in our October 9, 2018, proposed rule (83 FR 50574) concerning the prudency and determinability of critical habitat for the coastal marten. In our proposed rule, we found that designating critical habitat for the coastal marten may be prudent, but that a designation was not determinable at that time because information sufficient to perform a required analysis of the impacts of the designation was lacking. We continue to develop a careful assessment of the economic impacts that may occur due to a critical habitat designation and to work with the States and other partners in acquiring the complex information

needed to perform that assessment. At this time, however, the information sufficient to perform a required analysis is incomplete, and, therefore, we find designation of critical habitat for the coastal marten to be not determinable at this time. When we have completed our assessment, we will publish in the **Federal Register** a proposed rule to designate critical habitat for the coastal marten and solicit public comments on that proposal.

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

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. In development of the SSA report, we sent letters noting our intent to conduct a status review and requested information from all tribal entities within the historical range of the coastal marten, as well as providing a draft SSA report to the tribes for review. The tribes within the range of the coastal marten include the Yurok Tribe; the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; the Coquille Indian Tribe; the Cow Creek Band of Umpqua Tribe of Indians; the Confederated Tribes of Grand Ronde; and the Confederated Tribes of Siletz Indians. As discussed earlier in this rule, we did not receive comments on the October 9, 2018, proposed rule (83 FR 50574) from any tribal entities. As such, we believe we have fulfilled our relevant responsibilities.

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 Arcata Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the Fish and Wildlife Service's Species Assessment Team, the Arcata Fish and Wildlife Office, and the Oregon Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we 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; 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11 in paragraph (h) by adding an entry for ''Marten, Pacific [Coastal DPS]'' to the List of Endangered and Threatened Wildlife in alphabetical order under MAMMALS 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
MAMMALS				
*	*	*	*	*
Marten, Pacific [Coastal DPS].	*Martes caurina*	U.S.A. (CA (north-western), OR (south-western)).	T	85 FR [Insert ***Federal Register*** page where the document begins], 10/8/2020; 50 CFR 17.40(s).[4d]
*	*	*	*	*

■ 3. Amend § 17.40 by adding a paragraph (s) to read as follows:

§ 17.40 Special rules—mammals.

* * * * *

(s) Pacific marten (*Martes caurina*), Coastal DPS.

(1) *Prohibitions.* Except as provided in paragraph (s)(2) of this section, all prohibitions and provisions of section 9(a)(1) of the Act apply to the Coastal DPS of the Pacific marten.

(2) *Exceptions from prohibitions.* In regard to the Coastal DPS of the Pacific marten (''coastal marten''), you may:

(i) Conduct activities as authorized by a permit under § 17.32.

(ii) Take as set forth at § 17.21(c)(2) through (c)(4) for endangered wildlife.

(iii) Take as set forth at § 17.31(b).

(iv) Conduct forest management activities for the purposes of reducing the risk or severity of wildfire, which include fuels reduction projects, firebreaks, and wildfire firefighting activities. More specifically, forest management practices such as those that treat vertical and horizontal (ladder) fuels in an effort to reduce continuity between understory and the overstory vegetation and the potential for crown fires, remove fuels within 150 feet of legally permitted structures and within 300 feet of habitable structures, or implement Fuelbreak/Defensible Space Prescriptions that allow for removal of trees or other vegetation to create a shaded fuelbreak along roads or other natural features, or create defensible space.

(v) Conduct forestry management activities included in a plan or agreement for lands covered by a Natural Communities Conservation Plan or State Safe Harbor Agreement that addresses and authorizes State take of coastal marten as a covered species and is approved by the California Department of Fish and Wildlife under the authority of the California Endangered Species Act.

(vi) Conduct forestry management activities consistent with the conservation needs of the coastal marten (*e.g.,* activities that promote, retain, or restore suitable coastal marten habitat that increase percent canopy cover, percent ericaceous shrub cover, and denning and resting structures). These include activities consistent with finalized conservation plans or strategies, such as plans and documents that include coastal marten conservation prescriptions or compliance, and for which the Service has determined that meeting such plans or strategies, or portions thereof, would be consistent with conservation strategies for coastal marten.

(vii) Conduct activities to remove toxicants and other chemicals consistent with conservation strategies for coastal marten. Such activities include management or cleanup activities that remove toxicants and other chemicals from forested areas, for which the Service has determined that such activities to remove toxicants and other chemicals would be consistent with conservation strategies for coastal marten. Cleanup of these sites may involve activities that may cause localized, short-term disturbance to coastal martens, as well as require limited removal of some habitat structures valuable to coastal martens (*e.g.,* hazard trees that may be a suitable den site).

Aurelia Skipwith,

Director, U.S. Fish and Wildlife Service.

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Part VI

Department of Energy

Bonneville Power Administration

Record of Decision; Columbia River System Operations Environmental Impact Statement; Notice

DEPARTMENT OF ENERGY

Bonneville Power Administration

Record of Decision; Columbia River System Operations Environmental Impact Statement

AGENCY: Bonneville Power Administration (BPA), Department of Energy (DOE).

ACTION: Record of decision (ROD).

SUMMARY:

Section 1. Introduction

The Columbia River System Operations Environmental Impact Statement (CRSO EIS) dated July 2020 addresses the ongoing operations, maintenance, and configuration of the 14 federal Columbia River System (CRS) projects on the Columbia and Snake rivers. The 14 projects are Libby, Hungry Horse, Albeni Falls, Grand Coulee, Chief Joseph, Dworshak, Lower Granite, Little Goose, Lower Monumental, Ice Harbor, McNary, John Day, The Dalles, and Bonneville. The co-lead agencies (the U.S. Army Corps of Engineers [Corps], Bureau of Reclamation [Reclamation], and Bonneville Power Administration [Bonneville]) share responsibility and legal authority for managing the Federal elements of the CRS. These three co-lead agencies coordinate the operation of the CRS and have worked together to develop this EIS.

ADDRESSES: This Record of Decision will be available to all interested parties and affected persons and agencies and is being sent to all stakeholders who requested a copy. Copies of the Draft and Final CRSO EISs, and additional copies of this document can be obtained from Bonneville's Public Information Center, P.O. Box 3621, Portland, Oregon 97208–3621. Copies of these documents may also be obtained by calling Bonneville's nationwide toll-free request line at 1–800–622–4520, or by accessing the CRSO EIS project website at *https://www.bpa.gov/efw/Analysis/NEPADocuments/Pages/Columbia-River-System-Operations-Project.aspx*. Additional information is also available at *www.crso.info*.

FOR FURTHER INFORMATION CONTACT: Dave Kennedy, Environmental Planning and Analysis, Bonneville Power Administration—EC–4, P.O. Box 3621, Portland, Oregon, 97208–3621; or toll-free telephone number 1–800–622–4519; or email *ECAdmin@bpa.gov*.

SUPPLEMENTARY INFORMATION:

Section 1. Introduction, Continued

The Corps and Reclamation develop operating requirements for their projects. These are the limits within which a reservoir or dam must be operated. Some requirements are established by Congress when a project is authorized, while others are established by the agencies based on operating experience. Within these operating limits, Bonneville schedules and dispatches power. This process requires continuous communication and coordination among the three agencies. The co-lead agencies have identified the Preferred Alternative, as described in detail in Chapter 7 of the Final EIS, as the Selected Alternative in this Record of Decision (ROD).

This CRSO EIS and ROD represent the detailed work, evaluation, and decision-making of the three co-lead agencies. The CRSO EIS was completed considering the input and assistance of the multiple cooperating agencies with special expertise and authority over the resources evaluated. The co-lead agencies provided for robust public and stakeholder review beginning with scoping and continuing throughout the National Environmental Policy Act (NEPA) process.

As part of the CRSO EIS, the agencies considered six alternatives to Columbia River System operations, maintenance, and configuration. The agencies analyzed the effects of these alternatives on the human environment, including environmental, economic, and social impacts. On February 28, 2020, the co-lead agencies released for public comment the Draft CRSO EIS describing the effects of these alternatives and identifying the agencies' Preferred Alternative. The 45-day public comment period ended on April 13, 2020, and the agencies reviewed and responded to these comments in the Final CRSO EIS. The co-lead agencies released the Final EIS on July 28, 2020, and the agencies issued this joint Record of Decision on September 28, 2020.

All three co-lead agencies recognize selecting an alternative is a complex decision, and have identified the Preferred Alternative as the Selected Alternative to implement. The agencies' expertise, developed over decades of experience operating the projects, allowed for careful, comprehensive consideration of current, high quality technical and scientific information, as well as expert analysis for thorough evaluation of each alternative. The agencies conferred with tribes, public interest groups, the Northwest's Congressional delegation and governors, as well as stakeholder groups, and Federal, state and local public service agencies. The co-lead agencies also closely read, considered, and responded to the public comments which represented diverse voices with numerous perspectives. The agencies considered the effects of making this decision, and sought to provide a balanced approach and the flexibility needed to continue operations and maintenance of the CRS in this dynamic environment.

On March 20, 2018, Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ) issued an OMB/CEQ Memorandum to Heads of Federal Departments and Agencies titled ''One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under Executive Order 13807'' (OFD Framework), in accordance with Executive Order 13807 (82 FR 40,463 (Aug. 24, 2017)). This ''One Federal Decision'' policy has increased federal coordination on environmental processes and review, shortened previous timelines, and resulted in the utilization of a joint ROD for federal agencies. This CRSO EIS ROD is consistent with the One Federal Decision policy.

1.1 Decision Summary

1.1.1 Corps' Decision Summary

The information presented in this joint ROD is the Corps' determination of the Selected Alternative for implementation, the agencies' compliance with the NEPA policy and procedures, environmental regulations, and public and agency review. The NEPA process has produced sufficient and accurate assessments of the resources, needs, concerns, and other issues that relate to the evaluated alternatives and has undergone public and agency review as required by 33 CFR part 230 and 40 CFR parts 1500 through 1508. The conclusions additionally have been reviewed and evaluated by an independent review panel and found to be appropriate. Consultation on the Selected Alternative has been completed per Section 7(a)(2) of the Endangered Species Act (ESA) and incorporated into the Selected Alternative. The Corps has determined, and the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) CRS Biological Opinions demonstrate, based on the best available commercial and scientific information, that the Corps' implementation of the Selected Alternative will not jeopardize listed

species or adversely modify or destroy critical habitat.

Based on the analysis contained in the Draft and Final EIS (including review of a reasonable range of alternatives), the reviews by other Federal, State, and local agencies, Tribes, input of the public, and the review by my staff, I, D. Peter Helmlinger, P.E., Brigadier General, U.S. Army, Division Commander, select the alternative identified as the Preferred Alternative in the Final EIS as the Selected Alternative in this ROD. I find the Selected Alternative, along with the incorporation of the identified mitigation, and consistent with the requirements outlined in the Incidental Take Statements contained in the 2020 USFWS and NMFS CRS Biological Opinions, which were also incorporated in this decision, to be technically feasible, meets the Purpose and Need Statement and many of the objectives developed for the EIS, is in accordance with environmental statutes and in the public interest. Additionally, it best balances the human and natural environment in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and to fulfill the social, economic, and other requirements of present and future generations of Americans. I have also considered tribal treaty rights and the United States' trust responsibilities to the tribes in selecting this alternative. Actions that will be implemented by the co-lead agencies will improve salmonid survival, which will benefit tribal fisheries. Therefore, the Corps is deciding to operate its 12 CRS projects, and implement associated mitigation and conservation actions, according to the description of the Preferred Alternative in the Final EIS and the proposed action analyzed in the 2020 USFWS and NMFS CRS Biological Opinions.

1.1.2 Reclamation's Decision Summary

Reclamation is deciding in this ROD to operate its two CRS projects, Grand Coulee and Hungry Horse, and implement associated mitigation and conservation actions, according to the description of the Preferred Alternative in the Final EIS and the proposed action analyzed in the 2020 USFWS and NMFS CRS Biological Opinions. The Final EIS provides Reclamation a reasonable range of alternatives to implement, identifies key issues and significant effects of alternative actions, and complies with the procedural requirements of NEPA and its implementing regulations. The Final EIS shows that the Selected Alternative is feasible and satisfies Reclamation's statutory obligations. The NMFS and USFWS CRS Biological Opinions demonstrate, based on the best available commercial and scientific information, that Reclamation's implementation of the Selected Alternative will not jeopardize listed species or adversely modify or destroy critical habitat.

This decision improves upon multiple existing measures related to project operations, such as by limiting winter drafting of Reclamation reservoirs to conserve water for spring flow augmentation for migrating salmon and steelhead. Reclamation will also coordinate with the sovereign inter-agency Technical Management Team to solicit, review, comment, and make recommendations for consideration during preparation of the Water Management Plan and during in-season operational adjustments. Additionally, Reclamation's tributary habitat restoration program has improved salmonid and lamprey habitat across the basin since its inception in the early 2000s. It has matured significantly over that period, and this decision implements several advancements resulting from program maturation. In particular, this decision implements improvements in project prioritization, focused research and monitoring efforts to directly support implementation knowledge, and efficiency gains in the design process.

Reclamation's decision implements new measures, including several operations at Grand Coulee. One allows additional maintenance flexibility on generating units and spillways, which the Final EIS shows could result in small increases in spill and thus downstream total dissolved gas (TDG) concentrations. It also updates flood risk management calculations, which Corps and Reclamation will apply in a coordinated and adaptive manner consistent with the Final EIS. Reclamation is also deciding to utilize local water supply forecasts in its operation of Hungry Horse, which will better balance downstream flow augmentation with local resident fish needs.

Before reaching this decision, Reclamation reviewed a reasonable range of alternatives in the EIS; the results of the physical, environmental, economic, and human resources impact analyses; comments submitted by federal, state, and local agencies, tribes, interested parties, and the public; and applicable laws and regulations. The Selected Alternative meets the Purpose and Need of the action, balancing Reclamation's ability to meet its statutory project obligations while also complying with the requirements of the ESA, Clean Water Act (CWA), and other applicable laws.

1.1.3 Bonneville's Decision Summary

Summary of the Decision

Bonneville is deciding to implement its part of the Preferred Alternative identified in the CRSO EIS (DOE/EIS–0529, July 2020), which also constitutes the proposed action reviewed in the 2020 NMFS and USFWS CRS Biological Opinions. Under the Selected Alternative, Bonneville will market and transmit the power generated by the CRS projects as part of coordinated system operations. More specifically, Bonneville will use the CRSO EIS for any operational changes associated with power marketing. These operations will be coordinated with other operational, maintenance or configuration actions for flood risk management, irrigation, fish and wildlife conservation, water quality, navigation and other congressionally authorized purposes. Bonneville's implementation of the Selected Alternative will also comply with all applicable laws and regulations, including the NEPA, the ESA, the Pacific Northwest Electric Power Planning and Conservation Act and the CWA.

As part of the Selected Alternative, Bonneville will continue to mitigate for the effects of its power operational actions. Bonneville will fund non-operational conservation measures as part of implementation of the proposed action consulted upon in the NMFS and USFWS CRS Biological Opinions and mitigation actions associated with the CRSO EIS (see Section 7.6 of the CRSO EIS; Attachment 1, Mitigation Action Plan). These actions will be included in its existing Fish and Wildlife Program and are consistent with the Northwest Power and Conservation Council's Columbia River Basin Fish and Wildlife Program (see Chapters 2, 5, 7 of the CRSO EIS; Attachment 1, Mitigation Action Plan).

In addition to Bonneville's fish and wildlife mitigation commitments described above, there are fish and wildlife mitigation costs associated with fulfilling Bonneville's power share responsibilities that are direct funded by Bonneville to the Corps and Reclamation for mitigation activities, such as hatchery operations, fish stocking, elk habitat maintenance, and others. In addition to the hatchery operations that are funded through the Fish and Wildlife Program, Bonneville will continue to provide USFWS with annual operations and maintenance

funding for the Lower Snake River Compensation Plan (LSRCP), in accordance with Bonneville's direct funding agreement with USFWS and any future renewals.

Section 2. Background

2.1 Purpose and Need

The CRSO EIS evaluated the long-term coordinated operation and management of the CRS projects for the multiple authorized project purposes. An underlying need is to review and update the management of the CRS, including evaluating measures to avoid, offset, or minimize impacts to resources affected by managing the CRS in the context of new information and changed conditions in the Columbia River Basin subsequent to the 1995 System Operation Review EIS, with the RODs in 1997. In addition, the co-lead agencies responded to the Opinion and Order issued by the U.S. District Court for the District of Oregon (District Court), described in more detail in Section 2.3. This included evaluating mitigation and non-operational conservation measures to address impacts to ESA-listed species from CRS operations. The CRSO EIS evaluated actions within the current authorities of the co-lead agencies, as well as certain actions that are not within their authorities, based on the District Court's observations about alternatives that should be considered and comments received during the scoping process. The CRSO EIS also provided information and analyses that allowed the co-lead agencies and the region to evaluate the costs, benefits, and tradeoffs of various alternatives as part of reviewing and updating management of the CRS. The co-lead agencies will use the information garnered through this process to guide future decisions, and allow for a flexible approach to meeting multiple responsibilities including resource and legal and institutional purposes of the action. A full discussion of the Purpose and Need for the CRSO EIS is discussed in Section 1.2 of the Final CRSO EIS.

2.2 Objectives

The eight objectives presented below, along with the CRSO EIS Purpose and Need Statement (Section 1.2 of the Final CRSO EIS), guided the development of a reasonable range of alternatives. The co-lead agencies evaluated the alternatives to determine how effectively they met the objectives as described in Chapter 2. The specific objectives are as follows:

(1) Improve ESA-listed anadromous salmonid juvenile fish rearing, passage, and survival within the CRSO project area through actions including but not limited to project configuration, flow management, spill operations, and water quality management.

(2) Improve ESA-listed anadromous salmonid adult fish migration within the CRSO project area through actions including but not limited to project configuration, flow management, spill operations, and water quality management.

(3) Improve ESA-listed resident fish survival and spawning success at CRSO projects through actions including but not limited to project configuration, flow management, improving connectivity, project operations, and water quality management.

(4) Provide an adequate, efficient, economical, and reliable power supply that supports the integrated Columbia River Power System.

(5) Minimize greenhouse gas emissions from power production in the Northwest by generating carbon-free power through a combination of hydropower and integration of other renewable energy sources.

(6) Maximize operating flexibility by implementing updated, adaptable water management strategies to be responsive to changing conditions, including hydrology, climate, and the environment.

(7) Meet existing contractual water supply obligations and provide for authorized additional regional water supply.

(8) Improve conditions for lamprey within the CRSO project areas through actions potentially including but not limited to project configurations, flow management, spill operations, and water quality management.

2.3 Recent Litigation History

On May 4, 2016, the District Court issued an opinion invalidating NMFS' biological opinion evaluating the operation of the Columbia River System. The Court held that the 2014 biological opinion violated the ESA and remanded the biological opinion to NMFS and ordered it to complete a new biological opinion. In addition to its findings under the ESA, the District Court found the Corps and Reclamation did not comply with NEPA when they adopted the biological opinion. The District Court ordered that a new environmental impact statement under NEPA be prepared by March 26, 2021 and that the agencies' respective related Records of Decision be issued on or before September 24, 2021. The District Court further ordered the Corps and Reclamation to continue to implement the biological opinion until a new biological opinion is prepared and filed. On October 18, 2018, the *Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in the West* directed the co-lead agencies to develop a schedule to complete the CRSO EIS and the associated biological opinions by 2020.

On January 9, 2017, plaintiffs filed motions for injunction with the District Court requesting (1) increased spring spill at eight lower Snake and Columbia River Federal projects beginning with the spring 2017 fish migration season, (2) initiation of bypass operations on March 1, 2017, for smolt monitoring, and (3) a halt to spending by the Corps on certain ongoing and future capital projects at the four lower Snake River projects. On March 27, 2017, the District Court issued an Opinion and Order granting in part and denying in part the motions for injunction with respect to spill, smolt monitoring, and capital project funding.

In its spill ruling, the District Court indicated that it intended to order ''increased spill'' for the spring 2018 migration season. It ordered the Federal defendants[1] to work with regional experts to develop a plan for increased spill during the spring fish passage season at eight lower Snake and Columbia River projects beginning in the 2018 spring migration season.

In its capital project ruling, the Court concluded that capital spending at the four lower Snake River dams is ''likely to cause irreparable harm'' under NEPA by creating a significant risk of bias in the CRSO EIS process. The Court declined, however, to enjoin two specific projects at Ice Harbor because their primary benefit is increasing fish survival. On May 16, 2017, the Federal defendants filed a joint proposed notification process to disclose sufficient information to the plaintiffs on future capital spending projects at each dam during the NEPA remand period at appropriate and regular intervals, as directed by the District Court, which it adopted in an order dated May 25, 2017. On June 8, 2017, the Corps and Bonneville provided information to National Wildlife Federation as part of the notification process on 13 capital hydropower improvement projects. Since June 2017, the Corps and Bonneville have continued to provide information on certain capital hydropower improvement projects, Columbia River Fish Mitigation (CRFM) and Other Non-Power capital projects (primarily navigation) at the lower Snake River

[1] The Federal defendants referred to in Section 2.3 are NMFS, Corps, and Reclamation.

dams (Lower Granite, Little Goose, Lower Monumental, and Ice Harbor).

On October 30, 2017, the Federal defendants filed a status report with the Court addressing: (1) The appropriateness of the remaining NEPA schedule; and (2) how the agencies intend to integrate and coordinate the NEPA process and the ESA Section 7(a)(2) consultation. The Federal defendants reported they are on target to complete the NEPA process and will integrate the NEPA/ESA processes so the agencies can make informed decisions on the future management of the Federal Columbia River Power System (FCRPS).

On December 8, 2017, the Federal defendants and the plaintiffs filed a joint proposed order and spill implementation plan with the Court. On January 8, 2018, the District Court entered a final spill injunction order governing 2018 spring fish passage spill operations, in which the Court adopted the joint proposed order without modification.

In December 2018 the Federal defendants, the State of Washington (defendant-intervenor), the State of Oregon (plaintiff-intervenor), and the Nez Perce Tribe (amicus curiae) executed an agreement on spring operations (the *2019–2021 Spill Operation Agreement*) in which these parties agreed to certain operations and also agreed not to litigate issues relating to the biological opinion until the CRSO EIS process is complete. On December 18, 2018, the parties filed a joint status report with the District Court[2] notifying the Court of this agreement and that the Federal defendants intended to complete consultation on a new biological opinion before spring operations began in April 2019. NMFS issued a new BiOp on March 29, 2019, incorporating the spring spill operations that were agreed upon in December 2018. The 2019 Columbia River System Biological Opinion went into effect on April 1, 2019.

2.4 Statutory Background

The statutes defining how the agencies operate, maintain, and configure the CRS play a critical role in this decision. Those laws fall primarily into two categories: (1) Specific authorizations to construct and operate projects for particular purposes; and (2) general operation and maintenance authorities and responsibilities. Collectively, these statutes define the full extent of the agencies' abilities to operate, maintain, and configure the CRS.

Congress enacted numerous specific statutes authorizing the construction and operation of each CRS project. Congress authorized the first two projects, Bonneville and Grand Coulee, in the Rivers and Harbors Act of 1935, Public Law 74–409.[3] Congress then authorized Hungry Horse in 1944 under Public Law 78–329; McNary and the four lower Snake River dams (Ice Harbor, Lower Monumental, Little Goose and Lower Granite) in the River and Harbor Act of 1945, Public Law 79–14; and Chief Joseph in the Rivers and Harbors Act of 1946, Public Law 79–525. Congress authorized the remaining CRS projects in the Flood Control Act of 1950, Public Law 81–516, except for Dworshak, which Congress authorized in the Flood Control Act of 1962, Public Law 87–874.

Each project's authorizing statute differs, identifying, among other things, the specific purposes for which Reclamation or the Corps must operate a project. Likewise, each project's authorization may vary in defining how that purpose is implemented at each specific project. Every CRS project's authorizing statute includes hydroelectric power generation, and most also include navigation. All of the Corps projects are authorized to support recreation and fish and wildlife conservation.[4] The storage projects—Grand Coulee, Dworshak, Albeni Falls, and Hungry Horse, John Day, and Libby—are authorized for flood risk management. The two Reclamation projects, Grand Coulee and Hungry Horse, as well as the Corps' John Day project, include in their authorizing statutes authority to operate for irrigation purposes. Congress also authorized irrigation as an incidental benefit at the Corps' projects on the lower Snake River and at The Dalles. Fish and wildlife mitigation at the lower Snake River projects was the result of negotiations under the Fish and Wildlife Coordination Act, Public Law 85–624.

Overlaying these specific project laws is the Pacific Northwest Electric Power Planning and Conservation Act, Public Law 96–501. Passed in 1980, the Act seeks to fulfill many objectives, including to provide ''an adequate, efficient, economic, and reliable power supply'' and ''to protect, mitigate and enhance the fish and wildlife . . . of the Columbia River and its tributaries.'' In support of these goals, the Act requires federal agencies, including the co-lead agencies, to exercise their responsibilities for operating and maintaining CRS projects ''to adequately protect, mitigate, and enhance fish and wildlife . . . affected by such projects or facilities in a manner that provides equitable treatment for such and fish and wildlife with the other purposes'' of the projects. It also obligates the co-lead agencies to take into account, at the relevant stages of their decision-making and to the fullest extent practicable, the Columbia River Basin Fish and Wildlife Program adopted by the Northwest Power and Conservation Council.

As a backdrop to the foregoing legislation specific to the CRS, general agency statutes also guide the agencies' operation, maintenance, and configuration of the CRS. These include foundational laws, like the Bonneville Project Act of 1937, Public Law 75–329, which governs aspects of Bonneville's power marketing activities; the Reclamation Project Act of 1939, Public Law 76–260, which guides Reclamation's operation of its two CRS projects; and the Flood Control Act of 1944, Public Law 78–534, which authorizes the sale of power from Corps dams, defines the Corps' role in flood risk management at non-Corps dams, and establishes recreation as a purpose of Corps projects.

In addition to these statutes, requirements of the ESA heavily influence CRS operations. Still other laws, including the CWA and National Historic Preservation Act, are important considerations in how the agencies operate and maintain the CRS projects.

Fulfilling these many statutory responsibilities, some of which must be balanced with each other and often pose conflicts, is extremely complex, requiring consideration of multiple factors across an expansive geographic scale. Many additional factors impacting these responsibilities involve matters beyond the reach of the agencies' authorities, including incoming water

[2] Status Report RE: 2019–2021 Spill Operation Agreement During the NEPA Remand Period, *Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* No. 3:01–CV–00640–SI (D. Or. Dec. 18, 2018). Footnote 3 stated: ''The Confederated Tribes of the Umatilla Reservation, the Confederated Tribes of the Warm Springs, and the State of Idaho indicated that they support the Agreement. The Confederated Salish and Kootenai Tribes, the Kootenai Tribe of Idaho, and the State of Montana collectively do not oppose the Agreement so long as its implementation does not adversely affect or preclude the improvement of the Montana Operations. . ..''

[3] Construction of Bonneville and Grand Coulee commenced under the 1933 National Industry Recovery Act, which authorized the Federal Emergency Administrator of Public Works to develop hydropower, transmit electricity, construct river improvements, and control floods. Public Law 73–67, 202 (June 16, 1933). After litigation concerning application of the Act to another project, Congress formally reauthorized both Bonneville and Grand Coulee in the 1935 Rivers and Harbors Act.

[4] Recreation as a Corps' project purpose was generally authorized under the Flood Control Act of 1944, Public Law 78–534.

quality, ocean conditions, and historical environmental degradation.

2.5 Alternatives Considered

The agencies used an iterative process to develop a range of alternatives for the future physical configuration, operation, and maintenance of the 14 projects of the CRS to achieve a reasonable balance of competing resource demands for the available water and for the multiple authorized purposes, including evaluating measures to avoid, offset, or minimize impacts to resources affected by managing the CRS in the context of new information and changed conditions in the Columbia River Basin since the System Operation Review EIS in 1997. This process began by identifying the EIS Purpose and Need Statement and objectives for future management of the CRS. A suite of eight preliminary draft alternatives were developed to focus on individual resources. These Single Objective Alternatives provided information regarding how well measures might perform when combined, and helped identify any conflicts between resources, actions, or locations. These alternatives informed the next iteration of alternatives development, resulting in a reasonable range of Multiple Objective Action Alternatives (MOs) suitable for analysis. Following analysis and identification of effects for the four MO alternatives, the co-lead agencies used these findings to develop a fifth action alternative, which was described as the agencies' Preferred Alternative.

2.5.1 No Action Alternative

The No Action Alternative includes all operations, maintenance, fish and wildlife programs, and mitigation in effect when the CRSO EIS was initiated in September 2016. Juvenile fish passage spill operations at the eight lower Columbia River and Snake River dams would follow the 2016 Fish Operations Plan developed by the Corps, which used performance standard spill provided under previous NMFS biological opinions. The co-lead agencies would also implement structural measures that were already budgeted and scheduled as of September 2016 that affected CRS operations. The majority of these structural measures are dam modifications to improve conditions for ESA-listed salmon and steelhead. For example, installation of Improved Fish Passage (IFP) turbines planned for Ice Harbor and McNary Dams would occur. Other ongoing habitat and mitigation programs would continue, as was planned at the time the CRSO EIS process started. A detailed description of measures included in the No Action Alternative is included in Section 2.4.2 of the CRSO EIS.

2.5.2 Multiple Objective Alternative 1

Multiple Objective Alternative 1 (MO1) was developed with the goal to avoid unreasonable effects—and if possible, achieve—congressionally authorized project purposes while also benefiting ESA-listed fish species relative to the No Action Alternative. MO1 differs from the other alternatives by carrying out a juvenile fish passage spill operation referred to as a block spill design. The block spill design alternates between two operations: A base operation that releases surface flow, where juvenile fish are most present, over the spillways using different flows at each project based on historical survival tests; and a fixed higher spill target at all projects. For the block that uses the same target at all projects, the operators would release flow through the spillways up to a target of 120 percent TDG in the tailrace of projects and 115 percent TDG in the forebay of those projects. The intent of these two spill operations is to demonstrate the benefit of different spill levels to fish passage. In addition, MO1 sets the duration of juvenile fish passage spill to end based on a fish count trigger, rather than a predetermined date. MO1 proposes to initiate transport operations for juvenile fish approximately two weeks earlier than under the No Action Alternative.

MO1 also incorporates measures to increase hydropower generation flexibility in the lower basin projects and alters the use of stored water at Dworshak for downstream water temperature control in the summer. MO1 includes measures similar to the other action alternatives, which include increased water management flexibility and water supply, and using local forecasts in whole-basin planning. MO1 also includes measures to disrupt predators of ESA-listed fish. A detailed description of the measures in MO1 is in Section 2.4.3 of the CRSO EIS.

2.5.3 Multiple Objective Alternative 2

Multiple Objective Alternative 2 (MO2) was developed with the goal to increase hydropower generation and reduce regional greenhouse gas emissions while avoiding or minimizing adverse effects to other congressionally authorized project purposes. MO2 would slightly relax the No Action Alternative's restrictions on operating ranges and ramping rates to evaluate the potential to increase hydropower generation efficiency and increase operators' flexibility to respond to changes in power demand and changes in generation of other renewable resources. The measures within MO2 would increase the ability to meet power demand with hydropower generation during the periods when it is most valuable (*e.g.,* winter, summer, and daily peak demands). The upper basin storage projects would be allowed to draft slightly deeper, allowing more hydropower generation in the winter and less during the spring. MO2 also differs from the other alternatives by excluding the water supply measures and evaluating an expanded juvenile fish transportation operation season.

This alternative proposed to transport all collected ESA-listed juvenile fish for release downstream of the Bonneville project, by barge or truck, and to reduce juvenile fish passage spill operations to a target of up to 110 percent TDG. Inclusion of the target up to 110 percent TDG spill operation provided the lowest end of the range of juvenile fish passage spill operations evaluated in the CRSO EIS.

Structural measures of MO2 are aimed at benefits for ESA-listed fish and lamprey. These measures are similar to other alternatives and include making improvements to adult fish ladders, upgrading spillway weirs, adding powerhouse surface passage, and IFP turbine upgrades at John Day Dam. A detailed description of measures included in MO2 is in Section 2.4.4 of the CRSO EIS.

2.5.4 Multiple Objective Alternative 3

Multiple Objective Alternative 3 (MO3) was developed to integrate actions for water management flexibility, hydropower generation at the remaining CRS projects, and water supply with measures that would breach the four lower Snake River dams (Lower Granite, Little Goose, Lower Monumental, and Ice Harbor). In addition to breaching these four projects, MO3 differs from the other alternatives by carrying out a juvenile fish passage spill operation that sets flow through the spillways up to a target of 120 percent TDG in the tailrace of the four lower Columbia River projects (McNary, John Day, The Dalles, and Bonneville). This alternative also proposes an earlier end to summer juvenile fish passage spill operations than the No Action Alternative. Instead, flows would transition to increased hydropower generation when low numbers of juvenile fish are anticipated.

Structural measures in this alternative include breaching the four lower Snake River dams by removing the earthen embankments at each dam location, resulting in a controlled drawdown. A

detailed description of measures included in MO3 is in Section 2.4.5 of the CRSO EIS.

2.5.5 Multiple Objective Alternative 4

Multiple Objective Alternative 4 (MO4) was developed to examine a combination of measures to benefit ESA-listed fish, integrated with measures for water management flexibility, hydropower production in certain areas of the basin, and additional water supply. This alternative included the highest fish passage spill level considered in this CRSO EIS, dry-year augmentation of spring flow with water stored in upper basin reservoirs, and annually drawing down the lower Snake River and lower Columbia River reservoirs to their minimum operating pools (MOP). This alternative also included spillway weir notch inserts, changes to the juvenile fish transportation operations, and spill through surface passage structures for kelts, overwintering steelhead and steelhead overshoots. In MO4, the juvenile fish transport program would operate only in the spring and fall, while juvenile fish passage spill is set up to 125 percent TDG during the spring and summer spill season. The alternative contains a measure for restricting winter flows from the Libby project to protect newly established downstream riparian vegetation to improve conditions for ESA-listed resident fish, bull trout, and Kootenai River white sturgeon (KRWS) in the upper Columbia River Basin.

The structural measures in this alternative are primarily focused on improving passage conditions for ESA-listed salmonids and Pacific lamprey. The inclusion of spillway weir notch inserts is the only structural measure unique from the other MO alternatives. A detailed description of measures that are included in MO4 is in Section 2.4.6 of the CRSO EIS.

2.5.6 Preferred Alternative

This alternative was developed using a combination of measures already described in one or more of the four MO alternatives, with some measures slightly refined based upon previous analysis during the EIS process. The Preferred Alternative also drew upon new information obtained from spill operations implemented in 2019 and 2020. The spill regime in this alternative includes a high rate of spill at six of the eight lower Columbia and lower Snake River projects (up to 125% TDG, consistent with the relevant state water quality standards) for up to 16 hours a day, then reduces spill for up to 8 hours, producing benefits for both out-migrating juvenile salmonids and hydropower. The Preferred Alternative also includes measures for lamprey and resident fish, and other measures intended to provide flexibility for water management and water supply operations over the foreseeable future. The Preferred Alternative also improves upon the actions committed to in the past to benefit ESA-listed fish species described in the No Action Alternative, ongoing routine maintenance of the 14 CRS projects, including maintenance of hydropower assets, navigation infrastructure, and fish facilities, continued management of invasive species, and management of avian and pinniped predators of ESA-listed salmonids.[5]

Structural measures in the Preferred Alternative are focused on improving and maintaining hydropower assets, and making changes at the dams to improve passage and conditions for ESA-listed salmonids, resident fish, and lamprey. These include power plant modernization projects at the Hungry Horse, Grand Coulee, and Ice Harbor projects. Fish passage improvement projects are planned at Lower Granite, Little Goose, John Day, and Bonneville. One new structural measure was added to this alternative—closeable floating gate orifices at Bonneville to benefit lamprey.

Operational measures would provide flexible water management across the basin to adjust to local conditions and ensure water availability to benefit resident fish in the upper basin and improve flow conditions for ESA-listed fish in the middle and lower basin. The *Juvenile Fish Passage Spill* measure would be implemented using adaptive management as more information on the effects of increased spill becomes available. The Preferred Alternative also includes a measure to ensure future flexibility for Reclamation to meet authorized water supply obligations.

The Preferred Alternative endeavors to provide the most balanced way to fulfill all of the CRS projects' congressionally authorized purposes, meets a majority of the CRSO EIS objectives, minimizes and avoids adverse impacts to the environment, benefits tribal interests and treaty resources, and provides additional improvements for ESA-listed species. The Preferred Alternative is described in detail in Chapter 7 of the CRSO EIS. The Preferred Alternative is selected in this ROD.

[5] MO3 would provide the highest potential benefit to ESA-listed Snake River salmon and steelhead but would not address the full range of environmental resources to the same degree as the Preferred Alternative.

2.5.7 Environmentally Preferable Alternative

Federal agencies are required to identify the ''environmentally preferable alternative'' in their Record of Decision consistent with 40 CFR 1505.2. If the environmentally preferable alternative is not selected as the alternative for implementation, the agencies are to discuss the reasons for not selecting the environmentally preferable alternative. CEQ provided guidance on the ''environmentally preferable alternative'' in its *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations:* ''The environmentally preferable alternative is the alternative that will promote the national environmental policy as expressed in NEPA's Section 101.''[6] As stated by CEQ, ''Ordinarily, this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.''[7]

To identify the environmentally preferable alternative, the co-lead agencies used the policies identified in 42 U.S.C. 4331(b) (Section 101 of NEPA), to compare the alternatives and determine which meets the environmental intent of the law.[8]

[6] 46 FR 18026 (Mar. 23, 1981), as amended (1986), *available at https://www.energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act.*

[7] *Id.*

[8] Section 101 of NEPA, 42 U.S.C. 4331, states the following:

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

Continued

Through this evaluation, the agencies determined the Preferred Alternative is the environmentally preferable alternative. Comparatively, it meets each of the policies of NEPA and achieves the widest range of environmental benefits, while minimizing adverse effects to the environment and avoiding hazards to human health and safety.

The Preferred Alternative assures safe, healthful, productive, and esthetically and culturally pleasing surroundings by maintaining current riparian habitat, for example, while providing safe and reliable power generation. The Preferred Alternative supports the widest range of beneficial uses of the environment, without appreciable degradation, risk to health or safety, or other undesirable or unintended consequences by providing flood risk management, power generation and reliability, navigation, and fish and wildlife conservation, including improvements to fish survival, water supply, and irrigation. Commercial and tribal fishing in the lower Columbia and lower Snake rivers would improve over the No Action Alternatives. There would be fewer effects to cultural resources and improvements to tribal fisheries. The Preferred Alternative includes fish passage improvements, creating some job loss and potential higher power rates, as compared to the No Action Alternative. The agencies would monitor for potential shoaling at projects for unintended effects to navigation, resident fish, and anadromous adult fish passage at certain fish passage projects; this is included as mitigation. Effects to cultural resources will continue, but would be mitigated through the FCRPS Cultural Resource Program. Viewed with respect to ''the interrelations of all components of the natural environment,'' [9] the Preferred Alternative is deemed the environmentally preferable alternative based on its wide benefits to the environment, and the minor adverse effects compared to the other alternatives analyzed.

2.6 Summary of Potential Effects

For all alternatives, the potential effects were evaluated, as appropriate, and discussed in Chapters 3, 4, 6, and 7 of the CRSO EIS. A summary of the potential adverse effects of the Selected Alternative is listed in Table 1.

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(2) Assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

[9] 43 U.S.C. 101(a).

Table 1. Summary of Potential Adverse Effects of Selected Alternative

	Major adverse effect*	Minor or negligible effects due to mitigation**	Minor or negligible effects	Resource unaffected by action
Hydrology and Hydraulics	☐	☒	☐	☐
River Mechanics	☐	☐	☒	☐
Water Quality	☐	☒	☐	☐
Aquatic Habitat, Aquatic Invertebrates, and Fish	☐	☒	☐	☐
Vegetation, Wetlands, Wildlife, and Floodplains	☐	☒	☐	☐
Power Generation and Transmission	☐	☐	☒	☐
Air Quality and Greenhouse Gases	☐	☐	☒	☐
Flood Risk Management	☐	☐	☐	☒

Navigation and Transportation	☐	☒	☐	☒
Recreation	☐	☐	☒	☐
Water Supply	☐	☐	☒	☐
Visual	☐	☐	☒	☐
Noise	☐	☐	☒	☐
Fisheries and Passive Use	☐	☒	☐	☐
Cultural Resources	☐	☒	☐	☐
Indian Trust Assets, Tribal Perspectives and Tribal Interests	☐	☐	☐	☒
Environmental Justice	☐	☐	☒	☐
Invasive Species	☐	☒	☐	☐
Land Use	☐	☐	☐	☒
Socio-economics	☐	☐	☒	☐

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There are some localized moderate hydrological changes at Libby and Dworshak projects, affecting storage reservoir elevations and flows immediately downstream. Mitigation was proposed for habitat and riparian stabilization, as wetlands and aquatic habitat are primarily affected. Lower Snake River and lower Columbia River projects have increases in spill, potentially adversely affecting tailrace conditions, increasing energy dynamics that could cause sediment movement and damage to federal infrastructure. Shoaling and navigation channel effects would be monitored and any adverse effects would be mitigated, including dredging and potential coffer cells. This increased spill operation also creates a moderate impact to water quality because it could increase TDG, especially on the lower Snake River projects, which could adversely affect aquatic life and fish. Additionally, the spill could create eddies and delay migrating juvenile and adult salmon. These adverse effects have associated mitigation components including monitoring, maintenance actions, and fish transport, as well as adaptively managing operations as needed. These actions are described in the Mitigation Measures, Section 2.7, below, Chapter 5 of the CRSO EIS and Appendix R of the CRSO EIS, which includes the description of monitoring and adaptive management.

Modifications of reservoir operations could result in earlier and longer duration drafts of Lake Roosevelt in wet years, resulting in the Inchelium-Gifford Ferry being out of operation for on average four days per year more than under the No Action Alternative. This limits communities, primarily on the Confederated Tribes of the Colville Reservation, from accessing basic services such as medical and education services. Mitigation is proposed to extend the ramp for the Ferry to improve access and allow operation of the ferry under a wider range of reservoir elevations.

The Selected Alternative will negligibly affect cultural resources. The ongoing FCRPS Cultural Resource Program manages and treats cultural resources affected by operations and maintenance in the region, under a Programmatic Agreement between the agencies and consulting parties, and will continue with implementation of the Selected Alternative. There is the additional potential for impacts to built resources, such as modifications of the federal projects themselves, which could affect their historic value.

Under the Selected Alternative, hydropower generation will decrease and the CRS will lose 330 average megawatts (aMW) of firm power during critical water conditions (roughly the

amount of power consumed by about 250,000 Northwest homes in a year) and lose an average of 210 aMW across all historical water conditions modeled. The decrease in hydropower generation across the Pacific Northwest (an average decrease of 230 aMW regionally, including Federal and non-Federal projects) results in social welfare costs ranging between $12 million and $17 million. In addition, the Selected Alternative will result in additional costs of compliance with greenhouse gas emission reduction programs in the region of between $16 and $83 million per year. Residential, commercial, and industrial end users will experience slight upward retail rate pressure as a result.

The potential effects to commercial and tribal fisheries relative to the No Action Alternative vary from moderately adverse to majorly beneficial. Migrating juvenile anadromous fish could be affected by the *Juvenile Fish Passage Spill Operations* measure. In addition to the mitigation measures, the Preferred Alternative will be implemented using a robust monitoring plan, which is detailed in the CRSO EIS, Appendix R, part 2, *Process for Adaptive Implementation of the Flexible Spill Operational Component of the Columbia River System Operations EIS.*

The EIS included a discussion of practicable mitigation measures to avoid or minimize adverse environmental effects that were analyzed and incorporated into the Selected Alternative. Best management practices will be implemented to minimize impacts during operations of the projects.

2.7 Mitigation Measures

To mitigate for the unavoidable adverse impacts discussed in the previous section, the co-lead agencies will implement the mitigation actions described below. The descriptions also identify which agency is proposing to adopt each action. Each such measure is discussed in detail in Section 7.6 of the CRSO EIS, as well as the *Monitoring and Adaptive Management Plan* and the *Process for Adaptive Implementation of the Flexible Spill Operational Component of the Columbia River System Operations Environmental Impact Statement* in Appendix R of the CRSO EIS. A Mitigation Action Plan, consistent with Department of Energy's NEPA regulations, is included as Attachment 1 to this ROD. This Mitigation Action Plan identifies the mitigation actions Bonneville is adopting as part of this NEPA process.

2.7.1 Plant Cottonwood Trees (Up to 100 Acres) Near Bonners Ferry

The flow regime at Libby makes natural establishment of riparian vegetation downstream of the dam challenging. Higher winter flows make it difficult to sustain young stands of cottonwoods to maturity. The co-lead agencies would plant up to 100 acres of riparian forest along the Braided and Meander reaches of the Kootenai River near Bonners Ferry, using 1- to 2-gallon cottonwood trees, with the expectation that the larger size trees would be better suited to withstand the higher winter flows. This would improve habitat and floodplain connectivity to benefit ESA-listed KRWS, and complement other actions already being taken in the region to benefit their habitat. To the extent possible, this work will be completed through ongoing projects under Bonneville's Fish and Wildlife Program, such as the Kootenai Tribe of Idaho's Kootenai River White Sturgeon Habitat Restoration Program.

2.7.2 Plant Native Wetland and Riparian Vegetation (Up to 100 Acres) on the Kootenai River Downstream of Libby

The co-lead agencies would plant up to 100 acres of native forested and scrub-shrub wetland vegetation at a lower river elevation in Region A (see CRSO EIS, Section 3.2.2.1, for descriptions of the regions). This would offset effects to existing wetlands and riparian forests downstream of Libby, which would be caused by the *Modified Draft at Libby* measure, and result in lower water levels on the Kootenai River. To the extent possible, this work will be completed through ongoing projects under Bonneville's Fish and Wildlife Program, such as the Kootenai Tribe of Idaho's Kootenai River White Sturgeon Habitat Restoration Program.

2.7.3 Temporary Extension of Performance Standard Spill Operations

It is expected that higher spill levels and the resultant TDG associated with the *Juvenile Fish Passage Spill* measure could result in delays to adult passage. Eddies created by a high spill operation may confound upstream passage by salmonids. If a delay in adult salmon and steelhead upstream passage is observed, operations would revert to performance standard spill until the adult fish pass the dam, and this would be managed adaptively, through the established Regional Forum process and as described in the CRSO EIS, Appendix R, Part 2. This work would be carried out by the Corps.

2.7.4 Update and Implement Invasive Species Management Plans

Deeper drafts at Libby would result in lower lake elevations in spring, exposing previously submerged lands during the growing season and potentially allowing establishment of invasive weeds. The Corps would update and implement an invasive species management plan to combat the establishment and proliferation of invasive species, as required by Executive Order 13751.

2.7.5 Spawning Habitat Augmentation at Lake Roosevelt

In Lake Roosevelt, changes in elevation would result in higher rates of kokanee and burbot egg dewatering in winter, and lower reservoir levels in spring would decrease access to tributary spawning habitat for redband rainbow trout. Increased flexibility of refilling Lake Roosevelt through the month of October, depending on the annual water conditions, may affect the spawning success of kokanee, burbot and redband rainbow trout. In 2019, Bonneville funded year one of a three-year study to determine potential effects of modifications in Lake Roosevelt refill to resident fish spawning habitat access. Other evaluations will be conducted to determine potentially affected areas. If study evaluations and other available data indicate resident fish spawning habitat areas are affected by changes in reservoir elevations, the co-lead agencies will work with regional partners to determine where to augment spawning habitat at locations along the reservoir and in the tributaries (up to 100 acres). This mitigation action, when combined with the existing study funded by Bonneville, would evaluate existing effects to reservoir elevation changes from fall operations in Lake Roosevelt and would mitigate for additional effects of the new action. Exact sites and acreage would be determined post-alternative implementation. The Bureau of Reclamation commits to provide staff time and to seek technical assistance and funding to support collaboration with the Confederated Tribes of the Colville Reservation, the Spokane Tribe of Indians, and other interested parties to better understand the effects of Grand Coulee operations on the life history requirements of fish and wildlife resources in the Lake Roosevelt area.

2.7.6 Extension of the Boat Ramp for the Inchelium-Gifford Ferry in Lake Roosevelt

Earlier and longer drafts at Grand Coulee would affect water levels,

making the Inchelium-Gifford Ferry on Lake Roosevelt unavailable on average four days per year more than under the No Action Alternative. Reclamation would work with the Bureau of Indian Affairs to extend the ramp at the Gifford-Inchelium Ferry on Lake Roosevelt so that it would be available at lower water elevations. This work would be subject to available appropriations.

2.7.7 Monitoring at Lower Granite, Lower Monumental, and McNary To Evaluate Effects of Shoaling From Increased Spill, and if Warranted, Install Coffer Cells To Dissipate Energy

It is expected that higher spill and variable timing of the spill over the course of a day could result in changes to the tailraces at Lower Granite, Lower Monumental and McNary. The Corps would monitor the tailrace at each project to track changes that could affect safe navigation or conditions for ESA-listed fish. If changes to the tailrace warrant action, the Corps would construct coffer cells to dissipate energy.

2.7.8 Increased Dredging at McNary, Ice Harbor, Lower Monumental, and Lower Granite Projects

In Regions C and D, the increased spill operations and lower tailwater would increase shoaling in the navigation channel due to increased spill operations in the lower Snake and Columbia rivers, adversely affecting navigation. In order to maintain the navigation channel and reduce effects to negligible, effects would be mitigated by increasing the frequency and total volume of dredging at McNary, Ice Harbor, Lower Monumental, and Lower Granite at a four- to seven-year interval. As discussed above, shoaling would be monitored to determine if additional installation of coffer cells at Lower Monumental, Little Goose, and McNary could reduce dredging needs and further maintain the channel. Coffer cells would dissipate energy during high spill operations, which would support movement of sediment in the navigation channel, thereby maintaining navigational capacity and river transportation. This would increase overall maintenance costs for the projects, but would reduce the adverse effects to negligible. This work would be carried out by the Corps.

2.7.9 Federal Columbia River Power System Cultural Resource Program and Systemwide Programmatic Agreement

For new effects to archaeological resources, traditional cultural properties, and the built environment at storage projects caused by implementation of the Preferred Alternative relative to the No Action Alternative, the co-lead agencies would use the existing FCRPS Cultural Resource Program and the Systemwide Programmatic Agreement to implement mitigation actions, as warranted and appropriate.

Section 3. Key Considerations for the Decision

3.1 Introduction

The agencies considered several factors when making their decisions in this ROD. These considerations are described in detail below, and are in addition to considering the overall Purpose and Need Statement. The agencies also considered the authorized purposes for which the co-lead agencies operate the Federal projects, including how the purposes complement or conflict with each other, as briefly summarized in Section 2.4.

3.1.1 Alternatives Not Fully Meeting the Purpose and Need

The co-lead agencies considered whether an alternative met the Purpose and Need Statement in making their decisions. Initially, eight single objective alternatives were developed to maximize certain project purposes and emphasize specific resources, utilizing the analytical assumption that other purposes did not constrain the actions that could possibly be taken. These single objective alternatives provided the framework for comparing the tradeoffs associated with different objectives throughout the Columbia River Basin. None of the single-objective alternatives were found to fully meet the Purpose and Need, and they were screened from further consideration; however, many of the measures in these alternatives were integrated into the MOs. In comparing the multiple objective alternatives, MO3 and MO4 did not meet, or did not fully meet, the Purpose and Need (see Table 7–1 in the Final EIS).

3.2 Responding to the U.S. District Court for the District of Oregon's Opinion and Order

As outlined in the Purpose and Need Statement, the co-lead agencies responded to the Opinion and Order issued by the District Court [10] by updating the long-term system operating strategy for the CRS projects with updated information, including information on ESA-listed species and their critical habitat and climate change. The co-lead agencies also responded to the Opinion and Order by evaluating actions that ensure CRS operations, maintenance and configuration are 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. To begin, the co-lead agencies, in coordination with the cooperating agencies, proposed measures as part of the alternatives development process to benefit ESA-listed juvenile and adult anadromous and resident fish species. Through this process, the agencies evaluated actions within their current authorities, as well as certain actions that are not within the co-lead agencies' authorities, based on the District Court's observations about alternatives that could be considered and comments received during the scoping process. This analysis included evaluating breaching the four lower Snake River dams. Based on the proposed alternatives' effects analysis, the agencies then developed additional mitigation measures as part of the CRSO EIS process for affected resources. The analysis from the No Action and Multiple Objective Alternatives, including the mitigation measures, climate effects and cumulative effects analysis informed the development of the Preferred Alternative. The co-lead agencies then proposed non-operational conservation measures through the ESA consultations for the Preferred Alternative that are responsive to uncertainty from the effects of the proposed action and from climate change to ESA-listed species. These same measures were analyzed in Chapter 7 of the EIS to evaluate the direct, indirect and cumulative effects as well as climate change effects and unavoidable adverse effects of the Preferred Alternative. Finally, the co-lead agencies committed to continue funding their ongoing programs that benefit fish and wildlife and other resources affected by the CRS projects (see Chapters, 2, 5 and 7 of the CRSO EIS for more information).

3.3. ESA-Listed Species

Based on input received during development of the EIS, and in response to the Order and Opinion issued by the District Court, the agencies focused on developing a Preferred Alternative that maintained and improved on their existing commitments for fish improvements in the region. As reflected in both the Purpose and Need Statement and EIS objectives, a key consideration for the co-lead agencies in their decision-making is how the alternatives could affect ESA-listed and

[10] *Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* 184 F. Supp. 3d 861 (D. Or. 2016).

non-listed species. The effects analysis is available in Chapters 3, 4, 6 and 7 of the CRSO EIS.

In addition to routine operations and maintenance of the CRS, the co-lead agencies implement a number of actions and programs to benefit ESA-listed species in the Columbia River Basin. Examples of these actions include habitat measures (*e.g.,* tributary habitat improvements for salmon, steelhead, KRWS, and in consideration of bull trout), operational measures at storage and run-of-river projects (*e.g.,* flow management and fish passage), conservation and safety-net hatcheries (funding, support, design, construction), and predation management (avian, piscivorous, pinnipeds). See Table 7–5 of the CRSO EIS, and, for greater detail, reference the associated Biological Opinions (BiOps) and Chapters 2, 5, and 7 of the CRSO EIS.

3.3.1 Anadromous Adult and Juvenile ESA-listed Species

The Selected Alternative provides a balanced approach between spring and summer flow and spill operations to benefit ESA-listed juvenile and adult salmonids, while also providing benefits to ESA-listed resident fish in the upper Columbia River Basin. It includes measures that benefit adult and juvenile salmonids and continues commitments for ongoing actions to improve conditions for ESA-listed species through habitat improvements. The Selected Alternative is predicted to benefit survival of ESA-listed juvenile salmonids by improving fish passage conditions through reductions in juvenile travel times and instances of powerhouse and juvenile bypass system passage, as detailed in Section 7.7.4 of the CRSO EIS.

The Selected Alternative is also designed to evaluate return rates to the Columbia River Basin of ESA-listed salmonid will increase due to the improvements in the juvenile migration as detailed in Section 7.7.4 of the CRSO EIS. Improved adult abundance is predicted to increase as a result of improved juvenile survival and decreases in latent mortality, (*i.e.*, the delayed death of salmonids), associated with juvenile passage through the CRS projects as discussed in Section 3.5 of the CRSO EIS.

The co-lead agencies will monitor fish passage at the projects and utilize adaptive management principles in implementing the Selected Alternative based on results of biological studies and monitoring information.[11] These results will be discussed and operations modified in collaboration with Federal, state, and tribal sovereigns to ensure expected benefits to salmon and steelhead are being realized based on the best available scientific information. The adaptive implementation plan is discussed in the CRSO EIS, Appendix R, Part 2, *Process for Adaptive Implementation of the Flexible Spill Operational Component of the Columbia River System Operations EIS.*

3.3.2 Resident ESA-Listed Species

The Selected Alternative is predicted to benefit ESA-listed bull trout and KRWS, as well as other resident fish through both operational and mitigation measures as detailed in Section 7.7.5 of the CRSO EIS. The Selected Alternative benefits resident fish by improving productivity and food resources in storage reservoirs and by including additional mitigation measures to improve habitat. Structural and operational measures developed for anadromous fish that regulate reservoir levels and remove predators may also provide beneficial effects to resident fish, especially in the lower Columbia River. The co-lead agencies would continue to utilize the Kootenai River Regional Coordination workgroups to guide adaptive management of operations and address technical issues related to KRWS.

3.3.3 Other Considerations Under the ESA

In their analysis of the Selected Alternative under Section 7 of the ESA and its implementing regulations, the co-lead agencies conclude that the benefits to ESA-listed species' survival and recovery and to the conservation function of designated critical habitat are sufficient to outweigh and offset the Selective Alternative's adverse effects on ESA-listed species and designated critical habitat. As such, the Selected Alternative as a whole is not likely to contribute to any reductions in reproduction, numbers, or distribution of ESA-listed species that could appreciably reduce their survival and recovery, nor is the action as a whole likely to diminish the conservation function of designated critical habitat. For these reasons, the Selected Alternative is not an action that is likely to jeopardize the continued existence of ESA-listed species or destroy or adversely modify their designated critical habitat. Because of this, the co-lead agencies agree with the determinations of the USFWS and NMFS (together referred to as the Services) in the 2020 USFWS and NMFS CRS BiOps (together referred to as the 2020 CRS BiOps) that implementation of the Selected Alternative and the actions described in the Incidental Take Statements are not likely to jeopardize the continued existence of ESA-listed species or destroy or adversely modify their designated critical habitat. The jeopardy and destruction or adverse modification analyses in the 2020 CRS BiOps that facilitated the Services' determinations are based on the regulatory definitions for both ''jeopardize the continued existence of'' and ''destruction or adverse modification'' of designated critical habitat. The ESA regulations define ''to jeopardize the continued existence of'' a listed species, which is ''to engage in an action that would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.'' [12] Therefore, the analyses considered both survival and recovery of the species. The critical habitat analysis is based upon the regulatory definition of ''destruction or adverse modification,'' which ''means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.'' [13]

The analysis under these regulatory definitions must always consider whether the effects of the Selected Alternative's effects *cause* appreciable reductions to survival and recovery or *cause* appreciable diminishment of the conservation function of critical habitat. This analysis is separate from the analysis of the environmental baseline [14] or a characterization of the condition of the species prior to implementation of the proposed

[11] *Biological Assessment of Effects of the Operations and Maintenance of the Federal Columbia River System* (January 2020) (2020 CRS Biological Assessment), at 2–1 to 2–6.

[12] 50 CFR 402.02.

[13] *Id.*

[14] *Id.* (''Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.'').

action,[15] even where the proposed action is a continuation of a prior federal action. ''Effects of the action'' is defined as ''all consequences to listed species or designated critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action, and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.'' [16] The Services and the co-lead agencies analyzed the Selected Alternative's consistency with the ESA's substantive mandates by using these applicable statutory and regulatory standards.

By maintaining or improving actions that arose through past consultations, along with significant additional actions through the CRSO EIS process, the co-lead agencies developed the Selected Alternative to, on the whole, benefit ESA-listed species' likelihood of survival and recovery and the conservation function of designated critical habitat. The co-lead agencies worked closely with the Services throughout this development process, as well as cooperating agencies contributing to the CRSO EIS, to ensure that continued operation and maintenance of the CRS and implementation of the non-operational conservation measures, is not likely to jeopardize the continued existence of listed species and is not likely to destroy or adversely modify designated critical habitat.

The co-lead agencies have ensured compliance with the ESA through improvements to system operations and fish passage, with resulting higher dam passage survival rates and faster fish travel times.[17] The co-lead agencies will continue to implement these operations, along with the *Juvenile Fish Passage Spill Operation* measure or Flexible Spill with Adaptive Management with spill levels that are higher than the co-lead agencies have discretionarily implemented prior to 2020. In order to determine the effects of this operation, the Action Agencies and NMFS considered results from lifecycle models created and implemented by state and Federal agencies, the Comparative Survival Study (CSS) managed by the Fish Passage Center, and the Comprehensive Passage Model (COMPASS) and Lifecycle models (LCM) conducted by NMFS' Northwest Fisheries Science Center.

The CSS model predicts substantial juvenile survival increases for Snake River spring-summer Chinook salmon and steelhead, and further predicts that fewer powerhouse passage events (as a result of higher spill levels and higher proportions of juveniles passing the projects via spillbays) will increase adult returns. NMFS LCMs did not predict increases to the levels that the CSS model did, but did qualitatively predict improvements in adult abundance if reductions in latent mortality occurred. The differences resulting from these two models are due to a number of factors, including how latent mortality is addressed in each model. The *Juvenile Fish Passage Spill Operation* measure will be implemented with a robust monitoring plan for salmon and steelhead that will help narrow the uncertainty between these two models and determine how effective additional spill can increase salmon and steelhead returns to the Columbia Basin.[18] Despite the differences in the predictions from these models, the co-lead agencies have determined that implementation of the *Juvenile Fish Passage Spill Operation* measure is anticipated to substantially contribute to offsetting the adverse effects resulting from other measures in the Selected Alternative in a manner that will not reduce appreciably the likelihood of survival and recovery.

In addition, the co-lead agencies have included other operational measures that are intended to offset the adverse effects of the operation and maintenance of the CRS. These measures include *Providing Surface Spill to Reduce Adverse Effects to Overshooting Adult Steelhead* and *John Day Reservoir Spring Operations for Caspian Tern Nesting Dissuasion.* Details of these operational measures can be found in the CRSO EIS. These operational measures, among others, will not appreciably reduce the likelihood of survival and recovery of ESA-listed species.

The Selected Alternative also includes structural improvements for both juvenile and adult fish, as well as maintaining or improving implementation of non-operational conservation measures to help address uncertainty related to residual adverse effects of system operations and maintenance and the uncertainty related to effects of climate change, including habitat improvement and restoration actions in the tributaries and estuary, nutrient enhancement, continued support for conservation and safety net hatcheries, and predation management. In addition, the Selected Alternative and the Incidental Take Statements in the Services' 2020 CRS BiOps call for the co-lead agencies to submit regular reports to the Services on implementation progress, to conduct ongoing research, monitoring and evaluation (RM&E) of the biological effectiveness of conservation measures, and to manage implementation of the conservation measures adaptively as new information about mitigation action effectiveness emerges. Regular reporting facilitates transparency and co-lead agency accountability for implementing the Selected Alternative and Terms and Conditions. Taken together, the effects of the measures in the Selected Alternative will not appreciably reduce the likelihood of survival and recovery for ESA-listed species.

3.3.4 Southern Resident Killer Whales

The overall health and condition of the Southern Resident Killer Whale (SRKW) depends on the availability of a variety of fish populations throughout their range. SRKW are Chinook specialists, but also consume other available prey populations while they move through various areas of their range in search of prey. There is no evidence that SRKW feed or benefit differentially between wild and hatchery Chinook salmon.[19] Snake River spring/summer Chinook salmon is a small portion of SRKW overall diet, but can be an important forage species during late winter and early spring months near the mouth of the Columbia River.[20]

The co-lead agencies would continue to fund the operations and maintenance of safety-net and conservation hatchery

[15] The ESA utilizes the term ''proposed action'' in its implementing regulations to describe the agency action that is subject to consultation under Section 7(a)(2) of the ESA. Proposed action is not a term that is used in NEPA. In order to avoid confusion in this ROD, the co-lead agencies have consistently referred to the agency action subject to decision in this ROD as the Selected Alternative.

[16] *See* 50 CFR 402.17 (the preamble explains that the terms ''effect'' and ''consequences'' are generally used interchangeably. 84 FR 44976 (Aug. 27, 2019). The co-lead agencies use these terms in that manner in this document).

[17] U.S. Army Corps of Engineers, Bureau of Reclamation, and Bonneville Power Administration. 2017. Federal Columbia River Power System, 2016 Comprehensive Evaluation.

[18] *See* CRSO EIS, Appendix R, Part 2, *Process for Adaptive Implementation of the Flexible Spill Operational Component of the Columbia River System Operations Environmental Impact Statement.*

[19] *Southern Resident Killer Whale and the Snake River Dams,* NOAA Fisheries Service West Coast Region (March 16, 2016).

[20] Ford, M. J., J. Hempelmann, M. B. Hanson, K. L. Ayres, R. W. Baird, C. K. Emmons, et al.

2016. Estimation of a killer whale (Orcinus orca) population's diet using sequencing analysis of DNA from feces. PLoS ONE 11(1):e0144956.

programs with implementation of the Selected Alternative. The agencies would also continue to fund certain independent congressionally-authorized hatchery mitigation responsibilities [21] over the 15-year implementation period of the 2020 NMFS CRS BiOp. This continued funding was an important consideration in the analysis of effects to SRKWs because production from these hatchery programs is expected to offset any adverse effects from the Selected Alternative. For this reason, NMFS concurred with the co-lead agencies' conclusion that the Selected Alternative is not likely to adversely affect the SRKW.

3.4 Lamprey

The Selected Alternative addresses adult and juvenile lamprey passage through specific structural modifications to the projects. These measures provide benefits to lamprey through reducing impingements and incidences of lamprey falling out of the Washington Shore Fish Ladder. The Selected Alternative also includes other measures that are expected to further benefit lamprey passage conditions. These measures are described in Chapter 7 of the CRSO EIS.

3.5 Tribal Viewpoints

Input from the tribes was a key consideration in the co-lead agencies' decision to select the Preferred Alternative. The tribes of the Columbia River Basin represent distinct cultures, each unique. Most of the 19 tribes identified as being affected by the operations of the CRS provided extensive input into the CRSO EIS either as cooperating agencies or through their comments, or both.

Many upper basin tribes were concerned there was an inequity in the analysis resulting from a historical continuation of focusing on lower river issues at the expense of others in the region. They expressed their perception that the co-lead agencies prioritize resources on the lower rivers over upper basin needs and problems. This group was very interested in the construction of fish passage facilities and reintroduction above Grand Coulee and Chief Joseph dams, which had been eliminated from further detailed analysis in the CRSO EIS. Many upper basin tribes commented that the co-lead agencies failed to adequately engage or consider their concerns as a cooperating agency in the process. In response, the co-lead agencies worked closely to keep a balance in the Selected Alternative to benefit the entire Columbia Basin, and not disproportionately affect upper basin cultural or tribal resources. They also committed to ongoing regional collaboration to discuss future studies and initiatives for fish management in blocked areas above Chief Joseph and Grand Coulee dams.

Lower basin tribes engaged in CRSO EIS cooperating agency teams; however, these tribes expressed that the EIS failed to analyze a broad range of alternatives and inadequately considered climate change. Most tribes also were concerned whether the co-lead agencies complied with several laws, including the ESA, NEPA, and the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act). Generally, their comments expressed that consideration of breaching the four lower Snake River dams was completed without a thorough analysis and with biased methods. They expressed that the co-lead agencies fell short of regional salmon and steelhead recovery goals, and did not prioritize or place ESA-listed species recovery on equal footing with other resource improvements. They expressed their belief that there was bias in the methods and analysis conducted by the co-lead agencies against fish and for power and other project purposes. Throughout the process, the co-lead agencies discussed with the Tribes their concerns and preferences in alternatives, and many Tribes, as cooperators, participated in the analysis of alternatives. This was important in having a shared understanding of the resource effects and ultimately in determining the effects of implementing the Selected Alternative.

A few tribes around Libby and Hungry Horse shared that they found the CRSO EIS to be thorough and balanced, and supported both the analysis and the Preferred Alternative. Their focus was primarily around the resident fish, wildlife, and cultural resources in this region, and provided the CRSO EIS cooperating agency teams with measures and assisted in effects analysis for this region.

3.6 Protect and Preserve Cultural Resources

As discussed in Chapters 3, 4, 5, 6 and 7 of the CRSO EIS, the co-lead agencies considered the effects the alternatives had on cultural resources. Ongoing major effects to cultural resources under the Preferred Alternative would be similar to the No Action Alternative. The co-lead agencies determined that cultural resources affected by the implementation of the Preferred Alternative would be addressed under the ongoing FCRPS Cultural Resource Program.

The FCRPS Cultural Resource Program implements the terms of the existing Systemwide Programmatic Agreement for the Management of Historic Properties Affected by the Multipurpose Operations of Fourteen Projects of the Federal Columbia River Power System for Compliance with Section 106 of the National Historic Preservation Act (Systemwide Programmatic Agreement).[22] The FCRPS Cultural Resource Program had its origins in the System Operation Review Environmental Impact Statement and Records of Decision in the 1990s. During that process, eight cooperating groups were eventually established to address the effects of operations and maintenance on cultural resources. The cooperating groups formed the basis of the FCRPS Cultural Resource Program then and continue to do so today.

The Systemwide Programmatic Agreement commits the co-lead agencies to work collaboratively with the cooperating group participating organizations including states, tribes, and other federal agencies. The agencies will continue to support the FCRPS Cultural Resource Program over the course of implementing the CRSO EIS ROD. The agencies will continue to collaborate with participants in prioritization of actions and implementing treatments for cultural resources that are eligible for inclusion in the National Register of Historic Places that are adversely affected by implementation of the CRSO EIS ROD. Treatments may include a variety of both on-site and off-site options including less conventional treatments sometimes referred to as creative or alternative treatments. All treatments will be consistent with the respective implementing agency's authorities.

3.7 Protect Native American Treat and Reserved Rights and Trust Obligations for Natural and Cultural Resources Throughout the Environment Affected by System Operations

The co-lead agencies also took into account Native American treaty and reserved right as well as their trust

[21] *See Clarification and Additional Information to the Biological Assessment of Effects of the Operations and Maintenance of the Columbia River System on ESA-listed Species Transmitted to the Services on January 23, 2020* (April 1, 2020). These independent congressionally-authorized hatchery mitigation responsibilities are consulted upon separately and are considered part of the environmental baseline for purposes of this consultation.

[22] A description of the FCRPS Cultural Resource Program can be found here: *https://www.bpa.gov/efw/CulturalResources/FCRPSCulturalResources/Pages/default.aspx.*

obligations in their decision-making. To the extent that the Preferred Alternative provides for protection and mitigation of natural and cultural resources, then it also helps protect and preserve Native American treaty and executive order rights and meet agency trust obligations. The Preferred Alternative includes operational measures designed to protect ESA-listed anadromous and resident species as identified by NMFS and USFWS, and to improve the quality of other natural resources through reservoir operation and management of natural streamflows. Operations at John Day, The Dalles, and Bonneville dams also facilitate tribal treaty fisheries.

The co-lead agencies' commitment to implement actions that benefit ESA-listed fish, their designated critical habitat, and other wildlife helps fulfill Federal tribal treaty and trust responsibilities. As part of the implementation of the Selected Alternative, the agencies committed to ongoing coordination and open dialogue through the established Regional Forum. The Regional Forum workgroups have consistent participation by regional tribal sovereigns and this participation is critical to informing management actions and policy decisions. The co-lead agencies will continue to fund actions that benefit tribal partners, including the implementation of hatchery programs, habitat improvement actions, and other projects. This funding provides jobs for tribal members and promotes broad opportunities for exercising natural resource management expertise. These opportunities help protect trust resources while supporting tribal sovereignty and the exercise of treaty and resource management rights both on reservations and in ceded areas throughout the Columbia River Basin.

The co-lead agencies also engaged tribes during the development of the CRSO EIS and made extensive fish and wildlife mitigation commitments to tribes through the Columbia Basin Fish Accords and the 2018 Accord Extensions. These commitments further tribal sovereignty by supporting the tribes' exercise of their rights as comanagers of the fisheries in coordination with other resource managers in the region.

3.8 Indian Trust Assets

Reclamation, consistent with its requirements for decision-making under this ROD, has complied with its policy to evaluate potential impacts to Indian Trust Assets (ITAs) in the development of the EIS. ITAs are ''trust lands, natural resources, trust funds, or other assets held by the federal government in trust for Indian tribes or individual Indians.'' [23] Although there are multiple federally recognized Indian tribes in the vicinity of the project area on the Columbia and Snake Rivers and associated tributaries, Reclamation did not identify any potential impacts to ITAs as a result of the Preferred Alternative. Potentially adverse effects to the interests of federally recognized tribes evaluated include erosion of land or sites of cultural importance, degradation of water quality, detrimental effects on salmonid populations, and impediments to access for tribes with fishing rights. The Preferred Alternative is expected to improve some conditions for salmonid populations while other conditions are not expected to vary greatly from the No Action Alternative.

3.9 Water Quality

In Region A, the Preferred Alternative is expected to have negligible to minor effects to water temperatures and TDG conditions at the projects when compared to what would occur under the No Action Alternative. In Regions B and D, the Preferred Alternative is expected to have negligible effects on water temperatures and TDG when compared to the No Action Alternative. In Region C, the Preferred Alternative is expected to have negligible effects to water temperature at Dworshak and all four lower Snake River projects. For TDG, moderate increases in Regions C and D are anticipated due to the *Juvenile Fish Passage Spill* measure that would allow for spill up to 125 percent TDG 16 hours per day, from the beginning of April through the third week of June. Effects to other water quality parameters would be negligible.

Under the Selected Alternative, the co-lead agencies will continue to implement certain measures to improve water temperature, where practicable, to address potential effects from the dams and reservoirs. For example, the effects of the Dworshak Dam summer cool water releases are expected to continue to influence water temperatures in the lower Snake River. At the Lower Granite and Little Goose Projects, the forebay tends to stratify, with warm water near the surface and cool water from the Dworshak Project deeper in the water column. When temperatures in the fish ladders are equal to or greater than 68 degrees Fahrenheit, the Corps operates pumps to supply the fish ladders with cool water pumped from deep in the reservoir. The pumps are typically operated from mid- to late summer, depending on climatic conditions. From June 1 to September 30, water temperature data is collected at adult ladder entrances and exits at each Corps project in the lower Snake and lower Columbia Rivers. This serves to monitor for temperature differentials in the ladder that could act to block adult fish from ascending the fish ladders to migrate upstream of each dam.

Moreover, the Corps would continue several actions related to adult fish ladder water temperature differentials: (1) Continue monitoring all mainstem fish ladder temperatures and identifying ladders with substantial temperature differentials (>1.0 degree Celsius); (2) where beneficial and practicable, develop and implement operational and structural solutions to address high temperatures and temperature differentials in adult fish ladders at mainstem dams with identified temperature issues; (3) complete a study that evaluates alternatives to assess the potential to trap-and-haul adult sockeye salmon at lower Snake River dams after development of a contingency plan by NMFS and state and tribal fish managers; and (4) maintain or improve the adult trap at Ice Harbor Dam to allow for emergency trapping of adult salmonids as necessary. The Corps may refurbish the trap in the future to prepare for the implementation of emergency trap-and-haul activities (*e.g.,* sockeye during high temperature water years similar to 2015).

In terms of impacts from TDG, measures under the Preferred Alternative would be implemented consistent with state water quality standards to manage TDG exposure to fish in the Clearwater River below Dworshak Dam as well as manage TDG at Ice Harbor, John Day and McNary dams. Juvenile fish passage spill operations would be implemented at the lower Snake River projects and the lower Columbia River projects. The spill would benefit salmon and steelhead through increased spring juvenile spill, while providing a degree of protection against unexpected or unintended consequences that may occur due to spilling up to the 125 percent TDG cap, such as adult migration delay, gas bubble trauma, or damage to infrastructure. These spill levels are slightly variable, depending on the project, and may be higher or lower, depending on river conditions and the opportunity to spill in the spring. Spring and summer juvenile spill operations would be managed adaptively, through the established Regional Forum processes and as described in the CRSO EIS, Appendix R, Part 2, to address anticipated and unexpected challenges, such as

[23] 25 CFR 115.002.

potential delays to adult migration, effects to navigation, and other challenges or opportunities that may require either a temporary or permanent change. Additionally, operations of the spill deflectors at Chief Joseph Dam would continue to decrease TDG saturations between the forebay and tailrace during high flow and high spill years, consistent with the Preferred Alternative.

3.10 Provide an Adequate, Efficient, Economical and Reliable Power Supply That Supports the Integrated Columbia River Power System

Bonneville, along with the Corps and Reclamation, evaluated whether the Preferred Alternative would continue to provide an adequate, efficient, economical and reliable power supply that supports the integrated Columbia River Power system. This purpose and objective holistically looks at maintaining the federal power system's ability to reliably produce power at a reasonable cost, while also balancing Bonneville's other statutory objectives and responsibilities. To assess whether the alternatives met this objective, the Final CRSO EIS measures the effects of the Alternatives on not only the federal system but also on broader regional reliability using the loss-of-load probability or LOLP metric.

LOLP is an electric industry reliability planning standard that measures the likelihood of an energy shortage in a given year.[24] In simple terms, the higher the LOLP percentage, the greater the chance that utilities supplying power in the region will have at least one blackout that year. The LOLP of the No Action Alternative is 6.6 percent, or roughly one or more blackouts in one of every 15 years.[25] This is the baseline from which all the Alternatives are measured.[26]

Using the effects analysis for CRS operations from the Alternatives, the Final CRSO EIS calculates an LOLP for each alternative and then compares this value to the LOLP of the No Action Alternative, (*i.e.,* 6.6 percent).[27] If the Alternative's LOLP is *higher* than the LOLP of the No Action Alternative (*i.e.,* higher than 6.6 percent), then additional resources would be needed until the LOLP of the alternative is equal to the LOLP of the No Action Alternative. The Final CRSO EIS identifies two resource groups that reduce LOLP cost effectively and presents these resources as a range of possible options that Bonneville or regional utilities would have when selecting specific resources to acquire.[28] The Final CRSO EIS then performs a rates analysis to estimate the incremental impact the alternative would have on Bonneville's wholesale power rate and regional retail consumers' rates as compared to the No Action Alternative.[29]

After reviewing the Final CRSO EIS, public comments, and analysis, the co-lead agencies concur with the findings in the Final CRSO EIS that the Preferred Alternative meets this objective and, therefore, is the agencies' choice for the Selected Alternative for CRS operations, maintenance and configuration. The Selected Alternative would decrease CRS hydropower generation relative to the No Action Alternative by 330 aMW of firm power assuming critical water conditions (roughly the amount of power consumed by about 250,000 Northwest homes in a year).[30] This decrease, however, would have no adverse effect on regional reliability compared to the No Action Alternative. The LOLP of 6.4 percent under the Selected Alternative is slightly lower than the LOLP of 6.6 percent under the No Action Alternative, but is essentially the same for purposes of the risk to regional reliability.[31]

The LOLP does not increase even with the loss of generation because of the shape of the remaining generation in the Selected Alternative. The largest reductions in annual average hydropower generation occur in periods when the system generally has surplus (spring) and loads are easier to meet. The reduction in generation in the Selected Alternative during this period does lead to some risk of power shortages in June when there was none in the No Action Alternative, and increases the risk of power shortages in July and the first half of August compared to the No Action Alternative. Conversely, the Selected Alternative increases generation in late August and in the winter, periods when demand is often high and it is more difficult to meet load, reducing the risk of power shortages compared to the No Action Alternative. The net effect of the spring and early summer generation decreases combined with the late-summer and winter increases returns the LOLP to essentially the same level of the No Action Alternative.[32]

While the Selected Alternative maintains reliability at the No Action Alternative levels in the near term, the analysis shows that over the long term this alternative meaningfully reduces the region's risk of blackouts when taking into account likely retirement of regional coal-fired resources in the future. As described in Section 3.7 of the Final CRSO EIS, the LOLP estimates used in the EIS analysis rely on the assumption that 4,246 megawatts (MW) existing coal generating capacity would continue to serve loads in the region over the study period.[33] The risk of blackouts in the region increases significantly under the No Action Alternative if some or all of the existing coal plants are retired. The Final CRSO EIS evaluates the impact additional coal retirements could have on regional reliability through two scenarios: a ''limited coal scenario'' (which captures current and expected coal retirements) and a ''no coal scenario'' (which assumes all regional coal is retired).[34] Under the ''limited coal scenario'', the No Action Alternative LOLP increases to 27 percent (a one in four chance of one or more blackouts each year), while under the ''no coal scenario'', the No Action Alternative LOLP jumps to 63 percent (a two out of three chance of one or more blackouts each year).[35] While these LOLP numbers are indicative of a serious reliability problem facing the region, the Selected Alternative has a downward effect on these high LOLP values. Specifically, the Selected Alternative decreases the LOLP by 3 percentage points (to 24 percent) under a limited coal scenario, and decreases it by 4 percentage points under the no coal scenario (to 59 percent), compared to the No Action Alternative.[36] In this way, the Selected Alternative not only maintains current regional reliability, but also reduces the

[24] CRSO EIS, Appendix H, Power and Transmission, Section 2.1; *id.,* Appendix J, Hydropower, Section 4.1. While not a mandatory standard, LOLP operates as an ''early warning'' of a potential resource shortage for the region. *See id.,* Section 3.7.3.2 at 3–881, n. 58.

[25] CRSO EIS, Appendix H, Power and Transmission, Section 2.1, tbl. 2–1. For context, the regional LOLP target adopted by the Northwest Power and Conservation Council (Council) in 2011 was 5 percent. *Id.,* Section 3.7.2.2 at 3–823.

[26] CRSO EIS, Section 3.7.3.2 at 3–880.

[27] *Id.,* Appendix J, Hydropower, Section 4.1 at J–4–1.

[28] *Id.,* Appendix H, 2.2.2.4.3, at H–2–15. The CRSO EIS does not identify whether Bonneville or regional utilities would acquire the resources necessary to return regional reliability to the level of the No Action Alternative. This follows from the uncertainty around the nature of Bonneville's future power obligation. In general, if the supply of power from the federal power system declines, leaving Bonneville with insufficient power to meet its customers' firm power needs, Bonneville's customers have a choice: they may elect to have Bonneville acquire resources to make up the difference *or* they may choose to acquire the resources themselves.

[29] *See id.,* Section 3.7.3.1.

[30] *Id.,* Section 7.7.9.9.

[31] *Id.,* Section 7.7.9.2.

[32] *Id.*

[33] *Id.,* Section 3.7.3.1, at 3–875 to 3–877.

[34] *Id.,* Appendix H, Section 2.3, at H–2–24.

[35] *Id.* at H–2–25.

[36] *Id.,* Section 7.7.9.2, at 7–163.

amount of additional resources that would likely be need if/when additional coal facilities are retired.

Because the Selected Alternative essentially maintains regional reliability at the No Action Alternative levels, the Final CRSO EIS concludes that no replacement resources are needed to replenish lost firm power from the CRS projects.[37] Similarly, with no additional resources entering the grid, no new transmission interconnections or reinforcements would be required under the Selected Alternative.[38] Both of these factors contribute to the Selected Alternative having a low overall effect on wholesale and retail rate pressure, which is an important consideration in selecting this alternative.

Under the Selected Alternative, Bonneville's average wholesale Priority Firm (PF) power rate would experience upward rate pressure of $0.94 per megawatt-hour (MWh) or a 2.7 percent increase relative to the No Action Alternative, which results in a PF power rate of $35.50/MWh.[39] This rate pressure occurs because of a combination of increased costs for structural measures and reduced firm power sales to Bonneville's public power customers.[40] The upward rate pressure on Bonneville's wholesale transmission rates would be smaller—around 0.09 percent annually, largely due to reduced short-term transmission sales.[41] This pressure is modest and within a range that is generally manageable within Bonneville's cost structure.

Regional average residential retail rates would experience slight upward rate pressure of +0.44 percent, though the effect would be larger for power customers of Bonneville and would range up to +1.2 percent in some counties.[42] Across the Pacific Northwest, changes to the average residential retail rate would range from an increase of less than of 0.01 cents per kilowatt-hour (kWh) to an increase of 0.11 cents/kWh (in percentage terms this represents an increase of less than 0.1 percent to an increase of 1.2 percent). For commercial end users, rate effects range from an increase of less than 0.01 cents/kWh to an increase of 0.11 cents/kWh (an increase of less than 0.1 percent to an increase of 1.4 percent). Moreover, for industrial customers, the rate effects range from an increase of less than 0.01 cents/kWh to an increase of 0.11 cents/kWh (an increase of less than 0.1 percent to an increase of 2.0 percent).[43] These increases are lower than the regional retail impacts created by MO1, MO3, and MO4. Moreover, they do not include potential offsetting reductions, which Bonneville may be able to achieve through cost management actions that could reduce the upward pressure on the PF rate paid by Bonneville's firm power customers.

3.10.1 Alternatives Considered

The co-lead agencies considered, but ultimately chose not to select, the No Action Alternative, MO1, MO2, MO3, or MO4. CRS operations under MO1, MO3, and MO4, reduce federal power generation, which results in a corresponding reduction in power system reliability relative to the No Action Alternative, *i.e.,* they increase the LOLP percentage. To return the region to the LOLP of the No Action Alternative, additional resources would need to be built or acquired at a substantial cost to regional ratepayers. As described more fully below, MO3 and MO4 result in long-term, major, adverse effects on power costs and rates.[44] Similarly, MO1 results in long-term, moderate, adverse effects on power costs and rates.[45] Furthermore, until replacement resources are built and operating, regional reliability would decline below the level of the No Action Alternative.

3.10.1.1 No Action Alternative

The No Action Alternative met the Purpose and Need Statement of the CRSO EIS, but it did not meet all of the objectives developed for the CRSO EIS.[46] The No Action Alternative generally satisfied the Power Objective[47] as it resulted in no additional upward power rate pressure or potential regional reliability issues. However, it only partially met the objectives for water supply and adaptable water management because it did not provide the additional authorized regional water supply. Further, it did not include effects of the changes to CRS operations from important maintenance activities at Grand Coulee needed in the near term.

3.10.1.2 MO1

The Final CRSO EIS concludes that MO1 would not meet the Power Objective.[48] Under this alternative, hydropower generation from the CRS projects would decrease by 130 aMW (roughly enough to power 100,000 households annually).[49] The FCRPS, which includes the CRS, would lose 290 aMW of firm power under critical water conditions. This reduces the total amount of firm power available to Bonneville for supplying power customers under current long-term, firm power sales contracts. While the decrease in generation in MO1 is less than under the Preferred Alternative, MO1 had a greater impact on regional reliability because of the timing of when these declines occur. Specifically, MO1 changed the availability of generation in the summer months, when demand for electricity is relatively high and existing generating capacity is already relatively low.[50] As such, regional reliability would decline under this alternative, with LOLP increasing to 11.6 percent (or one or more blackouts in 1 in every 9 years) in MO1.[51]

The Final CRSO EIS concluded that additional resources would need to be built to maintain regional reliability at the same level as the No Action Alternative. It considered two resource portfolios that regional utilities could likely select from to replace the decrease in generation capability under MO1. Those portfolios include: (1) A conventional least-cost portfolio (natural gas); and (2) a zero-carbon portfolio (solar and demand response). Under the conventional least-cost portfolio, approximately 560 MW of natural gas fired generation would be needed at a cost of around $43 million per year to return regional reliability to the level of the No Action Alternative.[52] If the zero-carbon portfolio is selected, then 1,200 MW of solar produced power and 600 MW of demand response would

[37] *Id.,* Section 7.7.9.3, at 7–163.

[38] *Id.,* Section 7.7.9.4, at 7–166.

[39] *Id.,* Section 7.7.9.5, at 7–169, tbl. 7–33. It should be noted that the wholesale rates described here represent the average rates paid by Bonneville's customers as calculated for the Preferred Alternative using the methodology and assumptions established in the Final EIS and is a useful comparison to the calculated rate for the No Action Alternative. It does not represent the effective rate paid by a particular Bonneville customer and it is not an actual or forecasted rate in Bonneville rate cases. Further, this rate pressure does not account for potential offsetting cost reductions Bonneville may engage in to reduce this pressure.

[40] *Id.*

[41] *Id.,* Section 7.7.9.5, at 7–173.

[42] *Id.,* Section 7.14, at 7–236, tbl. 7–55; *see also id.,* Section 7.7.9.6, at 7–175 to 7–178, tbls. 7–37, 7–38.

[43] CRSO EIS, Section 7.9.7.5, at 7–173; *see also id.,* Section 7.9.10, at 7–221.

[44] CRSO EIS, Section 7.14, at 7–236, tbl. 7–55.

[45] *Id.*

[46] *Id.,* Section 7.3.1, at 7–5 to 7–6.

[47] The ''Power Objective'' refers to Objective 4, (''providing an adequate, efficient, economical, and reliable power supply that supports the integrated Columbia River Power System'') described above in Section 2.2, and in the CRSO EIS, Section 2.2.1, at 2–3.

[48] CRSO EIS, Section 7.3.2, at pg. 7–7.

[49] *Id.,* Section 3.7.3.3; *id.,* Section 3.1.3, tbl. 3–1.

[50] CRSO EIS, Section 3.7.3.3, at 3–896.

[51] *Id.; id.,* Appendix H, at H–2–3, tbl. 2–1.

[52] CRSO EIS, Section 3.7.3.3, at 3–899.

be needed, for a cost of around $162 million a year.[53]

As noted above, the Final CRSO EIS included a rate analysis to estimate the impact of each MO on Bonneville's wholesale power and transmission rates. This analysis showed that MO1 placed upward pressure on Bonneville's PF power rate. Depending upon the type of resources acquired and the source of funding for those resources, MO1 placed upward pressure on Bonneville's PF rate of between 4.5 percent and 8.6 percent over the No Action Alternative.[54] Sensitivities performed in the Final CRSO EIS around these values showed the range of rate impacts widening from a low of 5.9 percent to a high of 14.3 percent (if Bonneville acquires the resources).[55] The upward transmission rate pressure under MO1 has annual increases between 0.62 and 0.74 percent depending on the resource replacement scenario.[56]

The regional average residential retail electric rates would also see increases under MO1. Regional retail rates could see upward rate pressure from between +0.65 percent and +0.79 percent annually depending on the applicable scenario.[57] The retail impact would be even larger for power customers of Bonneville, with the retail increase ranging as high as +7.6 for residential consumers in some counties.[58] These effects could be greater if fossil fuel generation is reduced under the No Action Alternative, as is expected.

3.10.1.3 MO2

MO2 best met the Power Objective.[59] MO2 was developed with the goal to increase hydropower production and reduce regional greenhouse gas emissions while avoiding or minimizing adverse effects to other authorized project purposes. MO2 would slightly relax the No Action Alternative's restrictions on operating ranges and ramping rates to evaluate the potential to increase hydropower production efficiency, and increase operators' flexibility to respond to changes in power demand and to integrate variable renewable resources.[60] Average CRS generation would increase under MO2 by 450 aMW or 5 percent.[61] Firm generation would increase by 380 aMW or 6 percent.[62] The LOLP improves under MO2 to 5 percent, which is below the No Action Alternative level of 6.6 percent and is consistent with the Northwest Power and Conservation Council's target for the region.[63]

MO2 also has the smallest wholesale power and transmission rate pressure of the alternatives, with a base power rate impact of −0.8 percent and a range of between −3.2 percent to a high of 1.3 percent under the sensitivity analysis.[64] Transmission rate pressure was approximately 0.11 percent annually. MO2 also has long-term benefits to regional reliability if additional coal retirements occur.[65] Because MO2 increased CRS hydropower generation, fewer replacement resources would be needed to maintain regional reliability if existing plants serving load in the region are retired.[66] While MO2 provides the greatest benefits for the Power Objective, it generally produced minor to major adverse effects for anadromous fish except for minor beneficial effects for Snake River Chinook as modeled by NMFS. Thus, this alternative was not selected as the Preferred Alternative because of the adverse effects to anadromous and resident fish as well as cultural resources.

3.10.1.4 MO 3

The Final CRSO EIS concludes that MO3 would not meet the Purpose and Need Statement for the integrated FCRPS[67] or the Power Objective.[68] This is due primarily to the decline in reliability and the upward rate pressure resulting from breaching the four lower Snake River dams. Under MO3, FCRPS generation would decline by 1,100 aMW, or roughly 8 percent.[69] The firm power capability of the FCRPS—power that on a planning basis is made available to meet Bonneville's customers' firm power needs—would decrease by 750 aMW, or roughly 12 percent.[70] The risk of a regional shortage of power would more than double compared to the No Action Alternative to 14 percent under MO3, or one or more blackouts in one out of every 7 years.[71]

Additional generation resources would be needed to maintain regional reliability at the No Action Alternative level. As with other MOs, the Final CRSO EIS considered two replacement resource portfolios: (1) Conventional least-cost; and (2) zero-carbon.[72] The conventional least-cost portfolio required approximately 1,120 MW of natural gas generation for an annual cost of around $249 million.[73] The zero-carbon portfolio required 1,960 MW of solar generation supported by 980 MW of batteries and 600 MW of demand response to return regional reliability to the No Action Alternative levels.[74] This portfolio included battery storage to return some of the lost sustained peaking and ramping capability that would occur under MO3.[75] This feature of the MO3 resource portfolio recognized the important role that generation capacity (the ability of a generator to increase or decrease generation) plays in balancing solar resources. Without batteries, solar resources would need to rely on other regional resources to help balance their generation when the sun goes down or clouds roll in.[76] The cost of the zero carbon portfolio is about $416 million a year.[77]

The ''base case'' evaluation in the Final EIS described the resources needed to return regional reliability to the level of the No Action Alternative (*i.e.,* LOLP of 6.6 percent). These resources, however, would not return to the Federal system, or the region, the full functionality, flexibility, and capability provided by the four lower Snake River dams. The four lower Snake River dams provide many operational benefits to power system functionality, such as 2,000 MW of quickly responding up or down (*i.e.,* ramping) generation capacity that can be deployed to meet fluctuations in load and generation.[78] This type of flexibility is crucially important during times of system stress, such as when generation goes offline or wind and solar generation fluctuate. To account for these additional operational benefits, the Final CRSO EIS performed a sensitivity analysis to estimate the amount of additional resources needed to replace the flexibility attributes of the four lower Snake River dams. The EIS concludes that to fully replace the capability of these projects, 3,306 MW of solar, 1,144 MW of wind, and 2,515 MW of batteries (at a cost of over $800 million a year) would be needed.[79]

[53] *Id.*
[54] *Id.* at 3–904, tbl. 3–135, and 3–907, tbl. 3–136.
[55] *Id.* at 3–904, tbl. 3–135.
[56] *Id.* at 3–908.
[57] *Id.* at 3–909.
[58] *Id.* at 3–918 to 3–919, tbl. 3–147.
[59] *Id.,* Section 7.3.3, at 7–8.
[60] *Id.* at 7–7.
[61] *Id.,* Section 3.7.3.4, at 3–920.
[62] *Id.*
[63] *Id.* at 3–922.
[64] *Id.* at 3–927, tbl. 3–150.
[65] *Id.,* Section 3.7.3.4 at 3–922.
[66] *Id.* at 3–923.
[67] *Id.,* Section 7.2, at 7–4.
[68] *Id.,* Section 7.3.4, at 7–10.
[69] *Id.,* Section 3.7.3.5, at 3–939 to 3–940.
[70] *Id.* at 3–941.
[71] *Id.,* Section 3.7.3.5, at 3–942; *id.,* Appendix H, Power and Transmission, Section 2.1, tbl. 2–1.
[72] CRSO EIS, Section 3.7.3.5, at 3–942.
[73] *Id.* at 3–943.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 3–960, tbl. 3–168.
[78] *Id.* at 3–945 to 3–946.
[79] *Id.* at 3–947 to 3–948, tbl. 3–164.

The Final CRSO EIS rates analysis showed that MO3 would place substantial upward rate pressure on Bonneville's PF power rates. Under the least-cost conventional portfolio, Bonneville's power rates could see rate pressure in a range between 8.2 percent and 9.6 percent.[80] The rate sensitivity analysis for this portfolio shows this range expanding from a low of 4 percent to a high of 10.1 percent (if Bonneville acquires the resources).[81] The upward pressure to Bonneville's PF power rate under the zero carbon portfolio would range from 9.8 percent (if regional utilities acquire replacement resources) to 20.6 percent (if Bonneville acquires the resources).[82] The rate sensitivity analysis in the Final CRSO EIS shows these rate impacts potentially growing even larger under MO3, with the low end of that range at 11.8 percent to a high end of over 50 percent, if Bonneville acquires the resources.[83]

MO3 results in upward pressure on Bonneville's transmission rates as well. Upward transmission rate pressures would be 1.3 percent annually for the conventional least-cost portfolio and 1.6 percent annually under the zero-carbon portfolio, relative to the No Action Alternative.[84]

The regional average residential retail rates for power would see substantial increases under MO3. Regional retail rates across all utilities (both Bonneville customers and non-Bonneville customers) could see upward rate pressure from between +1.7 percent and +2.8 percent depending on the applicable scenario.[85] The retail impact would be even larger for Bonneville's power customers, with the retail increase ranging as high as +14 percent for residential consumers in some counties and +28 percent for some industrial consumers.[86] These effects could be greater if fossil fuel generation is reduced under the No Action Alternative, as is expected.

While the high cost of MO3 is an important factor in the co-lead agencies' decision to not include breaching the four lower Snake River dams in the Preferred Alternative, other factors under MO3 also weigh against its selection. For example, the time involved to select, permit, and build the replacement resources and any associated transmission facilities is unknown. The Final CRSO EIS assumes breaching the four lower Snake River dams would occur starting in 2021. The Final CRSO EIS also assumes all replacement resources would be available to serve load beginning in 2023.[87] This is a methodological assumption designed to create a level playing field to measure the effects of the Alternatives compared to the No Action Alternative. While useful for the rates analysis (and other affected resources), this assumption does not take into account the elements of the planning required, and the time needed to site, permit, and build the replacement resources. In the case of MO3, the zero-carbon replacement resources would be on a level well above those currently operating in the region. For a sense of scale, the region has around 1,000 MW of installed solar capacity,[88] and the largest operating battery in the world is 100 MW, though several larger batteries are in development.[89] Installing 1,960 MW of solar would require roughly 12,000 acres of land or approximately 18 square miles.[90]

The CRSO EIS acknowledges the timing issues with these large resource builds, noting that it would likely take years—perhaps decades—to complete the planning, environmental analysis, permitting, land acquisition, and physical construction of the transmission and generation resources needed in this alternative.[91] Moreover, the environmental effects from building this level of renewable resources would require its own evaluation. That evaluation would include, among other matters, impacts to the natural environment and methods to dispose of or recycle the metals and minerals used in large-scale solar, wind, and battery installations at the end of their useful life.[92] The feasibility of building thousands of megawatts of new resources, miles of new transmission infrastructure, upscaling emerging technologies (*e.g.,* batteries) to unprecedented levels, and the associated environmental review of these actions, is a factor in the co-lead agencies' choice of an alternative. Until those resources are constructed and operating, actions to implement MO3 could not be undertaken without seriously undermining regional reliability.[93]

Another important consideration weighing against selection of this alternative is the long-term regional reliability impacts of reducing existing carbon-free, flexible resources. As discussed in the Preferred Alternative, the Final CRSO EIS analysis assumes that coal plants generating 4,246 MW would continue to serve loads in the region over the study period.[94] Several of these plants have already been slated for retirement, while others are likely to retire in the coming years as state policymakers continue to take actions to reduce the use of fossil fueled resources.[95] While the CRSO EIS focuses on selection of the operating strategy for the CRS projects, the Final CRSO EIS recognizes the effects that coal plant retirements can have on regional reliability.[96] The resource retirement choices that utilities make affect the reliability of the broader interconnected grid and markets, likely putting additional strain on the existing power system, particularly if the replacement resources are intermittent or variable renewable resources. If regional utilities retire their coal plants, the need for existing hydropower becomes greater.[97] A similar paradigm applies to hydropower generation. Breaching existing hydropower projects places additional strain on the existing power system, including thermal and renewable resources, compounding the reliability problems the region will already be facing with additional coal plant retirements. The end result is that regional utilities would need to fill the holes in reliability left by reductions in both resources (coal and hydropower), which may result in even *more* investments in resources by regional utilities.

The Final CRSO EIS analyzed the effects of coal plant retirements plus reductions in hydropower generation in the ''Other Regional Cost'' pressure sensitivity.[98] In simple terms, this sensitivity asks whether the combination of (1) accelerated coal plant retirements, and (2) operations under the applicable alternative, would require regional utilities to build *incremental* zero carbon resources, above and beyond what would be needed if (1) and (2) were viewed

[80] *Id.* at 3–960, tbl. 3–168 and at 3–964, tbl. 3–169.

[81] *Id.* at 3–960, tbl. 3–168.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 3–965.

[85] *Id.* at 3–965 to 3–966.

[86] *Id.* at 3–966.

[87] *Id.,* Section 3.7.3.1, at 3–859.

[88] *Id.,* Section 3.7.3.2, at 3–882.

[89] *Id.,* Section 3.7.3.5, at 3–947.

[90] *Id.* at 3–943.

[91] *Id.,* Section 3.7.3.3 at 3–899; *see also id.,* Appendix H, Section 2.2.4.

[92] CRSO EIS, Appendix H, Section 2.2.4, at H–2–24.

[93] *Id.* at H–2–3, tbl. 2–1 (showing the region facing blackout/energy shortages in 1 out of every 7 years under MO3).

[94] *Id.,* Section 3.7.3.1, at 3–875–77.

[95] *Id.,* Appendix H, Section 2.3.

[96] *Id.,* Section 6.3.1.7, at 6–68 to 6–69.

[97] *Id.,* Appendix J, Hydropower, Section 4.2.5, at J–4–19.

[98] *Id.,* Section 3.7.3.1, at 3–875 to 3–876.

separately. For MO1 and MO4, the Final CRSO EIS concludes in the Other Regional Cost pressure analysis that no incremental resources were needed to maintain regional reliability when viewing (1) and (2) together. For MO3, however, an effect is identified, with a range of between 660 MW to 3,460 MW of additional zero-carbon resources.[99] This effect shows that the combined effects of MO3 operations *plus* coal plant retirements would potentially lead the region to build even more resources than the sum of coal plant retirements and hydropower generation losses occurring in isolation. This analysis confirms that eliminating the generation of the four lower Snake River projects would exacerbate the existing resource adequacy issue already facing the region.

3.10.1.5 MO4

The Final CRSO EIS concludes that MO4 would not meet the Power Objective.[100] This is primarily due to the large reductions in generating output resulting from CRS operations under MO4. Average CRS generation under MO4 would decline by 1,300 aMW, which is a 15 percent reduction.[101] The firm power capability of the CRS would decline by 890 aMW or 14 percent.[102] The risk of a regional shortage of power (LOLP) would increase to 30 percent, an almost fivefold increase to the No Action Alternative LOLP of 6.6 percent. This is equivalent to one or more blackouts every 3 years.[103]

Returning regional reliability to the level of the No Action Alternative would require substantial investments in new resources. Using conventional least-cost resources, the Final CRSO EIS estimates that 3,240 MW of power produced by new natural gas plants would be needed to return regional reliability to the level of the No Action Alternative at an annual cost of approximately $242 million.[104] If zero-carbon resources are selected, then roughly 5,000 MW of power produced by solar resources and 600 MW of demand response would be needed at an annual cost of roughly $576 million.[105]

MO4 would place substantial upward rate pressure on Bonneville's PF power rates. Under the least-cost conventional (natural gas) portfolio, Bonneville's PF power rates could see base case rate pressure in the range between 15.3 percent (if regional utilities acquire the resources) and 23.5 percent (if Bonneville acquires the resources).[106] The rate sensitivity analysis showed this rate pressure increasing, from a low of 18.6 percent to a high of 26.4 percent (if Bonneville acquires the resources).[107] The rate pressure to Bonneville's wholesale power rate under the zero-carbon portfolio ranges from 18.3 percent (if regional utilities acquire replacement resources) to 25.3 percent (if Bonneville acquires the resources).[108] The rate sensitivity analysis in the Final CRSO EIS shows these rate impacts potentially growing even larger under MO4, with the low end of that range at 20.2 percent to a high end of over 40 percent (if Bonneville acquires the resources).[109]

MO4 resulted in the most substantial upward pressure on Bonneville's transmission rates as well. Upward transmission rate pressures would be 1.6 percent annually for the conventional least-cost portfolio, and 1.9 percent under the zero-carbon portfolio, relative to the No Action Alternative.[110]

Regional retail rates would also see significant upward rate pressure. On average, counties would experience a 2.9 to 3.3 percent upward rate pressure on their residential retail rate, depending on the replacement portfolio, relative to the No Action Alternative.[111] The largest effect for all end-user groups under MO4 is a 36 percent upward rate pressure in the industrial retail rate for some counties.[112]

As with MO3, the co-lead agencies considered the long-term impacts on regional reliability and the feasibility of implementing this alternative. If the region selects a zero-carbon portfolio to replace the lost generation in MO4, then upwards of 30,000 acres of land or roughly 47 square miles would be needed to site a solar project capable of producing 5,000 MW.[113] These replacement resources, which would take years, if not decades to site, permit, construct, and acquire would need to be up and running before CRS operations under MO4 could be in place. Without these resources, regional reliability would decline to unprecedented low levels, with a 30 percent chance of a year with one or more blackouts, *i.e.* one year every three years, creating potential public safety and health effects from decreased power reliability. In addition, as with MO3, the mass buildup of resources called for in MO4 would involve environmental effects that would have to be evaluated and considered.

3.11 Minimize Greenhouse Gas Emissions From Power Production in the Northwest by Generating Carbon-Free Power Through a Combination of Hydropower and Integration of Other Renewable Energy Sources

Similar to MO1, MO3, and MO4, the Selected Alternative does not meet the CRSO EIS objective of minimizing greenhouse gases (GHG) emissions from power production in the Northwest. Hydropower generation will decrease, resulting in increased generation from existing gas and coal plants. The air quality analysis for the Selected Alternative concludes that power sector GHG emissions in the Northwest will increase by approximately 0.54 million metric tons per year, which is about 1.5 percent of total power sector emissions in the region. This increase is not as substantial as the increases for MO3 or MO4, but similar to the increase under MO1. For states that have established policies for reducing GHG emissions, such as Oregon and Washington, this could adversely impact the timeframe and costs associated with meeting these targets. Similarly, this could also increase the cost for utilities that need to comply with state policies that place a price on carbon or require use of a high percentage of renewables to meet retail load. For example, Washington's Clean Energy Transformation Act (2019) directs Washington retail utilities to serve loads with 100 percent carbon-neutral power by 2030 and 100 percent carbon-free power by 2045 (Revised Code of Washington 19.405). The CRSO EIS analysis indicates that in 2030 the approximately 0.54 million metric ton increase in GHG emissions could cost utilities—and ultimately ratepayers—across the region $15 to $77 million a year in compliance costs under these types of state programs (prices are stated in 2019 dollars).

Given the Selected Alternative's changes in hydropower generation largely occur in April through June,—a time of year when hydropower generation is typically surplus to Bonneville's preference customers' loads—it is more likely that increased

[99] *Id.,* Section 3.7.3.5, at 3–952, tbl. 3–167.

[100] *Id.,* Section 7.3.5, at 7–14.

[101] *Id.,* Section 3.7.3.6, at 3–978.

[102] *Id.* at 3–979.

[103] *Id.* at 3–980.

[104] *Id.* at 3–981. Although MO4 requires more natural gas plant capacity than MO3, the cost of operating and running these plants is slightly less because they will be operated less frequently than in MO3, and a lower-cost technology (frame as opposed to combined cycle) was selected in the resource selection process for MO4.

[105] *Id.* at 3–981 to 3–982.

[106] *Id.,* Section 3.7.3.6, at 3–989, tbl. 3–184, and at 3–992, tbl. 3–185.

[107] *Id.*

[108] *Id.* at 3–989, tbl. 3–184.

[109] *Id.*

[110] *Id.* at 3–993.

[111] *Id.* at 3–994.

[112] *Id.*

[113] *Id.* at 3–981 to 3–982.

fossil-fuel generation owned by the investor-owned utilities in the region would be serving investor-owned utility load, thus resulting in these GHG emissions costs being borne largely by investor-owned utilities. However, there could be conditions when some of these costs could also be borne by Bonneville and its preference customers depending on which entity is responsible under state programs for the GHG compliance costs associated with the increases in fossil-fuel generation. While the Selected Alternative results in increases in GHG emissions and likely additional costs to ratepayers, thus not meeting this CRSO EIS objective, this represents a trade-off to allow for potential benefits to ESA-listed salmonids.

3.12 Climate Change

Future climate projections indicate warming temperatures and changes in precipitation trends, which generally are likely to result in declining snowpack, higher average fall and winter flows, earlier peak spring runoff, and longer periods of low summer flows. These changes could lead to higher and more variable winter flows and lower flows during summer months across all regions in the basin. Water temperatures throughout the basin are likely to increase. Climate change is expected to affect nearly all purposes and uses of the CRS. These effects are not caused by the CRS (though changes in operations of the system evaluated in the CRSO EIS impact hydropower generation and in turn regional GHG emissions) and are expected to occur regardless of the alternative selected. However, certain measures could exacerbate or ameliorate the impacts of climate change, thus affecting the overall resiliency of a resource in response to these expected changes in climate.

The analysis concluded that climate change is expected to have negligible to moderate effects (beneficial or adverse) on resources and the effectiveness of the Preferred Alternative. The EIS analysis showed minor to moderate effects from climate change to these resources: Hydrology and Hydraulics; River Mechanics; Water Quality; Anadromous Fish; Resident Fish; Vegetation, Wildlife, Wetlands, and Floodplains; Power Generation and Transmission; Flood Risk Management; and Fisheries.

In the final biological opinion, NMFS states that climate change poses a substantial threat to anadromous fish species over the next twenty years. While climate change will affect anadromous fish in all stages of life, the impacts are largely driven by changes in ocean conditions that are projected to reduce survival during the marine life history stage. NMFS concluded that ''these conditions are not caused by, nor will they be exacerbated by, the continued operation and maintenance of the CRS as proposed in the biological assessment.'' The USFWS concluded in its final biological opinion that the Preferred Alternative, in combination with other Federal and non-Federal actions, is likely to exacerbate the effects of climate change on resident fish by further diminishing habitat quality, decreasing forage availability, causing migration delays, and increasing the risk of injury and mortality. The USFWS recommended measures be taken where possible to increase instream flow to improve water quality, decrease stream temperatures, and otherwise reduce the impacts to resident fish from climate change. The Selected Alternative contains measures that are adaptive to emerging changes in climate and ensure there is flexibility to respond to future changes.

Operational measures for the Selected Alternative as well as non-operational conservation measures are expected to improve the existing survival levels of fish species and contribute to overall resiliency in light of climate change. For example, the co-lead agencies committed to continuing the tributary and estuary habitat improvement program for salmon and steelhead (with considerations for benefits to bull trout, where appropriate), habitat restoration actions for KRWS, and to evaluate and improve tributary habitat access for species such as bull trout which will give spawning fish access to additional habitat. These actions improve resilience to climate change by increasing access to more diverse spawning habitat. Another example of this is the tributary habitat restoration program that counters increased stream temperature with deeper pools and more shaded areas. These types of habitat improvement projects are examples of many actions that will be implemented throughout the Columbia Basin. The Selected Alternative also contains operational measures that are expected to contribute to species resiliency, such as the continued use of cool water stored behind Dworshak Dam and structures to address ladder temperature differentials to help to reduce water temperatures in the lower Snake River as fish approach and pass Lower Granite and Little Goose dams.

The Preferred Alternative also contains measures that provide additional flexibility for operations of the CRS, which may contribute to the resiliency of other resources to climate change. For example:

- The reduction in fish passage spill in the second half of August, which increases generation during a time when climate change is expected to increase demand for power while at the same time reducing the volume of water.
- The updated flood risk management drawdown operation at Dworshak, which will provide more planning certainty counteracting the increased uncertainty from climate change.
- Sliding scale operations for summer flow augmentation are staged to better respond to local water supply conditions by using local forecasts and to better balance anadromous and resident fish needs.

A full discussion of climate and evaluation of resources are included in Chapters 4 and 7 of the CRSO EIS.

3.13 Scientific Integrity and Commitments to Independent Review

Based on the nature of the CRSO EIS, the standards in the applicable statutes, and comments during scoping from the public, the co-lead agencies concurred that scientific integrity and independent review of both the analysis in the CRSO EIS and the methodologies used to conduct the evaluation were important parts of the process. Following the Corps and OMB guidance described in Corps (2018) and OMB (2004), the agencies had independent technical review conducted in addition to agency and cooperator agency technical review. This helped assure the evaluations were sound and identified where materials need clarity or where the information had considerable risk and uncertainty. These findings were used by the decisionmakers in considering alternatives and making a final selection. Several of the tools used were not owned or operated by the co-lead agencies. The results of these peer reviews are discussed in the body of the CRSO EIS. The owners of these tools were provided the results from the peer review panel to help improve the tools in the future, should those entities choose to do so.

3.14 Comparable Benefits and Adverse Effects of the Alternatives

In addition to the benefits that could be achieved by implementing each of the alternatives, the agencies closely reviewed the analysis of both benefits of implementing an alternative, and potential adverse impacts to the human and natural environment, including risk to human health or safety, changes to community culture and wellbeing, impacts to local and regional economies, and ability to access and enjoy the natural environment. The Northwest region has diverse tribal

communities and a rich history of cultural resources; the co-lead agencies gave particular consideration to not exacerbate any effects to, or adversely or disproportionately impact, tribal resources or communities. The agencies also consider risk, potential undesirable and unintended consequences of alternatives, and how climate variability, such as conditions of both the short term and long term shifts in climate, including extended droughts, or wetter and warmer weather, may affect the system operations and the resources in the region.

The No Action Alternative would continue with the planned operations and mitigation components in place in September 2016. The No Action Alternative also would not include the additional water supply commitments from Lake Roosevelt, or the operations of Grand Coulee during planned maintenance activities over the next 25 years. The No Action Alternative also would not meet the Power, GHG, or water supply objectives of the EIS for balancing considerations of future operations.

All of the alternatives included measures to benefit ESA-listed anadromous and resident fish and lamprey. MO1 included several measures, which were carried forward or modified in the Preferred Alternative. MO1 included all lamprey structural measures included in the Preferred Alternative, except the *Closeable Floating Orifice Gates* measure, which was only added to the Preferred Alternative. Measures unique to MO1 for fish were the juvenile spill operation, the *Predator Disruption Operations* measure, and the *Modified Dworshak Summer Draft* measure. The *Predator Disruption Operations* measure (like the Preferred Alternative) could result in larval lamprey being stranded in shallow rearing areas, depending on dewatering rates. The *Modified Dworshak Summer Draft* measure was intended to provide cooler water for anadromous fish. The analyses showed it would actually increase temperatures and have an adverse effect on ESA-listed anadromous and resident fish as well as non-ESA-listed lamprey. This measure was not carried forward into the Preferred Alternative. Finally, MO1 did not meaningfully meet resident fish, power or GHG objectives.

MO2 included measures with less spill and spring flow compared to the No Action Alternative and generally had lower expected performance related to anadromous adult and juvenile fish. For some species, such as Snake River Chinook salmon, the analysis produced mixed results with the NMFS Lifecycle models predicting minor improvements and the CSS Lifecycle models predicting major declines. The MO2 resident fish results showed the measures to increase power generation and water supply would have moderate to localized major adverse effects to resident fish throughout the basin, especially at Hungry Horse Dam where increased winter flows and lower summer reservoir elevations would affect food productivity, tributary access, habitat suitability, and entrainment. Regions B and C would also experience adverse effects to resident fish from power generation and water management measures that were eliminated or modified for the Preferred Alternative. Finally, MO2 included the same lamprey structural measures as MO1. Relative to the Preferred Alternative, the overall shift to more powerhouse flow and passage makes this alternative less effective at improving conditions for lamprey. Greater numbers of lamprey would likely pass near fish bypass screens and would be at a higher risk of injury or impingement compared to the No Action Alternative. Thus, although MO2 met the power and GHG objectives, it did not meet the objectives for ESA-listed juvenile fish or resident fish and may not meet the ESA-listed adult anadromous fish objective. These adverse effects could impact tribal and commercial fishing. It also did not meet the water supply objective.

MO3 included improvements to fish passage by structural modification with the *Removal of the Earthen Embankments* measure at the four lower Snake River dams. Model estimates for MO3 showed the highest predicted potential smolt-to-adult returns (SARs) for Snake River salmon and steelhead as compared to the other alternatives analyzed in the CRSO EIS. Quantitative model results from both the CSS and NMFS Lifecycle models were available and indicated a range of potential long-term benefits largely due to how the models address latent mortality. Quantitative predictions for improvements for Upper Columbia Chinook were not anticipated to be at the same magnitude as Snake River species since upper Columbia stocks do not pass the four lower Snake River dams. Moreover, resident fish would have major adverse short-term effects during construction followed by major long-term benefits to bull trout and white sturgeon (not ESA-listed in this reach) due to habitat connectivity. Other native fish in the Snake River would also benefit from the conversion of reservoir conditions to more riverine habitat. MO3 analyses showed similar effects as MO1 for resident fish in other regions. The primary benefit is anticipated to be for ESA-listed fish in the lower Snake River, which could improve commercial and tribal fishing and recreation. Finally, MO3 included the same lamprey structural measures as MO1. Relative to the Preferred Alternative, the most substantial change would be the breaching of the four Lower Snake River dams. This could reduce mortality to lamprey during the downstream migration phase and would substantially improve the ease of upstream migration. Finally, MO3 did not meet the power or GHG objectives.

Significant human health and safety concerns were identified for MO3. This alternative has the potential to temporarily contaminate water, used for both municipal and agricultural purposes. Indirect impacts included potential to contaminate fish and communities that may consume these fish. The uncertainty around remediation actions that would be required to clean hot spots and underground storage leaks elevates the risk. Much of the safety improvements needed to public and private infrastructure (roads, rails, water intakes, pipes) in the reach of the lower Snake River would be conducted by other entities. The method of dam breaching would be staged and water levels lowered to prevent shoreline slumping, but changes in river velocities on infrastructure could contribute to degradation that would need to be addressed. Water intakes for municipal water access would need to be extended in some areas, a concern for communities to have access to adequate water supply. Several communities currently use the lower Snake and McNary reservoirs for fire prevention and emergency services via boats and sea planes, and would need to adjust their emergency plans. Carbon emissions and traffic congestion would be elevated in some communities as commodities shift from shipping by navigation to truck or rail. As sediment is moved through the system, areas of the navigation channel and shorelines could capture sediment and create temporary shoaling areas, which could pose hazards to boaters.

MO3 additionally would have adverse effects to the communities along the lower Snake River and confluence with the Columbia River. This area would have to adjust to changes in agricultural and shipping practices, and jobs. While economically these shifts will pass from one type of service to another, the people involved are likely to change, and the composition of these communities with it. There would be

higher cost for shipping in the region, as well as upward pressure on power and transmission rates and increased risks for power outages unless and until replacement resources are acquired. Additionally, there would be significant shifts in use of this region for recreational purposes, from a reservoir to river system. Most access points to the river will be inaccessible until regional entities provide local infrastructure. Over time, it is anticipated these communities would stabilize. In the interim, these communities would have limited and changed use of the river, shifts in community practices, and impacts to visual and aesthetic enjoyment of the natural environment.

There was significant short term risk to the natural environment with MO3 implementation. While mitigation and time could help offset those impacts to wetlands, floodplains and wildlife usage adversely affected by the breaching measure, there is significant uncertainty around responses to extended years of low dissolved oxygen. Significant die-off of aquatic organisms could occur. Long term risks include increases in ambient air temperature, which could exacerbate water temperatures in a post breach lower Snake River, which would be much shallower and narrower. It is anticipated it would be more sensitive to air temperatures, including getting hotter in the spring, and cooling earlier in the fall. The potential of unintended consequences is higher as there is greater uncertainty in multiple breaching scenarios, which could also implicate funding and associated production at mitigation hatcheries.

MO4, which had the highest juvenile fish passage spill levels and the most flow augmentation, also produced mixed results based on the two primary modeling approaches. NMFS Lifecycle models predicted that survival and abundance would decrease under MO4 while the CSS models predicted increases. MO4 incorporates a flow augmentation measure to benefit juvenile anadromous fish that would have major adverse effects to resident fish in the upper basin (Region A), and also in Lake Roosevelt (Region B), especially in dry years. Notably, this alternative is the only one that showed adverse effects to resident fish in the Pend Oreille River and Lake Pend Oreille. Additionally, MO4 included the same lamprey structural measures as MO1. Relative to the Preferred Alternative, the increased spill and flow augmentation under MO4 may result in minor beneficial effects for out-migrating juvenile lamprey. Adults migrating upstream in July would experience higher water temperatures in the Columbia River from Chief Joseph Dam to McNary Dam that would likely lower their survival and migration success relative to the Preferred Alternative. In MO4, drawdowns in late March could dewater sediment used for larval lamprey rearing, and this alternative could reduce the amount of habitat available for larval lamprey. MO4 has the potential to affect communities adversely along the upper storage reservoirs and rivers. The increase in water flows in the lower Columbia River would pull water from the upper basin projects, adversely affecting riparian and resident fish habitat. Many of these areas have tribal and commercial fishing, directly affecting the fish resources, economics, and community wellbeing. Additionally, these areas would have adverse visual effects. Several cultural sites would also be at risk of damage.

MO4 would remove flexibility for water discharge outlets at projects, and increase TDG in the water column. This has a known adverse impact to aquatic organisms, but uncertainty around the scale of adverse impacts at the project level. Additionally, the energy associated with the discharged spill could confuse and prevent migrating ESA-listed adult fish from passing the projects. There would be additional infrastructure maintenance and dredging of the navigation channel to sustain the higher spill, impacting the sediments and aquatic organisms more frequently. Finally, MO4 did not meet the ESA-listed resident fish, power or GHG objectives.

With these results, in concert with results relating to the other objectives in mind, the co-lead agencies developed the Preferred Alternative. A major difference from past operations is the Preferred Alternative includes a new spill operation to test balancing fish benefits and flexibility for hydropower production by spilling more water in the spring for juvenile fish passage. The Preferred Alternative did not carry forward some measures that were initially expected to provide a benefit to anadromous fish, including construction of additional powerhouse surface collectors because neither NMFS nor CSS Lifecycle modeling efforts predicted a measurable benefit to fish.

Relative to resident fish, the Preferred Alternative includes measures that provide benefits for resident fish, such as ramping rate restrictions, minimum downstream flow requirements, and temperature control, as well as ongoing non-operational conservation measures such as Kootenai River white sturgeon habitat restoration projects and leveraging benefits for bull trout where feasible when developing tributary habitat projects for salmon. Other measures allow for the summer draft from Libby and Hungry Horse Reservoirs for downstream flow augmentation to be determined based on local water supply forecast and to be sensitive to water supply conditions. As a result, water reservoir elevations would be a little higher in the summer, especially in dry years. This action is expected to affect resident fish by improving food production, tributary access, entrainment, and downstream habitat suitability. Finally, measures included in the Preferred Alternative should decrease susceptibility to physical stress and mortality for lamprey relative to the No Action Alternative. The Preferred Alternative is expected to contribute to improvements in spatial distribution and recruitment of Pacific lamprey in the Columbia Basin, though it remains difficult to quantify effects and benefits of some actions. Finally, the Preferred Alternative meets all EIS objectives except the GHG objective.

Section 4. Public Review

Public review of the Draft CRSO EIS was conducted February 28, 2020 through April 13, 2020 (85 FR 11986). All comments submitted during the public comment period were responded to in the Final CRSO EIS and can be found in Appendix T. A 30-day waiting period and state and agency review of the Final EIS was completed on August 31, 2020 (85 FR 46095).

4.1 Comments Recevied on the Final EIS

The co-lead agencies received two comment(s) after issuance of the Final EIS. Commenters, included the U.S. Environmental Protection Agency (EPA) and the Columbia-Snake River Irrigators Association.

EPA provided comments pursuant to the National Environmental Policy Act, (40 CFR parts 1500–1508), and Section 309 of the Clean Air Act. The comments focused on appreciation for adding information requested during a meeting of the co-lead agencies with EPA; support for refining monitoring and adaptive management proposed in the EIS; and acknowledgement of modifications that were made in collaboration with Federal and non-Federal agencies, cooperating agencies, and tribes. EPA also expressed its willingness to continue support on wide-ranging water quality issues, where appropriate.

The Columbia-Snake River Irrigators Association submitted comments related to irrigation and navigation

effects of MO3. In response to Draft EIS comments received regarding over-estimating transportation costs associated with dam breaching, the Final EIS included a sensitivity analysis that examined the potential use of the Great Northwest Railroad for transporting grain to export elevators on the Columbia River. The sensitivity analysis determined that the costs to upgrade the rail lines to meet Positive Train Control (PTC) requirements, add sufficient space to port facilities, and modify port facilities to load trains would likely be economically unfeasible when compared to other options. The co-lead agencies deemed that the sensitivity analysis was sufficient for informed decision-making and that a more detailed and costly analysis would not result in a significantly different estimate of impacts or ultimately change the Selected Alternative.

4.2 Cooperating Agencies, Tribes, and Stakeholders Review

4.2.1 Review from States

The four states—Oregon, Washington, Idaho, and Montana—all provided expertise and contributions to the CRSO EIS as cooperating agencies. The states were unified in calling for a continued commitment to improving conditions for the region's fish and wildlife. In support of requests for continued regional collaboration, the co-lead agencies support efforts to hold forums focused on improving salmonid populations. The co-lead agencies expect that this EIS will provide a useful foundation of information as the region works together on a shared vision for abundant fish runs and a clean, reliable, and affordable energy future for the Northwest.

4.2.2 Tribal Views Shared Prior to the Joint Record of Decision

The agencies engaged with regional tribes after the release of the Final CRSO EIS and had additional discussions with five tribes.[114] These were not typical consultations as they were held remotely using video conferencing due to the coronavirus pandemic. Nearly all tribes reiterated the dramatic impacts to their culture and way of life resulting from the construction, operations and maintenance of the CRS and the importance of salmon and other fish to their people. Some tribes were complimentary and supportive of the CRSO EIS process, citing the considerable effort put into regional coordination, soliciting input from tribes, and the comprehensive analysis resulting in a quality report. Some expressed concerns about the expedited schedule of the EIS and a perceived lack of tribal consideration and contribution to the EIS process and content.

There was uniform interest in next steps following the CRSO EIS and how the tribes would be included in regional forums, implementation of the CRSO EIS, and notably mitigation actions. All tribes inquired about how regional forums would be conducted, who the lead entities would be, goals of the forums, and what the agency roles would be. Frustration was expressed about the decision to not include fish reintroduction into blocked areas as part of the CRSO EIS alternatives. A strong interest was expressed for having fish reintroduction into blocked areas be the primary focus of upcoming forums. Many expressed a desire to collaborate on mitigation planning efforts (*e.g.,* fish habitat studies) to contribute technical expertise and tribal perspectives.

The pre-ROD tribal consultations were informative and provided helpful suggestions, some of which were included in this joint ROD. Tribal perspectives have and will always continue to improve our agency understanding of the CRS. Discussions about the future of managing the CRS does not end with this EIS and associated Tribal consultations. This EIS is part of the ongoing effort to manage the CRS.

4.2.3 Common Publicly-Held Views

Many members of the public through public comments, cooperating agencies throughout their participation in developing the EIS and in comments on the EIS, and tribes expressed a preference for the agencies to select an alternative that included the dam breaching measures in MO3, sometimes in combination with juvenile spill operations in MO4. Although MO3 potentially had the greatest benefits for some species of ESA-listed fish, it would achieve those benefits at the expense of not meeting the other components of the agencies' Purpose and Need Statement or certain EIS objectives. The agencies also received numerous comments expressing opposition to MO3.

The measure to breach the four lower Snake River dams in MO3 (a main component of this alternative) has been the topic of a large amount of public discourse for decades. Many environmental organizations and some tribes have been strong proponents of breaching the dams. They assert breaching the dams will result in large improvements to certain salmonid populations, and this in turn would have beneficial effects to the overall function of the Northwest ecosystem and for tribal ways of life. At the same time, many stakeholders within the navigation industry, and agricultural producers within the region that depend on the navigation industry to export grains to overseas markets, have expressed high concern with the potential regional socioeconomic effects from breaching the dams. This alternative would eliminate approximately 48,000 irrigated acres, hydropower generation flexibility and navigation on the lower Snake River which affects the ability of this alternative to meet the Purpose and Need Statement.

Section 5. Environmental Compliance Summary

5.1 Section 7 of the Federal ESA

Pursuant to Section 7 of the Endangered Species Act of 1973, as amended, NMFS and USFWS issued biological opinions, both dated July 24, 2020, that determined that the Selected Alternative will not jeopardize the continued existence of the following federally listed species or adversely modify designated critical habitat: Snake River (SR) spring/summer Chinook salmon, SR Basin steelhead, SR sockeye salmon, SR fall Chinook salmon, Upper Columbia River (UCR) spring-run Chinook salmon, UCR steelhead, Middle Columbia River steelhead, Columbia River chum salmon, Lower Columbia River (LCR) Chinook salmon, LCR steelhead, LCR coho salmon, Upper Willamette River (UWR) Chinook Salmon, UWR steelhead, the southern Distinct Population Segment of eulachon, bull trout, and KRWS. The agencies will implement the Selected Alternative reviewed in the consultations, as well as the Services' terms and conditions to both minimize take of ESA-listed species and avoid jeopardizing the continued existence of ESA-listed species or destroying or adversely modifying designated critical habitat.

Pursuant to Section 7 of the Endangered Species Act of 1973, as amended, the co-lead agencies determined that the recommended plan may affect but is not likely to adversely affect the following federally listed species or their designated critical habitat: Southern Resident killer whales, southern Distinct Population Segment of green sturgeon, streaked

[114] These tribes included the Confederated Tribes of the Colville Reservation, the Coeur d'Alene Tribe, the Confederated Salish and Kootenai Tribes, the Confederated Tribes and Bands of the Yakama Nation, and the Nez Perce Tribe. Several informal meetings were also conducted with various tribes from the region, including an invitation to all regional tribes for a large virtual video conference.

horned lark, Columbian white-tailed deer, grizzly bear, Ute ladies tresses, and the western yellow-billed cuckoo. NMFS and USFWS concurred with the co-lead agencies' determination on July 24, 2020.

In order to inform ongoing implementation of the Selected Alternative (with adaptive management principles), the co-lead agencies would continue to rely upon annual species status monitoring results to ascertain the need for contingency actions. The co-lead agencies do not propose to use specific abundance or trend triggers as previously set forth in the 2009 Adaptive Management Implementation Plan [115] because they have become outdated (*e.g.,* they were based on adult returns through 2007 or 2008), because many identified contingency actions are already being implemented (*e.g.,* substantially higher spill levels due to the proposed flexible spill operation, refined transportation operations, hatchery reform, etc.), and because several contingency actions (*e.g.,* reducing harvest, some elements of predator control, etc.) are outside their authority to implement. Instead, the co-lead agencies would work with NMFS, USFWS, Federal, state and tribal sovereigns and other appropriate parties in any region-wide diagnostic efforts to determine the causes of declines in the abundance of naturally produced salmon and steelhead and to identify potential contingency actions should the need arise. The co-lead agencies proposed three specific actions in the proposed action: modification of the fish transportation program, reprogramming of safety-net hatchery programs, and kelt reconditioning in years of low steelhead returns.[116]

The co-lead agencies complete appropriate environmental analysis prior to implementing fish and wildlife protection, mitigation and enhancement actions, whether that analysis is programmatic or site-specific. These analyses include review under all applicable laws and regulations. During the course of the implementation of future actions associated with operations from the CRS projects and the other actions addressed in the 2020 CRS BiOps, actions would continue to undergo site-specific environmental analysis prior to implementation.

The current consultation in the 2020 CRS BiOps encompasses operations and maintenance of the CRS for a fifteen-year period. This decision to implement the 2020 CRS BiOps is therefore a decision to implement the action as described therein until the end of that fifteen-year period, subject to adaptive management. If the next consultation commences before the 2020 CRS BiOps are fully implemented, the co-lead agencies and the Services will consider adjustments in the timing and content of remaining implementation plans and reporting called for in the 2020 CRS BiOps.

5.2 Magnuson-Stevens Fishery Conservation and Management Act

Under Section 305 of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the agencies consulted with NMFS as part of the consultation that resulted in the 2020 NMFS CRS BiOp. NMFS considered essential fish habitat (EFH) designated by the Pacific Fisheries Management Council for Pacific Coast groundfish and salmon and coastal pelagic species. NMFS concluded that further consultation under the MSA was not required for these habitats because the operation and maintenance of the CRS as described in the 2020 NMFS CRS BiOp would not adversely affect EFH for these species. NMFS made four conservation recommendations to mitigate adverse effects on EFH of species. In accordance with MSA Section 305(b)(4)(B), the agencies confirmed to NMFS that the agencies will adopt and follow these conservation recommendations, which were consistent with the measures in the proposed action and Terms and Conditions in the 2020 NMFS CRS BiOp.

5.3 Cultural Resources

Cultural resources affected by the implementation of the Selected Alternative will be addressed under the ongoing FCRPS Cultural Resource Program. The FCRPS Cultural Resource Program implements the terms of the existing *Systemwide Programmatic Agreement for the Management of Historic Properties Affected by the Multipurpose Operations of Fourteen Projects of the Federal Columbia River Power System for Compliance with Section 106 of the National Historic Preservation Act.*

5.3.1 National Historic Preservation Act

After reviewing the changes in operations, maintenance, and configuration proposed as a part of the Selected Alternative, the co-lead agencies have determined that the existing Systemwide Programmatic Agreement would address the co-lead agencies' responsibilities under Section 106 of the National Historic Preservation Act for all proposed operations. If it is determined at a later date that any proposed structural measures are not covered by the Systemwide Programmatic Agreement, then separate Section 106 compliance would be completed prior to construction, when sufficient site-specific information on the undertaking becomes available.

5.3.2 Archaeological Resources Protection Act

Unlike the National Historic Preservation Act, consultation under the Archaeological Resources Protection Act (ARPA) is only applicable to issuance of a permit to conduct archaeological investigations. Therefore, there is nothing specifically that the co-lead agencies would need to do as a part of considering these changes in operations, maintenance, or configuration. Under the Selected Alternative, the land managing co-lead agencies (Reclamation and Corps) will continue to issue ARPA-related permits to external project proponents for archaeological investigations occurring on their respectively managed Federal land. The co-lead agencies will also continue efforts related to documenting destruction or alteration of archaeological resources in violation of ARPA.

5.3.3 Native American Graves Protection and Repatriation Act

There is not a general consultation requirement triggered under this act by changes in operations, maintenance, or configuration under the Selected Alternative. The existing FCRPS Cultural Resource Program maintained by the co-lead agencies addresses inadvertent discoveries of human remains that could result from system operations (43 CFR 10.4).

5.3.4 American Indian Religious Freedom Act

The co-lead agencies do not anticipate taking any actions under the Selected Alternative that would infringe upon the rights afforded under the American Indian Religious Freedom Act to Native American tribes. The co-lead agencies will continue to consult and work with area tribes to protect and provide access to sacred sites on CRS Federal lands, when possible and practicable to do so.

[115] FCRPS Adaptive Management Implementation Plan. U.S. Army Corps of Engineers, U.S. Department of Interior, and U.S. Department of Energy, September 11, 2009, *available athttps://www.salmonrecovery.gov/Files/BiologicalOpinions/AMIP/AMIP_09%2010%2009.pdf.*

[116] 2020 CRS Biological Assessment at 2–120.

5.3.5 Curation of Federally Owned and Administered Collections

Under the Selected Alternative, the co-lead agencies will continue to implement the existing FCRPS Cultural Resource Program which ensures the ongoing responsibility of managing Federal archaeological collections generated from Federal lands as a result of construction, operations, and maintenance.

5.4 Clean Water Act

Pursuant to the Federal Water Pollution Control Act of 1972 (33 U.S.C. 1251 *et seq.*), as amended, commonly referred to as the Clean Water Act (CWA). Section 401 water quality certifications would be obtained for project-specific structural measures, as appropriate, prior to construction. Section 402 of the CWA established the national pollutant discharge elimination system for permitting point source discharges to waters of the U.S. The Corps and Reclamation have filed applications for CWA Section 402 permits for discharges of pollutants at the CRS mainstem dams on the Columbia and Snake Rivers. These permits have not yet been issued by the U.S. Environmental Protection Agency (EPA) or Oregon Department of Environmental Quality.

For Section 404, the Corps prepared a Section 404(b)(1) evaluation to determine whether a project has unacceptable adverse impacts either individually or in combination with known or probable impacts of other activities that affect the aquatic resources in the project area. This evaluation can be found in Appendix W of the Final CRSO EIS.

Under the CWA, each state must develop a Total Maximum Daily Load (TMDL) for the waters identified on their Section 303(d) list of impaired waters, according to their priority ranking on that list. In May of 2020, EPA issued for public review and comment the TMDL for temperature on the Columbia and lower Snake Rivers to address portions of the rivers that Washington and Oregon have identified as impaired from temperatures that exceed the states' water quality standards.

The co-lead agencies will continue to operate certain measures to improve water temperature, where practicable, to minimize or offset potential effects from the dams and reservoirs, as described in the Key Considerations for the Decision, Water Quality, Section 3.9.

In terms of impacts from TDG, measures under the Selected Alternative will be implemented consistently with state water quality standards to manage TDG exposure to fish in the Clearwater River below Dworshak Dam as well as manage TDG at Ice Harbor, John Day and McNary dams. Juvenile fish passage spill operations will be implemented at the lower Snake River projects and the lower Columbia River projects. These measures are described above in Key Considerations for the Decision, Water Quality, Section 3.9.

The Spill Prevention Control and Countermeasures Rule (40 CFR part 112) includes requirements to prevent discharges of oil and oil-related materials from reaching the navigable waters of the United States and adjoining shorelines, among others. It applies to facilities with total aboveground oil storage capacity (not actual gallons onsite) of greater than 1,320 gallons and facilities with belowground storage capacity of 42,000 gallons. Construction activities associated with the structural measures would comply with this rule in implementing the Selected Alternative, if needed.

5.5 Pacific Northwest Electric Power Planning and Conservation Act

Under the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. 839 *et. seq.,* the co-lead agencies have certain responsibilities with respect to the operation, maintenance, and configuration of the 14 dams and reservoirs comprising the Columbia River System. In particular, the co-lead agencies share a mandate to exercise their responsibilities for management and operation of the CRS, consistent with the purposes of the Northwest Power Act and other applicable laws, to adequately protect, mitigate, and enhance affected fish and wildlife in a manner that provides such fish and wildlife equitable treatment with the other purposes for which the CRS is managed and operated.[117] Further, the co-lead agencies are to take into account, at the relevant stages of their decision-making and to the fullest extent practicable, the Columbia River Basin Fish and Wildlife Program adopted by the Northwest Power and Conservation Council (Council).[118]

In addition, Bonneville has separate duties under the Northwest Power Act that the Corps and Reclamation do not share, as explained in Section 7.3 below. Specifically, Bonneville must use its authorities under the Northwest Power Act and other laws to ''protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation'' of the FCRPS, including the CRS.[119] Bonneville must fulfill this mandate ''in a manner consistent with'' the purposes of the Northwest Power Act and the Council's Power Plan and Columbia River Basin Fish and Wildlife Program.

5.5.1 Equitable Treatment

The co-lead agencies must exercise their responsibilities for CRS projects, consistent with the purposes of the Northwest Power Act and other applicable laws, to adequately protect, mitigate, and enhance affected fish and wildlife in a manner that provides such fish and wildlife equitable treatment with the other purposes for which the CRS is managed and operated.[120]

The equitable treatment provision of the Act specifically applies to the co-lead agencies' responsibilities for (1) ''managing [and] operating'' (2) the federal dam and reservoir projects themselves, including the CRS.[121] The co-lead agencies may consider equitable treatment of fish and wildlife, in relation to the other purposes for which the CRS is managed and operated, on a system-wide basis, meaning that they may, for example, make certain decisions that place power above fish, so long as on the whole, they treat fish on par with power.[122]

Further, the purposes of the Northwest Power Act also factor into the agencies' consideration of equitable treatment. In addition to protection, mitigation, and enhancement of fish and wildlife affected by the FCRPS, such statutory purposes include encouraging development of renewable generation resources and assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply.[123]

The CRSO EIS process and the Preferred Alternative identified in the Final CRSO EIS demonstrate the co-lead agencies' continued equitable treatment of fish and wildlife in their operation and management of the CRS. Under the No Action Alternative, the co-lead agencies had provided equitable treatment for fish in part through annual

[117] 16 U.S.C. 839b(h)(11)(A)(i).

[118] *Id.* 16 U.S.C. 839b(h)(11)(A)(ii).

[119] *Id.* 16 U.S.C. 839b(h)(10)(A).

[120] *Id.* 16 U.S.C. 839b(h)(11)(A)(i).

[121] *Id.* 16 U.S.C. 839b(h)(11)(A). The Northwest Power Act's equitable treatment provision pertains to ''managing [and] operating,'' which in the context of the CRSO EIS includes the system operation, maintenance, and configuration actions analyzed by the co-lead agencies.

[122] *See Nw. Envtl. Defense Ctr* v. *Bonneville Power Admin.,* 117 F.3d 1520, 1533–34 (th Cir. 1997); *see also Confederated Tribes of the Umatilla Indian Reservation, et al.* v. *Bonneville Power Admin.,* 342 F.3d 924 (9th Cir. 2003).

[123] *See* 16 U.S.C. 839(1)–(2), (6).

fish operations planning and preparation of an annual Water Management Plan for biological opinion purposes.[124] New alternatives considered in the CRSO EIS included further operational and structural measures with a range of anticipated benefits and effects to fish in relation to other authorized system purposes. As a starting point, the Purpose and Need Statement and four of the eight CRSO EIS objectives pertain to improvements for fish through system operation, maintenance, and configuration actions. Some alternatives favored, for example, hydropower generation while others would maximize certain fish benefits to the detriment of other purposes—*e.g.,* MO3, which the CSS model predicts would create the greatest benefits for anadromous fish, but that would curtail or, in specific portions of the Basin, effectively eliminate other system purposes such as navigation, hydropower generation and irrigation.

Ultimately, the operational and structural measures of the Selected Alternative strike a new equitable balance by expanding on the actions of the No Action Alternative that benefit fish while also accommodating continuation of all authorized system purposes.[125] The combination of new and existing actions that benefit fish in the Preferred Alternative incorporates consideration of the Northwest Power Act's statutory purposes. In particular, the purposes of (1) assuring an adequate, economic, and reliable power supply, when balancing the system's treatment of fish with other authorized purposes, and (2) protecting, mitigating, and enhancing fish and wildlife—''particularly anadromous fish''—including related spawning grounds and habitat, by providing suitable environmental conditions substantially obtainable from management and operation of the CRS and other power generating facilities on the Columbia River and its tributaries.

With respect to wildlife, the existing effects associated with the majority of the CRS projects relate to the reservoirs' inundation of wildlife habitat; that is, the effects are the result of the dams' construction, not their operation, maintenance, or configuration. Bonneville's historic wildlife mitigation for construction and inundation effects have focused on offsetting effects up to the full-pool inundation level, which covers operational impacts that might occur between full-pool and minimum operations.[126] Nevertheless, where appropriate Bonneville will continue to support CRS operations that benefit wildlife, such as operations that may support establishment of wetland vegetation and soil conditions or increase the overall quantity and quality of wetlands in the John Day pool area.[127]

However, for the most part, the Northwest Power Act's equitable treatment provision tends to be more relevant in its application to fish rather than wildlife, particularly in light of the Act's stated emphasis on anadromous fish ''which are dependent on suitable environmental conditions substantially obtainable from the management and operation of [the FCRPS].'' [128] Even for storage projects, where operations can result in greater reservoir fluctuations and effects to wildlife can be more pronounced, the Final CRSO EIS generally found effects were minor, negligible, or not measurable for wildlife and vegetation.[129] Particular to wildlife, operations can lead to shoreline erosion and loss of terrestrial habitat. These effects are difficult to mitigate solely through operations because of the need to provide multipurpose operations for fish flows, power generation, and flood risk management among other purposes. When the nature of wildlife effects is impractical to address through management of operations themselves, wildlife managers have generally favored habitat enhancement actions as appropriate mitigation to address operational effects to wildlife.[130]

The CRS operations, maintenance, and configuration actions reflected in the Preferred Alternative and selected in this ROD, demonstrate the extent to which equitable treatment of fish and wildlife will continue in the co-lead agencies' management and operation of the CRS.

5.5.2 Consideration of Columbia River Basin Fish and Wildlife Program

Under the Northwest Power Act, in their management and operation of the CRS, the co-lead agencies are to take into account, at the relevant stages of their decision-making and to the fullest extent practicable, the Columbia River Basin Fish and Wildlife Program (''Program'') adopted by the Council.[131] An understanding of the statutory foundation, components, and requirements for the Council's Program itself is critical to inform and understand the co-lead agencies' responsibility to take this program into account during their decision-making.

According to the Act, the content of the Council's Program is to consist of ''measures''—*i.e.,* actions that can be taken—''to protect, mitigate, and enhance fish and wildlife affected by development, operation, and management of [hydroelectric] facilities while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply,'' [132] including off-site ''enhancement'' measures as appropriate in certain circumstances,[133] as well as ''objectives for development and operation of such projects . . . in a manner designed to protect, mitigate, and enhance fish and wildlife.'' [134] With respect to anadromous fish, the Council Program's measures are to ''provide for improved survival of such fish at hydroelectric facilities,'' and ''provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of such fish . . . .'' [135] The Council must review its Program at least once every five years, pursuant to specified statutory processes.[136]

In practice, the Council's Program has grown to include a substantial aggregate of content addressing general policy, a regional vision for the Columbia River Basin, fisheries management goals, perspectives and advice on federal agency implementation practices, and other additional components to those prescribed by the statute—that is, the mitigation measures themselves. To the extent that these supplemental Program components are extraneous to content mandated by the Northwest Power Act, such components still prove useful context for the co-lead agencies to consider, but they do not carry the same weight as, for instance, the Program

[124] *See generally* CRSO EIS, Sections 1.9.4–1.9.7.

[125] *See generally id.,* Sections 7.6.1–7.6.3.

[126] *See also* Bonneville Power Admin., Comments on Recommendations to Amend the Council's Fish and Wildlife Program (Feb. 8, 2019), *available at https://app.nwcouncil.org/uploads/2018amend/comments/1221/Bonneville%20Comments%20on%20Recommendations%20to%20Amend%20the%20Council%20Fish%20and%20Wildlife%20Program%202.8.2019.pdf* (regarding scope of Bonneville's wildlife mitigation responsibilities under the Northwest Power Act).

[127] *See* CRSO EIS, Section 7.7.7.4.

[128] 16 U.S.C. 839(6).

[129] *See* CRSO EIS, Section 7.7.7; *see also* CRSO EIS, tbl. 7–55.

[130] *See, e.g.,* Northern Idaho Memorandum of Agreement between Bonneville Power Administration and the State of Idaho for Wildlife Habitat Stewardship and Restoration (2018) (providing in-place/in-kind habitat improvement funding to offset habitat losses from power operations).

[131] 16 U.S.C. 839b(h)(11)(A)(ii).

[132] *Id.* 16 U.S.C. 839b(h)(5).

[133] *See id.,* 16 U.S.C. 839b(h)(8)(A).

[134] *Id.* 16 U.S.C. 839b(h)(2)(B).

[135] *Id.* 16 U.S.C. 839b(h)(6)(E).

[136] *Id.* 16 U.S.C. 839b(d)(1); *see generally id.* 16 U.S.C. 839b(h)(2)–16 U.S.C. 839b(h)(8).

provisions that adhere to the statutory criteria for ''measures.'' Moreover, the Council's inclusion of such additional content as regional vision and implementation provisions does not make the co-lead agencies responsible for adhering to the proffered processes or ensuring the particular outcome of a Council goal, especially when it depends on factors beyond the co-lead agencies' influence such as the effects of hundreds of non-federal dams, not just the 14 CRS projects.[137] Therefore, when taking the Council's Program into account during decision-making, the co-lead agencies look primarily to statutory-based content in the Program—such as actionable measures.

The Council's Program is, in large part, an off-site mitigation (or ''enhancement'') program that primarily recommends continued implementation of fish and wildlife projects such as habitat protection and improvements, artificial production (*i.e.* hatchery production), and research, monitoring, and evaluation. However, Program content directly relevant to the actions under consideration in the CRSO EIS—operation, maintenance, and configuration of the CRS—is limited.

In the various Program iterations since 2003—when it last provided comprehensive guidance on system operations in its ''Mainstem Amendments''—the Council has for the most part amended its Program to follow or endorse the system management actions included in the current NMFS and USFWS biological opinions, Fish Accord agreements, and more recently the *2019–2021 Spill Operation Agreement.*[138] Furthermore, the findings associated with the Council's recent Program amendment process do not indicate any substantive review of the 2003 Mainstem Amendments by the Council, which leaves considerable question as to the extent to which such amendments still apply, given the Council's statutory duty to review the Program at least once every five years and the fact that the Council has supported further changes to operations since the 2003 Mainstem Amendments were adopted. Therefore, few current Program provisions directly address system operations in a way that would provide meaningful additional guidance to consider. The co-lead agencies have nonetheless taken appropriate Council guidance into account. For example, the majority of the Libby and Hungry Horse operations discussed in part two of the Council's 2020 Addendum to its Program were considered in the CRSO EIS alternatives and were either incorporated or modified in the Preferred Alternative.[139]

In addition, another operational matter included in both the CRSO EIS and past Council Program guidance relates to the timing of Lake Roosevelt's refill to a particular elevation level in the fall. Under the Preferred Alternative, the date for the elevation refill target may be shifted to later in the fall than the date initially proposed as guidance in the Council's 2003 Mainstem Amendments. However, in considering this operational measure in the CRSO EIS, the co-lead agencies took into account the fish protection purpose associated with the Council's 2003 guidance (protecting access to kokanee spawning habitat) as well as subsequent mitigation work that was implemented to address the underlying concern.[140] And further, through the Mitigation Action Plan in Attachment 1, the co-lead agencies have agreed to additional mitigation for the potential effects of this operation after evaluation by supplementing spawning habitat at locations along the reservoir and tributaries, if appropriate.

Another topic raised in both the CRSO EIS process and the Council's Program is passage and reintroduction of anadromous fish above Chief Joseph and Grand Coulee dams. The Council's 2020 Program amendments recommended ''Bonneville and others are to continue to make progress on the program's phased approach to evaluating the possibility of reintroducing anadromous fish above Grand Coulee and Chief Joseph dams.'' It further said, ''many others have a role to play—making progress on this effort is not the sole province of the program,'' and therefore not the sole effort of the co-lead agencies, the primary implementers of the program. The co-lead agencies took reintroduction into account during the preparation of the CRSO EIS, but decided not to analyze it in detail for the reasons discussed in Section 2.5.10 of the Final CRSO EIS.

Finally, certain other Council Program provisions relating to general policy, regional vision, or fisheries management goals, rather than actionable statutory measures per se, have nonetheless been taken into account. For example, the Council's Program has continually included a 5 million fish goal and 2–6% SAR objective. This goal and objective apply to the entire Columbia River Basin and all federal and non-federal hydroelectric dams, not simply the FCRPS or the CRS. This goal and objective is also influenced greatly by fisheries management, climate, and ocean conditions, as well as farming, logging, mining, and development practices—all of which are beyond the co-lead agencies' control or sole responsibility to manage. The CRSO EIS nonetheless, examined the alternatives in terms of the likely effect each would have on SARs, and CSS analysis of the Preferred Alternative selected in this ROD estimates the potential for SARs greater than 2% for both Snake River spring Chinook and Snake River steelhead,[141] thus falling within the range recommended by the Council.

As described previously, relevant provisions of Council's Program were taken into account by the co-lead agencies in their consideration of the CRSO EIS alternatives and adoption of the Preferred Alternative. And as discussed in greater detail in Attachment 1, the Mitigation Action Plan included with this ROD likewise reflects Bonneville's consideration of the Council's Program with respect to relevant off-site mitigation aspects of the Program.

5.6 National Environmental Policy Act

In accordance with the National Environmental Policy Act (NEPA) of 1969, the co-lead agencies published a Notice of Intent to prepare an EIS in the **Federal Register** on September 30, 2016 (81 FR 67382), and held 16 public scoping meetings and two webinars. The 45-day public review period for the

[137] *See generally* Letter from S. Armentrout, Bonneville Exec. Vice President Environment, Fish and Wildlife, to R. Devlin, Council Chair, (June 20, 2020); *see also* Letter from S. Armentrout, Bonneville Exec. Vice President Environment, Fish and Wildlife, to J. Anders, Council Chair, at 4–8 (Oct. 19, 2018). Both letters are available at: *https://app.nwcouncil.org/uploads/2018amend/comments/1392/Final%20Council%20Addendum%20Pt%201%20Cover%20Ltr%20and%20Comments%202020.06.22.pdf.* Many of the Program's broad regional goals are also challenging for the co-lead agencies to consider or apply given that the goals are affected by many factors outside of the co-lead agencies' control or responsibility while the Program's mitigation measures are narrowly focused almost exclusively on the FCRPS and mitigation funded or implemented by Bonneville, the Corps and Reclamation.

[138] *See, e.g.,* Council, Findings on Recommendation and Response to Comments for the 2020 Addendum [Part II] to the 2014 Fish and Wildlife Program, at 48–50 (recognizing and incorporating the 2019 NMFS CRS BiOp, 2018 Fish Accord Extensions, and 2019–2021 Spill Operation Agreement); 57 (supporting ongoing estuary restoration work); and 69 (recognizing 2018 Accord Extension agreements) (March 2020).

[139] *See* Northwest Power & Conservation Council, 2020 Addendum, Part II, Columbia River Basin Fish & Wildlife Program, at 7 (Jan. 14, 2020, pre-publication version).

[140] *See also* Categorical Exclusion Determination, Bonneville Power Admin., Dept. of Energy, Grand Coulee Dam/Lake Roosevelt Fall 2019 Operations (Sep. 27, 2019), *available at https://www.bpa.gov/efw/Analysis/CategoricalExclusions/cx/20190927_Grand_Coulee_Lake_Roosevelt_Fall_2019_Operations_CX_FINAL.pdf.*

[141] *See* CRSO EIS, at 7–109, tbl. 7–28.

Draft EIS started February 28, 2020, and ended April 13, 2020. Six virtual public comment meetings and five virtual tribal meetings were held during the public review period. Appendix T of the CRSO EIS includes comments received during this EIS review and corresponding responses to substantive comments. Following the 30-day public review of the final EIS, the signing of this Record of Decision by co-lead agency decision makers, outlining the rationale for their decision, completes the NEPA process for the CRSO EIS.

The Selected Alternative provides flexibility to adjust to changing conditions by relying on adaptive management. However, the agencies may, if in the future they propose a new or altered measure, determine that it is appropriate to prepare a supplemental NEPA analysis or, if a site-specific analysis is needed, a tiered NEPA document. This situation may arise if there are substantial changes in the Selected Alternative that are relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,[142] including, but not limited to, changes in natural conditions or actions outside of the control of the co-lead agencies. In such circumstances, the agencies may continue to rely on the CRSO EIS analysis and only focus on the new action, seeking public input on that action and notification of a final assessment and any changes to the agencies' decision outlined in the Record of Decision. A tiered document may look at multiple alternatives for that site-specific analysis, relying on the broader EIS for the impact analysis. If an action is being considered under a supplemental or tiered NEPA process, the subsequent NEPA analysis is only required to summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and will concentrate on the issues specific to the subsequent action,[143] not reconsider the action in its entirety.

5.7 Fish and Wildlife Coordination Act

Pursuant to the Fish and Wildlife Coordination Act of 1934, as amended, the co-lead agencies received the final Coordination Act Report (CAR) on May 28, 2020. The co-lead agencies considered the findings and recommendations while finalizing the EIS. Eighty-four recommendations are included in the final CAR and, of those, the majority are either part of the Selected Alternative or existing programs. A few recommendations are outside the scope of the action and were not adopted. Two recommendations are being considered as part of monitoring and adaptive management plans. The co-lead agencies' response to the USFWS' recommendations can be found in Appendix U of the CRSO EIS.

5.8 Executive Order 12898, Environmental Justice

In accordance with provisions of Executive Order 12898 Environmental Justice, dated February 11, 1994, the Selected Alternative will not cause disproportionately high and adverse effects on any environmental justice populations.

5.9 Executive Order 13007, Indian Sacred Sites

In compliance with this order, the co-lead agencies contacted 19 tribes to request their assistance in identifying sacred sites within the study area. Kettle Falls and Bear Paw Rock have been identified as sacred sites. The effects to these sacred sites under the Selected Alternative are negligible, as described in Section 7.7.18 of the CRSO EIS.

5.10 Secretarial Order 3175, U.S. Department of the Interior Responsibilities for Indian Trust Assets

In compliance with Secretarial Order 3175, this EIS has analyzed potential effects to Indian Trust Assets in Sections 3.17 and 7.7.19 of the CRSO EIS.

Section 6. Final Agency Findings

6.1 Corps' Decision

As summarized in Section 1.1.1, after reviewing the benefits, environmental effects, and unavoidable adverse impacts of the alternatives, as detailed in the Final EIS and this ROD, and thorough considerations of the views of Tribes, federal, state, and local agencies, and public comments, the Preferred Alternative described in the Final EIS is the Selected Alternative to be implemented for the ongoing operations, maintenance, and configuration of the Columbia River System. All applicable laws, regulations, executive orders, and local government plans were considered in evaluation of alternatives. Further, the Corps has determined, and the NMFS and USFWS Biological Opinions demonstrate, based on the best available commercial and scientific information that the Corps' implementation of the Selected Alternative will not jeopardize listed species or adversely modify or destroy critical habitat. This Record of Decision completes the National Environmental Policy Act process.

Date: September 28, 2020.

D. Peter Helmlinger, P.E.
Brigadier General, U.S. Army Division Commander.

Section 6.2 Reclamation's Decision

After reviewing the Purpose and Need Statement, EIS objectives and effects analysis for the alternatives, as detailed in the Final EIS, biological assessment, 2020 biological opinions, and this ROD, as well as input from the Tribes, federal, state, and local agencies, and public comments, Reclamation selects the Preferred Alternative described in the Final EIS as the Selected Alternative for the ongoing operations, maintenance, and configuration of the Columbia River System. All applicable laws, regulations, executive orders, and local government plans were considered in evaluation of alternatives. This Record of Decision completes the National Environmental Policy Act process.

Date: September 28, 2020.

Lorri J. Gray,
Regional Director, Bureau of Reclamation, Columbia-Pacific Northwest Region.

Section 6.3 Bonneville's Decision

Bonneville decided to implement its part of the Preferred Alternative identified in the Columbia River System Operations Final Environmental Impact Statement (DOE/EIS–0529, July 2020) and analyzed in the 2020 CRS BiOps, including the applicable terms and conditions set forth in these BiOps. This decision, as well as the evaluation of the alternatives is consistent with the authorities granted to it under existing statutes and complies with all applicable environmental laws and regulations and other applicable federal statutory and regulatory requirements. This Record of Decision completes the National Environmental Policy Act process. The Selected Alternative would have negligible to minor effects to floodplains and minor effects to wetlands. This decision continues to support an adequate, efficient, economical and reliable power supply that supports the integrated Columbia River Power system while providing for the conservation of fish and wildlife and protection and preservation of cultural resources affected by System operation. This decision helps protect and preserve Native American treaty and executive order rights and meet trust obligations. This decision also considers and plans for climate change effects on affected

[142] 40 CFR 1502.9(d) (since potential tiering or supplemental NEPA analysis may occur after CEQ updated its NEPA implementing regulations on July 15, 2020, this citation is to the revised NEPA regulations).

[143] 40 CFR 1501.11(b).

resources and on the management of the System. Bonneville, with the Corps and Reclamation, will continue to use the collaborative Regional Forum framework and continue to collaborate with the region in other forums to allow for flexibility and adaptive management of the Columbia River System.

All mitigation measures described in the Draft CRSO EIS and updated in the Final CRSO EIS have been adopted with the signing of this Record of Decision. A complete list of the mitigation measures Bonneville is adopting from the Draft and Final EISs can be found in the Mitigation Action Plan in Attachment 1. Additional mitigation measures are being adopted by the Corps and Reclamation as discussed previously and noted in their decision sections of this Record of Decision. The mitigation measures include additional commitments Bonneville agreed to as part of implementation of the proposed action analyzed in the 2020 CRS BiOps and Incidental Take Statements and the Final CRSO EIS (see Section 7.6 of the Final CRSO EIS; Attachment 1, Mitigation Action Plan).

Consistent with the factors considered in Section 3, Bonneville considered the Purpose and Need Statement, CRSO EIS Objectives, as well as the effects analysis, including direct, indirect and cumulative effects as well as the effects from climate and mitigation. As described below, Bonneville considered the ESA, NEPA and Northwest Power Act in making its decision.

6.3.1 ESA Compliance

Pursuant to Section 7 of the Endangered Species Act of 1973, as amended, Bonneville consulted with the Services on the operation and maintenance of the CRS for a fifteen-year period. The proposed action [144] consulted upon was consistent with the Preferred Alternative analyzed in the Final CRSO EIS.[145] NMFS issued a biological opinion (2020 NMFS CRS BiOp), dated July 24, 2020, and determined that the proposed action is not likely to jeopardize the continued existence of the federally listed species as listed in Section 6.1 of this ROD or destroy or adversely modify designated critical habitat. In addition, NMFS concurred with Bonneville's determination that the proposed action may affect, but is not likely to adversely affect the following federally listed species or their designated or proposed critical habitat: Southern Resident killer whales and the southern Distinct Population Segment of green sturgeon.

USFWS issued a biological opinion (2020 USFWS CRS BiOp), dated July 24, 2020, and determined that the proposed action is not likely to jeopardize the continued existence of the following federally listed species or destroy adversely modify designated critical habitat: Kootenai River white sturgeon and bull trout. In addition, USFWS concurred with the agencies' determination that the recommended plan may affect but is not likely to adversely affect the federally listed species as listed in Section 6.1of this ROD or their designated critical habitat.

As described in further detail above and in Sections 3 and 5 of this ROD, and informed by the analysis in the 2020 Biological Assessment and the determinations in the Services' 2020 CRS BiOps, Bonneville has concluded that implementation of the proposed action and the actions described in the Incidental Take Statements are not likely to jeopardize the continued existence of ESA-listed species or destroy or adversely modify their designated critical habitat. Bonneville's analysis of the proposed action has led to the conclusion that the benefits to ESA-listed species' survival and recovery offset the adverse effects resulting from the proposed action in a manner that will not reduce appreciably the likelihood of survival and recovery or appreciably diminish the value of critical habitat as a whole. Bonneville also concludes that it has the authority and discretion to implement the proposed action and the actions described in the Incidental Take Statements in cooperation with the other co-lead agencies. Given these findings regarding the action proposed by Bonneville, this document records Bonneville's determination to operate and maintain the Columbia River System, in collaboration with the Corps and Reclamation, consistent with the action as described in the 2020 Biological Assessment, the 2020 Clarification Letter, and the Incidental Take Statements, including all terms and conditions and reasonable. This fulfills the regulatory requirements for ESA consultations, which provide that ''[f]ollowing issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its [ESA] Section 7 obligations and [NMFS'] biological opinion.'' [146]

6.3.1.1 Discussion of Actions Pertinent to the 2020 NMFS CRS BiOp

The following actions were proposed by Bonneville and analyzed by NMFS in its 2020 CRS BiOp. Bonneville believes that these actions are key to its finding under Section 7 of the ESA, either because of the associated benefits for ESA-listed salmonids or the lack of adverse effects from actions that benefit hydropower generation.

6.3.1.1.1 Spill Operations for ESA-Listed Salmon and Steelhead Juvenile Fish Passage Spill Operations

As described in more detail in Chapter 7 of the Final CRSO EIS and the 2020 Biological Assessment, the proposed action includes Flexible Spill that incorporates juvenile fish passage spill to levels that are much higher than the operations that have been implemented as part of a discretionary action [147] prior to 2020. Flexible Spill is an operation that will be implemented during the spring juvenile salmonid migration season at the lower Snake River and Columbia River projects. Flexible Spill is variable over a 24-hour period and takes advantage of peak and off-peak load hours for hydropower generation in order to provide flexibility. Flexible Spill is envisioned to incorporate a range of spring spill levels up to a 125% TDG spill cap during designated hours each day, consistent with the concepts tested as part of the *2019–2021 Spill Operations Agreement.*[148]

The implementation of Flexible Spill is intended to increase overall survival of fish passing through the system and returning as adults by providing additional spill during periods of time when spill is expected to be most important. The increased spill is expected to decrease the number of juvenile fish that bypass the dams through non-spillway routes, improve fish travel through the forebays, gain scientific information on latent (delayed) mortality, and provide

[144] For purposes of Bonneville's Rationale for Decision, the term ''proposed action'' is utilized to refer to the Selected Alternative. Proposed action is the appropriate term for an action consulted upon with the Services under Section 7 of the ESA.

[145] The co-lead agencies worked closely with the Services throughout the development of the CRSO EIS as the range of alternatives were developed and analyzed. The proposed action that underwent consultation with the Services was described in the draft and final CRSO EIS (February 2020 and July 2020); the *Biological Assessment of Effects of the Operations and Maintenance of the Federal Columbia River System* (January 2020) (2020 CRS Biological Assessment); *Clarification and Additional Information to the Biological Assessment of Effects of the Operations and Maintenance of the Columbia River System on ESA-listed Species Transmitted to the Services on January 23, 2020* (April 1, 2020) (2020 BA Clarification Letter); and additional discussions throughout the formal consultation process.

[146] *See* 50 CFR 402.15(a).

[147] Prior to 2020, spill levels at or above the 125% TDG only occurred during periods of high runoff that exceeded available turbine capacity.

[148] 2019–2021 Spill Operation Agreement, *Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* No. 3:01–cv–00640–SI (D. Or. Dec. 18, 2018).

flexibility for hydropower generation. Under some conditions, and at some projects, high spill has been demonstrated to impede adult passage. Any potential delay for adult migration caused by high spill or impacts from elevated levels of TDG resulting from high spill are addressed through periods of reduced spill or adaptive management measures. These Flexible Spill spring operations will be implemented April 3–June 20 at the lower Snake River projects, and April 10–June 15 at the lower Columbia projects.[149] When Flexible Spill spring operations cease, the projects will transition to summer spill operations. Summer spill operations have been modified from past operations to include a reduction in spill in mid-August when few juveniles are migrating in the lower Snake and Columbia Rivers to offset CRS impacts to power.[150] Both spring and summer operations are subject to adaptive management.[151]

As described in Section 3.3.3, the CSS and NMFS Lifecycle modeling produced different results. In addition to differences in how latent mortality is addressed, the differences are also a result of a reduction in transportation rates as higher levels of spill resulting in fewer fish accessing the juvenile bypass systems where fish are collected for transportation. NMFS also qualitatively assessed potential improvements in adult abundance if reductions in latent mortality similar to those predicted by the CSS model were realized. Bonneville has included a robust monitoring plan for salmon and steelhead to help narrow the uncertainty between the biological models and help determine how effective increased spill can be in increasing salmon and steelhead returns to the Columbia Basin.[152] Despite the differences in the predictions from these models, Bonneville has determined that the monitoring and resulting data, as well as in-season management flexibility will reduce any risk of adverse consequences of higher levels of spill. Combined, this action is expected to materially benefit juvenile salmonids by increasing life-stage survival, thereby reducing risks to the species' survival and recovery.

6.3.1.1.2 Surface Spill To Reduce Adverse Effects To Overshooting Adult Steelhead

Adult steelhead can sometimes overshoot their natal streams, swimming above additional dams and then volitionally migrating back downstream past the dams to reach their natal streams in the fall, late winter, and early spring. In the CRS, substantial percentages of steelhead from some populations in the Middle Columbia River and Snake River Distinct Population Segments can exhibit this behavior. In order to reduce the adverse effects to overshooting adult Middle Columbia River and Snake River steelhead, in the fall of 2020, the Action Agencies will implement offseason surface spill as a means of providing safe and effective downstream passage for adult steelhead that overshoot and then migrate back downstream through McNary Dam and the lower Snake River dams during months when there is no scheduled spill for juvenile passage. The Action Agencies will implement this measure within the October 1 to November 15 and March 1 to March 30 timeframes, for a minimum of four hours per day, 3 times per week. The Action Agencies will utilize the information associated with these operations to investigate whether to refine the time period of spill based on benefits to steelhead through adaptive management.

6.3.1.1.3 John Day Reservoir Spring Operations for Caspian Tern Nesting Dissuasion

From April 10 to June 1 (or as feasible based on river flows), the John Day reservoir elevation will be held between 264.5 feet and 266.5 feet to deter Caspian terns from nesting in the Blalock Islands Complex. The Action Agencies intend to begin increasing the forebay elevation prior to initiation of nesting by Caspian terns to avoid take of tern eggs; operations may begin earlier than April 10 (when the reservoir is typically operated between 262.0 to 266.5 feet). The operation may be adaptively managed due to changing run timing; however, the intent of the operation is to begin returning to reservoir elevations of 262.5–264.5 feet on June 1, but no later than June 15, which generally captures 95% of the annual juvenile steelhead migration. The results of this action will be monitored and communicated with the Services. During the operation, safety-related restrictions will continue, including but not limited to maintaining ramp rates for minimizing project erosion and maintaining power grid reliability.

6.3.1.1.4 Operation of Turbines Above 1%

Operations of turbines within the ±1% peak efficiency of the turbine range is generally considered to be beneficial for juvenile fish passage. Based on an analysis of historic system operations, conditions that necessitate or call for consideration of operations above 1% from peak efficiency are relatively rare and are typically short in duration[153] and therefore the limited expansion of operations in the proposed action is not expected to affect ESA-listed species in a way that will appreciably reduce the likelihood of survival and recovery. The agencies will operate turbines as specified below during juvenile fish passage season in order to provide increased power generation flexibility and reliability or to assist with TDG management.

(a) Contingency Reserves—Bonneville deploys contingency reserves to meet energy demands caused by unexpected events such as transmission interruption or failure of a generator. These events are unpredictable in timing, magnitude, and location of the necessary deployment of contingency reserves, but occur approximately once per month and average 35 minutes. Bonneville will strive to cover contingencies without temporarily operating above 1% from peak efficiency and the use of contingency reserves is limited to no more than 90 minutes under reliability regulations;

(b) Balancing reserves—Bonneville is responsible for transmission system reliability, which requires the use of balancing reserves to respond to power demand and supply fluctuations (including the integration of renewable power sources). Operations will be set within ±1% of peak efficiency, but may exceed the upper end of this range for short durations of time; and,

(c) TDG management—during periods of high spring run-off, TDG levels can exceed 125% saturation. The Action Agencies may operate above 1% from peak efficiency to mitigate TDG production when flexible spill targets are met, all available turbines are operating, and additional power demand and market exists.

Operations above 1% from peak efficiency are likely to improve attraction to the adult fish ladders and have beneficial impacts on water quality by reducing TDG exposure for juveniles and adults migrating through the tailrace. NMFS did find that increasing

[149] *See* 2020 NMFS CRS BiOp Table 1.3–1 for initial spring spill levels.

[150] *See* 2020 NMFS CRS BiOp Table 1.3–2 for initial summer spill levels.

[151] *See* CRSO EIS, Appendix R, Part 2 *Process for Adaptive Implementation of the Flexible Spill Operational Component of the Columbia River System Operations Environmental Impact Statement.*

[152] *See id.*

[153] *See* 2020 BA Clarification Letter.

powerhouse flows can have the effect of increasing juveniles that pass downstream through turbines or the bypass systems and adults may fall back over the dam.[154] The Action Agencies will monitor the magnitude and frequency of this operation; if the expected frequencies and magnitudes of this operation are exceeded, the Action Agencies will notify NMFS.[155]

6.3.1.1.5 Zero Generation

Generating hydropower to meet demand in the winter in the Pacific Northwest can be a challenge when demand can increase dramatically and there is little additional electricity available due to adjustments in power generation in order to integrate variable renewable resources. Therefore, Bonneville has and will continue to use the capacity of the CRS to support the flexibility necessary for this integration and has proposed an expansion of that capacity under limited circumstances. Between October 15 and February 28, power generation may cease at the four lower Snake River projects and water may be stored during nighttime hours (2300 to 0500) when adult fish are typically not passing. This operation will end no later than 2 hours before dawn to facilitate adult upstream passage, which generally resumes as the sun rises. Between December 15 and February 28, a period of time when water temperatures are low and very few adult fish are still migrating in the river, daytime hours will no longer be excluded from this operation, and up to 3 hours of daytime cessation may occur. NMFS found that Passive Integrated Transponder (PIT)-tag data indicated that some adult Middle Columbia River steelhead will migrate through and overwinter in the lower Snake River during this operation (as will bull trout), but past zero generation operations have not produced observably negative impacts for Middle Columbia River steelhead.[156] It is expected that this operation will not appreciably reduce the likelihood of survival and recovery for these fish.

6.3.1.1.2 Non-Operational Conservation Measures for ESA-Listed Salmonids

The conclusion that the proposed action is not likely to jeopardize the continued existence of ESA-listed species or destroy or adversely modify designated critical habitat is further supported by the inclusion of non-operational conservation measures to assist in addressing any residual adverse effects of operation and maintenance of the CRS and uncertainties related to the impacts of climate change. These measures are further discussed.

6.3.1.1.2.1 Structural Modifications

The Action Agencies have constructed and operated many structural modifications to the dams and to fish passage facilities associated with the dams over the past couple of decades that have had marked improvements in fish survival including juvenile bypass systems, improved turbine technology, spillway weirs, and modifications to ice and trash sluiceways and other surface routes. The Action Agencies are continuing to construct structural modifications that will benefit ESA-listed fish.

(1) Improved Fish Passage Turbines

The first of these structural modifications is an ongoing effort to improve fish passage through the turbines by designing and constructing turbines (Improved Fish Passage or IFP Turbines) that will then be installed and tested for optimal configuration and to assess impacts to fish passage. The proposed action includes the completion of the efforts to design and install IFP turbines at Ice Harbor, McNary and John Day dams. Installation of the IFP turbines has the potential to improve fish passage conditions, improve hydropower efficiency and capacity, minimize greenhouse gas emissions, and indirectly improve water quality by reducing TDG. The proposed action also includes biological testing of the IFP turbines to determine whether the operation of the IFP turbines without fish screens would show a neutral or beneficial effect on ESA-listed fish survival metrics at each dam. The agencies will collaborate with the Services to develop a Turbine Intake Bypass Screen Management and Future Strategy process to monitor success of the IFP turbines and determine if and when it would be best to remove fish screens at these projects.

(2) Adult Fish Ladder Differentials

At Lower Granite and Little Goose dams, warm river surface temperatures in the forebay during late summer can create a temperature difference between the adult ladder exit and the entrance that can contribute to delays in adult passage. The Action Agencies have modified the juvenile bypass system to route excess water to the adult trap for cooling and installed intake chimneys that draw cooler water from deep in the forebay that is then released or sprayed in the fish ladder. These improvements were completed and installed during the winter of 2015–2016 and successfully tested to show that they effectively reduced near-surface water temperatures near the ladder exit.[157] The Action Agencies will continue operating these structures, while also monitoring and reporting all mainstem fish ladder temperatures, and identify ladders that have substantial temperature differentials (>1.0 °C). At fish ladders at mainstem lower Snake and Columbia River dams that are shown to have substantial temperature differentials, the Action Agencies will develop and implement operational or structural solutions to address these issues where beneficial and feasible.

6.3.1.1.2.2 Additional Improvements to Fish Migration and Survival

The proposed action includes several other measures that will provide additional improvements to fish migration and survival. The Action Agencies will complete follow-on modifications to a new adult separator integrated into the Lower Granite Dam Juvenile Bypass System to reduce delay, injury, and stress to salmon and steelhead, bull trout, and non-target species. The Action Agencies will also design and implement structural modifications to the Lower Granite Dam adult fish trap gate to reduce delay and stress for adult salmonids and non-target species such as Pacific Lamprey. The Action Agencies will also design and implement cost-effective solutions designed to minimize and reduce ESA-listed salmonid injury and mortality associated with debris accumulation at lower Snake River dams and McNary Dam.

6.3.1.1.2.3 Tributary and Estuary Habitat Actions

For over a decade, the agencies have implemented hundreds of projects to improve the quantity and quality of salmon habitat in the estuary[158] and tributaries[159] as non-operational conservation measures to address the residual adverse effects of operation and maintenance of the CRS and the uncertainties of the effects of climate change on migrating salmon and steelhead. These actions typically address impacts to fish not caused by the Columbia River System, but are things the agencies can do to improve the overall conditions for fish to help

[154] 2020 NMFS CRS BiOp, Section 2.2.5.2, at 292.

[155] *Id.,* Section 2.17, at 1398.

[156] *Id.,* Section 2.8.3.1.4, at 944.

[157] 2020 CRS Biological Assessment at E–57 (citing Anchor QEA. 2017. Lower Granite Adult Passage and Post-passage Evaluation Final Adult Passage and Post-passage Behavior Report. Prepared for Army Corps of Engineers. Project 161163–0201).

[158] *See* 2020 CRS Biological Assessment at 2–104.

[159] *See* 2020 BA Clarification Letter.

address uncertainty related to any residual adverse effects of the CRS on ESA-listed salmon and steelhead. Best available science indicates that these tributary spawning and rearing habitat improvements will result in benefits to distribution, abundance, and survival of these fish. The tributary habitat improvements implemented by Bonneville under previous CRS BiOps, as well as habitat improvement actions implemented by other federal agencies, form part of the environmental baseline. These completed actions will provide ongoing benefits into the future, which are expected to increase over time as natural processes are improved and fully realized.

Bonneville proposes to implement targeted tributary and estuary improvements during the term of this BiOp to provide meaningful biological benefits for ESA-listed species. Bonneville and Reclamation will implement tributary habitat actions in collaboration with local experts utilizing the best scientific and commercial data available to develop strategies, priorities, and specific actions. Bonneville, the Corps and NMFS will also continue to coordinate and implement the Columbia Estuary Ecosystem Restoration Program (CEERP). With an institutionalized adaptive management framework, CEERP will continue to provide forums to revisit the habitat improvement actions and pair them with action-effectiveness monitoring results. The agencies will continue to implement habitat actions that were identified by NMFS as priority actions [160] for restoring salmon habitat and for their ability to ameliorate climate change effects. Barrier removals, floodplain reconnection, incised channel restoration and improving stream flow regimes are the types of activities most effective at addressing increased temperatures, reduced base flow, increased peak flow and increasing salmon resilience. Through these efforts, the agencies will strategically evaluate the effectiveness of habitat improvement actions and inform any necessary adjustments to the current habitat improvement and monitoring strategies. The agencies have sufficient systems to track and assure progress on habitat improvement projects, which are designed to take future climate change effects into account.

[160] Beechie, T., Imaki, H., Greene, J., Wade, A., Wu, H., Pess, G., Roni, P., Kimball, J., Stanford, J., Kiffney, P., Mantua, N. 2012. Restoring salmon habitat for a changing climate. River Research and Applications 29: 939–960.

6.3.1.1.2.4 Conservation and Safety-Net Hatcheries

To support ESA-listed salmon and steelhead species affected by CRS operations and maintenance, the Action Agencies will continue to fund the operations and maintenance of safety-net and conservation hatchery programs that preserve and rebuild the genetic resources of ESA-listed salmon and steelhead in the Columbia and Snake River Basins. These programs are helping to rebuild and enhance the naturally reproducing ESA-listed fish in their native habitats using locally adapted broodstocks, while maintaining genetic and ecologic integrity, and supporting harvest where and when consistent with conservation objectives. Safety-net programs are focused on preventing extinction and preserving the unique genetics of a population using captive broodstocks to increase the abundance of the species at risk. These programs have undergone separate, program-specific ESA consultations with NMFS, which have identified operations, best practices and associated monitoring to meet both production goals as well as reduce detrimental genetic and ecological effects on ESA-listed species. The programs will be operated in accordance with those BiOps. RM&E relevant to each hatchery program has been incorporated into the relevant hatchery program BiOp(s).[161] As discussed in Section 3.3.4, these programs were an important consideration for the conclusion that the proposed action is not likely to adversely affect SRKW.

6.3.1.1.2.5 Predation Management

The proposed action includes a suite of predation measures to reduce the impacts from avian, pinniped, and piscivorous predators. Maintaining avian wires in the tailrace of lower Columbia and Snake River dams, active hazing of gulls at the dams, and the pattern of operating the spillway gates all mitigate for predation at the dams by birds and fish. The *Predator Disruption Operations* measure at the John Day Reservoir will mitigate Caspian Tern predation on juvenile salmon and steelhead in the lower Columbia River. Management efforts are ongoing to reduce salmonid consumption by terns in the lower Columbia River, and similar efforts are in progress to reduce the nesting population of Double-crested cormorants in the estuary. The Action Agencies currently implement a Northern Pikeminnow Management Program which includes an ongoing base program and general increase in northern pikeminnow sport-reward fishery reward structure to reduce predation by these fish. The Action Agencies also will continue to implement measures to reduce pinniped predation in the tailraces of Bonneville and The Dalles dams. The agencies expect that these actions will reduce or maintain the levels of predation within the juvenile and adult migration corridors that were achieved in recent years.

[161] The Action Agencies note the continued existence of their respective independent congressionally authorized hatchery mitigation responsibilities, including, but not limited to, Grand Coulee Dam mitigation, John Day Dam mitigation, and programs funded and administered by other entities, such as the Lower Snake River Compensation Plan, which is administered by USFWS. Similar to the conservation and safety-net programs, and where appropriate, the Action Agencies will conduct or have conducted separate consultations addressing effects to ESA-listed species from CRS operations and maintenance, as well as associated monitoring and evaluation (including tagging) for these programs.

6.3.1.1.2.6 Fish Status Monitoring Actions

The Action Agencies propose to continue monitoring and evaluation activities in coordination with other regional monitoring efforts that collectively track survival of ESA-listed species affected by the continued operation and maintenance of the CRS, including select PIT-tag marking, natural abundance monitoring, and selected fish status and trend monitoring in the Columbia and Snake River basins. The monitoring and evaluation efforts of the Action Agencies' tributary and estuary habitat programs have standardized and hierarchically organized the intensity of monitoring across sites. Collectively, these actions ensure a statistically sound sampling plan to inform adaptive management at the site and landscape levels.

These non-operational conservation measures, along with the continued operation and maintenance of the CRS, provide the basis for Bonneville to conclude that the action as described in the 2020 Biological Assessment and the Incidental Take Statement in the 2020 NMFS CRS BiOp is not likely to jeopardize the continued existence of ESA-listed species and is not likely to destroy or adversely modify designated critical habitat.

6.3.1.2 Discussion of Actions Pertinent to the 2020 USFWS CRS BiOp

The following actions were proposed by Bonneville and analyzed by USFWS in its 2020 CRS BiOp. Bonneville believes that these actions are key to its finding under Section 7 of the ESA. These actions offset the adverse effects

of the proposed action such that the effects of the action as a whole will not appreciably reduce the likelihood of survival and recovery for KRWS or bull trout.

6.3.1.2.1 Actions for Kootenai River White Sturgeon

6.3.1.2.1.1 Operational Measures for Kootenai River White Sturgeon

The Action Agencies have proposed a suite of actions that have been designed to benefit KRWS and its designated critical habitat. As described in the proposed action, the Action Agencies will manage river flow and water temperature from Libby Dam in a manner that is likely to create improved river depth and water velocities in areas important for sturgeon migration, spawning and rearing, as well as to provide stable water temperatures during sturgeon migration and spawning periods. The sturgeon flow operation is a combination of three approaches: (1) Releases from Libby Dam during the Kootenai sturgeon spawning season and in coordination with the Flow Plan Implementation Protocol (FPIP) process; (2) use of the selective withdrawal facilities to achieve appropriate downstream river temperatures; and (3) a tiered volume approach that varies the volume of water available for sturgeon conservation each year depending on the May 1 forecast of total volume into Koocanusa Reservoir expected during the April through August period. Based on this approach, there is no flow augmentation during low water years. These measures are specifically designed to improve the co-occurrence of the Primary Constituent Elements of designated critical habitat for KRWS during critical periods of sturgeon breeding (appropriate water depths, water temperature, flow velocities, rocky substrate, and inter-gravel spaces).

In addition, Libby Dam will be operated consistent with variable discharge (VARQ) and flood risk management (FRM) procedures, which provide greater assurance that Koocanusa Reservoir will refill in medium runoff years. The proposed action modifies the VARQ FRM procedure to incorporate local conditions in the draft rate and account for planned releases during refill, such as the Sturgeon Volume, in order to respond to local FRM conditions and increase the chances of refill.

6.3.1.2.1.2 Non-Operational Conservation Measures for Kootenai River White Sturgeon

(1) Conservation Aquaculture

The proposed action includes continued implementation of the conservation aquaculture program for KRWS. Over 300,000 hatchery-origin KRWS have been released into the Kootenai basin since 1990. Monitoring data indicate that these hatchery-origin sturgeon are surviving at high rates. The program has successfully captured between 70 and 80 percent of the genetic diversity in the wild population, which has and will continue to help reduce effects to KRWS from CRS operations.

(2) Habitat Restoration Actions

The proposed action includes implementation of a habitat restoration program, which is likely to increase spawning sturgeon access to river reaches that have sufficient amounts of rocky substrate, and is likely to address other habitat-related threats to Kootenai sturgeon. From 2011 to 2019, 12 habitat restoration projects have been successfully implemented in the Braided, Straight, and Meander reaches of the Kootenai River. Under the proposed action, the Action Agencies have committed to funding and implementing a minimum of one major habitat restoration project per year through at least 2025 (after 2025 additional projects may continue to be implemented, pending the results of an assessment of implemented restoration projects). Together, these projects have produced, and are expected to continue to produce, increased river depth and complexity, reduced bank erosion, increased available sturgeon spawning and rearing habitat, and enhanced fundamental ecosystem processes, which have and will continue to reduce effects to KRWS from CRS operations.

(3) Nutrient Enhancement

The proposed action includes nutrient additions in the Kootenai River and Kootenay Lake. Monitoring of these projects has shown increased beneficial algal production, increased abundance, biomass and diversity of invertebrate food items for fish, and improved overall biological productivity in the Kootenai River, which has and will continue to reduce effects to Kootenai sturgeon from CRS operations.

6.3.1.2.2 Actions for Bull Trout

6.3.1.2.2.1 Operational Measures for Bull Trout

The Action Agencies have proposed a suite of actions that have been designed to benefit bull trout and its designated critical habitat. As described in the proposed action, Hungry Horse Dam is operated to meet minimum flows all year both below the dam on the South Fork Flathead River and at Columbia Falls, Montana on the mainstem Flathead River to benefit bull trout when not operating for FRM or releasing water for flow augmentation to benefit anadromous fish. Ramping rate limits were established below Hungry Horse Dam to reduce the likelihood of fish becoming stranded. Libby Dam is operated to provide minimum flows for bull trout and KRWS, including in September for bull trout habitat inundation. This action provides benefits that maintain water levels suitable for foraging and migrating throughout the Kootenai River. Libby's reservoir summer elevation is kept above 2,450 feet to improve primary production and zooplankton production. Providing surface spill to reduce adverse effects to overshooting adult steelhead at McNary and the lower Snake River dams is also expected to benefit bull trout during migration past the dams.

6.3.1.2.2.2 Non-Operational Conservation Measures for Bull Trout

The Action Agencies' proposed action includes three non-operational conservation measures: tributary restoration actions, particularly on the Kootenai River, funding of the operations and maintenance of conservation and safety-net hatcheries, and monitoring of impacts to bull trout that are expected to minimize the long-term impact to survival and recovery of all affected Core Areas of bull trout during the timeframe of this consultation. In addition, the nutrient additions proposed for the Kootenai River will benefit bull trout at this location. Further, once construction of upstream passage occurs at Albeni Falls Dam, substantial benefits to bull trout in this Core Area are anticipated to occur, and have been included in this analysis as part of the environmental baseline as it is subject to a separate planning and environmental compliance process. Many of the proposed structural improvements discussed above in the discussion of the 2020 NMFS CRS BiOp for salmon and steelhead are expected to benefit bull trout, including the new IFP turbines at Ice Harbor, McNary, and John Day dams.

(1) Restoration Actions for Bull Trout

Proposed habitat restoration projects will benefit bull trout both in tributaries and in mainstem river habitats. The proposed action includes an evaluation

of delta formations at the mouths (confluences) of important bull trout spawning tributaries of the Kootenai River downstream of Libby Dam that may be causing upstream fish passage barriers to bull trout seeking spawning grounds in tributaries during summer months. In 2021, the Action Agencies will contribute funding for an initial assessment of blocked passage to bull trout key spawning tributaries identified by the USFWS. The assessment may cover a range of water year types but must include a dry water year to adequately understand the problem. Upon completion of the initial assessment, the Action Agencies, in collaboration with local stakeholders and USFWS, will develop an action plan and prioritization process for tributaries identified as having blocked passage. The Action Agencies will work with the USFWS and stakeholders to identify and initiate a process to address two restoration or improvement projects (or a combination of both) benefitting upstream passage over the period from 2021 to 2026. Any additional improvement opportunities to benefit bull trout passage in Kootenai River tributaries will be evaluated based on biological priorities and available funding.

Additionally, habitat enhancement actions on and adjacent to the Kootenai River may improve juvenile to adult survival of kokanee salmon that are an important prey species for both KRWS and bull trout. Further, the Action Agencies will work with USFWS to leverage benefits for bull trout where feasible when developing tributary habitat projects for ESA-listed salmon and steelhead.

(2) Monitoring for Bull Trout in the Lower Columbia and Lower Snake River

The Action Agencies will continue to monitor for bull trout at the lower Columbia and lower Snake River dams. The primary means of monitoring bull trout will be through the Corps' adult fish counts program, PIT detection arrays in fish ladders and juvenile bypass systems, and through the Smolt Monitoring Program (SMP). Monitoring objectives will be refined as priorities evolve and the state of knowledge advances. The Action Agencies will continue to emphasize monitoring that informs management needs.

In consideration of this suite of proposed actions for KRWS and bull trout, Bonneville concludes that the action as described in the 2020 Biological Assessment and the Incidental Take Statement in the 2020 USFWS CRS BiOp is not likely to jeopardize the continued existence of ESA-listed species and is not likely to destroy or adversely modify designated critical habitat.

6.3.1.3 Climate Change Analysis

In the 2020 NMFS CRS BiOp, NMFS found that climate change poses a substantial threat to anadromous fish species over the next twenty years. While climate change will affect anadromous fish in all stages of life, the impacts are largely driven by changes in ocean conditions that are projected to reduce survival during the marine life history stage. NMFS concluded that ''these conditions are not caused by, nor will they be exacerbated by, the continued operation and maintenance of the CRS as proposed in the biological assessment.'' USFWS concluded in the 2020 USFWS CRS BiOp that the proposed action, in combination with other Federal and non-Federal actions, is likely to exacerbate the effects of climate change on resident fish, but recognized the contributions that adaptive management and habitat improvement actions will have in supporting habitat and flexibility to respond to climate change.[162] Despite these impacts, Bonneville has concluded that the proposed action, particularly operational measures and non-operational conservation measures, is expected to offset adverse effects that may impact the survival and recovery of ESA-listed species such that the action will not appreciably reduce the likelihood of survival and recovery and will positively contribute to the overall resiliency of the ESA-listed species in light of climate change. The measure to use local water supply conditions in order to implement sliding scale operations for summer flow augmentation are staged to better balance anadromous and resident fish needs. The agencies have committed to continuing the tributary and estuary habitat improvement program for salmon and steelhead (with considerations for benefits to bull trout, where appropriate) and to evaluate and improve tributary habitat access for bull trout which will give spawning fish access to additional habitat. The continued use of cool water stored behind Dworshak Dam and structures to address ladder temperature differentials help to reduce water temperatures as fish approach and pass Lower Granite and Little Goose dams.

[162] *See* 2020 USFWS CRS BiOp at 34 and 37.

6.3.1.4 Adaptive Management and RM&E

6.3.1.4.1 Regional Forum and Kootenai River Regional Coordination

The agencies will continue to utilize adaptive management principles in implementing the proposed action based on results of biological studies and monitoring information.[163] These results will be discussed, and operations modified in collaboration with federal, state and tribal sovereigns through the Regional Forum, to ensure expected benefits to salmon and steelhead are being met based on the best available scientific information. The Kootenai River Regional Coordination workgroups will continue to be utilized to provide recommendations regarding operations and address technical issues related to KRWS.

6.3.1.4.2 RM&E

Biological performance for system operations will be tracked through ongoing juvenile and adult fish monitoring at the lower Columbia and lower Snake River dams. Annual and in-season monitoring results are used to inform in-season operations decisions and through the Regional Forum, identify potential research or evaluation needs, and inform longer-term management decisions regarding system operations. Bonneville will assess a number of the proposed operations and structural modifications through action-effectiveness evaluations, including the deployment of IFP turbines, spill for steelhead overshoots, and Flexible Spill. The agencies will implement planning and progress reporting to the Services to inform and signal appropriate adaptations to changing circumstances.

6.3.2 NEPA Compliance

Bonneville will use the CRSO EIS for operational changes associated with CRS power marketing activities. These operations will be coordinated with other operational, maintenance or configuration actions for flood risk management, irrigation, fish and wildlife conservation, water quality, navigation and other congressionally authorized purposes. For mitigation actions, Bonneville will use a combination of existing programmatic NEPA documents as well as site-specific NEPA documents to implement certain mitigation measures described in Section 7.6 of the Final CRSO EIS and the Mitigation Action Plan. Since these actions mitigate for impacts from the CRS projects, these actions will be

[163] 2020 CRS Biological Assessment at 2–1 to 2–6.

conducted as part of Bonneville's Northwest Power Act commitments.

Generally, if new or existing projects change the status quo or directly impact the human environment in a manner not considered in an existing NEPA document, commensurate NEPA analysis will be conducted. More specifically, Bonneville could either supplement or develop new NEPA documents consistent with 40 CFR 1502.9 and 10 CFR 1021.314. Moreover, consistent with its existing practice for new projects, Bonneville will determine the appropriate level of NEPA compliance once projects are proposed for implementation and integrate compliance with other applicable environmental laws, including but not limited to the Northwest Power Act, ESA and the National Historic Preservation Act.

For habitat restoration actions in tributaries in the Columbia River Basin, Bonneville will continue to conduct site-specific NEPA compliance for these actions (*e.g.,* Bird Track Springs Fish Habitat Enhancement Project (DOE/EA–2032)). Bonneville also plans to use programmatic NEPA documents analyzing habitat restoration actions, including the Aquatic Restoration Activities in and near Umatilla National Forest Environmental Assessment (DOE/EA–2119) and the Columbia River Basin Tributary Habitat Restoration Environmental Assessment (DOE/EA–2126), pending completion of that NEPA process, where appropriate.

For habitat restoration actions in the estuary, Bonneville will continue to determine whether the project fits under the Columbia Estuary Ecosystem Restoration Program Environmental Assessment (DOE/EA–2006) or if site-specific NEPA compliance is needed.

For hatchery projects, Bonneville will continue to rely on existing hatchery NEPA documents, where appropriate (*e.g.,* Springfield Sockeye Hatchery Project (DOE/EA–1913); Kootenai River White Sturgeon and Burbot Hatcheries Project (DOE/EA–1901)), and will continue to conduct site-specific NEPA compliance for changes to existing hatchery programs.

Finally, for research, monitoring and evaluation actions, Bonneville will either integrate these actions into applicable NEPA documents for other actions (*e.g.,* with habitat or hatchery actions), as appropriate, or conduct site-specific NEPA actions if the projects are not tied to other actions.

Thus, by completing the CRSO EIS, the agencies are ensuring the Preferred Alternative analysis and associated ESA consultations take into account updated information and analysis on operational, structural and mitigation measures. Additionally, using the flexibility afforded by NEPA, Bonneville will use existing NEPA documents, where appropriate or complete new or supplemental environmental evaluation, if necessary.

TABLE 2—MITIGATION MEASURES AND EXISTING OR PLANNED NEPA COMPLIANCE

Mitigation measure	Existing or planned NEPA compliance
Implement tributary habitat improvements for both Chinook salmon and steelhead as well as other species through implementation of specified construction projects, research, monitoring and evaluation actions, and species status and trend data collection on habitat and survival improvement.	Site-specific or other programmatic NEPA compliance or Columbia River Basin Tributary Habitat Restoration Environmental Assessment (DOE/EA–2126), pending completion of that NEPA process.
Implement Kootenai white sturgeon habitat restoration as included in the CRS Biological Assessment.	Site-specific NEPA compliance, other programmatic NEPA documents or Columbia River Basin Tributary Habitat Restoration Environmental Assessment (DOE/EA–2126), pending completion of that NEPA process.
Implement estuary habitat improvements through implementation of specified construction projects; research, monitoring and evaluation actions; and species status and trend data collection on habitat and survival improvement.	Site-specific NEPA compliance or Columbia Estuary Ecosystem Restoration Program Environmental Assessment (DOE/EA–2006), if needed.
Continue support of the Kootenai River white sturgeon nutrient enhancement through FY 2025.	Kootenai River Ecosystem Environmental Assessment (DOE/EA–1518) and Supplement Analysis or site-specific NEPA Compliance, if necessary.
Continue to fund operations and maintenance of ongoing safety-net and conservation hatchery programs to provide benefits to ESA-listed stocks at high risk of extinction.	Site-specific NEPA Compliance.
Continue Northern Pikeminnow Management Program	Northern Pike Suppression Project Categorical Exclusion.
Ongoing monitoring of East Sand Island Caspian tern and Double-crested cormorant colonies during nesting season through 2021 breeding season.	Site-specific NEPA Compliance.
Sea Lion Non-Lethal Hazing and Monitoring	Site-specific NEPA Compliance.
Bull trout access to perched tributaries in Kootenai River: Contribute funding for an initial assessment of blocked passage to bull trout key spawning tributaries identified by the USFWS. Initiate two restoration or improvement projects benefitting upstream passage opportunities over the period of 2021–2026.	Site-specific NEPA compliance or Columbia River Basin Tributary Habitat Restoration Environmental Assessment (DOE/EA–2126), pending completion of that NEPA process.
Supplement spawning habitat at Lake Roosevelt at locations along the reservoir and tributaries (up to 100 acres).	Site-specific NEPA compliance or Columbia River Basin Tributary Habitat Restoration Environmental Assessment (DOE/EA–2126), pending completion of that NEPA process.
Plant cottonwood trees (up to 100 acres) near Bonners Ferry to improve habitat and floodplain connectivity.	Site-specific NEPA compliance or Columbia River Basin Tributary Habitat Restoration Environmental Assessment (DOE/EA–2126), pending completion of that NEPA process.
Plant native wetland and riparian vegetation (up to 100 acres) on the Kootenai River downstream of Libby.	Site-specific NEPA compliance or Columbia River Basin Tributary Habitat Restoration Environmental Assessment (DOE/EA–2126), pending completion of that NEPA process.

6.3.3 Bonneville's Duty Under the Northwest Power Act To Protect, Mitigate, and Enhance Fish and Wildlife

Apart from the co-lead agencies' shared Northwest Power Act duties discussed above, Bonneville's Administrator has a separate responsibility to use the Bonneville fund to ''protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation'' of the Federal Columbia River Power System, including the CRS.[164] Bonneville must fulfill this mandate ''in a manner consistent with'' the purposes of the Northwest Power Act and the Council's Power Plan and Columbia River Basin Fish and Wildlife Program.[165] The Ninth Circuit Court of Appeals has original jurisdiction over suits to challenge final actions and decisions taken pursuant to the Northwest Power Act by the Bonneville Administrator, or the implementation of such final actions.[166]

In the context of the CRSO EIS, this responsibility applies to Bonneville's ongoing programs described in Chapters 2, 5 and 7 as well as the additional mitigation measures Bonneville is adopting in the Mitigation Action Plan. One of the ongoing programs described in Chapters 2, 5, and 7 is Bonneville's existing Fish and Wildlife Program. Mitigation actions and projects funded through Bonneville's Fish and Wildlife Program are the means by which Bonneville addresses its responsibility to ''protect, mitigate, and enhance'' fish and wildlife under 16 U.S.C. 839b(h)(10)(A).[167] Continuation of the actions and projects under Bonneville's existing Fish and Wildlife Program is consistent with the Council's Program because the existing Bonneville actions and projects have been subject to past Council review and have either been recommended for funding and implementation by the Council or have been incorporated into the Council's Program. Further, the Independent Scientific Review Panel periodically reviews the mitigation projects under certain statutory criteria—such as benefits to fish and wildlife.[168]

To the extent that the Mitigation Action Plan includes any new or expanded actions, those will likely be incorporated into existing fish and wildlife mitigation projects that are already funded consistent with the Council's Program, and can be designed for implementation in such a way that is consistent with appropriate Program measures or guidance. In addition, Bonneville's funding of these mitigation actions through its Fish and Wildlife Program projects will follow other applicable provisions of the Northwest Power Act, such as the in-lieu funding prohibition[169] and the congressional authorization requirement for construction of capital facilities.[170]

6.3.4 Summary

The Selected Alternative and associated ESA consultations take into account updated information and analysis on operational and non-operational conservation and mitigation measures. This alternative also provides for the conservation of fish and wildlife resources, including threatened, endangered, and sensitive species throughout the environment affected by CRS operations consistent with the NEPA, ESA and Northwest Power Act analysis. Thus, Bonneville is acting within its existing authorities and complying with applicable environmental laws and regulations and all other applicable federal statutory and regulatory requirements in making this decision.

Signing Authority

This document of the Department of Energy was signed on September 28, 2020, by John L. Hairston, Acting Administrator and Chief Executive Officer, Bonneville Power Administration, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on October 2, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

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[164] 16 U.S.C. 839b(h)(10)(A).

[165] *Id.*

[166] *Id.* 16 U.S.C. 839f(e)(5).

[167] Bonneville's use of its Northwest Power Act authority and Fish and Wildlife Program as the tools for implementing actions from the Mitigation Action Plan should not be conflated with Bonneville's overall compliance with its Northwest Power Act mitigation responsibility under 16 U.S.C. 839b(h)(10)(A), which is fulfilled through a broader set of mitigation actions in addition to those described in the Mitigation Action Plan in this ROD.

[168] 16 U.S.C. 839b(h)(10)(D)(iv).

[169] *Id.* 16 U.S.C. 839b(h)(10)(A).

[170] *Id.* 16 U.S.C. 839b(h)(10)(B).

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Part VII

Department of Labor

Employment and Training Administration

20 CFR Parts 655 and 656

Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States; Interim Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

[DOL Docket No. ETA–2020–0006]

RIN 1205–AC00

Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of Labor (DOL or the Department) is amending Employment and Training Administration (ETA) regulations governing the prevailing wages for employment opportunities that United States (U.S.) employers seek to fill with foreign workers on a permanent or temporary basis through certain employment-based immigrant visas or through H–1B, H–1B1, or E–3 nonimmigrant visas. Specifically, DOL is amending its regulations governing permanent labor certifications and Labor Condition Applications (LCAs) to incorporate changes to the computation of wage levels under the Department's four-tiered wage structure based on the Occupational Employment Statistics (OES) wage survey administered by the Bureau of Labor Statistics (BLS). The primary purpose of these changes is to update the computation of prevailing wage levels under the existing four-tier wage structure to better reflect the actual wages earned by U.S. workers similarly employed to foreign workers. This update will allow DOL to more effectively ensure that the employment of immigrant and nonimmigrant workers admitted or otherwise provided status through the above-referenced programs does not adversely affect the wages and job opportunities of U.S. workers.

DATES: This interim final rule is effective on October 8, 2020. Written comments and related material must be received on or before November 9, 2020.

ADDRESSES: You must submit comments, identified as DOL Docket No. ETA–2020–0006, via *https://beta.regulations.gov*, a Federal E-Government website that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type ''1205–AC00'' (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

Docket: For access to the docket and to read background documents or comments received, go to the Federal e-Rulemaking Portal at *https://beta.regulations.gov*, referencing DOL Docket No. ETA–2020–0006. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR parts 655 and 656, contact Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, Box #12–200, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 513–7350 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legal Framework

The Immigration and Nationality Act (INA or Act), as amended, assigns responsibilities to the Secretary of Labor (Secretary) relating to the entry and employment of certain categories of immigrants and nonimmigrants.[1] This rule deals with the prevailing wage levels used with respect to the labor certifications that the Secretary issues for certain employment-based immigrants and the labor condition applications (LCA) that the Secretary certifies in connection with the temporary employment of foreign workers under the H–1B, H–1B1, and E–3 visa classifications.[2]

1. Permanent Labor Certifications

The INA prohibits the admission of certain employment-based immigrants unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (I) there are not sufficient workers who are able, willing, qualified and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.[3]

This ''labor certification'' requirement does not apply to all employment-based immigrants. The INA provides for five ''preference'' categories or immigrant visa classes, only two of which—the second and third preference employment categories (commonly called the EB–2 and EB–3 immigrant visa classifications)—require a labor certification.[4] An employer seeking to sponsor a foreign worker for an immigrant visa under the EB–2 or EB–3 immigrant visa classifications generally must file a visa petition with the Department of Homeland Security (DHS) on the worker's behalf, which must include a labor certification from the Secretary of Labor.[5] Further, the Department of State (DOS) may not issue a visa unless the Secretary of Labor has issued a labor certification in conformity with the relevant provisions of the INA.[6] If the Secretary determines both that there are not sufficient able, willing, qualified, and available U.S. workers and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers, the Secretary so certifies to DHS and DOS by issuing a permanent labor

[1] There are two general categories of U.S. visas: immigrant and nonimmigrant. Immigrant visas are issued to foreign nationals who intend to live permanently in the U.S. Nonimmigrant visas are for foreign nationals who enter the U.S. on a temporary basis—for tourism, medical treatment, business, temporary work, study, or other reasons.

[2] 8 U.S.C. 1101(a)(15)(E)(iii), (a)(15)(H)(i)(b), (a)(15)(H)(i)(b1).

[3] 8 U.S.C. 1182(a)(5)(A). Although this provision references the Attorney General, the authority to adjudicate immigrant visa petitions was transferred to the Director of the Bureau of Citizenship and Immigration Services (an agency within the Department of Homeland Security) by the Homeland Security Act of 2002, Public Law 107–296, 451(b) (codified at 6 U.S.C.271(b)). Under 6 U.S.C. 557, references in federal law to any agency or officer whose functions have been transferred to the Department of Homeland Security shall be deemed to refer to the Secretary of Homeland Security or other official or component to which the functions were transferred.

[4] *See* 8 U.S.C. 1153(b)(2), (3), 1182(a)(5)(D). Section 1153(b)(2) governs the EB–2 classification of immigrant work visas granted to foreign workers who are either professionals holding advanced degrees (master's degree or above) or foreign equivalents of such degrees, or persons of ''exceptional ability'' in the sciences, arts, or business. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, unless the work he or she is seeking admission to perform is in the ''national interest,'' such as to qualify for a waiver of the job offer (and hence, the labor certification) requirement under 8 U.S.C. 1153(b)(2)(B). Section 1153(b)(3), governs the EB–3 classification of immigrant work visas granted to foreign workers who are either ''skilled workers,'' ''professionals,'' or ''other'' (unskilled) workers, as defined by the statute. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, without exception.

[5] 8 U.S.C. 1154(a)(1)(F), 1182(a)(5)(A) and (D).

[6] 8 U.S.C. 1153(b)(3)(C), 1153(b)(2), 1201(g).

certification. If the Secretary cannot make one or both of the above findings, the application for permanent employment certification is denied.

2. Labor Condition Applications

The H–1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations. ''Specialty occupation'' is defined by statute as an occupation that requires the theoretical and practical application of a body of ''highly specialized knowledge,'' and a bachelor's or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation in the U.S.[7] Similar to the H–1B visa classification, the H–1B1 and E–3 nonimmigrant visa classifications also allow U.S. employers to temporarily employ foreign workers in specialty occupations, except that these classifications specifically apply to the nationals of certain countries: The H–1B1 visa classification applies to foreign workers in specialty occupations from Chile and Singapore,[8] and the E–3 visa classification applies to foreign workers in specialty occupations from Australia.[9] The Secretary must certify an LCA filed by the foreign worker's prospective U.S. employer before the prospective employer may file a petition with DHS on behalf of a foreign worker for H–1B, H–1B1, or E–3 nonimmigrant classification.[10] The LCA contains various attestations from the employer about the wages and working conditions that it will provide for the foreign worker.[11]

B. Description of the Permanent Labor Certification Process

The Department's regulations at 20 CFR part 656 govern the labor certification process and set forth the responsibilities of employers who desire to employ, on a permanent basis, foreign nationals covered by the INA's labor certification requirement.[12]

Prior to filing a labor certification application, the employer must obtain a Prevailing Wage Determination (PWD) for its job opportunity from OFLC's National Prevailing Wage Center (NPWC).[13] The standards and procedures governing the PWD process in connection with the permanent labor certification program are set forth in the Department's regulations at 20 CFR 656.40 and 656.41. If the job opportunity is covered by a Collective Bargaining Agreement (CBA) that was negotiated at arms-length between a union and the employer, the wage rate set forth in the CBA agreement is considered the prevailing wage for labor certification purposes.[14] In the absence of a prevailing wage rate derived from an applicable CBA, the employer may elect to use an applicable wage determination under the Davis-Bacon Act (DBA) or McNamara-O'Hara Service Contract Act (SCA), or provide a wage survey that complies with the Department's standards governing employer-provided wage data.[15] In the absence of any of the above sources, the NPWC will use the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) survey to determine the prevailing wage for the employer's job opportunity.[16] After reviewing the employer's application, the NPWC will determine the prevailing wage and specify the validity period, which may be no less than 90 days and no more than one year from the determination date. Employers must either file the labor certification application or begin the recruitment process, required by the regulation, within the validity period of the PWD issued by the NPWC.[17]

Once the U.S. employer has received a PWD, the process for obtaining a permanent labor certification generally begins with the U.S. employer filing an *Application for Permanent Employment Certification,* Form ETA–9089, with OFLC.[18] As part of the standard application process, the employer must describe, among other things, the labor or services it needs performed; the wage it is offering to pay for such labor or services and the actual minimum requirements of the job opportunity; the geographic location(s) where the work is expected to be performed; and the efforts it made to recruit qualified and available U.S. workers. Additionally, the employer must attest to the conditions listed in its labor certification application, including that ''[t]he offered wage equals or exceeds the prevailing wage determined pursuant to [20 CFR 656.40 and 656.41] and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment.''[19]

Through the requisite test of the labor market, the employer also attests, at the time of filing the Form ETA–9089, that the job opportunity has been and is clearly open to any U.S. worker and that all U.S. workers who applied for the job opportunity were rejected for lawful, job-related reasons. OFLC performs a review of the Form ETA–9089 and may either grant or deny a permanent labor certification. Where OFLC grants a permanent labor certification, the employer must submit the certified Form ETA–9089 along with an *Immigrant Petition for Alien Worker,* Form I–140 (Form I–140 petition) to DHS. A permanent labor certification is valid only for the job opportunity, employer, foreign worker, and area of intended employment named on the Form ETA–9089, and must be filed in support of a Form I–140 petition within 180 calendar days of the date on which OFLC granted the certification.[20]

C. Description of the Temporary Labor Condition Application Process

The Department's regulations at 20 CFR part 655, subpart H, govern the process for obtaining a certified LCA and set forth the responsibilities of employers who desire to temporarily employ foreign nationals in H–1B, H–1B1, and E–3 nonimmigrant classifications.

A prospective employer must attest on the LCA that (1) it is offering to and will pay the nonimmigrant, during the period of authorized employment, wages that are at least the actual wage level paid by the employer to all other employees with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of intended employment, whichever is

[7] *See* 8 U.S.C 1101(a)(15)(H)(i)(b), 1184(i).

[8] 8 U.S.C. 1101(a)(15)(H)(i)(b1).

[9] 8 U.S.C. 1101(a)(15)(E)(iii).

[10] 8 U.S.C. 1101(a)(15)(E)(iii), (a)(15)(H)(i)(b), (a)(15)(H)(i)(b1); 8 CFR 214.2(h)(2)(i)(E).

[11] *See generally* 8 U.S.C. 1182(n), (t); 20 CFR part 655, subpart H.

[12] The current regulations were issued through a final rule implementing the streamlined permanent labor certification program through revisions to 20 CFR part 656 was published on December 27, 2004, and took effect on March 28, 2005. *See Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,* 69 FR 77326 (Dec. 27, 2004). The Department published a final rule on May 17, 2007 to enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to permanent labor certification, commonly known as ''the fraud rule.'' *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,* 72 FR 27904 (May 17, 2007).

[13] 20 CFR 656.15(b)(1), 656.40(a).

[14] *See* 20 CFR 656.40(b)(1).

[15] *See* 20 CFR 656.40(b), (g).

[16] *See* 20 CFR 656.40(b)(2).

[17] 20 CFR 656.40(c).

[18] Applications for Schedule A occupations are eligible to receive pre-certification and bypass the standard applications review process. In those cases, employers file the appropriate documentation directly with DHS. *See* 20 CFR 656.5, 656.15.

[19] 20 CFR 656.10(c)(1).

[20] 20 CFR 656.30(b)(1).

greater (based on the best information available at the time of filing the attestation); (2) it will provide working conditions for the nonimmigrant worker that will not adversely affect working conditions for similarly employed U.S. workers; (3) there is no strike or lockout in the course of a labor dispute in the occupational classification at the worksite; and (4) it has provided notice of its filing of an LCA to its employee's bargaining representative for the occupational classification affected or, if there is no bargaining representative, it has provided notice to its employees in the affected occupational classification by posting the notice in a conspicuous location at the worksite or through other means such as electronic notification.[21]

As relevant here, the prevailing wage must be determined as of the time of the filing of the LCA.[22] In contrast to the permanent labor certification process, an employer is not required to obtain a PWD from the NPWC.[23] However, like the permanent labor certification process, if there is an applicable CBA that was negotiated at arms-length between a union and the employer that contains a wage rate applicable to the occupation, the CBA must be used to determine the prevailing wage.[24] In the absence of an applicable CBA, an employer may base the prevailing wage on one of several sources: a PWD from the NPWC; an independent authoritative source that satisfies the requirements in 20 CFR 655.731(b)(3)(iii)(B); or another legitimate source of wage data that satisfies the requirements in 20 CFR 655.731(b)(3)(iii)(C).[25]

An employer may not file an LCA more than six months prior to the beginning date of the period of intended employment.[26] Unless the LCA is incomplete or obviously inaccurate, the Secretary must certify it within seven working days of filing.[27] Once an employer receives a certified LCA, it must file the *Petition for Nonimmigrant Worker,* Form I–129 (''Form I–129 Petition'') with DHS if seeking classification of the alien as an H–1B worker.[28] Upon petition, DHS then determines, among other things, whether the employer's position qualifies as a specialty occupation and, if so, whether the nonimmigrant worker is qualified for the position.

D. History and Current Use of the Four-Tiered OES Prevailing Wage Structure

Historically, the Department relied on State Workforce Agencies (SWAs) to determine prevailing wages for purposes of its nonagricultural labor certification programs.[29] To determine the prevailing wage for a particular job opportunity, SWAs relied on wage rates that were determined to be prevailing for the occupation and locality under other Federal laws—*e.g.,* wages issued for purposes of the DBA or SCA—or when applicable, wages negotiated in a CBA.[30] In the absence of such wage determinations, SWAs determined prevailing wages based on wage information obtained ''by purchasing available published surveys or by conducting ad hoc surveys of employers in the area of intended employment.'' [31]

Beginning at least as early as the 1990s, users of the H–1B program and permanent program users urged the Department to ''create a multi-tiered wage structure to reflect the largely self-evident proposition that workers in occupations that require sophisticated skills and training receive higher wages based on those skills.'' [32]

The Department first adopted a multi-tiered system to determine prevailing wages for the nonagricultural labor certification programs in 1995, when it issued General Administration Letter No. 4–95 (GAL 4–95).[33] As relevant here, GAL 4–95 directed SWAs to provide two wage levels—entry and experienced—when they conducted prevailing wage surveys for nonagricultural positions.[34] Specifically, under this guidance, wage rates issued under the DBA, SCA, or a collective bargaining agreement continued to be controlling, if applicable, and, when they were not, SWAs continued to conduct their own prevailing wage surveys or use published wage surveys.[35] However, under GAL 4–95, when SWAs conducted such surveys, they had to distinguish between entry-level positions and positions requiring several years of experience, taking into account factors like the level of education and experience required, complexity of the tasks performed, and level of supervision and autonomy.[36]

In October 1997, the Department amended its prevailing wage guidance to incorporate the wage component of the recently-expanded OES survey.[37] Specifically, pursuant to General Administration Letter No. 2–98 (GAL 2–98), SWAs continued to assign prevailing wage determinations using wage rates issued under the DBA, SCA, or a CBA, where applicable. But in the absence of such wages, the Department now directed SWAs to use the OES survey (rather than conduct their own prevailing wage survey or use other public or private wage surveys).[38] As described below, the Department divided OES wage data into two skill levels: a Level I wage for ''beginning level employees'' and a Level II wage for ''fully competent employees.[39] To determine the prevailing wage level applicable to a particular position, SWAs considered the level of skill required by the employer, identified the appropriate occupation, and selected the appropriate wage level.[40]

[21] 8 U.S.C. 1182(n)(1)(A)–(C), (t)(1)(A)–(C); 20 CFR 655.705(c)(1), 655.730(d).

[22] 20 CFR 655.731(a)(2).

[23] *Id.*

[24] *Id.*

[25] 20 CFR 655.731(a)(2)(ii)(A) through (C).

[26] 20 CFR 655.730.

[27] 8 U.S.C. 1182(n)(1), (t)(2)(C); 20 CFR 655.740(a)(1).

[28] For aliens seeking H–1B1 or E–3 classification, the alien may apply directly to the State Department for a visa once the LCA has been certified.

[29] *See, e.g., Miscellaneous Amendments,* 32 FR 10932 (July 26, 1967).

[30] *See, e.g., id.*

[31] *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,* 67 FR 30466, 30479 (May 6, 2002).

[32] *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program,* 76 FR 3452, 3453 (Jan. 19, 2011).

[33] General Administration Letter No. 4–95 (May 18, 1995), *available at https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=485.*

[34] *See id.* at 5 (''The job related education, training and experience requirements of an occupation are factors to be considered in making prevailing wage determinations. A prevailing wage survey and/or determination should distinguish between entry level positions and those requiring several years of experience. At a minimum, a distinction should be made based on whether or not the occupation involved in the employer's job offer is entry level or at the experienced level.''). As the Department later explained, adoption of tiered wages was necessary for the H–1B and permanent labor certification programs because job opportunities in these programs ''reflect[] a wide range of experience, skills, and knowledge which appropriately correspond to stratified wage levels.'' *Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3461 (Jan. 19, 2011).

[35] GAL 4–95 at 1–2.

[36] *Id.* at 5–6.

[37] *Prevailing Wage Policy for Nonagricultural Immigration Programs,* General Administration Letter No. 2–98 (GAL 2–98) (Oct. 31, 1997), *available at https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=942.*

[38] GAL 2–98 at 1. Under this guidance, employers could still make specific requests for prevailing wages based on different (non-OES) wage data, provided it met certain requirements. *Id.* at 8. But where an employer provided data that met applicable requirements, that data was used only to determine the prevailing wage for purposes of that employer's job opportunity, and not for subsequent prevailing wage requests in that occupation. *See id.* at 9.

[39] GAL 2–98 at 5.

[40] *Id.* GAL 2–98 did not change the definition of the skill levels that were first announced in GAL 4–95, but it did direct SWAs to issue a level II wage in several additional contexts, including cases in which state licensure was required for independent performance of all of the duties encompassed by the

GAL 2–98 was accompanied by a Memorandum of Understanding (MOU) between ETA and BLS, wherein BLS agreed to provide, through its cooperative agreements with the SWAs, two wage levels for each occupational classification in areas of intended employment, where available.[41] Because the OES survey does not provide data about skill differentials within Standard Occupational Classification (SOC) codes, ETA established the entry and experienced skill levels mathematically. Specifically, under the MOU, BLS computed a Level I wage calculated as the mean of the lowest paid one-third of workers in a given occupation (approximately the 17th percentile of the OES wage distribution) and a Level II wage calculated as the mean wage of the highest paid upper two-thirds of workers (approximately the 67th percentile). This two-tier wage structure was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a surrogate for the entry-level wage, but the Department did not conduct any meaningful economic analysis to test its validity.'' [42] Rather, as the Department explained at the time, it adopted this structure to ''insure the use of a consistent methodology by all States'' in making prevailing wage determinations.[43] The wage structure adopted in 1998, which was developed without notice and comment, has never been codified in the Department's regulations.

In 2002, the Department issued additional guidance to SWAs regarding the assignment of prevailing wage levels.[44] In this guidance, the Department stressed that skill levels should not be assigned solely on the basis of the occupational classification because ''[a]ll OES/SOC codes encompass both level I and level II positions . . . including managerial and professional jobs at the high end, and assistant or helper codes at the low end.'' [45] Rather, as the guidance emphasized throughout, the employer's job description and the nature of the work were the primary determinants of a wage level determination. The Department directed SWAs to consider relevant factors, such as ''the complexity of the job duties, the level of judgment, the amount [and nature] of supervision, and the level of understanding required to perform the job duties,'' and to a lesser extent, factors like licensure requirements or the position's location in the employer's hierarchy.[46] Job duties alone could necessitate a level II determination where, for example, they indicated the employee would ''operate with little supervision, perform advanced [] procedures, and exercise great latitude of independent judgment.'' [47] The Department also directed states to consider whether the job opportunity required education or experience exceeding entry-level occupational requirements and, reiterating GAL 2–98, explained that ''the wage rate for a job offer that requires an advanced degree (Master's or Ph.D.)'' was to be considered level II if a lesser degree was ''normally required for entry into the occupation.'' [48]

That same year, in response to a proposed rule amending the permanent labor certification process, the Department received comments criticizing it ''for arbitrarily dividing salary data into two wage levels'' and ''suggest[ing] existing OES wage data would be more useful if the number of wage levels were expanded to appropriately differentiate among various occupational groupings.'' [49] For example, one commenter believed adoption of ''[m]ulti-tiered wage levels . . . set for each occupation [would] better reflect 'real world' experience'' and stated that ''[a] two-tier wage level is unrealistic where an entry level job by its nature requires considerable independence (*e.g.,* a teacher) or the salary for the second level is markedly higher, *e.g.,* post-doctoral research fellow, medical resident, college instructor, marketing manager.'' [50] Similarly, another commenter expressed concern that use of just one upper-bound, level II wage for ''all experienced workers create[d] gross inaccuracies at both ends of the spectrum,'' and asserted that ''[m]ultiple levels allow for a reasoned wage based upon years of experience and levels of responsibility that reflect real world patterns.''

The Department adopted the four-tier prevailing wage level structure that is currently in effect in response to the H–1B Visa Reform Act of 2004.[51] As relevant here, the H–1B Visa Reform Act of 2004 amended section 212(p) of the INA to provide where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the two levels offered, adding the quotient thus obtained to the first level, and subtracting that quotient from the second level.[52]

To implement this provision, the Department published comprehensive Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (''2005 Guidance''), which expanded the two-tier OES wage level system to provide four ''skill levels'': Level I ''entry level,'' Level II ''qualified,'' Level III ''experienced,'' and Level IV ''fully competent.'' [53] The Department applied the formula in the statute to its two existing wage levels to set Levels I through IV, respectively, at approximately the 17th percentile, the 34th percentile, the 50th percentile, and the 67th percentile.[54]

occupation and the job opportunity required such a worker. *Id.*

[41] Intra-Agency Memorandum of Understanding executed by Mr. John R. Beverly, III, Director, U.S. Employment Service, ETA, and Ms. Katharine Newman, Chief, Division of Financial Planning and Management, Office of Administration, BLS (Sept. 30, 1998).

[42] GAL 2–98, *available at https://oui.doleta.gov/dmstree/gal/gal98/gal_02–98.htm. See also Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76FR 3452, 3453 (Jan. 19, 2011); *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013).

[43] GAL 2–98; *see also Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3464 (Jan. 19, 2011) (explaining that the Department moved to the OES in part due to the ''inconsistencies that resulted from State to State in the treatment of the same job opportunity, reflecting not the local conditions but the quality of the surveyors and the collection instruments used'' and because the Department determined that ''the OES provides a more reliable and cost-effective means for producing prevailing wage rates on a consistent basis across the country.'').

[44] Training and Employment Guidance Letter No. 5–02 (TEGL 5–02): Clarification of Level I and Level II Skill Levels for the Purposes of Prevailing Wage Determinations (Aug. 7, 2002), *available at https://oui.doleta.gov/dmstree/tegl/tegl2k2/tegl_05–02.htm.*

[45] *Id.* at 2.

[46] *Id.*

[47] *Id.* at 5 (referring to job opportunities for medical residents that might otherwise be considered entry level).

[48] *Id.* at 4.

[49] *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System,* 69 FR 77326, 77367 (Dec. 27, 2004).

[50] *Id.* at 77370.

[51] *Consolidated Appropriations Act,* 2005, Public Law 108–447, div. J, tit. IV, 423; 118 Stat. 2809 (Dec. 8, 2004).

[52] 8 U.S.C. 1182(p)(4).

[53] ETA Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs 7 (May 2005), *available at https://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf.*

[54] *See id.* at 1.

In 2010, the Department centralized the prevailing wage determination process for nonagricultural labor certification programs within OFLC's NPWC, eliminating SWAs' involvement in the process.[55] In preparation for this transition, the Department issued new Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (2009 Guidance).[56] This guidance currently governs OFLC's PWD process for the PERM, H–1B, H–1B1, and E–3 visa programs and will continue to govern OFLC's PWD process for these programs.

When assigning a prevailing wage using BLS OES data, the NPWC examines the nature of the job offer, the area of intended employment, and job duties for workers that are similarly employed.[57] In particular, the NPWC uses the SOC taxonomy to classify the employer's job opportunity into an occupation by comparing the employer's job description, title, and requirements to occupational information provided in sources like the Department's Occupational Information Network (O*Net).[58] Once the NPWC identifies the applicable SOC code, it determines the appropriate wage level for the job opportunity by comparing the employer's job description, title, and requirements to those normally required for the occupation, as reported in sources like O*Net. This determination involves a step-by-step process in which each job opportunity begins at Level I (entry level) and may progress to Level II (experienced), Level III (qualified), or Level IV (fully competent) based on the NPWC's comparison of the job opportunity to occupational requirements, including the education, training, experience, skills, knowledge, and tasks required in the occupation.[59] After determining the prevailing wage level, the NPWC issues a PWD to the employer using the OES wage for that level in the occupation and area of intended employment.

II. Amendments To Adjust the Prevailing Wage Levels

A. Reasons for Adjusting the Prevailing Wage Levels

A primary purpose of the restrictions on immigration created by the INA, both numerical and otherwise, is ''to preserve jobs for American workers.'' [60] Safeguards for American labor, and the Department's role in administering them, have been a foundational element of the statutory scheme since the INA was enacted in 1952.[61] For the reasons set forth below, the Department has determined that the way it currently regulates the wages of certain immigrant and nonimmigrant workers in the H–1B, H–1B1, E–3, and PERM programs is inconsistent with the text of the INA. A substantial body of evidence examined by the Department also suggests that the existing prevailing wage rates used by the Department in these foreign labor programs are causing adverse effects on the wages and job opportunities of U.S. workers, and are therefore at odds with the purpose of the INA's labor safeguards. The current wage levels were also promulgated through guidance and without any meaningful economic justification. Accordingly, the Department is acting to adjust the wage levels to ensure they are codified and consistent with the factors the INA dictates must govern the calculation of foreign workers' wages. In so doing, the Department expects to reduce the dangers posed by the existing levels to U.S. workers' wages and job opportunities, and thereby advance a primary purpose of the statute.

The modern H–1B program was created by the enactment of the Immigration Act of 1990 (IMMACT 90). Among other reforms, IMMACT 90 established ''various labor protections for domestic workers'' in the program.[62] These protections were primarily designed ''to prevent displacement of the American workforce'' by foreign labor.[63] In general, the purpose of the H–1B program is to ''allow[] an employer to reach outside of the U.S. to fill a temporary position because of a special need, presumably one that cannot be easily fulfilled within the U.S.'' [64] Using a foreign worker as a substitute for a U.S. worker who is already working in or could work in a given job is therefore inconsistent with the broad aims of the program. Congress has recognized that repeatedly, both in the enactment of IMMACT 90 and when making subsequent changes to the H–1B program.[65]

Wage requirements are central to the H–1B program's protections for U.S. workers.[66] Under the INA, employers must pay H–1B workers the greater of ''the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question,'' or the ''the prevailing wage level for the occupational classification in the area of employment.'' [67] By ensuring that H–1B workers are offered and paid wages that are no less than what U.S. workers similarly employed in the occupation are being paid, the wage requirements are meant to guard against both wage suppression and the replacement of U.S. workers by lower-cost foreign labor.[68]

[55] *See Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes,* 73 FR 78020 (Dec. 19, 2008); *Prevailing Wage Determinations for Use in the H–1B, H–1B1 (Chile/Singapore), H–1C, H–2B, E–3 (Australia), and Permanent Labor Certification Programs; Prevailing Wage Determinations for Use in the Commonwealth of the Northern Mariana Islands,* 74 FR 63796 (Dec. 4, 2009).

[56] Employment and Training Administration; Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (Revised Nov. 2009) (*hereinafter* 2009 Guidance), *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.*

[57] *Id.* at 1.

[58] *Id.* at 1–7; *see also* Occupational Information Network, *available at http://online.onetcenter.org.* O*Net provides information on skills, abilities, knowledge, tasks, work activities, and specific vocational preparation levels associated with occupations and stratifies occupations based on shared skill, education, and training indicators.

[59] 2009 Guidance at 6.

[60] *Sure-Tan, Inc.* v. *N.L.R.B.,* 467 U.S. 883, 893 (1984).

[61] H.R. Rep. No. 1365, 82d Cong., 2d Sess., 50–51 (1952) (discussing the INA's ''safeguards for American labor'').

[62] *Washington All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.,* 156 F. Supp. 3d 123, 142 (D.D.C. 2015), judgment vacated, appeal dismissed sub nom. *Washington All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.,* 650 F. App'x 13 (D.C. Cir. 2016).

[63] *Cyberworld Enter. Techs., Inc.* v. *Napolitano,* 602 F.3d 189, 199 (3d Cir. 2010).

[64] *Caremax Inc* v. *Holder,* 40 F. Supp. 3d 1182, 1187 (N.D. Cal. 2014).

[65] *See, e.g.,* Public Law 105–277 § § 412–13, 112 Stat. 2681, 2981–642 to –650 (1998). *See also* H.R. Rep. No. 101–723(I), 101st Cong., 2d Sess. 44, 66–67 (1990) (''[IMMACT 90] recognizes that certain entry-level workers with highly specialized knowledge are needed in the United States and that sufficient U.S. workers are sometimes not available. At the same time, heavy use and abuse of the H–1 category has produced undue reliance on alien workers.''); 144 Cong. Rec. S12741, S12749 (daily ed. October 21, 1998) (statement of Sen. Abraham) (describing the purpose of the H–1B provisions of the American Competiveness and Workforce Improvement Act as being to ensure ''that companies will not replace American workers with foreign born professionals, including increased penalties and oversight, as well as measures eliminating any economic incentive to hire a foreign born worker if there is an American available with the skills needed to fill the job.'').

[66] *See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models,* 59 FR 65646, 65655 (December 20, 1994) (describing the ''Congressional purposes of protecting the wages of U.S. workers'' in the H–1B program); H.R. REP. 106–692, 12 (*quoting* Office of Inspector General, U.S. Department of Labor, Final Report: The Department of Labor's Foreign Labor Certification Programs: The System is Broken and Needs to Be Fixed 21 (May 22, 1996) (''The employer's attestation to . . . pay the prevailing wage is the only safeguard against the erosion of U.S. worker's [sic.] wages.'').

[67] 8 U.S.C. 1182(n)(1)(A).

[68] *See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as*

The OES prevailing wage levels that the Department uses in the H–1B program—as well as the related H–1B1 and E–3 ''specialty occupation'' programs for foreign workers from Chile, Singapore, and Australia—are the same as those it uses in its PERM programs. Through the PERM programs, the Department processes labor certification applications for employers seeking to sponsor foreign workers for permanent employment under the EB–2 and EB–3 immigrant visa preference categories. Aliens seeking admission or adjustment of status under the EB–2 or EB–3 preference categories are inadmissible ''unless the Secretary of Labor has determined and certified . . . that—(I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' [69]

The Secretary makes this determination in the PERM programs by, among other things, requiring the foreign worker's sponsoring employer to recruit U.S. workers by offering a wage that equals or exceeds the prevailing wage, and to assure that the employer will pay the foreign worker a wage equal to or exceeding the prevailing wage.[70] In this way, similar to its role in the H–1B program, the prevailing wage requirement in the PERM programs furthers the statute's purpose of protecting the interests of, and preserving job opportunities for American workers.[71] Effectuating this purpose is the principle objective of the Department's regulatory scheme in the PERM programs.[72]

While the prevailing wage levels the Department sets in the H–1B, H–1B1, E–3, and PERM programs are meant to protect against the adverse effects the entry of immigrant and nonimmigrant workers can have on U.S. workers, they do not accomplish that goal—and have not for some time. For starters, the Department has never offered a full explanation or economic justification for the way it currently calculates the prevailing wage levels it uses in these foreign labor programs.[73] The INA requires that a government survey employed to determine the prevailing wage provide wage levels commensurate with experience, education, and level of supervision. However, it is clear that the Department's current wage levels are not sufficiently set in accordance with the relevant statutory factors. Further, the Department's analysis of the likely effects of H–1B and PERM workers on U.S. workers' wages and job opportunities shows that the existing wage levels are not advancing the purposes of the INA's wage provisions. As explained below, under the existing wage levels, artificially low prevailing wages provide an opportunity for employers to hire and retain foreign workers at wages well below what their U.S. counterparts—meaning U.S. workers in the same labor market, performing similar jobs, and possessing similar levels of education, experience, and responsibility—make, creating an incentive—entirely at odds with the statutory scheme—to prefer foreign workers to U.S. workers, and causing downward pressure on the wages of the domestic workforce. The need to fix this problem and ensure the wage levels are set in a manner consistent with the INA is especially pressing now, given the elevated unemployment and economic dislocation for U.S. workers caused by the COVID–19 pandemic. The Department is therefore acting to adjust the existing wage levels to ensure the levels reflect the wages paid to U.S. workers with levels of experience, education, and responsibility comparable to those possessed by similarly employed foreign workers.

1. The Relationship Between the Prevailing Wage Levels, the OES Survey, and the Statutory Framework Governing the Department's Foreign Labor Programs

As noted, the INA requires employers to pay H–1B workers the greater of ''the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question,'' or ''the prevailing wage level for the occupational classification in the area of employment.'' [74] The statute further provides that, when a government survey is used to establish the wage levels, ''such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.'' [75] If an existing government survey produces only two levels, the statute provides a formula to calculate two intermediate levels.[76] Thus, like the statute's actual wage clause, the prevailing wage requirement, when calculated based on a government survey, makes the qualifications possessed by workers, namely education, experience, and responsibility, an important part of the wage calculation. Put slightly differently, both clauses yield wage calculations that in similar fashions are designed to approximate the rate at which workers in the U.S. are being compensated, taking into account the area in which they work, the types of work they perform, and the qualifications they possess; and the statute requires employers to pay the rate of whichever calculation yields the higher wage. In this way, the statutory scheme is meant to ''protect U.S. workers' wages and eliminate any economic incentive or advantage in

Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 FR 80110, 80110 (Dec. 20, 2000) (''The [INA], among other things, requires that an employer pay an H–1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.''); *Panwar* v. *Access Therapies, Inc.,* 975 F. Supp. 2d 948, 952 (S.D. Ind. 2013) (''The wage requirements are designed to prevent . . . the influx of inexpensive foreign labor for professional services.'').

[69] 8 U.S.C. 1182(a)(5)(A)(i).

[70] 20 CFR 656.10(c)(1).

[71] *Pai* v. *U.S. Citizenship & Immigration Servs.,* 810 F. Supp. 2d 102, 110 (D.D.C. 2011) (''The plain language of [8 U.S.C. 1182(a)(5)(A) and 1153(b)(3)] reflects a concern to protect the interests of workers in the United States.''); *Fed'n for Am. Immigration Reform, Inc.* v. *Reno,* 93 F.3d 897, 903 (D.C. Cir. 1996) (explaining that the INA's various limits on immigration, such as in the allocation of visas in the EB–2 and EB–3 preference categories, ''reflect a clear concern about protecting the job opportunities of United States citizens.''). *See generally Texas* v. *United States,* 809 F.3d 134, 181 (5th Cir. 2015) (quoting *I.N.S.* v. *Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183, 194 (1991) (''The INA's careful employment-authorization scheme 'protect[s] against the displacement of workers in the United States,' and a 'primary purpose in restricting immigration is to preserve jobs for American workers.' '').

[72] *See, e.g., Durable Mfg. Co.* v. *U.S. Dep't of Labor,* 578 F.3d 497, 502 (7th Cir. 2009) (''The point remains that the new § 656.30(b) advances, to some degree, the congressional purpose of protecting American workers.''); *Rizvi* v. *Dep't of Homeland Sec. ex rel. Johnson,* 627 F. App'x 292, 294–95 (5th Cir. 2015) (unpublished) (''Viewed in the proper context, the challenged regulation serves purposes in accord with the statutory duty to grant immigrant status only where the interests of American workers will not be harmed; showing the employer's ongoing ability to pay the prevailing wage is one reasonable way to fulfill this goal.'').

[73] *See Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013) (''Since the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported, the two-tier wage structure introduced in 1998 was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a reasonable proxy for the entry-level wage. DOL did not conduct any meaningful economic analysis to test the validity of that assumption . . .'').

[74] 8 U.S.C. 1182(n)(1)(A).

[75] 8 U.S.C. 1182(p)(4).

[76] *Id.*

hiring temporary foreign workers.'' [77] If employers are required to pay H–1B workers approximately the same wage paid to U.S. workers doing the same type of work in the same geographic area and with similar levels of education, experience, and responsibility as the H–1B workers, employers will have significantly diminished incentives to prefer H–1B workers over U.S. workers, and U.S. workers' wages will not be suppressed by the presence of foreign workers in the relevant labor market.

To set an appropriate prevailing wage for an H–1B worker in a given occupation, it is therefore appropriate to identify what types of U.S. workers in the occupation have comparable levels of education, experience, and responsibility to H–1B workers. To answer this question, the place to start is the INA itself, which sets the minimum qualifications an alien must have to obtain an H–1B visa. While the INA makes clear that the prevailing wage levels must be set commensurate with education, experience, and level of supervision, it leaves assessment of those factors to the Department's discretion. How the Department exercises that discretion is informed by the legislative context in which the four-tier wage structure was enacted, which indicates that the wage levels are primarily designed for use in the Department's high-skilled and PERM foreign labor programs.[78] Other provisions in the INA relating to the education and experience requirements of those programs—and in particular the statutory definition of ''specialty occupation''—therefore serve as critical guides for how wage levels based on experience, education, and level of supervision should be formulated.

A review of this statutory framework and its interplay with the BLS OES survey data that the Department uses to calculate prevailing wages demonstrates that, while the OES survey is the best source of wage data available for use in the Department's foreign labor certification programs, it is not specifically designed for such programs, and therefore does not account for the requirement that workers in the H–1B program possess highly specialized knowledge in how it gathers data about U.S. workers' wages. This fact necessarily shapes how the Department integrates the OES survey into its foreign labor programs and also demonstrates the existing wage levels' inconsistency with the INA.

At the outset, the Department notes that much of its assessment of how best to adjust the prevailing wage levels gives special attention to the H–1B program. The H–1B program accounts, by order of magnitude, for the largest share of foreign workers covered by the Department's four-tier wage structure. Upwards of 80 percent of all workers admitted or otherwise authorized to work under the programs covered by the wage structure are H–1B workers.[79] This, in combination with the fact that, as explained below, the risk of adverse effects to U.S. workers posed by the presence of foreign workers is most acute where there are high concentrations of such workers, supports the Department's determination to focus on the H–1B program. Because the wage structure governs, and, for reasons explained below, will continue to govern wages for hundreds of thousands of workers across five different foreign labor programs and hundreds of different occupations, no wage methodology will be perfectly tailored to the unique circumstances of every job opportunity.[80] Advancing the INA's purpose of guarding against displacement and adverse wage effects against this statutory backdrop therefore means, in the Department's judgment, that particular weight should be given in the Department's analysis to those aspects of the problem this rule is meant to address where there is the greatest danger to U.S. workers' wages—hence the added focus on the H–1B program. For the same reasons, and as elaborated on below, the Department's analysis focuses on those occupations in which the vast majority of H–1B workers are employed.

Relatedly, the Department notes that the H–1B program is closely linked to the PERM programs that are also covered by the Department's wage structure. A very substantial majority of workers covered by PERM labor certification applications are already working in the U.S. as H–1B nonimmigrants, and there is significant overlap in the types of occupations in which H–1B and PERM workers are employed.[81] It is also clear that H–1B status often serves as a pathway to employment-based green card status for many foreign workers.[82] The programs have thus long been regulated in connection with one another.[83] For these reasons, giving particular attention to the H–1B program in determining how to adjust the wage levels is entirely consistent with also ensuring that how the wage levels are applied in the PERM programs is properly accounted for in the Department's analysis.

Under the INA, H–1B visas can, in most cases, only be granted to aliens entering the U.S. to perform services ''in a specialty occupation.'' [84] The statute defines ''specialty occupation'' as an occupation that requires theoretical and practical application of a body of ''highly specialized knowledge'' and the ''attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.'' [85] An alien may be classified as an H–1B specialty occupation worker if the alien possesses ''full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,'' ''completion of [a bachelor's or higher degree in the specific specialty (or its equivalent)],'' or ''(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively

[77] *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States,* 65 FR 80110, 80110 (Dec. 20, 2000).

[78] *See Consolidated Appropriations Act,* 2005, Public Law 108–447, div. J, tit. IV, § 423; 118 Stat. 2809 (Dec. 8, 2004).

[79] *See* Department of Homeland Security, 2017 Yearbook of Immigration Statistics, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017, available at *https://www.dhs.gov/immigration-statistics/yearbook/2017/table7*; United States Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers: Fiscal Year 2017 Annual Report to Congress October 1, 2016—September 30, 2017, (2020), *available at https://www.uscis.gov/sites/default/files/document/foia/Characteristics_of_H–1B_Specialty_Occupation_Workers_FY17.pdf.*

[80] *Cf. Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3461 (Jan. 19, 2011) (justifying wage methodology designed for lower-skilled workers that was adopted in the H–2B program on grounds that the program ''is overwhelmingly used for work requiring lesser skilled workers,'' while also acknowledging that ''not all positions requested through the H–2B program are for low-skilled labor.'').

[81] In FY2019, 68.2 percent of all PERM labor certification applications filed were for H–1B workers already working in the United States. Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.*

[82] *See* Sadikshya Nepal, *The Convoluted Pathway from H–1B to Permanent Residency: A Primer,* Bipartisan Policy Center (2020).

[83] *See* 144 Cong. Rec. S12741, S12756 (explaining that 8 U.S.C. 1182(p)''spells out how [the prevailing] wage is to be calculated in the context of both the H–1B program and the permanent employment program in two circumstances.''); *Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 81 FR 82398 (November 18, 2016).

[84] 8 U.S.C. 1101(a)(15)(H)(i)(b).

[85] 8 U.S.C. 1184(i)(1).

responsible positions relating to the specialty.'' [86] DHS regulations further clarify the requirements for establishing that the position is a specialty occupation and that the beneficiary of an H–1B petition must be qualified for a specialty occupation.[87] The Department's regulations restate the statute's definition of specialty occupation essentially verbatim.[88]

A few features of the definition bear emphasizing. First, the statute sets the attainment of a bachelor's degree in a specific specialty, or experience that would give an individual expertise equivalent to that associated with a bachelor's degree in the specific specialty, as the baseline, minimum requirement for an alien to qualify for the classification. Of even greater importance, having any bachelor's degree as a job requirement is not sufficient to qualify a job as a specialty occupation position—the bachelor's degree or equivalent experience required to perform the job must be ''in the specific specialty.'' In other words, the bachelor's degree required, or equivalent experience, must be specialized to the particular needs of the job, and impart a level of expertise greater than that associated with a general bachelor's degree, meaning a bachelor's degree not in some way tailored to a given field.[89] These aspects of the definition play an important role in how the Department will use data from the BLS OES survey to set appropriate prevailing wage levels.

The Department has long relied on OES data to establish prevailing wage levels. That is because it is a comprehensive, statistically valid survey that, in many respects, is the best source of wage data available for satisfying the Department's purposes in setting wages in most immigrant and nonimmigrant programs. As the Department has previously noted the OES wage survey is among the largest continuous statistical survey programs of the Federal Government. BLS produces the survey materials and selects the nonfarm establishments to be surveyed using the list of establishments maintained by State Workforce Agencies (SWAs) for unemployment insurance purposes. The OES collects data from over 1 million establishments. Salary levels based on geographic areas are available at the national and State levels and for certain territories in which statistical validity can be ascertained, including the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Salary information is also made available at the metropolitan and nonmetropolitan area levels within a State. Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Base rate, cost-of-living allowances, guaranteed pay, hazardous duty pay, incentive pay including commissions and production bonuses, tips, and on-call pay are included. The features described above are unique to the OES survey, which is a comprehensive, statistically valid, and useable wage reference.[90]

Put simply, the OES survey's quality and characteristics have made it, and continue to make it, a useful tool for setting prevailing wage levels in the Department's foreign labor programs. There are no alternative surveys or sources of wage data that would provide DOL with wage information at the same level of granularity needed to properly administer the H–1B and PERM programs.

That said, the OES survey is not specifically designed to serve these programs. For one thing, ''the OES survey captures no information about differences within the [occupational] groupings based on skills, training, experience or responsibility levels of the workers whose wages are being reported'' [91]—the factors the INA requires the Department to rely on in setting prevailing wage levels.[92] Relatedly, ''there are factors in addition to skill level that can account for OES wage variation for the same occupation and location.'' [93] Further, the geographic areas used by BLS to calculate local wages do not always match up exactly with the ''area of employment'' for which wage rates are set, as that term is defined by the INA for purposes of the H–1B program.[94] So while the OES survey is the best available source of wage data for the Department's purposes, it is not a perfect tool for providing wages in the H–1B, H–1B1, E–3, and PERM programs—a fact that the Department must take into consideration in how it uses the OES data.

Similarly, the INA's definition of ''specialty occupation'' should be accounted for in how the Department fits the OES survey into its foreign labor programs. The survey categorizes workers into occupational groups defined by the SOC system, a federal statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.[95] An informative source on the duties and educational requirements of a wide variety of occupations, including those in the SOC system, is the Department's Occupational Outlook Handbook (OOH), which, among other things, details for various occupations the baseline qualifications needed to work in each occupation. A review of the OOH shows that only a portion of the workers covered by many of the occupational classifications used in the OES survey likely have levels of education and experience similar to those of H–1B workers in the same occupation. Some share of workers in these classifications likely do not have the education or experience qualifications necessary to be considered similarly employed to specialty occupation workers. Because the INA requires the prevailing wage levels for H–1B workers to be set based on the wages of U.S. workers with levels of experience and education similar to those of H–1B workers, the Department must take this into account when using OES data to determine prevailing wages.

For example, a common occupational classification in which H–1B nonimmigrants work is Computer Programmers.[96] The OOH's entry for Computer Programmers describes the educational requirements for the occupation as follows: ''Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree.'' [97] In other words, while common, a bachelor's degree-level education, or its equivalent,

[86] 8 U.S.C. 1184(i)(2).

[87] 8 CFR 214.2(h)(4)(iii)()(()((A) and C).

[88] *See* 20 CFR 655.715.

[89] *See Chung Song Ja Corp.* v. *U.S. Citizenship & Immigration Servs.,* 96 F. Supp. 3d 1191, 1197–98 (W.D. Wash. 2015) (''Permitting an occupation to qualify simply by requiring a generalized bachelor degree would run contrary to congressional intent to provide a visa program for specialized, as opposed to merely educated, workers.''); *Caremax Inc* v. *Holder,* 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014) (''A position that requires applicants to have any bachelor's degree, or a bachelor's degree in a large subset of fields, can hardly be considered specialized.'').

[90] *Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3463 (Jan. 19, 2011).

[91] *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program,* 80 FR 24146, 24155 (Apr. 29, 2015).

[92] 8 U.S.C. 1182(p)(4).

[93] *Id.* at 24159.

[94] 8 U.S.C. 1182(n)(4)(A).

[95] U.S. Bureau of Labor Statistics, Standard Occupational Classification, *https://www.bls.gov/soc/.*

[96] Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf.*

[97] Bureau of Labor Statistics, Occupational Outlook Handbook, Computer Programmers, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm.*

is not a prerequisite for working in the occupation. United States Citizenship and Immigration Services (USCIS) and at least one court have reasoned from this that the mere fact that an individual is working as a Computer Programmer does not establish that the individual is working in a ''specialty occupation.'' [98] Because a person without a specialized bachelor's degree can still be classified as a Computer Programmer, some portion of Computer Programmers captured by the OES survey are not similarly employed to H–1B workers because the baseline qualifications to enter the occupation do not match the statutory requirements.[99]

The same is true for other occupational classifications in which H–1B workers are often employed. For example, the Medical and Health Services Manager occupation, as described by the OOH, does not in all cases require a bachelor's degree as a minimum requirement for entry.[100] USCIS has therefore concluded that the fact that an individual works in that occupational classification does not necessarily mean that he is working in a ''specialty occupation.'' [101] USCIS and its predecessor agency, the Immigration and Naturalization Service, have long emphasized that the term ''specialty occupation'' does not ''include those occupations which [do] not *require* a bachelor's degree in the specific specialty.'' [102] In other words, if an occupation does not require a specialized bachelor's degree or equivalent experience, under the INA other evidence is needed to show that a worker will be performing duties in a specialty occupation beyond whether the job opportunity falls within a particular SOC classification.[103]

A review of the OOH entries for the occupations in which H–1B nonimmigrants most commonly work demonstrates that most H–1B workers fall within SOC classifications that include some number of workers who would not qualify for employment in a specialty occupation. For instance, the OOH entries for Software Developers—an occupation accounting for over 40 percent of all certified LCAs [104]—provides that such workers ''*usually* have a bachelor's degree in computer science and strong computer programming skills.'' [105] For Computer Systems Analysts, which make up approximately 8.8 percent of all certified LCAs,[106] ''a bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.'' [107] Similarly, the O*Net database, which surveys employers on the types of qualifications they seek in workers for various occupations, shows that, on average, over 13 percent of all jobs in the occupations that H–1B workers are most likely to work in do not require workers to have even a bachelor's degree.[108] Moreover, the O*Net does not differentiate between jobs that require bachelor's degrees in specific specialties and job for which a general bachelor's degree will suffice. It is therefore a reasonable inference that the percentage of jobs in these occupations that would not qualify as specialty occupation positions for purposes of the INA is almost certainly even higher.

Simply put, the universe of workers surveyed by the OES for some of the most common occupational classifications in which H–1B workers are employed is larger than the pool of workers who can be said to have levels of education and experience comparable to those of even the least skilled H–1B

[98] *See Innova Sols., Inc.* v. *Baran,* 399 F. Supp. 3d 1004, 1015 (N.D. Cal. 2019).

[99] As noted throughout, under the INA a bachelor's degree is not an absolute prerequisite for obtaining an H–1B visa. Work experience imparting comparable levels of expertise will also suffice. Indeed, as the President has noted in other contexts, focusing on possession of a degree to the exclusion of work experience ignores important considerations about how merit and qualifications should be assessed. *See* Exec. Order No. 13932, 85 FR 39457 (2020). The Department's focus on the OOH's description of degree requirements here is not meant to suggest otherwise, but rather simply accounts for the fact that, within the H–1B program, nearly all nonimmigrants hold a degree. *See* U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.* Further, under the INA, EB–2 and EB–3 immigrants are, in many cases, required to possess a degree. And, in any event, the Department's assessment of the OOH's descriptions of education requirements and how they demonstrate that, for the most common H–1B occupations, there is some portion of workers who would not qualify as working in a specialty occupation holds true for the OOH's description of various occupations' experience requirements. The mere fact that OOH describes many workers in an occupation as having several years of experience in or skills relevant to their respective fields does not necessarily mean that they possess ''highly specialized knowledge,'' or that all workers in the occupation have such experience. *See Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007). *See also* Bureau of Labor Statistics, Occupational Outlook Handbook, Computer Systems Analysts, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm;* Bureau of Labor Statistics, Occupational Outlook Handbook, Food Service Managers, *available at https://www.bls.gov/ooh/management/food-service-managers.htm.* Whether discussing education or experience requirements, the fact remains that OOH's description of the occupational classifications used in the BLS OES are, in most cases, not limited to workers who would qualify as working in a specialty occupation.

[100] *See Ajit Healthcare Inc.* v. *U.S. Dep't of Homeland Sec.,* 2014 WL 11412671, at 4 (C.D. Cal. Feb. 7, 2014); *see also* Bureau of Labor Statistics, Occupational Outlook Handbook, Medical and Health Services Managers, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm.* The Department notes that some courts and USCIS have concluded that the fact that an occupation does not in all cases require a bachelor's degree as a minimum qualification does not necessarily preclude the occupational classification from serving as evidence that a particular job qualifies as a ''specialty occupation.'' *See, e.g., Taylor Made Software, Inc.* v. *Cuccinelli,* 2020 WL 1536306, at 6 (D.D.C. Mar. 31, 2020; *see also* 8 CFR 214.2(h)(4)(iii). That said the INA ultimately does not admit of any exceptions to the rule that a job must require a bachelor's degree in a specific specialty, or its equivalent, to qualify as a specialty occupation, meaning, whatever its relevance to determining whether a particular job is in a ''specialty occupation,'' the fact that many SOC classifications contain workers that would not meet the statutory definition is highly relevant to how OES data for an entire occupational classification is used in setting prevailing wage levels. Put another way, as the court in *Taylor Made* acknowledged, the fact that a bachelor's degree is not required in all cases for a given occupation means that some number of workers within the occupation are not performing work in a specialty occupation. *Id.* Because such workers are almost certainly captured within OES data, and the Department calculates prevailing wages by taking into account the actual wages reported for broad swaths of workers in the OES data, the presence of these workers in the survey data directly relates to how prevailing wage levels are set, even if it does not have a great deal of significance for how a single, specific job in an occupation is determined to be or not to be in a ''specialty occupation.''

[101] *See Ajit Healthcare,* 2014 WL 11412671, at 4.

[102] *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,* 56 FR 61111, 61113 (December 2, 1991) (emphasis added).

[103] 8 U.S.C. 1184(i); *see Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007).

[104] Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf.*

[105] Bureau of Labor Statistics, Occupational Outlook Handbook, Software Developers, *available at https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm.*

[106] Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf.*

[107] Bureau of Labor Statistics, Occupational Outlook Handbook, Computer Systems Analysts, *available at https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm.*

[108] *See* Office of Foreign Labor Certification, H–1B Temporary Specialty Occupations Labor Condition Program—Selected Statistics, FY 2019, *available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf;* O*NET Online, *https://www.onetonline.org/.*

workers performing work in a specialty occupation. Because the statutory scheme requires the Department to set the prevailing wage levels based on what workers similarly employed to foreign workers make, taking into account workers' qualifications and, as noted, the large majority of foreign workers are H–1B workers, it would be inappropriate to consider the wages of the least educated and experienced workers in these occupational classifications in setting the prevailing wage levels. To conclude otherwise would place the Department at odds with one of the purposes of the INA's wage protections—to ensure that foreign workers earn wages comparable to the wages of their U.S. counterparts.

This consideration also demonstrates the inconsistency of the existing wage levels with the statutory and regulatory framework. As noted above, the Department's first wage level is currently set by calculating the mean of the bottom third of the OES wage distribution. That means the wages for many H–1B workers are set based on a calculation that takes into account wages paid to workers who almost certainly would not qualify to work in a ''specialty occupation,'' as defined by the INA. The Department has noted previously that ''workers in occupations that require sophisticated skills and training receive higher wages based on those skills.'' [109] As a worker's education and skills increase, his wages are expected to as well.[110] For that reason, it is likely that workers at the lowest end of an occupation's wage distribution generally have the lowest levels of education, experience, and responsibility in the occupation. In consequence, if the occupation by definition includes workers who do not have the level of specialized knowledge required of H–1B workers, the very bottom of the wage distribution should be discounted in determining the appropriate baseline along the OES wage distribution to establish the entry-level wage under the four-tiered wage structure. Yet the existing wage structure makes such workers a central component of the prevailing wage calculation.[111]

Similarly, the current Level IV wage is set by calculating the mean of the upper two-thirds of the wage distribution. That means that the wage level provided for the most experienced and highly educated H–1B workers is determined, in part, by taking into account a sizeable number of workers who do not even make more than the median wage of the occupation. Given the correlation between wages and skills, this calculation also would appear inconsistent with the statutory and regulatory framework. Common sense dictates that workers making less than the median wage of the occupation cannot be regarded as being similarly qualified to the most competent and experienced members of that occupation.

The same reasons for discounting a portion of the workers at the bottom of the OES wage distribution in order to compute appropriate entry-level wages—because such workers are not similarly employed to even the least skilled H–1B workers—also apply to the wages for the EB–2 immigrant visa preference classification and the E–3 and H–1B1 nonimmigrant programs, for which the Department also uses the four-tier prevailing wage structure.

The E–3 and H–1B1 visa classifications, like the H–1B classification, have as a prerequisite for obtaining a visa that the alien work in a specialty occupation.[112] Thus those programs' relation to the OES wage data is essentially identical to that of the H–1B program.

As for the EB–2 classification, the reasons for discounting the lower end of the OES wage distribution for setting the baseline to establish an entry-level wage for the classification are even more apparent than they are for the specialty occupation programs. Under the INA, the EB–2 classification applies to individuals who are ''members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States.'' [113] USCIS regulations, in turn, define an ''advanced degree'' means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.[114]

The regulation goes on to define ''exceptional ability'' to mean ''a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.'' [115]

As is the case for H–1B nonimmigrants, the baseline, minimum qualifications that an EB–2 immigrant must possess exceed the educational and experiential requirements the OOH describes as generally necessary to enter some of the most common SOC occupational classifications in which EB–2 immigrants work. For example, the most common occupation in which PERM labor certifications—of which applications for EB–2 immigrants represent a substantial share—are sought is Software Developers, which accounts for nearly 40 percent of all approved PERM applications. As already noted, according to the OOH, Software Developers ''*usually* have a bachelor's degree in computer science and strong computer programming skills.'' [116] A master's degree, generally a prerequisite for receiving an EB–2 visa, is therefore substantially above the typical, baseline qualifications needed to work as a Software Developer. Similarly, a Software Developer who satisfies the regulatory definition of ''exceptional ability'' would be, *ipso facto,* more highly skilled than the typical entry-level-worker in that occupation. This pattern holds for most of the top occupations into which PERM applications fall.[117]

In sum, the eligibility criteria established by the INA for most of the immigrant and nonimmigrant programs

[109] *Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013).

[110] *See* Bureau of Labor Statistics, Learn more, earn more: Education leads to higher wages, lower unemployment, *available at https://www.bls.gov/careeroutlook/2020/data-on-display/education-pays.htm.*

[111] For example, the occupation of Software Developers, which accounts for a large number of H–1B workers, does not, as explained above, require the same degree of specialized knowledge as a baseline entry requirement as does the INA's definition of ''specialty occupation.'' Yet approximately 10 percent of all LCAs filed with the Department for software developer positions classify those positions as entry-level, meaning that under the current wage levels the wages paid to such specialty occupation workers are calculated based, at least in part, on the wages paid to some workers who do not have comparable specialized knowledge and expertise. This outcome directly contravenes the INA's requirement that H–1B workers be paid wages commensurate with the wages paid to U.S. workers with similar levels of education, experience, and responsibility.

[112] *See* 8 U.S.C. 1184(i).

[113] 8 U.S.C. 1153(b)(2)(A).

[114] 8 CFR 204.5(k)(2).

[115] *Id.*

[116] Bureau of Labor Statistics, Occupational Outlook Handbook, Software Developers, *available at https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm.*

[117] *See* Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf;* Bureau of Labor Statistics, Occupational Outlook Handbook, *https://www.bls.gov/ooh/.*

to which the Department's prevailing wage levels apply set a higher baseline for the minimum qualifications an alien must possess than the minimum qualification requirements that exist for workers generally in the most of the occupations in which these aliens most commonly work. The H–1B, H–1B1, E–3, and EB–2 classifications are for workers with specialized knowledge and skills and/or advanced degrees.[118] Because the INA requires that these workers be paid at least as much as U.S. workers similarly employed—taking into account the experience, education, and level of supervision of such workers—the prevailing wage rates should be formulated based on the wages paid to U.S. workers who similarly possess specialized knowledge and skills in their occupations. Given that not every worker in a given OES occupation is likely to meet that standard, and that workers at the lower end of the wage distribution are also likely to be the workers with the lowest levels of education and experience, the Department has determined it is appropriate to discount the lower portion of the OES distribution in setting the wage levels. The Department should instead identify where within the distribution workers are to be found who possess the same kinds of specialized education and experience possessed by aliens working in the H–1B, H–1B1, E–3, and EB–2 classifications. The wages paid to those U.S. workers can serve as the basis for appropriately adjusting the prevailing wage levels to ensure the employment of foreign workers does not adversely affect the wages and job opportunities of U.S. workers.

2. Adverse Effects of Current Prevailing Wage Levels

Beyond their inconsistency with the statutory scheme, the Department has also evaluated evidence on how the existing prevailing wage levels affect U.S. workers, and has concluded that the current levels are harming the wages and job opportunities of U.S. workers, and thus failing to serve the purposes of the INA's wage protections. This is a separate and independent reason justifying the Department's decision to adjust the existing levels. It also demonstrates that whatever assumptions or analyses, left unarticulated, that may have underlay the manner in which the current levels are set were seriously flawed.

First, a number of studies indicate that many H–1B workers are likely paid less than similarly employed U.S. workers in fields with high H–1B utilization. Where the wages of foreign workers are lower than those of U.S. workers, at least two harmful consequences to U.S. workers are likely to follow. In particular, employers will, in some instances, use H–1B workers to displace U.S. workers, and U.S. workers will experience wage suppression. Anecdotal evidence and academic research suggests that both consequences are being experienced by U.S. workers because of the H–1B program, which further substantiates the conclusion that wages for H–1B workers are, in some cases, materially lower than they would be if the prevailing wage levels actually resulted in H–1B wages commensurate with the wages paid to similarly employed U.S. workers with comparable levels of education, experience, and responsibility. Further demonstrating that the current prevailing wage levels do not in many cases reflect market wage rates, data on the actual wages paid by H–1B employers show that some firms do in fact pay H–1B workers wages well above the prevailing wage rates generated through application of the Department's four-tier wage structure. If the prevailing wage levels were correctly approximating the wages commanded by workers in the relevant labor markets, such significant disparities between actual wages and the prevailing wage levels would likely be less common. Such disparities also suggest that firms to which the statute's actual wage clause does not apply can pay wages well below what U.S. workers in the same labor market are paid. The Department also considered various studies that suggest the employment of H–1B workers has positive effects on the wages and job opportunities of U.S. workers. While the Department agrees that this is true in some instances, it is also clear that the current prevailing wage levels often result in adverse effects, and that adjustments to the wage levels are needed to ensure that the positive effects of the program will be enjoyed more widely. Finally, the Department notes that the evidence of the adverse effects of the existing prevailing wage levels in the H–1B program also likely applies to the PERM programs.

To begin, a variety of studies and analyses demonstrate that the current wage levels allow employers to pay H–1B workers wages far below what their U.S. counterparts are paid.[119] Most of these studies compare median H–1B worker earnings in an occupation to median U.S. worker earnings in the same occupation, without directly comparing workers with the same levels of education, experience, and responsibility. To some extent this limits the conclusions that can be drawn from the comparison. That being said, if H–1B workers were truly being used as a supplement to the U.S. workforce, then the wages H–1B workers typically earn would likely not be significantly lower than the wages of U.S. workers in these occupations. Indeed, because H–1B workers are required to possess specialized knowledge and expertise that often exceeds the level of education and experience necessary to enter a given occupation generally, and greater skills are associated with higher earnings, the median H–1B workers should earn a wage that is at least the same, if not more, than the median wage paid to U.S. workers in the occupation. But a variety of studies show that the opposite is occurring.

Studies on the subject often focus on the wages paid to H–1B workers in computer-related occupations, in which nearly two-thirds of all H–1B workers are employed.[120] According to some estimates, H–1B employees in information technology (IT) occupations earn wages that are about 25 percent to 33 percent less than U.S. workers' wages, a gap that appears to have persisted for more than two decades.[121]

[118] The Department notes that its assessment of the appropriateness of adjusting the prevailing wage levels in the manner described by this rule with respect to the EB–3 classification is governed by distinct considerations, which are described more fully below.

[119] *See, e.g.,* Atlantic Council, Reforming US' High-Skilled Guestworker Program, (2019), *available at https://www.atlanticcouncil.org/in-depth-research-reports/report/reforming-us-high-skilled-immigration-program/; The Impact of High-Skilled Immigration on U.S. Workers: Hearing before the Senate Committee on the Judiciary* (February 25, 2016) (testimony of John Miano, representing Washington Alliance of Technology Workers, Local 37083 of the Communications Workers of America, the AFL–CIO); Norman Matloff, *On the Need for Reform of the H–1B Non-Immigrant Work Visa in Computer-Related Occupations,* 36 U. Mich. J.L. Reform 815 (2003).

[120] *See* U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf,* (showing 66 percent of H–1B petitions approved in FY2019 were for computer-related occupations).

[121] Sean McLain & Dhanya Ann Thoppil, Bulging Staff Cost, Shrinking Margins, CRISIL Research, (2019), *available at https://www.crisil.com/en/home/our-analysis/reports/2019/05/bulging-staff-cost-shrinking-margins.html;* Sean McLain & Dhanya Ann Thoppil, *U.S. Visa Bill 'Very Tough' for Indian IT, The Wall Street Journal*, April 18, 2013, available at *https://blogs.wsj.com/indiarealtime/2013/04/18/u-s-visa-bill-very-tough-for-indian-it/?mod=wsj_streaming_latest-headlines;* The State of Asian Pacific America,'' Paul Ong (ed.),

Another analysis estimates that H–1B employees in computer science occupations earn 9 percent less than U.S. workers.[122] Although the precise findings of wage differences are not uniform, the results generally show meaningful wage differences in fields with high proportions of H–1B workers. Notably, as would be expected, the same phenomenon of markedly lower wages for H–1B workers are generally not found in fields with lower proportions of H–1B workers.[123]

One negative consequence that would be expected to occur if H–1B workers could be paid less than their U.S. counterparts is that some employers would use H–1B workers as a low-cost labor alternative to displace U.S. workers—a result at odds with the purpose of the statutory scheme. A significant body of research on how H–1B workers are used by some firms suggests that is exactly what is occurring.[124] Anecdotal evidence also demonstrates that H–1B workers are used as a low-cost alternative to U.S. workers doing similar jobs. Media accounts of U.S. workers being required to train their H–1B replacements abound.[125] In these cases, evidence that U.S. workers were required to train their foreign replacements calls into question the rationale for bringing in H–1B workers to fill the respective skilled positions given that the positions were already filled. One likely motivation for the replacement of U.S. workers with H–1B workers in these cases is cost savings, as detailed in the reporting on the topic. When that is the case, the displacement of U.S. workers by H–1B workers provides further evidence that the current prevailing wage levels are set materially below what similarly employed U.S. workers earn. If prevailing wages were placed at the appropriate levels, the incentive to prefer H–1B workers over U.S. workers would be significantly diminished, and the practice of replacing U.S. workers with H–1B workers would likely not be as prevalent as the reporting suggests it is.

Another likely harmful consequence for U.S. workers in cases where H–1B workers can be paid below what comparable workers in the same labor market are paid is wage suppression. Academic research indicates that the influx of low-cost foreign labor into a labor market suppresses wages, and this effect increases significantly as the number of foreign workers increases.[126] In particular, some research suggests that a substantial increase in the labor supply due to the presence of foreign workers reduces the wages of the average U.S. worker by 3.2 percent, a rate that grew to 4.9 percent for college graduates.[127] More generally, though the economics literature is mixed on the effects of higher-skilled foreign workers on overall job creation, economic theory dictates that increasing the supply of something above similar demand growth lowers prices. As a result, while employing foreign workers at wages lower than their U.S. counterparts may increase firms' profitability, a result that is not surprising if current prevailing wage levels allow firms to replace domestic workers with lower-cost foreign workers, such a practice also results in lower overall wages, particularly in occupations where there are high concentrations of foreign workers. A significant body of research demonstrates that this phenomenon is likely occurring in the H–1B program.

For starters, H–1B workers make up about 10 percent of the IT labor force in the U.S.[128] In certain fields, including Software Developers, Applications (approximately 22 percent); Statisticians (approximately 22 percent); Computer Occupations, all other (approximately 18 percent); and Computer Systems Analysts (approximately 12 percent), H–1B workers likely make up an even higher percentage of the overall workforce.[129] This high prevalence of H–1B workers in these fields far exceeds the supply increase in the research described above that found substantial increases in the labor supply lower U.S. workers' earnings.[130]

One study compared winning and losing firms in the FY2006 and FY2007 lotteries for H–1B visas by matching administrative data on these lotteries to

LEAP Asian Pacific American Public Policy Institute and UCLA Asian American Studies Center, 1994, pp. 179–180; Carnegie Endowment for International Peace, Balancing Interests: Rethinking U.S. Selection of Skilled Immigrants, (1996).

[122] Youyou Zhou, *Most H–1B workers are paid less, but it depends on the job,* Associated Press, April 18, 2017, *available at https://apnews.com/afs:Content:873580003/Most-H-1B-workers-are-paid-less,-but-it-depends-on-the-type-of-job.*

[123] *See, e.g.,* American Immigration Council, The H–1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy (2020), *available at https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h-1b_visa_program_a_primer_on_the_program_and_its_impact_on_jobs_wages_and_the_economy.pdf;* National Foundation for American Policy, H–1B Visas by the Numbers: 2017–18, (2018), *available at https://nfap.com/wp-content/uploads/2018/04/H-1B-Visas-By-The-Number-FY-2017.NFAP-Policy-Brief.April-2018.pdf.*

[124] *See, e.g.,* John Miano, Studies, Wages and Skill Levels for H–1B Computer Workers, 2005 Low Salaries for Low Skills, Center for Immigration Studies, (2007), *available at https://cis.org/Report/Wages-and-Skill-Levels-H1B-Computer-Workers-2005;* Patrick Thibodeau & Sharon Machlis, *U.S. law allows low H–1B wages; just look at Apple,* Computerworld, May 15, 2017, *available at https://www.computerworld.com/article/3195957/us-law-allows-low-h-1b-wages-just-look-at-apple.html;* Park, Haeyoun, ''How Outsourcing Companies Are Gaming the Visa System,'' The New York Times, November 10, 2015, *https://www.nytimes.com/interactive/2015/11/06/us/outsourcing-companies-dominate-h1b-visas.html;* National Research Council, Building a Workforce for the Information Economy, (2001), *available at https://www.nap.edu/catalog/9830/building-a-workforce-for-the-information-economy.*

[125] ''Visa Abuses Harm American Workers,'' *The New York Times,* June 16, 2016, *available at http://www.nytimes.com/interactive/opinion/editorialboard.html;* Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements,* The New York Times, June 3, 2015, *available at https://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html;* Julia Preston, *Toys 'R' Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas,* The New York Times, September 29, 2015, *available at https://www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html;* Michael Hiltzik, *A loophole in immigration law is costing thousands of American jobs,* Los Angeles Times, February 20, 2015, *available at https://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150222-column.html;* Daisuke Wakabayashi & Nelson Schwarts, *Not Everyone in Tech Cheers Visa Program for Foreign Workers,* The New York Times, February 5, 2017, *available at https://www.nytimes.com/2017/02/05/business/h-1b-visa-tech-cheers-for-foreign-workers.html.*

[126] George Borjas, Immigration Economics (2014). Borjas's research generally focuses on low-skilled immigrant labor, but the basic economic conclusions his research draws, principally that increases in labor supply lower wages, are applicable outside of the context of low skilled immigration.

[127] George Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market,* The Quarterly Journal of Economics Vol. 118, No. 4 (Nov., 2003), pp. 1335–1374, *available at https://www.jstor.org/stable/25053941?seq=1.*

[128] The Department estimated the share of H–1B workers in the IT sector by tallying the total number of computer occupation workers in the U.S., subtracting those workers that fill positions for which H–1B workers are ineligible, and dividing the total by the total number of H–1B workers likely working in computer occupations, based on data and reports issued by USCIS. *See* Bureau of Labor Statistics, Employment by detailed occupation, *https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm;* United States Citizenship and Immigration Services, H–1B Authorized-to-Work Population Estimate, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf;* United States Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.*

[129] These findings come from an analysis of data on H–1B beneficiaries in FY19 from the United States Citizenship and Immigration Services and the 2017 Occupational Employment Statistics survey from the Bureau of Labor Statistics.

[130] George Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market,* The Quarterly Journal of Economics Vol. 118, No. 4 (2003), pp. 1335–1374, *available at https://www.jstor.org/stable/25053941?seq=1.*

administrative tax data on U.S. firms.[131] The study found that winning additional H–1B visas causes at most a moderate increase in firms' overall employment that does not usually exceed the number of H–1B workers hired, meaning that H–1Bs workers essentially crowd out firms' employment of other workers. It also found evidence that additional H–1B workers lead to lower average employee earnings and higher firm profits.[132] On the whole, the study concluded that the current results of the H–1B program run counter to the program's purpose, which is to allow for a limited number of workers with specialized skills to work in the U.S. while ensuring that U.S. workers' wages are not adversely affected.

Similarly, other studies have found that an influx of foreign computer science workers suppresses wages for computer science workers across the board.[133] These lower wages crowd out U.S. workers into non-computer science-based fields. In particular, the findings of these studies ''imply that for every 100 foreign [computer science] workers that enter the US, between 33 to 61 native [computer science] workers are crowded out from computer science to other college graduate occupations.'' [134]

Other sources dispute the conclusion that existing prevailing wage levels disadvantage U.S. workers.[135] The Department acknowledges that H–1B workers can and do, in many instances, earn the same or more than similarly employed U.S. workers. However, the evidence described above appears to contradict that this claim is universal across firms and industries. The Department in its expertise views the studies, data, testimony, and anecdotal evidence showing displacement and lowered wages for U.S. workers in many cases as sufficient to demonstrate that the H–1B prevailing-wage levels are in need of reform, even if in other instances some firms do in fact pay H–1B workers wages comparable to those of U.S. workers.

Relatedly, some sources suggest that attracting foreign workers with specific, in-demand skills helps firms innovate and expand, driving growth and higher overall job creation, which in turn leads to more work opportunities for U.S. workers.[136] The Department does not dispute that allowing firms to access skilled foreign workers can lead to overall increases in innovation and economic activity, which can, in turn, benefit U.S. workers. However, H–1B workers' earnings data and other research indicate that, in many cases, the existing wage levels do not lead to these outcomes.[137] Even though some employers pay H–1B workers at rates comparable to what their U.S. counterparts are paid, that does not change the conclusion that the existing prevailing wage levels set a wage floor substantially below what similarly employed U.S. workers make in many instances, which allows some firms to use H–1B workers as a low-cost alternative to U.S. workers. And regardless, while the Department is certainly in favor of measures that increase economic growth and job creation, such outcomes are not the immediate objectives of the INA's wage protections, and, in any event, must be achieved in a manner consistent with the statute, which here requires the Department to focus on ensuring that the H–1B program does not impair wages and job opportunities of U.S. workers similarly employed. In short, the fact that some firms use the program as intended and pay H–1B workers the same or higher rates than similarly employed U.S. workers does not reduce the Department's need to act to ensure that this practice becomes more common, lessening the harms to U.S. workers caused by the existing prevailing wage levels.

Furthermore, given the annual numerical cap on some H–1B workers, a level that is frequently exceeded by the number of petitions each year, raising the prevailing wage levels to more accurately reflect what U.S. workers with levels of education, experience, and responsibility comparable to H–1B workers are paid should lead to more highly skilled H–1B nonimmigrants entering the U.S. labor market, and thus enhance the benefits of the program for U.S. workers identified by some studies. This is because, if firms are required to pay H–1B workers wages that accurately reflect what their U.S. counterparts earn, the firms would be more likely to sponsor foreign workers whose value exceeds this increased compensation. Given that workers' compensation tends to reflect the value provided from skills demanded by a firm, higher compensation should lead to workers with more specialized knowledge and expertise receiving the limited number of H–1B visas. Because this change in H–1B worker composition would limit applications to those with the skills necessary to command higher compensation, it would likely increase innovation and economic growth.

[131] Kirk Doran et al., *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries,* (2016), *available at https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf.*

[132] Supporting the argument that H–1B dependence increases firms' profit margins is evidence showing that firms that rely on H–1Bs can generate net profit margins of 20 percent to 25 percent in a sector. Normal expected margins are 6 percent to 8 percent. *See Immigration Reforms Needed to Protect Skilled American Workers: Hearing before the Senate Committee on the Judiciary* (March 17, 2015) (testimony of Ronil Hira, Associate Professor of Public Policy Rochester Institute of Technology, Rochester, NY), *available at https://www.judiciary.senate.gov/imo/media/doc/Hira%20Testimony.pdf.*

[133] John Bound et al., *Understanding the Economic Impact of the H–1B Program on the U.S.,* NBER Working Paper No. 23153 (2017), *available at https://www.nber.org/papers/w23153.pdf.* Additionally, some argue that H–1B visas are in such high demand because it is often cheaper to hire an H–1B employee than an American worker. *The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing before the Senate Committee on the Judiciary* (April 22, 2013) (testimony of Neeraj Gupta, CEO of Systems in Motion, to the Senate Judiciary Committee), *available at https://www.judiciary.senate.gov/imo/media/doc/04-22-13GuptaTestimony.pdf.* Furthermore some studies show that heavy users of H–1Bs workers pay their workers less than the median wages for the jobs they fill. Daniel Costa and Ronil Hira, *H–1B Visas and Prevailing Wage Levels,* Economic Policy Institute, (2020), *available at https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/.*

[134] John Bound et al., *Understanding the Economic Impact of the H–1B Program on the U.S.,* NBER Working Paper No. 23153 (2017), *available at https://www.nber.org/papers/w23153.pdf.* The authors find that, in the absence of high-skilled immigrants (mostly H–1B workers), wages for U.S. computer scientists would have been 2.6 percent to 5.1 percent higher and employment in computer science for U.S. workers would have been 6.1 percent to 10.8 percent higher in 2001.

[135] *See, e.g.,* David Bier, *100% of H–1B Employers Offer Average Market Wages—78% Offer More,* Cato Institute, (2020), *available at https://www.cato.org/blog/100-h-1b-employers-offer-average-market-wages-78-offer-more#:~:text=2020%209%3A37AM-,100%25%20of%20H%2D1B%20Employers%20Offer%20Average,Market%20Wages%E2%80%9478%25%20Offer%20More&text=The%20Economic%20Policy%20Institute%20(EPI,foreign%20workers%20in%20specialty%20occupations;Robert Atkinson, H–1B Visa Workers: Lower-Wage Substitute, or Higher-Wage Complement?,* Information Technology & Innovation Foundation, (2010), *available at https://itif.org/publications/2010/06/10/h-1b-visa-workers-lower-wage-substitute-or-higher-wage-complement.*

[136] *See* American Immigration Council, The H–1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy, (2020), *available at https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h-1b_visa_program_a_primer_on_the_program_and_its_impact_on_jobs_wages_and_the_economy.pdf;* National Foundation for American Policy, H–1B Visas by the Numbers: 2017–18, (2018), *available at https://nfap.com/wp-content/uploads/2018/04/H-1B-Visas-By-The-Number-FY-2017.NFAP-Policy-Brief.April-2018.pdf.*

[137] *See, e.g.,* Sarah Pierce and Julia Gelatt, *Evolution of the H–1B: Latest Trends in a Program on the Brink of Reform,* Migration Policy Institute, (2018), *available at https://www.migrationpolicy.org/research/evolution-h-1b-latest-trends-program-brink-reform;* Center for Immigration Studies, H–1Bs: Still Not the Best and Brightest, (2008), *available at https://cis.org/Report/H1Bs-Still-Not-Best-and-Brightest.*

Some also argue that the presence of H–1B workers, even those with wages lower than similarly employed U.S. workers, raises income for U.S. workers because in some fields there is an apparent shortage of U.S. Science, Technology, Engineering, and Math (STEM) workers.[138] If there are no available U.S. workers to fill a position, then a firm's labor need goes unmet without substantial investment in worker recruitment and training. Accordingly, importing needed workers allows companies to innovate and grow, creating more work opportunities and higher-paying jobs for U.S. workers.

While there are usually fewer U.S. graduates in STEM fields than there are open positions in the fields, this simple observation tends to ignore key characteristics of STEM workers, especially those in IT. As some researchers have noted, in recent years, for every two students who graduate from a U.S. university with a STEM degree, only one is hired into a STEM job.[139] This finding, along with other research on U.S. workers' skills,[140] calls into question, in some cases, the scarcity of U.S. STEM workers that some claim drive employers' use of H–1B workers.[141]

As noted above, there are high concentrations of H–1B workers in many STEM-related fields. The high number of H–1B workers in fields for which U.S. workers study but in which they either choose not to work or cannot find jobs suggests that H–1B workers are not being used where no domestic workers can be found for the market rate, but rather are being used to fill jobs with workers paid below the market rate.[142] Further, while the wage effects from a lower cost labor alternative may be minimal where the alternative only makes up a very small share of the labor pool, the effects can become negative and more pronounced as concentrations of foreign workers increase.[143] Thus, the fact that 10 percent of the IT workforce consists of H–1B workers, in combination with the fact that many U.S. IT graduates do not work in IT jobs, supports the notion that firms use H–1B workers as low-cost labor, and that this practice likely has a substantial harmful effect on U.S. workers. Moreover, insofar as the H–1B program suppresses wages for U.S. IT workers, it discourages U.S. students from entering the IT field in the first place, thus perpetuating the ''skills gap.'' Basic economic theory dictates that more U.S. students would likely enter the IT field if IT jobs paid more.

In short, contrary to the H–1B program's goals, prevailing wage levels that in many instances do not accurately reflect earning levels of comparable U.S. workers have permitted some firms to displace rather than supplement U.S. workers with H–1B workers. While allowing firms to access high-skilled workers to fill specialized positions can help U.S. workers' job opportunities in some instances, the benefits of this policy diminish significantly when the prevailing wage levels do not accurately reflect the wages of similarly employed workers in the U.S. labor market. The resulting distortions from a poor calculation of the prevailing wage allow some firms to replace qualified U.S. workers with lower-cost foreign workers, which is counter to the purpose of the INA's wage protections, and also lead to wage suppression for those U.S. workers who remain employed.

That the existing prevailing wage levels likely do not reflect actual market wage rates in many cases is further demonstrated by the fact that some firms already pay wages to their H–1B workers that are well above the applicable prevailing wage level. For example, Microsoft's General Counsel testified before the Senate Judiciary Committee in 2013 that at the company's headquarters, software development engineers had a starting salary that was typically more than 36 percent above the Level I wage, meaning they were being paid wages slightly above the Department's Level III wage at that time.[144] More recently, in Q3:2020, the Department's data show that many of the largest users of the H–1B program pay in many cases wages well over 20 percent in excess of the prevailing wage rate set by the Department for the workers in question.[145] Table 2 below shows this trend with respect to top H–1B employers.

TABLE 1—TOP 20 H–1B EMPLOYERS BY LCAS FILED: AVERAGE RATE AT WHICH THE WAGE OFFERED EXCEEDS THE PREVAILING WAGE

Top employers	Total LCAs filed/worker positions requested	Average rate at which the wage offered exceeds prevailing wage (percent)	Percentage of worker positions where wage offered exceeds prevailing wage by over 20 percent
Qualcomm Technologies, Inc	701/38,533	5.74	9.70

[138] *See, e.g., The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing before the Senate Committee on the Judiciary* (April 22, 2013) (testimony of Brad Smith, General Counsel of Microsoft), *available at https://www.judiciary.senate.gov/imo/media/doc/04-22-13BradSmithTestimony.pdf.*

[139] Questions for the Record submitted by Ronil Hira, Associate Professor of Public Policy Rochester Institute of Technology, Rochester, NY, to the Senate Judiciary Committee, April 2013, *https://www.judiciary.senate.gov/imo/media/doc/042213QFRs-Hira.pdf.*

[140] The Bureau of Labor Statistics studied the STEM skills gap and found varied results depending on geography, field, and other factors. Though some fields clearly face a shortage of qualified workers, this shortage is far from universal. *See* Yi Xue & Richard C. Larson, *STEM crisis or STEM surplus? Yes and yes,* Monthly Labor Review, U.S. Bureau of Labor Statistics, (2015), *available at https://doi.org/10.21916/mlr.2015.14.*

[141] Benedikt Herz & Thijs van Rens, *Accounting for Mismatch Unemployment,* IZA, Discussion Paper No. 8884 (2015), *available at http://ftp.iza.org/dp8884.pdf;* Thijs van Rens, The Skills Gap: Is it a myth? Social Market Foundation and Competitive Advantage in the Global Economy, (2015), *available at http://www.smf.co.uk/wp-content/uploads/2015/12/SMF-CAGE-Policy-Briefing-Skills-Gap-Myth-Final.pdf.*

[142] Benedikt Herz & Thijs van Rens, *Accounting for Mismatch Unemployment,* IZA, Discussion Paper No. 8884 (2015), *available at http://ftp.iza.org/dp8884.pdf;* Thijs van Rens, *The Skills Gap: Is it a myth?,* Social Market Foundation and Competitive Advantage in the Global Economy, (2015), *available at http://www.smf.co.uk/wp-content/uploads/2015/12/SMF-CAGE-Policy-Briefing-Skills-Gap-Myth-Final.pdf.*

[143] George Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market,* The Quarterly Journal of Economics Vol. 118, No. 4 (2003), pp. 1335–1374, *available at https://www.jstor.org/stable/25053941?seq=1.*

[144] *See, e.g., The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing before the Senate Committee on the Judiciary* (April 22, 2013) (testimony of Brad Smith, General Counsel of Microsoft), *available at https://www.judiciary.senate.gov/imo/media/doc/04-22-13BradSmithTestimony.pdf.*

[145] ''Top 20 LCA/H–1B Employers based on Certifications, as of 6/30/2020,'' Employment and Training Administration, accessed August 2020.

TABLE 1—TOP 20 H–1B EMPLOYERS BY LCAS FILED: AVERAGE RATE AT WHICH THE WAGE OFFERED EXCEEDS THE PREVAILING WAGE—Continued

Top employers	Total LCAs filed/worker positions requested	Average rate at which the wage offered exceeds prevailing wage (percent)	Percentage of worker positions where wage offered exceeds prevailing wage by over 20 percent
Infosys Limited	7,615/21,627	6.53	11.08
Cognizant Technology Solutions US Corp	20,192/20,192	0.24	0.32
Deloitte Consulting, LLP	7,316/16,567	61.62	44.16
Amazon.com Services, LLC	9,175/12,560	93.93	68.38
Oracle America, Inc	543/12,269	0.48	0.55
Tata Consultancy Services Limited	8,595/9,388	2.95	4.90
Zensar Technologies, Inc	130/9,207	1.03	0.77
NVIDIA Corporation	396/8,977	4.69	8.33
Google, LLC	8,669/8,669	71.73	58.60
Ernst & Young U.S., LLP	8,170/8,170	88.59	71.79
Facebook, Inc	3,583/7,674	24.71	47.92
Cisco Systems, Inc	925/7,121	8.88	16.65
Qualcomm Atheros, Inc	115/7,110	6.05	15.65
Apple, Inc	2,983/6,889	117.89	61.25
Microsoft Corporation	6,544/6,631	31.48	68.61
Western Digital Technologies, Inc	267/6,621	12.30	21.72
ServiceNow, Inc	359/6,383	0.00	0.00
Computer Sciences Corporation	231/6,034	0.44	1.30
Kforce, Inc	584/5,786	1.16	1.71
Percent of National LCA/H–1B Totals	19.2%/31.6%	.....	.....
Simple Average for the Top 20	.....	27.02	25.67

Source: ''Top 20 LCA/H–1B Employers based on Certifications, as of 6/30/2020,'' Employment and Training Administration, accessed August 2020.

If the Department's current prevailing wage levels accurately reflected earnings for similarly employed U.S. workers, then these major differences between actual wages paid to some H–1B workers and the otherwise applicable prevailing wage levels would not be as common. As noted previously, the INA takes a belt-and-suspenders approach to protecting U.S. workers' wages. Employers must pay the higher of the actual wage they pay to similarly employed workers or the prevailing wage rate set by the Department. Both possible wage rates generally should approximate the going wage for workers with similar qualifications and performing the same types of job duties in a given labor market as H–1B workers. It is therefore a reasonable assumption that, if both of the INA's wage safeguards were working properly, the wage rates they produce would, at least in many cases, be similar. Where the Department's otherwise applicable wage rate is significantly below the rates actually being paid by employers in a given labor market, it gives rise to an inference that the Department's current wage rates, based on statistical data and assumptions about the skill levels of U.S. workers, are not reflective of the types of wages that workers similarly employed to H–1B workers can and likely do command in a given labor market. There is a mismatch between what the Department's prevailing wage structure says the relevant cohort of U.S. workers are or should be making and what employers are likely actually paying such workers, as demonstrated by the actual wage they are paying H–1B workers. Put another way, when many of the heaviest users of the H–1B program pay wages well above the prevailing wage, it suggests that the prevailing wages are too low, and thus can be abused by other firms to replace U.S. workers with lower-wage foreign workers in cases where those firms do not have similarly employed workers on their jobsites whose actual wages would be used to set the wage for H–1B workers.

In the PERM programs, recent Employment and Training Administration data shows that the heaviest users of the programs also typically pay wages well above the prevailing wage levels. Whereas the simple average of the top 20 employers' wage offers over the prevailing wage is 27.02 percent for H–1B, it is 16.77 percent for PERM. And while the simple average of cases with wages more than 20 percent above the prevailing wage is 25.67 percent for H–1B, it is 30.59 percent for PERM, as shown in Table 3.[146]

[146] ''Top 20 LCA/H–1B Employers based on Certifications, as of 6/30/2020,'' Employment and Training Administration, accessed August 2020; ''Top 20 PERM Employers based on Certifications, as of 6/30/2020,'' Employment and Training Administration, accessed August 2020.

TABLE 2—TOP 20 PERM EMPLOYERS AVERAGE OF WAGE OFFERED OVER PREVAILING WAGE

PERM employers			
Top twenty employers	Total applications certified	Average rate at which the wage offered exceeds prevailing wage (percent)	Percentage of certified cases where wage offered exceeds prevailing wage by over 20 percent
Amazon.com Services, Inc	2,389	3.27	6.86
Google LLC	2,167	19.50	34.06
Facebook, Inc	1,204	40.57	68.11
Microsoft Corporation	1,114	27.71	48.56
Intel Corporation	939	2.08	2.88
Tata Consultancy Services Limited	923	0.00	0.00
Cognizant Technology Solutions US Corporation	808	0.00	0.00
Apple, Inc	697	37.85	69.30
HCL America, Inc	557	0.01	0.00
Capgemini America, Inc	502	6.12	7.97
Ernst Young U.S. LLP	426	13.71	27.00
Cisco Systems	325	9.95	19.69
Amazon Web Services, Inc	316	2.81	5.70
Deloitte Consulting LLP	303	39.29	67.99
LinkedIn Corporation	282	40.74	72.34
Nvidia Corporation	276	26.53	56.16
Salesforce.com	265	32.72	67.17
Oracle America, Inc	263	14.96	28.52
VMWare, Inc	258	12.43	21.71
Qualcomm Technologies	254	5.18	7.87
Percent of National PERM Totals	21.6%	.....	.....
Simple Average for the Top 20	.....	16.77	30.59

Source: ''Top 20 PERM Employers based on Certifications, as of 6/30/2020,'' Employment and Training Administration, accessed August 2020.

Beyond the similarities between wages offered above the prevailing wage levels in the H–1B and PERM programs, the Department notes that the volume of research and literature on the wage effects of the PERM programs is scant compared to that on the wage effects of the H–1B program. That said, there are reasonable grounds to conclude that adverse wage effects similar to those found in the H–1B program are also caused in some instances by the employment of EB–2 and EB–3 immigrants.

Critically, the PERM programs and the H–1B program are closely linked in both how they are regulated and used by employers. Unlike most nonimmigrant visas, H–1B visas are unusual in that they are ''dual intent'' visas, meaning under the INA H–1B workers can enter the U.S. on a temporary status while also seeking to adjust status to that of lawful permanent residents.[147] One of the most common pathways by which H–1B visa holders obtain lawful permanent resident status is through employment-based green cards, and in particular EB–2 and EB–3 visas.[148] USCIS has estimated that over 80 percent of all H–1B visa holders who adjust to lawful permanent resident status do so through an employment-based green card.[149] This is reflected in data on the PERM programs. In recent years, more than 80 percent of all individuals granted lawful permanent residence in the EB–2 and EB–3 classifications have been aliens adjusting status, meaning they were already present in the U.S. on some kind of nonimmigrant status.[150] Given that the H–1B program is the largest temporary visa program in the U.S. and is one of the few that allows for dual intent, it is a reasonable assumption that the vast majority of the EB–2 and EB–3 adjustment of status cases are for H–1B workers. This is corroborated by the Department's own data, which shows that, in recent years, approximately 70 percent of all PERM labor certification applications filed with the Department have been for H–1B nonimmigrants.[151]

Because of how many H–1B visa holders apply for EB–2 and EB–3 classifications, Congress has repeatedly adapted the INA to account for the close connection between the programs. For example, while H–1B nonimmigrants are generally required to depart the U.S. after a maximum of six years of temporary employment, Congress has created an exception that allows H–1B nonimmigrants who are beneficiaries of PERM labor certification applications with the Department, or who are beneficiaries of petitions for an employment-based immigrant visa with DHS that have been pending for longer than a year, be exempt from the 6-year period of authorized admission limitation if certain requirements are

[147] *dePape* v. *Trinity Health Sys., Inc.,* 242 F. Supp. 2d 585, 593 (N.D. Iowa 2003).

[148] *See* Sadikshya Nepal, *The Convoluted Pathway from H–1B to Permanent Residency: A Primer,* Bipartisan Policy Center (2020); Congressional Research Service, The Employment-Based Immigration Backlog (2020) (''A primary pathway to acquire an employment-based green card is by working in the United States on an H–1B visa for specialty occupation workers, getting sponsored for a green card by a U.S. employer, and then adjusting status when a green card becomes available.'').

[149] U.S. Citizenship and Immigration Services, H–1B Authorized-to-Work Population Estimate (2020).

[150] *See* Department of Homeland Security, 2017 Yearbook of Immigration Statistics, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017, available at *https://www.dhs.gov/immigration-statistics/yearbook/2017/table7.*

[151] Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.*

met.[152] Similarly, as noted above, Congress established the INA's prevailing wage requirements in section 212(p) with specific reference to the fact that they would apply in both the H–1B and PERM programs.[153]

The various features of the statutory framework governing the programs, working in combination, have further tightened the relationship between them. In particular, because H–1B workers can have dual intent and, if they have a pending petition for an employment-based green card, can remain in the U.S. beyond the 6-year period of authorized stay limitation, many workers for whom an employer has filed a PERM labor certification application are already working for that same employer on in H–1B status.[154] And because the method by which employment-based green cards are allocated can result in significant delays between when an alien is approved for a green card and when the green card is actually issued, the period during which a worker can, in some sense, have one foot in each program, is often protracted.[155]

This system results in an immense demographic overlap between the H–1B and PERM programs. For instance, 71.7 percent of all H–1B petitions approved in FY2019 were for individuals born in India.[156] Similarly, the vast majority of individuals waiting for adjudication of EB–2- and EB–3-based adjustment of status applications are Indian nationals.[157] Relatedly, LCAs and applications for PERM labor certifications often are for job opportunities in the same occupations. Data from the Department's OFLC shows that of the ten most common occupations in which H–1B workers are employed, seven are also among the ten most common occupations in which PERM workers are employed.

The upshot is that the H–1B and PERM programs are, in a variety of ways, inextricably conjoined. The rules governing them and how employers use them mean that, in many instances, workers in the PERM programs and workers in the H–1B program are often the exact same workers doing the same jobs in the same occupations for the same employers. And their wages are set based on the same methodology. It is therefore a reasonable inference that evidence that the Department's current wage levels under the four-tier structure result in inappropriately low wage rates in some instances for H–1B workers also holds true for the PERM programs.

3. Identifying the Appropriate Entry Level Wage

Having determined that the existing wage levels are not set based on the wages paid to U.S. workers with the education, experience, and levels of supervision comparable to those of similarly employed foreign workers and are likely harming the wages and job opportunities of U.S. workers, the Department must assess how the wage levels should be adjusted. While the INA provides the relevant factors and general framework by which the wage levels are to be set, it leaves the precise manner in which this is accomplished, including the types of data and evidence to be used and how such data and evidence is weighed, to the Department's discretion and expert judgment. In exercising that discretion, the Department's decision on how to adjust the wage levels is informed by the statute's purpose of protecting the wages and job opportunities of U.S. workers. This means the Department has focused its analysis on those areas where the risk to U.S workers is most acute, taken into account how the foreign labor programs are actually used by employers, and, where appropriate, resolved doubts in favor of refining the wage calculations so as to eliminate to the greatest extent reasonably possible adverse effects on U.S. workers caused by the employment of foreign workers.

For the reasons explained above, the Department has determined BLS's OES survey remains the best source of wage data to determine prevailing wages in the H–1B, H–1B1, E–3, and PERM programs. However, because the OES survey does not capture the actual skills or responsibilities of the workers whose wages are being reported, it is appropriate for the Department to rely on data outside the OES survey to establish the wage levels applicable to these immigrant and nonimmigrant visa programs, which encompass varying populations working in hundreds of different occupational classifications. The Department has therefore undertaken a comprehensive analysis concerning the types of U.S. workers in the most common occupations in the programs that have comparable levels of education, experience, and responsibility to the foreign workers in these programs, and estimated how much those U.S. workers earn. To identify the proper comparators, the Department looked not only to the INA itself, which sets the minimum qualifications foreign workers in the H–1B, H–1B1, and E–3 programs must have to qualify for these visas, but, in order to draw a more accurate comparison, demographic data about the types of workers who actually work in the programs as well.

The Department has concluded, in its discretion, that the Level I wage should be established based on the wages paid to workers in those occupations that make up a substantial majority of the applications filed in the H–1B, H–1B1, E–3, and PERM programs. This ensures that the Department appropriately takes into account the size and breadth of the programs covered by the four-tier wage structure by giving special attention to those areas where the risk to U.S. workers' wages and job opportunities is most acute. To make this determination, the Department has identified what it considers to be an analytically appropriate proxy for approved entry-level workers for the specialty occupation and EB–2 programs; consulted various, authoritative sources to determine what similarly qualified workers in the U.S. who fit this profile are paid; and identified where within the OES wage distribution these U.S. workers' wages fall. That point in the distribution, which the Department has estimated to be at approximately the 45th percentile, serves as the appropriate entry-level wage for purposes of the Department's four-tier wage structure.

In order to reach this estimate, the Department first identified an analytically usable definition of the prototypical entry-level H–1B and EB–2 workers. More specifically, the Department identified the education and experience typically possessed by such workers, which, in turn, was used to identify the wages paid to U.S. workers with similar levels of

[152] *See* Public Law 107–273, 11030A(a), 116 Stat. 1836 (2002).

[153] *See* 144 Cong. Rec. S12741, S12756 (explaining that 8 U.S.C. 1182(p) ''spells out how [the prevailing] wage is to be calculated in the context of both the H–1B program and the permanent employment program in two circumstances.'').

[154] *See* Congressional Research Service, The Employment-Based Immigration Backlog (2020).

[155] *See* 8 U.S.C. 1152(a)(2); Abigail Hauslohner, *The employment green card backlog tops 800,000, most of them Indian. A solution is elusive,* Washington Post (December 17, 2019), *available at https://www.washingtonpost.com/immigration/the-employment-green-card-backlog-tops-800000-most-of-them-indian-a-solution-is-elusive/2019/12/17/55def1da-072f-11ea-8292-c46ee8cb3dce_story.html*; U.S. Department of State, Visa Bulletin For September 2020, *https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-september-2020.html.*

[156] U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf*, (showing 66 percent of H–1B petitions approved in FY2019 were for computer-related occupations).

[157] Congressional Research Service, The Employment-Based Immigration Backlog (2020).

experience and education. Looking to the wages of such U.S. workers to adjust the entry-level wage paid to foreign workers is highly consistent with the statutory scheme.

After consulting the statutory criteria for who qualifies for the relevant visa classifications, as well as the demographic characteristics of actual H–1B nonimmigrants, the Department has determined that an individual with a master's degree and little-to-no work experience is the appropriate comparator for entry-level workers in the Department's PERM and specialty occupation programs for purposes of estimating the percentile at which such workers' wages fall within the OES wage distribution.

To begin with, the statutory criteria for who can qualify as an EB–2 worker provides a clear, analytically useable definition of the minimum qualifications workers within that classification must possess. Even the least experienced individuals within the EB–2 classification are likely to have at least a master's degree or its equivalent.[158] Possession of an advanced degree is thus a meaningful baseline with which to describe entry-level workers in the EB–2 classification.

As noted above, the baseline qualifications needed to obtain entry as an H–1B worker are different. An individual with a bachelor's degree in a specific specialty, or its equivalent, may qualify for an H–1B visa; a master's degree is not a prerequisite.[159] However, the bachelor's degree or equivalent must be in a specific specialty. A generalized bachelor's degree is insufficient to satisfy the requirement that H–1B workers possess highly specialized knowledge.[160] Further, the statute requires that the individual be working in a job that requires that application of ''highly specialized knowledge.'' [161] Again, this means that for the H–1B program the possession of a bachelor's degree is not the baseline qualification criterion for admission. Something more is needed. The ultimate inquiry rests also on whether the individual can and will be performing work requiring highly specialized knowledge.

As with aliens in the EB–2 classification, looking to the earnings of individuals with a master's degree provides an appropriate and analytically useable proxy for purposes of analyzing the wages of typical, entry-level workers within the H–1B program. For one thing, master's degree programs are, generally speaking, more specialized courses of study than bachelor's degree programs. Thus, while the fact that an individual possesses a bachelor's degree does not necessarily suggest one way or another whether the individual possesses the kind of specialized knowledge required of H–1B workers, the possession of a master's degree is significantly more likely to indicate some form of specialization. Although a master's degree alone does not automatically mean an individual will qualify for an H–1B visa, possession of a master's degree—something that is surveyed for in a variety of wage surveys—is thus a better proxy for specialized knowledge than is possession of a bachelor's degree for purposes of the Department's analysis. This is because, while possession of a bachelor's degree is also commonly surveyed for, mere possession of a bachelor's degree is not nearly as reliable an indicator that the degree holder possesses specialized knowledge.

Further, the demographic characteristics of H–1B workers suggests that many entry-level workers in the program are master's degree holders with limited work experience. A review of data from USCIS about the characteristics of individuals granted H–1B visas in fiscal years 2017, 2018, and 2019 indicates that H–1B workers with master's degrees tend to be younger and less highly compensated than H–1B workers with bachelor's degrees. On average, individuals with master's degrees in the program are approximately 30 years old, whereas bachelor's degree holders are, on average, 32 years old. This suggests that, while possessing a more advanced degree, master's degree holders in the program are likely to have less relevant work experience than their bachelor's degree counterparts.[162] Relatedly, H–1B master's degree holders make, based on a simple average, $86,927, whereas bachelor's degree holders make on average $88,565.[163] Given that differences in skills and experience often explain differences in wages, this gap in average earnings and age suggests that, while possessing a more advanced degree, master's degree holders in the H–1B program tend to be less skilled and experienced—and are therefore more likely to enter the program as entry-level workers—than are bachelor's degree holders.[164]

This conclusion is further bolstered by the fact that master's degree holders have, in recent years, been the largest educational cohort within the program. In FY2019, for instance, 54 percent of the beneficiaries of approved H–1B petitions had a master's degree—whereas only 36 percent of beneficiaries had only a bachelor's degree.[165] These facts, in combination with the age and earnings profiles of master's degree holders in the program, strongly suggest that a significant number of entry-level H–1B workers are individuals with a master's degree and very limited work experience.

The Department notes that its description of individuals with master's degrees and little-to-no work experience as appropriate comparators for entry-level workers in the Department's foreign labor programs for purposes of setting the proper Level I wage is not inconsistent with how the Department makes prevailing wage determinations under its 2009 Guidance. Many job opportunities that result in a Level I wage determination of course do not require a master's degree as the minimum qualification for the position. The Department is not changing that aspect of its guidance. Rather, the Department has decided, for the reasons given above, to rely on master's degree holders as an analytically useable proxy for the types of workers who actually fill many entry-level positions in the H–1B and PERM programs and who likely satisfy the key, baseline statutory qualification requirements for entry into the programs—namely the possession of specialized knowledge or an advanced degree—in order to identify where the first of four levels should fall along the OES wage distribution. This reflects how employers actually fill jobs for which workers are sought, not necessarily how job descriptions are used to assign wage levels for each individual job opportunity to provide a prevailing wage determination at the

[158] *See* 8 U.S.C. 1153(b)(2)(A) (''Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . .'').

[159] 8 U.S.C. 1184(i).

[160] *See Chung Song Ja Corp.* v. *U.S. Citizenship & Immigration Servs.,* 96 F. Supp. 3d 1191, 1197–98 (W.D. Wash. 2015).

[161] 8 U.S.C. 1184(i).

[162] Age is a common proxy for potential work experience. *See, e.g.,* Rebecca Chenevert & Danial Litwok, *Acquiring Work Experience with age*, United States Census Bureau, (2013) *available at https://www.census.gov/newsroom/blogs/random-samplings/2013/02/acquiring-work-experience-with-age.html.*

[163] This analysis is based on data from U.S. Citizenship and Immigration Services about the demographic characteristics of H–1B workers.

[164] Elka Torpey, Same occupation, different pay: How wages vary, Bureau of Labor Statistics (2015), *available at https://www.bls.gov/careeroutlook/2015/article/wage-differences.htm.*

[165] U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H–1B_Fiscal_Year_2019.pdf.*

beginning of the labor certification process, which often occurs before the identity and actual qualifications of the worker who will fill the position are known. Giving some weight to the actual characteristics of entry-level workers in the programs furthers the purpose of the statute, which is designed to ensure that foreign workers make at least as much as similarly employed U.S. workers with comparable levels of education, experience, and responsibility.

Further, practice in the H–1B program shows that a significant number of H–1B workers are placed at the first wage level, which demonstrates that the Department's focus on specialty occupation requirements in setting an entry-level wage is also consistent with how workers are presently classified for prevailing wage purposes under the 2009 Guidance. In FY2019, 14.4 percent of all worker positions on LCAs were for entry-level positions. This cohort includes LCAs filed for some of the most common H–1B occupations, including Software Developers, 19.4 percent of which were placed at the first wage level; Computers Systems Analysts, 4.8 percent of which were placed at the first wage level; and Computer Occupations, 7 percent of which were placed at the first wage level. As discussed previously, these occupations, as described in the OOH, likely include some workers at the lower end of the OES distribution who are not performing work that would fall within the INA's definition of ''specialty occupation.'' Thus, many workers in the H–1B program that have master's degrees or some other qualification that satisfies the INA's baseline, specialized knowledge requirement—a level of expertise that makes them more highly skilled than a portion of workers at the bottom end of the OES distribution for many occupations—also work in positions that fit within the entry-level classification as currently administered by the Department under its 2009 Guidance.

To determine the wages typically made by individuals having comparable levels of education, experience, and responsibility to the prototypical entry-level H–1B and EB–2 workers and working in the most common H–1B and PERM occupations, the Department consulted a variety of data sources, most importantly wage data on individuals with master's degrees or higher and limited years of work experience from the 2016, 2017, and 2018 Current Population Surveys (CPS) [166] conducted by the U.S. Census Bureau, and data on the salaries of recent graduates of master's degree programs in STEM occupations garnered from surveys conducted by the National Science Foundation (NSF) in 2015 and 2017. Both of these surveys represent the highest standards of data collection and analysis performed by the federal government. Both surveys have large sample sizes that have been methodically collected and are consistently used not just across the federal government for purposes of analysis and policymaking, but by academia and the broader public as well.

In the case of the CPS survey, the Department used a wage prediction model to identify the wages an individual with a master's degree or higher and little-to-no work experience (based on age) would be expected to make and matched the predicted wage with the corresponding point on the OES wage distribution. Using the NSF surveys, the Department calculated the average wage of individuals who recently graduated from STEM master's degree programs and matched the average wage against the corresponding point on the OES distribution.

These analyses located three points within the OES wage distribution at which the wages of U.S. workers with similar levels of education and experience to the prototypical entry-level workers in specialty occupations and the EB–2 program are likely to fall. In particular, the 2015 NSF survey data indicate that workers in some of the most common H–1B and PERM occupations with a master's degree and little-to-no relevant work experience are likely to make wages at or near the 49th percentile of the OES distribution.[167] The 2017 NSF survey suggests that these workers are likely to make wages at or near the 46th percentile of the OES distribution. On the low end, the CPS data suggest that such individuals make wages at or near the 32nd percentile.

The Department thus identified a range within the OES data wherein fall the wages of workers who, while being relatively junior within their occupations, clearly possess the kinds of specialized education and/or experience that the vast majority of foreign workers covered by the Department's wage structure are, at a minimum, required to have.[168] Put another way, through an assessment of the experience and education generally possessed by some of the least skilled and least experienced H–1B and EB–2 workers—workers who are likely entry-level workers within their respective programs—the Department determined what U.S. workers with similar levels of education and experience are likely paid. Accordingly, it is appropriate for the wages paid to such U.S. workers to govern the entry-level prevailing wage paid under the Department's wage structure.[169]

Translating the identified range into an entry-level wage for the Department's use in the H–1B and PERM programs could be accomplished in a number of ways. One option would be to simply calculate the average wage of all workers that fall within the range, meaning those workers whose reported wage falls between the 32nd and 49th percentiles, which would place the entry-level wage at just above the 40th percentile. An alternative would be to identify a subset of wages within the range—either on the lower end or the higher end of the range—and calculate the average wage paid to workers within such subset. Because of the greater suitability of the NSF data for the Department's purposes, likely distortions in the wage data of both surveys caused by the presence of lower-paid foreign workers in the relevant labor markets, and the purposes of the INA's wage protections, the Department has decided that the most appropriate course is to set the entry-level wage by calculating the average of a subset of the data located at the higher end of the identified wage range. This

[166] The Current Population Survey (CPS), sponsored jointly by the U.S. Census Bureau and BLS, is the primary source of labor force statistics for the population of the U.S. *See* United States Census Bureau, Current Population Survey, available at *https://www.census.gov/programs-surveys/cps.html.*

[167] For the CPS data, the Department looked at the wages of workers in all occupations that account for 1 percent or more of the total H–1B population. These occupations also account for the majority of PERM workers. For the NSF data the Department examined the wages of workers in 11 of the most common (in the top 17) occupational codes for H–1B workers that were convertible to the occupational code convention of the NSF, which account for approximately 63 percent of all H–1B workers, according to data from USCIS.

[168] The Department notes again by way of clarification that it is not suggesting that possession of a master's degree is required to work in a specialty occupation. Rather, as explained above, possession of a master's degree by someone with little-to-no relevant work experience is being employed as a useable proxy, for analytical purposes, of the level of education and experience that approximates the baseline level of specialized knowledge needed to work in the H–1B and EB–2 programs and that many entry-level workers in those programs actually possess.

[169] *See* 8 U.S.C. 1182(a)(5)(A) (requiring the Secretary to certify that the employment of immigrants seeking EB–2 classification ''will not adversely affect the *wages* and working conditions *of workers in the United States similarly employed*) (emphasis added); 8 U.S.C. 1182(n)(1)(A)(i) (requiring prospective H–1B employers to offer and pay at least the actual wage level or ''the prevailing wage level for the occupational classification in the area of employment'').

results in the entry-level wage being placed at approximately the 45th percentile.

As between the two data sources and the manner in which they were analyzed, the NSF data are better tailored to the Department's purposes in identifying an entry-level wage for the H–1B program. The NSF surveys provide data on the wages of individuals with degrees directly relevant to the specialized occupations in which they are working, namely degrees in STEM fields. By contrast, the CPS data only show whether a person does or does not have a master's degree, and does not identify what field the master's degree or the individual's undergraduate course of study was in. It is therefore likely that some of the wage data relied on in generating the CPS estimate were based on the earnings of individuals who possess degrees not directly related to the occupation in which they work. Given that the CPS data used only accounted for persons with little-to-no experience, such individuals would therefore be unlikely to have the qualifications needed to work in a ''specialty occupation,'' as that term is defined in the INA. Having neither a specialized degree nor experience, and therefore lacking in specialized skills or expertise, at least with respect to the occupations in which they work, such individuals would not qualify as similarly employed to even the least skilled H–1B workers and are thus not appropriate comparators for identifying an entry-level wage in the H–1B program. Because of these workers' relative lack of skill and expertise, they are likely to command lower wages, and thus decrease the predicted wage below what would be an appropriate entry-level wage for the Department's foreign labor programs.

Relatedly, the Department's method for approximating experience in the CPS data is also not as closely tailored to the goal of determining what U.S. workers similarly employed to the prototypical entry-level H–1B and EB–2 workers are paid as is the NSF data. The CPS analysis relied on potential experience as a proxy for actual experience, which was calculated using a standard formula of subtracting from individuals' ages their years of education and six, based on the common assumption that most individuals start their education at the age of six.[170] While a standard measure for potential experience, this method of approximation is imprecise because it shows each individual of the same age and education level as having the same level of work experience. In reality, such individuals may vary significantly in their levels of experience.

For one thing, the approximation does not take into account the possibility of a worker temporarily exiting the workforce, and would count the time spent outside the workforce as work experience. It also does not account for gaps between when a person received his or her bachelor's degree and when he or she enrolled in a master's degree program. In such cases, the work experience captured by the proxy of potential experience may thus not be directly relevant to the work a person performs after he or she graduates from a master's degree program since in some cases the work experience in question was likely acquired before the individual enrolled in a master's degree program. In consequence, the sample used in the CPS analysis almost certainly includes some individuals who have no relevant experience in the specialized occupations in which they are working, which likely decreases the wage estimate calculated using the CPS data and makes it a less precise and reliable estimation of the wages of U.S. workers with similar levels of education and experience to the prototypical, entry-level H–1B and EB–2 workers. In other words, the CPS data allows for only a rough approximation of experience—a key factor the Department must take into account in adjusting the prevailing wage levels. This, in combination with the fact that some workers contained within the CPS dataset likely also lack specialized education relevant to the occupations in which they work, means that CPS data is, in some degree, distorted by wage earners who should be discounted in identifying the appropriate entry-level wage because they likely possess neither the type of specialized experience nor the education in their field that is comparable to that possessed by entry-level H–1B and EB–2 workers.

The NSF survey data, by contrast, are uniquely suited to the Department's purposes. The NSF surveys in 2015 and 2017 capture wage data about exactly the sort of workers the Department has determined serve as the appropriate comparators for entry-level H–1B and EB–2 workers. They surveyed individuals with master's degrees in STEM fields who are working in STEM occupations, including some of the most common H–1B and PERM occupations, and who are approximately three years or less out of their master's degree programs. In other words, the NSF surveys report wage data for individuals with specialized knowledge and expertise working in the occupations in which H–1B and PERM workers are most often employed and who are relatively junior within their respective occupations. The NSF data therefore provide a more accurate wage profile of workers similarly employed to entry-level H–1B and EB–2 workers. While both data sources are useful in helping determine a wage range for entry-level H–1B and PERM workers, of the two, the NSF surveys provide information more relevant to the Department's assessment of what is the appropriate entry-level wage. Therefore, the Department's analysis relies more on the NSF surveys. This suggests that the entry-level wage should be placed higher up in the identified wage range given that is where the NSF survey results fall.

Beyond the relative weight of each data source, the Department also takes into account in identifying the appropriate entry-level wage the fact that both sources are likely distorted to some degree by the presence, in both the surveyed population and the labor market as a whole, of the very foreign workers the Department has determined are, in some instances, paid wages below the market rate. As noted above, various studies and data demonstrate that some H–1B workers are paid wages substantially below the wages paid to their U.S. counterparts, and that this has a suppressive effect on the wages of U.S. workers. Further, these adverse effects are most likely to occur and be severe in occupations with higher concentrations of foreign workers. It is therefore relevant to how the Department weighs the data that many of the occupations examined in the analyses of the NSF and CPS datasets have very high concentrations of H–1B workers. As noted previously, H–1B nonimmigrants make up about 10 percent of the total IT labor force in the U.S.[171] In certain fields, including

[170] For example, under this metric, a 30 year old individual with 18 years' worth of education would be counted as having six years of work experience.

[171] The Department estimated the share of H–1B workers in the IT sector by tallying the total number of computer occupation workers in the U.S., subtracting those workers that fill positions for which H–1B workers are generally ineligible, and dividing the total by the total number of H–1B workers likely working in computer occupations, based on data and reports issued by USCIS. *See* Bureau of Labor Statistics, Employment by detailed occupation, *https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm*; United States Citizenship and Immigration Services, H–1B Authorized-to-Work Population Estimate, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H–1B%20Authorized%20to%20Work%20Report.pdf*; United States Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018—September 30,

Continued

software developers, applications (22 percent); statisticians (22 percent); computer occupations, all other (18 percent); and computer systems analysts (12 percent), H–1B workers likely make up an even higher percentage of the overall workforce.[172]

From this, the Department draws two conclusions. First, the respondents reporting wages in the CPS and NSF surveys are likely in some cases H–1B or PERM workers, given that both surveys contain responses from both U.S. citizens and noncitizens and the surveyed occupations have high concentrations of such foreign workers. The reported wages are thus in some instances likely not the market wage paid to U.S. workers similarly employed to H–1B and PERM workers, but rather the wages of the foreign workers themselves, which, as discussed previously, will be likely lower than the wages of U.S. workers in some cases. Second, even the reported wages of respondents who are not H–1B and PERM workers are likely not perfectly accurate reflections of what the market rate would be absent wage suppression given that high concentrations of lower-paid foreign workers likely decrease the overall average wage paid in the relevant labor market, as detailed above.

The need to account for these distortions weighs in favor of the Department's decision to set the entry-level wage at the higher end of the identified wage range. To do otherwise would mean that, far from ensuring that the adjusted wage levels guard against adverse effects on U.S. workers caused by the presence and availability of lower-cost foreign labor, the Department would, to some degree, be basing its regulations on a preexisting distortion caused by the current, flawed wage rates.[173]

Finally, the purpose of the relevant INA authorities, particularly the prevailing wage requirement, also weighs in favor of adjusting the entry-level wage higher up within the identified wage range. As emphasized throughout, the guiding purpose of the INA's prevailing wage requirements is to ''protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.''[174] This consideration supports the Department's decision about how the entry-level wage should be set. Giving due weight to the purpose of the statutory scheme means, in the Department's judgment, resolving uncertainties so as to eliminate the risk of adverse effects on U.S. workers' wages and job opportunities. That means favoring the higher end of the wage range.

The Department therefore concludes that, within the portion of the OES wage distribution identified as likely consisting of U.S. workers with levels of education and experience similar to prototypical entry-level H–1B and EB–2 workers, the first wage level should be placed at the higher end. Each of the considerations described above—the relative strength of the NSF surveys as compared to the CPS data in serving the purpose of the Department's analysis; the likely distortion of both survey datasets caused by the presence of lower-paid foreign workers in the relevant labor markets; and the purposes of the INA's wage protections—alone would strongly countenance in favor of using the higher end of the identified wage range. In combination, they make the option of focusing on the upper portion of the range particularly compelling.

The wage range spans from the 32nd percentile to the 49th percentile. What accounts for the upper half of this range is approximately the fifth decile of the OES distribution. The arithmetic mean of the wages of workers similarly employed to entry-level H–1B and EB–2 workers, taking into account the experience and education of the types of workers who actually fill entry-level positions in these programs, is thus the mean of the fifth decile, or approximately the 45th percentile. This point within the distribution will govern the wages of workers placed at the first wage level and allows for a statistically meaningful calculation.

4. The Second, Third, and Fourth Wage Levels

Having concluded that the entry-level wage should be adjusted to the 45th percentile, the Department turns to explaining the manner in which the remaining three prevailing wage levels will be modified. The Department has determined that the upper-most level will be adjusted to the mean of the upper decile of the OES wage distribution, or approximately the 95th percentile, to reflect the wages of the most competent, experienced, and skilled workers in any given occupation. The intermediate wage levels will continue to be calculated in accordance with 8 U.S.C. 1182(p)(4), which yields second and third wage levels at the 62nd and 78th percentiles, respectively.

The highest wage level should be commensurate with the wages paid to the most highly compensated workers in any given occupation because such workers are also generally the workers with the most advanced skills and competence in the occupation, and therefore the type of workers who are similarly employed to the most highly qualified H–1B and PERM workers.[175] Again, as noted above, it is generally the case that, as a worker's education and experience increase, so too do his wages. Further, while the INA places baseline, minimum skills-based qualifications on who can obtain an H–1B or EB–2 visa, it does not place any limit on how highly-skilled a worker can be within these programs. Thus, while the Department necessarily discounted the lower end of the OES wage distribution in determining the entry-level wage, full consideration must be given to the uppermost portion of the distribution in adjusting the Level IV wage.

H–1B workers can be, and at least in some cases already are among the most highly paid, and therefore likely among the most highly skilled workers within their respective occupations.[176] This is demonstrated by a review of the highest salaries paid to H–1B workers in the most common occupations in which H–1B workers are employed. In FY19, for example, the most highly compensated

2019, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H–1B_Fiscal_Year_2019.pdf.*

[172] These findings come from data provided by USCIS and the 2017 Occupational Employment Statistics survey from the Bureau of Labor Statistics. They are based the total number of H–1B workers according the FY19 USCIS tracker data within a SOC code divided by the 2017 OES estimate of total workers in a SOC code.

[173] *Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3453 (Jan. 19, 2011) (acknowledging the Department did not conduct ''meaningful economic analysis to test [the] validity'' of its ''assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a surrogate for the entry-level wage''); *see also Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program, Part 2,* 78 FR 24047, 24051 (Apr. 24, 2013).

[174] *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States,* 65 FR 80110, 80110 (Dec. 20, 2000).

[175] Edward P. Lazear, *Productivity and Wages: Common Factors and Idiosyncrasies Across Countries and Industries,,* National Bureau of Economic Research, 11/2019, Working Paper 26428, *available at http://www.nber.org/papers/w26428*; David H. Autor & Michael J. Handel, *Putting Tasks to the Test: Human Capital, Job Tasks and Wages, National Bureau of Economic Research*, 6/2009, Working Paper 15116, available at *http://www.nber.org/papers/w15116.*

[176] Data on the actual wages paid to H–1B workers shows that in some cases such workers are paid at or near the very top of the OES wage distribution.

H–1B nonimmigrants employed as Computer Systems Analysts command annual wages as high as $450,000. That figure was $357,006 for H–1B workers in other Computer Occupations. The wages of workers at the 90th percentile of the OES distribution for these occupations, by contrast, are significantly lower. Computer Systems Analysts at the 90th percentile in the OES distribution make approximately $142,220. That figure is $144,820 for workers in other computer occupations. In other words, H–1B workers in some instances make wages far in excess of those earned by 90 percent of all U.S. workers in the same occupation. Indeed, a review of the wages of the top five percent highest earners among H–1B nonimmigrants in the 16 occupational classifications that account for one percent or more of all approved H–1B petitions in FY2019 shows that such workers make wages that are, on average, at least 20 percent higher than those made by workers at the 90th percentile in the OES wage distribution.

Further demonstrating that H–1B workers can be and sometimes are among the most skilled and competent workers in their occupations, an examination of the top end of the wage distribution within the H–1B program shows that, for H–1B nonimmigrants with graduate and bachelor's degrees, the association between education and income level begins to break down to some extent. Among the most highly compensated H–1B workers, the higher the income level, the more likely the foreign worker beneficiary only has a bachelor's degree.[177] This strongly suggests that individuals at the fourth wage level truly possess the most advanced skills and competence—the only remaining parameters that can reasonably account for significant wage differentials—within their occupations, as additional years of education are largely irrelevant in explaining wages among top earners. The U.S. workers who are similarly employed to the most highly qualified H–1B workers are, therefore, also likely to be among the most highly skilled, and, therefore, the most highly compensated workers within the OES wage distribution.

The high levels of pay that the most skilled H–1B workers can command is also shown by the fact that, due to their advanced skills, diversified knowledge, and competence, workers placed at the fourth wage level are likely to be far more productive than their less experienced and educated peers. Whereas experience itself generally increases on a linear basis, as a function of age and time spent in an occupation, productivity and an individual's supervisory responsibilities, as a function of experience and skills, do not. For example, the nature of senior management or supervisory roles, in particular, means workers who serve as productivity multipliers are more likely to fill such positions, which in turn translates to higher wages. Perhaps even more relevant to the Department's assessment of the wages paid to H–1B workers is the nature of the work these individuals do, which is highly specialized and typically in computer or engineering-related fields. In such occupations, experience and abilities can result in exponentially divergent levels of productivity, which in turn means that workers with the most advanced skills and competence can command wages far above what other workers in those occupations do.[178]

All of these considerations strongly indicate that U.S. workers similarly employed to the H–1B and PERM workers with the most advanced skills and competence are themselves among the most highly skilled workers in any given occupation, and therefore the most highly compensated. The uppermost wage level should, in accordance with the INA, therefore be calculated by taking the arithmetic mean of the wages paid to the most highly paid workers in the OES distribution. In consequence, the Department has determined that the fourth wage level should be calculated as the mean of the upper decile of the OES distribution, or approximately the 95th percentile. This calculation ensures that the fourth wage level is based on the wages paid to workers with the most advanced skills and competence in an occupation, while using a sample of workers to identify an average wage sufficiently large to allow for a statistically meaningful calculation.

The Department will continue to calculate the two intermediate wage levels in accordance with 8 U.S.C. 1182(p)(4), which provides that, in establishing a four-tier wage structure, ''[w]here an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.'' [179] The BLS OES survey is, as provided in the statute, an existing survey that has long provided two wage levels for Department's use in setting the prevailing wage rates.[180]

The statutory formula was designed by Congress specifically for use in the Department's high-skilled immigrant and nonimmigrant programs, and provides for an efficient way of calculating evenly-spaced, intermediate wage rates between the lower bound and upper bound of the Department's wage structure.[181] Creating new wage levels, as opposed to adjusting the field values within the existing levels produced by BLS (as the Department is doing here) would potentially result in less reliable statistical data and be unlikely to yield intermediate wage rates meaningfully different from those generated by operation of the statute. Further, the adjustments the Department is making to the two existing wage levels provided by the BLS OES survey preserve the same segmentation as the previous first and fourth wage level values—meaning they will continue to fall approximately 50 percentiles apart within the OES distribution and will thus preserve the intermediate level segmentation contemplated by the statute. Using the INA's formula to generate intermediate wage levels therefore continues to be, in the Department's judgment, the appropriate method to complete the prevailing wage structure.

The Department applies the statutory formula as follows: The difference between the two levels provided by the OES survey data is 50 percentiles. Dividing this by three yields a quotient of 16.67. This quotient, added to the value of the Level I wage at the 45th percentile, yields a Level II wage at approximately the 62nd percentile. When subtracted from the value of the Level IV wage at the 95th percentile, the quotient yields a Level III wage at approximately the 78th percentile of the OES distribution.

The Department acknowledges that the existing wage levels—set at approximately the 17th, 34th, 50th, and 67th percentiles—have been in place for over 20 years, and that many employers likely have longstanding practices of paying their foreign workers at the rates produced by the current levels.

[177] This analysis is based on data provided by U.S. Citizenship and Immigration Services and 2019 OFLC Disclosure Data.

[178] Andy Oram & Greg Wilson, Making Software: What Really Works, and Why We Believe It (2010).

[179] 8 U.S.C. 1182(p)(4).

[180] BLS also produces data for the public from the OES survey that is divided into five different wage levels. However, the public data BLS produces is not broken down with the level of granularity by area of employment needed to administer the Department's immigrant and nonimmigrant programs, which is why BLS has also long produced a separate dataset with two wage levels for the Department's use.

[181] *See Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3462 (January 19, 2011).

Adjusting the levels to the 45th, 62nd, 78th, and 95th percentiles represents a significant change, and may result in some employers modifying their use of the H–1B and PERM programs. It will also likely result in higher personnel costs for some employers, as detailed below. However, to the extent employers have reliance interests in the existing levels, the Department has determined that setting the wage levels in a manner that is consistent with the text of the INA and that advances the statute's purpose of protecting U.S. workers outweighs such interests and justifies such increased costs.

5. The EB–3 Immigrant Classification

As noted previously, the Department's four-tier wage structure is used to set the prevailing wage in five different immigrant and nonimmigrant programs. Having explained the Department's reasoning for how the adjusted wage levels are appropriate for the programs that consist of more highly skilled workers with advanced degrees and/or specialized knowledge—namely the EB–2 immigrant classification and the H–1B, E–3, and H–1B1 nonimmigrant programs—the Department now turns to explaining the appropriateness of using those same wage levels for the EB–3 classification, which consists of lower-skilled workers, professionals with bachelor's degrees, and individuals capable of performing unskilled labor. The Department concludes that the adjusted wage levels under the four-tiered structure also satisfy the statutory requirement that the wage levels be set based on experience, education, and level of supervision with respect to the EB–3 classification, taking into account the statutory and regulatory purposes of protecting U.S. workers from displacement and adverse wage effects.

At the outset, the Department notes that the close connections between the EB–3 classification and the other programs covered by the Department's wage structure make it inadvisable and impractical to treat the EB–3 classification differently. As detailed above, many H–1B workers adjust status to that of lawful permanent residents through EB–3 classification, and the manner in which the programs operate means that, in many cases, foreign workers can, in some sense, have one foot in each program simultaneously for extended periods of time. Using different wage methodologies in the programs would therefore result in the incongruous possibility of a worker doing the same job for the same employer suddenly receiving a different wage upon adjusting status. Similarly, while having somewhat different eligibility criteria, the EB–2 and EB–3 classifications are not mutually exclusive—many workers that satisfy the eligibility criteria for one would also do so for the other.[182] Applying the same wage methodology in both classifications is therefore important to ensure consistent treatment of similarly situated workers and prevent the creation of incentives for employers to prefer one classification over the other because different wage methodologies yield different wages.[183] These considerations make it important to treat the EB–3 classification the same as the EB–2 and H–1B programs. The question then devolves to whether the EB–3 classification is properly accounted for by the adjusted wage levels. The Department believes it is.

The Department acknowledges that applying the four-tier wage structure in five different immigrant and nonimmigrant programs with varying populations, and across hundreds of different occupational classifications presents inherent challenges. The breadth of occupations to which the wage levels apply means that the prevailing wages established by the wage structure will not be perfectly tailored to the circumstances of each individual job opportunity.[184] The Department has sought to address this challenge by focusing much of its analysis on the programs and occupations that represent the largest share of the immigrant and nonimmigrant populations covered by the four-tier wage structure. Doing so is, in the Department's judgment, the approach to addressing variations across the programs that is most consistent with the INA. The wage protections in the H–1B and PERM programs are designed to guard against the displacement of, or adverse effect on U.S. workers caused by the employment of foreign labor.[185] As noted above, the risk that the presence of lower-wage foreign workers in a labor market will undercut U.S. workers' wages and job opportunities is greatest when there are larger concentrations of such workers.[186] Adjusting the wage levels with particular attention to those occupations and visa classifications with the largest numbers of foreign workers therefore puts the focus on addressing the danger the statutory scheme is intended to guard against—adverse effects on U.S. workers—where it is most acute.

Thus, as previously explained, in ascertaining the wages paid to U.S. workers similarly employed to H–1B workers, the Department's analysis focused, to the greatest extent possible, on those occupations that account for 1 percent or more of the total H–1B population, and which also account for a significant share of the PERM population.[187] Similarly, the Department has given due weight in its analysis of where to set the prevailing wage levels to the fact that the EB–3 classification represents an exceedingly small share of the overall foreign worker population covered by the wage structure. The H–1B program is America's largest guest worker program.[188] In FY2017, the Department of Homeland Security approved 365,682 H–1B petitions.[189] That same year, 19,432 workers were admitted for lawful permanent residence in the EB–2 classification.[190] A total of only 18,115 EB–3 immigrant workers were admitted that year. Thus, the EB–3 program accounts for, at most, approximately 5 to 10 percent of the total immigrant and nonimmigrant population governed by the four-tier wage structure that is admitted or otherwise provided status in any given year.[191] That does not

[182] *See Musunuru* v. *Lynch,* 831 F.3d 880, 885 (7th Cir. 2016) (describing a person applying for both EB–2 and EB–3 status).

[183] *See Comite' De Apoyo A Los Trabajadores Agricolas* v. *Perez,* 774 F.3d 173, 185 (3d Cir. 2014) (noting loopholes that can be created if employers are able to use different methodologies to calculate wages for the same types of workers).

[184] *Cf. Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3461 (Jan. 19, 2011).

[185] *See, e.g., Cyberworld Enter. Techs., Inc.* v. *Napolitano,* 602 F.3d 189, 199 (3d Cir. 2010).

[186] George Borjas, Immigration Economics, 2014.

[187] In some instances, particularly when analyzing the NSF data, the Department was constrained in its ability to analyze wages for all top H–1B occupations because of discrepancies between how the NSF and BLS surveys classify workers by occupation.

[188] Nicole Torres, *The H–1B Debate, Explained,* Harvard Business Review (May 4, 2017), *available at https://hbr.org/2017/05/the-h-1b-visa-debate-explained.*

[189] *https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H–1B_Fiscal_Year_2018.pdf.*

[190] Department of Homeland Security, 2017 Yearbook of Immigration Statistics, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017, *available at https://www.dhs.gov/immigration-statistics/yearbook/2017/table7.*

[191] The Department notes that the total number of approved H–1B petitions ''exceeds the number of individual H–1B workers sponsored because of the different types of petitions that can be filed (*e.g.,* requests for concurrent employment with another employer, requests for extension of stay, amended petitions).'' U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2018 Annual Report to Congress October 1, 2017–September 30, 2018, (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H–1B_Fiscal_Year_2018.pdf.* The filing of these types of petitions means that some nonimmigrants are counted multiple times in the total number of

mean that the Department has not given full consideration to the EB–3 classification in assessing how best to adjust the wage levels. It only means that the Department has appropriately weighed the size of the program, and therefore the risk it poses to U.S. workers, in identifying a solution to the adverse effects caused by the existing wage levels—an approach the Department regards as the best way to take into account the variations across the programs covered by the wage structure in effectuating the purpose of the INA's wage protections.

After assessing the nature of the EB–3 immigrant population, the Department has determined that the adjusted wage levels under the four-tiered structure adequately take into account the experience, education, and level of supervision of EB–3 workers, in light of the purpose of the INA's wage safeguards. The EB–3 program consists of three discrete classifications: ''skilled workers,'' defined as aliens who are ''capable . . . of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States;'' ''professionals,'' defined as aliens ''who hold baccalaureate degrees and who are members of the professions;'' and ''other workers,'' defined as aliens who are ''capable . . . of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.'' [192] For each of these classifications, the revised wage levels, set at approximately the 45th, 62nd, 78th, and 95th percentiles, provide an appropriate method for calculating the prevailing wage.

As to the lower-skill classifications, the Department has previously recognized that lower-skilled workers are less likely to vary in the wages they are paid based on differences in skill levels.[193] This is because skill levels themselves are less likely to vary in such occupations. A job that requires limited skills, such as can be acquired through two years of training or less, can likely be performed with similar proficiency by someone with lower levels of education and experience as by someone with greater experience and education.[194] Meaningful differentiation between workers based on skills in such occupations is therefore reduced. From this, the Department has previously concluded that setting prevailing wages for lower-skilled workers closer to the mean of the overall OES wage distribution is a more appropriate way of guarding against adverse wage effects.[195] Since most workers in lower-skilled occupations have similar levels of skill, a wage that approximates the average wage for all workers in the occupation is more likely to ensure that similarly employed workers make similar wages.

That reasoning holds true for the lower-skilled classifications in the EB–3 immigrant visa preference category, which include workers whose jobs are unskilled or require two years of training. These workers are far more likely to fall within the lower two wage levels given their relative lack of education and experience. Under the new wage levels, they will thus likely be placed at either the 45th or the 62nd percentiles of the OES wage distributions. Both levels, while not perfectly tailored to the lower-skilled component of the EB–3 classification, fall near the middle part of the wage distribution, and are therefore generally appropriate for lower-skilled workers.

For separate reasons, the Department concludes that the newly adjusted wage levels also adequately satisfy the Department's obligations in setting the wage levels under the INA with respect to EB–3 professionals. Unlike lower-skilled EB–3 workers, professionals with bachelor's degrees in the EB–3 classification do possess a level of skill that allows for greater differentiation within the occupation. It is also the case that such workers will likely generally have lower levels of education and experience than EB–2 workers, who are required to possess a master's degree or higher. An entry-level wage at the 45th percentile, while more closely tailored to the education and experience of an EB–2 or H–1B worker, may be on the higher end for an EB–3 professional in some cases.[196] But other considerations demonstrate the appropriateness of the 45th percentile of the OES wage distribution as the entry-level wage for such workers.

The Department emphasizes that the labor certification process in the PERM programs is designed to ensure that there are not available and willing U.S. workers and that the wages and the wages and working conditions of U.S. workers will not be adversely affected by the employment of the immigrant worker(s). From when the INA was first enacted, its labor certification provisions were designed ''to provide strong safeguards for American labor and to provide American labor protection against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.'' [197] The availability of U.S. workers to fill jobs for which foreign workers are sought, being a guiding consideration behind the INA's wage protections, is also an appropriate consideration in determining the adequacy of the prevailing wage levels for EB–3 professionals.

Within the U.S. workforce, the credentials associated with the EB–3 professional classification are significantly more common than the credentials associated with the EB–2 classification. As of 2019, 36 percent of people age 25 and older in the United States possessed a bachelor's degree or higher.[198] That is compared to only 13.4 percent of native-born Americans and 14.1 percent of the foreign born population who possess an advanced degree, such as a master's degree or doctorate.[199] It follows that employers seeking to recruit individuals with only a bachelor's degree should be more likely to find qualified and available U.S. workers than if they are recruiting for a position that requires a master's degree. The pool of available workers in such cases is significantly larger.

As noted above, the Department is required to determine and certify that ''there are not sufficient workers who are able, willing, qualified'' and available to fill the position for which an EB–3 worker is sought.[200] This requirement is critical to the INA's ''core objective[] [of] balanc[ing] certain industries' temporary need for foreign

approved petitions. The total number of petitions for initial employment in FY17 was 108,101. However, that number does not account for the petitions filed on behalf of H–1B nonimmigrants to extend their status, and thus undercounts the total number of actual H–1B workers who were authorized to work in FY17.

[192] 8 U.S.C. 1153(b)(3); 8 CFR 204.5(l).

[193] *See Wage Methodology for the Temporary Non-agricultural Employment H–2B Program,* 76 FR 3452, 3461 (January 19, 2011).

[194] *Id.* at 3458.

[195] *Id.* at 3459.

[196] The Department also notes that, in some cases, EB–3 workers may in fact have higher levels of formal education than H–1B workers, given that H–1B workers can demonstrate specialized knowledge through experience and training, whereas possession of a bachelor's degree is required for all EB–3 immigrants. *See Employment-Based Immigrants,* 56 FR 60897, 60900 (Nov. 29, 1991).

[197] *Econo Inn Corp.* v. *Rosenberg,* 145 F. Supp. 3d 708, 713 (E.D. Mich. 2015) (quoting H.R. Rep. No. 1365, 82nd Cong. 2nd Session (1952)).

[198] United States Census Bureau, U.S. Census Bureau Releases New Educational Attainment Data, *available at https://www.census.gov/newsroom/press-releases/2020/educational-attainment.html.*

[199] *Id.*

[200] 8 U.S.C. 1182(a)(5)(A)(i)(I).

workers against a policy interest in protecting U.S. workers' jobs, salaries, and working conditions.'' [201] How to strike that balance turns on a variety of considerations, including the likely availability of U.S. workers for a given position. Where the nature of the labor market is such that U.S. workers are more likely to be readily found, it is appropriate that the Department have extra assurance that no qualified U.S. workers are available to fill a position before certifying as much. In the case of EB–3 professionals, the adjusted wage levels, which may in some cases place a slight premium on the wages paid to professionals with bachelor's degrees, are thus appropriately tailored to the circumstances of the EB–3 immigrant visa preference category. Because U.S. workers with bachelor's degrees are more common, placing some premium on the wage offered for these kinds of workers during the labor certification recruitment process helps advance the purpose of the INA's wage protections and provides the necessary extra assurance to the Department that U.S. workers with comparable levels of education, experience, and responsibility are not available. This approach is also entirely consistent with the Department's authority to prevent adverse effects on similarly employed U.S. workers.[202]

Finally, the Department notes that continuing to employ the same wage structure in this manner across both the H–1B and PERM programs advances the Department's interest in administrative consistency and efficiency. As noted already, there is significant overlap between the H–1B and PERM programs. In FY2019, 68.2 percent of all PERM applications were for aliens that at the time the applications were filed were already working in the U.S. on H–1B visas.[203] Further, the top ten most common H–1B occupations include seven of the ten most common PERM occupations. Through the third quarter of FY2020, 80 percent of PERM cases were for jobs in Job Zones 4 and 5 [204]—the most highly skilled job categories, which also account for 94 percent of all H–1B cases.[205] In sum, the close connection between the types of jobs and aliens that are covered by the two programs further supports using the same wage structure for both the PERM and H–1B programs.

For these reasons, the Department has concluded that using the adjusted wage levels for the EB–3 preference category is in keeping with the relevant statutory considerations that govern how the Department sets prevailing wage levels.

B. Explanation of Amendments To Adjust the Prevailing Wage Levels

In light of the foregoing, the Department is amending its regulations at part 20, sections 656.40 and 655.731 to reflect the new wage level computations the Department will use to determine prevailing wages in the H–1B, H–1B1, E–3, EB–2, and EB–3 classifications. These amendments are in accordance with the President's Executive Order (E.O.) 13788, ''Buy American and Hire American,'' which instructed the Department to ''propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system.'' [206] The amendments are also consistent with the aims of the Presidential ''Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak'' (Proclamation). This Proclamation found that the entry of additional foreign workers in certain immigrant and nonimmigrant classifications ''presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID–19 outbreak.'' [207] Section 5 of the Proclamation directed the Secretary of Labor to, ''as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action . . . to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit . . . pursuant to an EB–2 or EB–3 immigrant status or an H–1B nonimmigrant visa does not disadvantage United States workers.''

Although the amendments discussed below will extend beyond the duration of the Proclamation, the threats described in the Proclamation highlight the urgent need for strengthening wage protections in these programs to support the economic recovery. A core part of the Department's mission is to promote opportunities for profitable employment and ensure fair wages and working conditions for U.S. workers. This responsibility includes ensuring that U.S. workers similarly employed to foreign workers are not adversely affected by the employment of foreign workers on a permanent or temporary basis in the U.S., as required by the INA.

This rule will only apply to applications for prevailing wage determination pending with the NPWC as of the effective date of the regulation; applications for prevailing wage determinations filed with the NPWC on or after the effective date of the regulation; and LCAs filed with the Department on or after the effective date of the regulation where the OES survey data is the prevailing wage source, and where the employer did not obtain the PWD from the NPWC prior to the effective date of the regulation. The Department will not apply the new regulations to any previously-approved prevailing wage determinations, permanent labor certification applications, or LCAs, either through reopening or through issuing supplemental prevailing wage determinations or through notices of suspension, invalidation, or revocation.

1. Amending the Computation of the Wage Levels Based on the OES in the Permanent Labor Certification Program (20 CFR 656.40)

The Department is revising paragraphs (a), (b)(2), and (3) of 20 CFR 656.40. The most substantial changes are those made to paragraphs (b)(2). First, the Department has amended § 656.40(b)(2) by adding new paragraphs (b)(2)(i) and (ii) to codify the practice of using four wage levels and to specify the manner in which the wage levels are calculated. Specifically, new paragraph (b)(2)(i) stipulates that ''The BLS shall provide the OFLC Administrator with the OES wage data by occupational classification and geographic area,'' and goes on to specify the four new levels (Levels I through IV) to be applied.

New paragraph (b)(2)(i)(A) describes the Level I Wage. This first wage level—currently calculated as the mean of the bottom third of the OES wage

[201] *Comite de Apoyo a los Trabajadores Agricolas* v. *Solis,* 933 F. Supp. 2d 700, 712 (E.D. Pa. 2013).

[202] *Cf. Williams* v. *Usery,* 531 F.2d 305, 306 (5th Cir. 1976) (''Even if desirable, the Secretary has no authority to set a wage rate on the basis of attractiveness to workers. His authority is limited to making an economic determination of what rate must be paid all workers to neutralize any 'adverse effect' resultant from the influx of temporary foreign workers.'').

[203] Office of Foreign Labor Certification, Permanent Labor Certification Program—Selected Statistics, FY 19, *available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.*

[204] Under the O*Net system a job zone is a group of occupations that are similar in the amount of education, experience, and on the job training that is required for a worker to fill a position in the occupation. Job Zone 4 includes occupations that require considerable preparation; Job Zone 5 includes occupations that require extensive preparation. *See https://www.onetonline.org/help/online/zones.*

[205] This information is based on data collected by the Department's Office of Foreign Labor Certification on LCAs filed between March 1, 2020, and August 14, 2020.

[206] *See* Exec. Order 13788, 82 FR 18837 (Apr. 18, 2017).

[207] *See* Proclamation No. 10052, 85 FR 38263 (June 22, 2020).

distribution—will now be calculated as the mean of the fifth decile of the wage distribution for the most specific occupation and geographic area available. Roughly speaking, this means that the first wage level will be adjusted from the 17th percentile to the 45th percentile of the relevant OES wage distribution.

Next, new paragraph (b)(2)(i)(D) provides that the Level IV Wage—currently calculated as the mean of the upper two thirds of the OES wage distribution—will now be calculated as the mean of the upper decile of the distribution for the most specific occupation and geographic area available. This means the fourth wage level will increase approximately from the 67th percentile to the 95th percentile of the relevant OES wage distribution.

For the two intermediate levels, II and III, the Department will continue to rely on the mathematical formula Congress provided in the INA.[208] Thus, new paragraph (b)(2)(i)(B) states that the Level II Wage shall be determined by first dividing the difference between Levels I and IV by three and then adding the quotient to the computed value for Level I. The Level III Wage is defined in new paragraph (b)(2)(i)(C) as a level determined by first dividing the difference between Levels I and IV by three and then subtracting the quotient from the computed value for Level IV. This yields second and third wage levels at approximately the 62nd and 78th percentiles, respectively, as compared to the current computation, which places Level II at approximately the 34th percentile and Level III at approximately the 50th percentile.

The newly created paragraph (b)(2)(ii) states that the OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the prevailing wage rates produced under the new paragraph (b)(2)(i) of section 656.40 as a notice posted on the OFLC website. This continues the Department's practice of having the OFLC Administrator to announce, via a notice of implementation, updates to OES wage data. Currently, OFLC publishes a routine announcement each year implementing updated OES prevailing wages for the new wage year and discussing any other significant related updates, including changes to OES survey areas and relevant updates to the SOC system. These announcements also serve as notice to employers of changes they need to make to the wage information on applications to reflect the changes to the OES. This IFR codifies the current publication practice in the regulations at section 656.40(b)(2)(ii).

The new regulation aligns with OFLC's current practice for notifying employers directly, rather than through the **Federal Register**, because the administrative burden of contacting employers directly is less than publishing multiple prevailing wage rates in the **Federal Register**. The Department has determined that the increased transparency resulting from publishing these updates via a notice on OFLC's website, at least once in a calendar year, will provide clear expectations for employers to meet their prevailing wage obligations in the coming year, prior to filing an application for permanent employment certification.

Further revisions to paragraph (b)(2) provide greater precision in the language used by changing the term ''DOL'' to ''BLS'' when describing which entity administers the OES survey and eliminate redundancy by deleting the language ''except as provided in (b)(3) of this section.'' Because the Department is now specifying within the regulation exactly how the prevailing wage levels are calculated, the revised text also removes the existing reference to how the levels are calculated—namely the reference to the ''arithmetic mean''—and will instead provide that the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be based on the wages of workers similarly employed using the wage component of the OES survey, in accordance with paragraph (b)(2)(i), unless the employer provides an acceptable survey under paragraphs (b)(3) and (g) of this section or elects to utilize a wage permitted under paragraph (b)(4).

Revisions to paragraph (a) remove an out-of-date reference, explained further below, to SWAs' role in the prevailing wage determination process. The changes to paragraph (b)(3) account for the elimination of the reference to the ''arithmetic mean'' in (b)(2).

2. Amending the Wage Requirement for LCAs in the H–1B, H–1B1, and E–3 Visa Classifications (20 CFR 655.731)

The Department amends section 655.731 by making technical revisions to paragraph (a)(2)(ii)(A) to remove another out-of-date reference to SWAs' role in the prevailing wage determination process. Non-agricultural PWD requests are no longer processed by SWAs; since 2010 they have solely been processed by the Department at a National Processing Center (NPC). PWD requests are primarily adjudicated by the NPWC, located in Washington, DC, but through interoperability, they may be processed by any regional NPC. The regulatory text is amended to reflect the current practice and to provide for operational flexibilities in the future with respect to where PWD requests are processed.

The Department also revises the language in section 655.731 to more clearly explain that it will use BLS's OES survey to determine the prevailing wages under this paragraph and has added a sentence to specify that these determinations will be made in a manner consistent with the amended section 656.40(b)(2).

The revised language in paragraphs (a)(2)(ii) introductory text, (a)(2)(ii)(A) introductory text, and (a)(2)(ii)(A)(*2*) also includes technical and clarifying revisions regarding other permissible wage sources (*i.e.,* applicable wage determinations under the Davis-Bacon Act or McNamara-O'Hara Service Contract Act, as well as other independent authoritative or legitimate sources of wage data in accordance with paragraph (a)(2)(ii)(B) or (C)).

The new language also removes the reference to ''arithmetic mean'' in paragraph (a)(2)(ii) and now states ''. . . the prevailing wage shall be based on the wages of workers similarly employed as determined by the OES survey in accordance with 20 CFR 656.40(b)(2)(i) . . .'' The revised language also corrects an error referencing ''H–2B nonimmigrant(s)'' by changing the reference to ''H–1B nonimmigrant(s)'' in paragraph (a)(2)(ii)(A)(*2*). The revisions further provide that an NPC will continue to determine whether a job is covered by a collective bargaining agreement that was negotiated at arms-length, but in the event the occupation is not covered by such agreement, an NPC will determine the wages of workers similarly employed using the wage component of the BLS OES, unless the employer provides an acceptable survey. An NPC will determine the wage in accordance with secs. 212(n) and 212(t) of the INA and in a manner consistent with the newly revised section 656.40(b)(2).

[208] *See* 8 U.S.C. 1182(p)(4) (''Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.'').

III. Statutory and Regulatory Requirements

A. Good Cause To Forgo Notice and Comment Rulemaking

The Administrative Procedure Act (APA) authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' [209] Under the APA, notice and comment is deemed ''impracticable'' when an agency ''cannot both follow section 553 and execute its statutory duties,'' [210] while the ''public interest'' prong ''connotes a situation in which the interest of the public would be defeated by any requirement of advance notice.'' [211] Generally, the good cause exception for forgoing notice and comment rulemaking ''excuses notice and comment in emergency situations, or where delay could result in serious harm.'' [212] While emergency situations are the most common circumstances in which good cause is invoked, the infliction of real harm that would result from delayed action even absent an emergency can be sufficient grounds to issue a rule without undergoing prior notice and comment.[213]

Here, two different circumstances are present that satisfy the APA's good cause criteria. First, the shock to the labor market caused by the widespread unemployment resulting from the coronavirus public health emergency has created exigent circumstances that threaten immediate harm to the wages and job prospects of U.S. workers. The INA's wage protections are meant to ensure that the employment of foreign workers does not have an adverse impact on similarly employed U.S. workers. But the flaws in the existing wage levels—which were promulgated through guidance and without meaningful economic justification, are inconsistent with the statute, and serve as the source of adverse labor effects on U.S. workers even under normal economic conditions—can only exacerbate, and severely so, the dangers posed to U.S. workers by recent mass lay-offs unless immediate action is taken. Keeping in place the current levels is untenable, and any delay in issuing this rule is contrary to the public interest. Notice and comment procedures in these circumstances would make it impracticable for the Department to fulfill its statutory mandate and carry out the ''due and required execution of [its] agency functions'' to protect U.S. workers.[214]

Separately, even absent the emergency labor market conditions caused by the coronavirus pandemic, providing the public an opportunity to comment before the adjustments to the wage levels take effect is contrary to the public interest insofar as it would impede the Department's ability to solve the problems this interim final rule is meant to address. Advance notice of the intended changes would create an opportunity, and the incentives to use it, for employers to attempt to evade the adjusted wage requirements. This constitutes a situation where the public's interest is ''defeated by any requirement of advance notice'' and also justifies the Department's decision to forgo notice and comment before issuing the rule.[215]

Preventing Fiscal Harm to U.S. Workers

To begin, an agency may invoke the good cause exception where the serious harm to be prevented is fiscal or economic in nature, particularly in cases where the agency is acting to prevent fiscal harm to third parties.[216] In this instance, serious fiscal harm would befall U.S. workers absent immediate action by the Department because the wage and employment risks, already immense, posed to workers by recent mass lay-offs are greatly compounded by the inappropriately low prevailing wage rates.

On January 31, 2020, the Secretary of the Department of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247d) in response to the Coronavirus Disease 2019 (COVID–19) outbreak.[217] This was followed on March 13th by the President's declaration of a National Emergency concerning the COVID–19 outbreak, retroactive to March 1, 2020, to control the spread of the virus in the U.S.[218]

On April 22, 2020, the President issued Proclamation 10014, *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID–19 Outbreak* (Proclamation 10014).[219] Proclamation 10014 suspended the entry of aliens in various immigrant classifications, including EB–2 and EB–3 classifications, on the grounds that ''the United States faces a potentially protracted economic recovery with persistently high unemployment if labor supply outpaces labor demand.'' [220] The President found that, once admitted, these immigrants are granted ''open market'' employment documents, which allow them ''immediate eligibility to compete for almost any job, in any sector of the economy,'' meaning it is especially difficult to ''protect already disadvantaged and unemployed Americans from the threat of competition for scarce jobs from new lawful permanent residents by directing those new residents to particular economic sectors with a demonstrated need not met by the existing labor supply.'' [221] Based on his findings, the President concluded that the entry of

[209] 5 U.S.C. 553(b)(B).

[210] *Nat. Res. Def. Council, Inc.* v. *Evans,* 316 F.3d 904, 911 (9th Cir. 2003); *see also Riverbend Farms, Inc.* v. *Madigan,* 958 F.2d 1479, 1485 (9th Cir. 1992) (''The existence of the good cause exception is proof that Congress intended to let agencies depart from normal APA procedures where compliance would jeopardize their assigned missions.''); *Kollett* v. *Harris,* 619 F.2d 134, 145 (1st Cir. 1980) (''Impracticable' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings.'').

[211] *Utility Solid Waste Activities Grp.* v. *E.P.A.,* 236 F.3d 749, 755 (D.C. Cir. 2001); *see also N.C. Growers Ass'n* v. *United Farm Workers,* 702 F.3d 755, 767 (4th Cir. 2012).

[212] *Jifry* v. *FAA,* 370 F.3d 1174, 1179 (D.C. Cir. 2004); *see also U.S. Corp.* v. *U.S. E.P.A.,* 595 F.2d 207, 214 (5th Cir. 1979) (''It is an important safety valve to be used where delay would do real harm.'').

[213] *Nat. Res. Def. Council, Inc.* v. *Evans,* 316 F.3d 904, 911 (9th Cir. 2003) (''[W]e have observed that notice and comment procedures should be waived only when 'delay would do real harm.' . . . 'Emergencies, though not the only situations constituting good cause, are the most common.' '') (citations omitted); *see also Buschmann* v. *Schweiker,* 676 F.2d 352, 357 (9th Cir. 1982) (''The notice and commend procedures in Section 553 should be waived only when 'delay would do real harm' . . . The good cause exception is essentially an emergency procedure.'') (citations omitted).

[214] *Kollet,* 619 F.2d at 145.

[215] *Utility Solid Waste Activities Grp.* 236 F.3d at 755.

[216] *Sorenson Commc'ns, Inc.* v. *F.C.C.,* 755 F.3d 702, 707 (D.C. Cir. 2014) (explaining that ''no particular catechism is necessary to establish good cause. . .''); *Nat'l Venture Capital Ass'n* v. *Duke,* 291 F. Supp. 3d 5, 18 (D.D.C. 2017) (explaining that preventing fiscal harm is most likely to justify good cause when it is harm ''to *third parties,* not the government''); *Am. Fed'n of Gov't Emp., AFL–CIO* v. *Block,* 655 F.2d 1153, 1157 (D.C. Cir. 1981) (finding good cause where ''the absence of specific and immediate guidance from the Department [of Agriculture] in the form of new standards would have forced reliance by the Department upon antiquated guidelines, thereby creating confusion among field administrators, and caused economic harm . . .'').

[217] Department of Health and Human Services, Determination that a Public Health Emergency Exists, *https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx* (last reviewed Jan. 31, 2020). *See also* Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020).

[218] Proclamation No. 9994, 85 FR 15337 (Mar. 18, 2020).

[219] Proclamation No. 10014, 85 FR. 23441 (Apr. 22, 2020).

[220] *Id.*

[221] *Id.*

aliens in these immigrant visa categories would be detrimental to the interests of the U.S. given that ''[e]xisting immigrant visa processing protections are inadequate for recovery from the COVID–19 outbreak.'' [222] Proclamation 10014 further required the Secretary of Labor and the Secretary of Homeland Security, in consultation with the Secretary of State, to review nonimmigrant programs and recommend other measures appropriate to ''stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers.'' [223]

On June 22, 2020, the President issued a *Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak.*[224] Subject to certain exceptions, the Proclamation restricts the entry of certain immigrants and nonimmigrants, including certain H–1B nonimmigrants and EB–2 and EB–3 immigrants, into the U.S. through December 31, 2020, as their entry would be detrimental to the interests of the U.S. The Proclamation notes that ''between February and April of 2020 . . . more than 20 million United States workers lost their jobs in key industries where employers are currently requesting H–1B and L workers to fill positions.'' [225] It further explained that ''American workers compete against foreign nationals for jobs in every sector of our economy, including against millions of aliens who enter the United States to perform temporary work,'' and that while, ''[u]nder ordinary circumstances, properly administered temporary worker programs can provide benefits to the economy,'' because of the ''extraordinary circumstances of the economic contraction resulting from the COVID–19 outbreak, certain nonimmigrant visa programs authorizing such employment pose an unusual threat to the employment of American workers.'' [226]

The Proclamation only suspends and limits new entries into the United States by aliens who did not have valid visas and required travel documents on the effective date of the Proclamation. It does not address potential harms to U.S. workers caused by the employment of foreign workers already in the country. Section 5(b) of the Proclamation, however, directs the Department of Labor as soon as practicable consider promulgating regulations or take other appropriate action to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit, or who are seeking admission or a benefit, pursuant to an EB–2 or EB–3 immigrant visa or an H–1B nonimmigrant visa does not disadvantage United States workers in violation of section 212(a)(5)(A) or (n)(1) of the INA (8 U.S.C. 1182(a)(5)(A) or (n)(1)).[227]

Accordingly, the issuance of this interim final rule, designed to ensure that U.S workers are not disadvantaged by the employment of aliens already present in the United States as the nation continues its economic recovery, is consistent with the aims of the Proclamation, and mitigates aspects of the danger to U.S. workers caused by recent shocks to the labor market and the employment of foreign workers not fully addressed by the Proclamation.

Notwithstanding the ongoing COVID–19 emergency, hiring in the U.S. has increased, with continued hiring across all sectors of the economy anticipated. Despite these gains, unemployment remains significantly above the historically low levels seen prior to the emergence of COVID–19 and the resultant economic emergency. As states continue to reopen their economies and the pace of hiring accelerates, U.S. workers will still face risks to their wages and job opportunities. It is therefore imperative that the Department take immediate action to ensure that U.S. workers' current and future wages and job prospects are protected.

As noted above, a substantial body of evidence shows that the Department's current prevailing wage rates, which govern, in many cases, the wages that employers offer when recruiting for U.S. workers and pay when employing foreign workers, have long been set below the rates at which similarly employed U.S. workers are paid, and that these rates are inconsistent with the statutory scheme. Even during normal economic circumstances this is likely to result in adverse effects on the wages and job opportunities of U.S. workers. Under the high unemployment rates experienced in the U.S. labor market this year, which reached 14.7 percent in April, a rate not seen since the Great Depression, and remain elevated, the existing flawed and arbitrary wage levels pose an immediate threat to the livelihoods of U.S. workers.[228]

More particularly, if, as the economy recovers, the existing wage levels remain in place, at least two negative consequences for U.S. workers are likely to occur. First, employers seeking to employ EB–2 and EB–3 workers, as well as, in some cases, H–1B nonimmigrants, are required to use prevailing wage rates to recruit U.S. workers before they are permitted to employ foreign workers. The provision of improperly low prevailing wage determinations under the existing wage level computations therefore means that U.S. workers reentering the workforce will not, in some cases, be offered wages commensurate with their education and experience. In such cases where an employer's job advertisement includes a wage rate for a position that does not accurately reflect the wage rate that should be paid, U.S. workers may be less likely to apply for the position.

Relatedly, the current wage level computations may adversely affect the wages and job opportunities of U.S. workers by allowing employers to pay wages to foreign workers at a rate below the market rate for similarly employed U.S. workers. This can result in either employers preferring to hire foreign workers over U.S. workers, or result in wage suppression for U.S. workers. These problems, in turn, can also impede U.S. workers' return to the workforce at income levels comparable to what they were making before the downturn.

Both delays in workers returning to the workforce and their doing so at wages below what they were making before being laid off can have severe immediate and long term adverse effects on workers' wellbeing. Extensive academic research shows that mass lay-offs that occur during times of elevated unemployment have dramatic and persistent consequences for individuals' earnings for years following the lay-off event.[229] This is because workers who become unemployed during an economic recession often have to accept employment at lower wages than they were making before the recession, or will remain unemployed for extended periods of time, which exacerbates the negative wage effects, also known as wage scarring, that result from lay-offs.[230] Some studies have found that

[222] *Id.*

[223] *Id.* at 23442.

[224] Proclamation 10052, 85 FR 38263 (June 25, 2020); *see also* Proclamation 10054, 85 FR 40085 (July 2, 2020).

[225] Proclamation 10052, 85 FR 38263, 38263–264.

[226] *Id.*

[227] *Id.* at 38266.

[228] Bureau of Labor Statistics, Civilian Unemployment Rate, *https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm.*

[229] Steven Davis & Till von Wachter, *Recessions and the Costs of Job Loss,* The Brookings Institution (2011), *available at https://www.brookings.edu/wp-content/uploads/2011/09/2011b_bpea_davis.pdf* (finding that

[230] Ben Leubsdorf, *Six Ways the Recession Inflicted Scars on Millions of Unemployed*

Continued

workers laid off during a recession may experience negative wage effects for as long as 20 years after the lay-off event, and may have average wage growth over their lifetimes that is 14.7 percent lower than what they would have otherwise enjoyed.[231]

Further, now is a critical moment for mitigating against the threat of these wage scarring effects. Without interventions to help U.S. workers, as many as 8 million individuals laid off earlier this year may reach 27 weeks or more of unemployment starting in October 2020. Unemployment of this duration, known as long term unemployment, is the point at which the risk of wage scarring and other adverse employment effects of unemployment becomes especially acute.[232]

The reforms to the prevailing wage levels that the Department is undertaking in this rulemaking—changes that the Department acknowledges should have been undertaken years ago—have therefore become urgently needed. U.S. workers, in the millions, have already experienced one of the most significant, mass lay-off events in U.S. history.[233] Ensuring that these workers can quickly return to work at wages equal to or greater than what they were making before being laid off is critical to reducing the long-term wage scarring effects of mass unemployment. In the Department's expert judgment, and based on its review of the evidence of the effects of the current wage levels, the existing levels are impeding and will continue to impede, to a significant degree, many U.S. workers' ability to return to well-compensated employment given that the current levels have, in many instances, a suppressive effect on U.S. workers' wages and allow employers to prefer foreign labor as a lower-cost labor alternative. Preserving the existing levels, a flawed policy even under ordinary economic conditions, is untenable as the U.S. continues through critical stages of its recovery from the labor market shocks of the coronavirus public health emergency. Immediate corrective action is therefore required to ensure that the Department's regulations are, consistent with their purpose, safeguarding the well-being of U.S. workers at a moment when workers are highly vulnerable to extreme vicissitudes in the labor market. Any delay in taking this action would mean not only that the Department was failing to protect the wages and job opportunities of U.S. workers, but, worse still, that its application of the existing, faulty wage levels during the recovery would be an active source of harm exacerbating the long term consequences of the public health emergency for workers' livelihoods.[234]

It is of course true that, even with appropriately set wage levels, some degree of wage scarring would occur for U.S. workers in any mass lay-off event. The regulatory changes produced by this rule will not alleviate all the adverse effects associated with the current downturn, and some level of wage scarring is likely to be associated with any recessionary period. The recent shocks to the labor market, however, bring the Department's invocation of good cause well within the admittedly narrow bounds of section 553(b)(B).[235] The Department is not seeking to use section 553(b)(B) as an ''escape clause'' from notice and comment requirements that would apply whenever, in the Department's view, a regulatory change would advance good policy aims.[236] Rather, the Department finds good cause here under extraordinary circumstances brought about by the unique confluence of a public health emergency of a kind not experienced in living memory, its impact on the labor market, and the aggravating effect the Department's arbitrary current wage levels are likely having on the harms experienced by U.S. workers under current economic conditions.

It is also clear that the change worked by this rule going immediately into effect directly and substantially addresses the harm the Department has determined poses an ongoing and grave danger to U.S. workers. As noted above, the Proclamation temporarily suspends entry of new H–1B and PERM workers, but does not affect those workers currently in the United States pursuant to an earlier admission into the U.S. Yet the presence of such workers in the labor market is substantial and should not be overlooked. For example, in recent years, over 80 percent of all foreign workers granted EB–2 and EB–3 status in a given year are adjustment of status cases, meaning they were already present in the U.S. before being granted an employment-based green card. In other words, one of the biggest risks U.S. workers face from having to compete with EB–2 and EB–3 immigrants recruited and paid at inappropriately low wage levels comes from workers who are already present in the U.S. The adjustments the Department is making to the prevailing wage levels will therefore have an immediate and substantial impact as U.S. employers recruit for and employ EB–2 and EB–3 workers even with the Proclamation in place and help mitigate the short and long term adverse wage effects caused by the existing wage levels as the economy recovers.

Similarly, in FY2019, 249,476 of H–1B petitions for continuing employment, *i.e.* petitions for workers already present in the U.S., were approved out of the 388,403 total approved petitions.[237] Thus, as with EB–2 and EB–3 immigrants, a substantial number of H–1B nonimmigrants who will be affected by the adjusted wage levels are already in the United States. Ensuring that they are paid an appropriate wage, even with the Proclamation in effect, in order to reduce the wage scarring and other adverse employment consequences of the coronavirus public health emergency to U.S. workers is therefore an urgent and important priority for the Department that demands immediate corrective action.

Simply put, millions of U.S. workers, many of whom work in industries that employ large numbers of H–1B and employment-based immigrants, lost their jobs over the past six months. This

Americans, Wall Street Journal (May 10, 2016), *available at https://blogs.wsj.com/economics/2016/05/10/six-ways-the-recession-inflicted-scars-on-millions-of-unemployed-americans/.*

[231] Justin Barnette & Amanda Michaud, *Wage Scars and Human Capital Theory, available at https://ammichau.github.io/papers/JBAMWageScar.pdf*; Daniel Cooper, *The Effect of Unemployment Duration on Future Earnings and Other Outcomes,* Federal Reserve Bank of Boston (2014).

[232] *See* Bureau of Labor Statistics, An Analysis of Long-Term Unemployment (2016), *available at https://www.bls.gov/opub/mlr/2016/article/pdf/an-analysis-of-long-term-unemployment.pdf.*

[233] Bureau of Labor Statistics, Unemployment rate rises to record high 14.7 percent in April 2020 (May 13, 2020), *available at https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm?view_full.*

[234] *See Nat'l Fed'n of Fed. Emp.* v. *Devine,* 671 F.2d 607, 611 (D.C. Cir. 1982) (finding good cause was properly invoked where under prior regulations ''the agency would have been compelled to take action which was not only impracticable but also potentially harmful.'').

[235] *See Am. Iron & Steel Inst.* v. *E.P.A.,* 568 F.2d 284, 292 (3d Cir. 1977).

[236] *United States* v. *Garner,* 767 F.2d 104, 120 (5th Cir. 1985).

[237] *See* U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019 (2020), *available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf*, (showing 66 percent of H–1B petitions approved in FY2019 were for computer-related occupations). Per USCIS, ''continuing employment'' refers to ''extensions, sequential employment and concurrent employment, which are filed for aliens already in the United States.''

kind of mass lay-off event can and often does result in wage scarring, meaning immediate and long term adverse consequences for workers' wages. The scale of the mass layoffs recently experienced makes the current risk of wage scarring especially acute, which is further compounded by flaws in the Department's existing wage levels for these foreign labor programs. Even under ordinary economic conditions the wage levels likely result, in many instances, in adverse effects on the wages and job prospects of U.S. workers. In light of the recent and unprecedented shocks to the labor market, keeping the existing levels in place is entirely untenable if the Department is to mitigate to the fullest extent possible against the threat to the livelihoods of U.S. workers caused by the pandemic. Immediate action is needed as the economy continues through critical stages of its recovery. Congress charged the Department, and more specifically, the Secretary, with ensuring the employment of foreign workers does not adversely affect similarly employed U.S. workers. Without the issuance of this rule, the Department is hindered in its ability to meet its statutory mandate and thus has appropriately found that notice and comment procedures in this instance would be impracticable and contrary to the public interest.

Preventing Evasion of the New Wage Rates

Beyond the immediate and long term harm to U.S. workers' wages and job opportunities that would result from delay in changes to the wage levels, the Department is also justified in bypassing notice and comment to prevent the evasion by employers of the new wage requirements that would likely result from announcing a change to the levels in advance of the change taking effect. Forgoing notice and comment is permitted under circumstances where advance notice of a rule and its delayed effectiveness would result in significant, changed behavior by private parties to evade the rule, or that would otherwise result in harmful market distortions.[238] For example, where a rule would effect a price freeze, invoking good cause to bypass notice and comment has been justified on the grounds that ''[h]ad advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct 'actual transactions'—or avoid them—before the freeze deadline.'' [239] Similarly, courts have found good cause was properly invoked where the announcement of a price increase to take effect at a future date would have likely resulted in producers withholding their product ''from the market until such time as they could take advantage of the price increase.'' [240] Advance notice of the new rule in such cases contravenes the public interest because it would result in private parties evading or being able to improperly take advantage of regulatory changes, thereby undermining their effectiveness and exacerbating the very harm the changes are meant to ameliorate.[241]

The same holds true for the Department's adjustments to the prevailing wage levels. Under the INA, the Department is required to approve an LCA within seven days of when the application is filed.[242] Further, employers have discretion as to when they file LCAs with the Department. The only limitation is that they are not permitted to file an LCA earlier than six months before the beginning date of the period of intended employment.[243] The Department therefore receives LCAs throughout the year in large numbers, at times that are, to some extent, of employers' choosing, including a substantial number during the period that would coincide with the submission of public comment and finalization of this rule if it were not issued as an interim final rule. For example, during the six month periods beginning in September for fiscal years 2017, 2018, and 2019, the Department received, on average, 147,123 LCAs.

The limited discretion the Department has with respect to how quickly it reviews LCAs, in combination with the leeway employers have on when they file, as well as historical filing patterns, show that advance notice of the wage level changes effected by this rule could result in the kind of ''massive rush'' to evade price changes—in this case changes to the price employers must pay for foreign labor—that have repeatedly been found to justify bypassing notice and comment.[244] The scale of the wage change achieved by this rule, and the fact that an LCA, once approved, can be and often is valid for multiple years, means that the incentive for employers to change their filing behavior and, to the greatest extent possible, thereby secure wages at the current low levels for extended periods of time is substantial, and would very likely result in a spate of LCA filings during a comment period.[245] Even leaving aside the potential administrative burden this increase in filing may place on the Department's operations, the harm it would cause to the public interest is clear. Allowing employers to lock in for extended periods prevailing wage rates that the Department has determined often result in adverse effects on U.S. workers' wages and job opportunities would prolong the very problem—made exigent by the current state of the labor market—that the Department is seeking to address through this rule.[246] This on its own is sufficient reason for the Department to bypass notice and comment in order to safeguard the public interest.

For the foregoing reasons, each of which is independently sufficient to justify bypassing notice and comment, the regulatory change made by this interim final rule is urgently needed. Although the Department acknowledges that the good cause exception is ''narrowly construed and only reluctantly countenanced,'' the Department has appropriately invoked the exception in this case.[247] Both to ensure that the Nation continues through critical stages of its economic recovery without severely disadvantaging U.S. workers or affecting their current or future wages and to avoid creating opportunities for employers to evade the new wage requirements, the Department is issuing this interim final rule without providing

[238] *See Mobil Oil Corp.* v. *Dep't of Energy,* 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983) (''On a number of occasions, however, this court has held that, in special circumstances, good cause can exist when the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare.'').

[239] *DeRieux* v. *Five Smiths, Inc.,* 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974).

[240] *Nader* v. *Sawhill,* 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975).

[241] *U.S. Steel Corp.* v. *U.S. E.P.A.,* 595 F.2d 207, 214 n.15 (5th Cir. 1979) (''Use of the exception has repeatedly been approved, for example, in cases involving government price controls, because of the market distortions caused by the announcement of future controls.'').

[242] 8 U.S.C. 1182(n)(1).

[243] 20 CFR 655.730(b).

[244] *DeRieux* v. *Five Smiths, Inc.,* 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974).

[245] *Cf. Carpenters 46 Cty. Conference Bd.* v. *Constr. Indus. Stabilization Comm.,* 393 F. Supp. 480, 501 (N.D. Cal. 1975) (finding that an agency lacked good cause to bypass notice and comment on the grounds that private ''parties would not be expected to alter their conduct in such a way as to frustrate the purposes of the Program in response to announcement of the proposed 'Substantive Policies.' Indeed, the improbability of any change in conduct based upon the 'Substantive Policies' underscores the fact that they did not impose any obligations on anybody that could stimulate evasive conduct.'').

[246] *See Mobil Oil Corp.* v. *Dep't of Energy,* 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983).

[247] *Tenn. Gas Pipeline Co.* v. *FERC,* 969 F.2d 1141, 1144 (D.C. Cir. 1992).

a prior opportunity for comment before the rule takes effect.

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay.[248] The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for foregoing notice and comment rulemaking.[249] For the same reasons set forth above, the Department also concludes that it has good cause to dispense with the 30-day effective date requirement.

In accordance with the above authorities, the Department is bypassing notice and comment requirements of 5 U.S.C. 553(b) and (c) to urgently respond to the economic crisis resulting from COVID–19. This rule is being issued as an interim final rule, and the Department requests public input on all aspects of the rule. Instead of issuing a notice of proposed rulemaking, the Department is taking post-promulgation comments and will review and consider the public comments before issuing a final rule.

B. Executive Orders 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* Pursuant to E.O. 12866, OIRA has determined that this is an economically significant regulatory action. However, OIRA has waived review of this regulation under E.O. 12866, section 6(a)(3)(A). Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated that this rule is a ''major rule,'' as defined by 5 U.S.C. 804(2).

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and qualitatively discuss values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Outline of the Analysis

Section III.B.1 describes the need for the IFR, and section III.B.2 describes the process used to estimate the costs of the rule and the general inputs used to reach these estimates, such as wages and number of affected entities. Section III.B.3 explains how the provisions of the IFR will result in costs and transfer payments, and presents the calculations the Department used to reach the cost and transfer payment estimates. In addition, this section describes the qualitative transfer payments and benefits of the changes contained in this IFR. Section III.B.4 summarizes the estimated first-year and 10-year total and annualized costs, perpetuated costs, and transfer payments of the IFR. Finally, section III.B.5 describes the regulatory alternatives that were considered during the development of the IFR.

Summary of the Analysis

The Department expects that the IFR will result in costs and transfer payments. As shown in Exhibit 1, the IFR will have an annualized cost of $3.06 million and a total 10-year cost of $21.51 million at a discount rate of 7 percent in 2019 dollars.[250] The IFR will result in annualized transfer payments of $23.5 billion and total 10-year transfer payments of $165.1 billion at a discount rate of 7 percent in 2019 dollars.[251] When the Department uses a perpetual time horizon to allow for cost comparisons under E.O. 13771, the annualized cost of this IFR is $1.95 million at a discount rate of 7 percent in 2016 dollars.[252]

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND TRANSFER PAYMENTS OF THE IFR

[2019 $ millions]

	Costs	Transfer payments
10-Year Total with a Discount Rate of 3%	$24.79	$198,292
10-Year Total with a Discount Rate of 7%	21.51	165,090
Annualized at a Discount Rate of 3%	2.91	23,246
Annualized at a Discount Rate of 7%	3.06	23,505
Perpetuated Costs * with a Discount Rate of 7% (2016 $ Millions)	.....	1.95

[248] 5 U.S.C. 553(d)(3).

[249] *Riverbend Farms, Inc.* v. *Madigan,* 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed'n of Gov't Emps., AFL–CIO* v. *Block,* 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp.* v. *EPA,* 605 F.2d 283, 289–90 (7th Cir. 1979).

[250] The IFR will have an annualized net cost of $2.91 million and a total 10-year cost of $24.79 million at a discount rate of 3 percent in 2019 dollars.

[251] The IFR will result in annualized transfer payments of $23.25 billion and total 10-year transfer payments of $198.2 billion at a discount rate of 3 percent in 2019 dollars.

[252] To comply with E.O. 13771 accounting, the Department multiplied the initial and then constant rule familiarization costs (initial cost of $4,709,218; constant costs of $2,578,885 in 2019$) by the GDP deflator (0.94242) to convert the cost to 2016 dollars (initial cost of $4,438,062; constant costs of $2,430,393 in 2019$). The Department used this result to determine the perpetual annualized cost ($2,561,735) at a discount rate of 7 percent in 2016 dollars. Assuming the rule takes effect in 2020, the Department divided $2,561,735 by 1.07^4, which equals $1,954,336. This amount reflects implementation of the rule in 2020.

The total cost associated with the IFR includes only rule familiarization. The rule is not expected to result in any cost savings. Transfer payments are the result of changes to the computation of prevailing wage rates for employment opportunities that U.S. employers seek to fill with foreign workers on a temporary basis through H–1B, H–1B1, and E–3 nonimmigrant visas.[253] See the costs and transfer payments subsections of section III.B.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some transfer payments and benefits of the IFR. The Department describes them qualitatively in section III.B.3 (Subject-by-Subject Analysis). The Department invites comments regarding the assumptions, data sources, and methodologies used to estimate the costs and transfer payments from this IFR. The Department invites public comment on any additional benefits or costs that could result from this IFR.

1. Need for Regulation

The Department has determined that new rulemaking is urgently needed to more effectively protect the recruitment and wages of U.S. workers, eliminate any economic incentive or advantage in hiring foreign workers on a permanent or temporary basis in the United States, and further the goals of E.O. 13788, Buy American and Hire American. *See* 82 FR 18837. The ''Hire American'' directive of the E.O. articulates the executive branch policy to rigorously enforce and administer the laws governing entry of nonimmigrant workers into the United States in order to create higher wages and employment rates for U.S. workers and to protect their economic interests. *Id.* sec. 2(b). It directs Federal agencies, including the Department, to propose new rules and issue new guidance to prevent fraud and abuse in nonimmigrant visa programs, thereby protecting U.S. workers. *Id.* sec. 5.

In addition, this IFR is consistent with the aims of the Presidential ''Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak,''[254] which determined that the entry of additional foreign workers in certain immigrant and nonimmigrant classifications ''presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID–19 outbreak.'' Section 5 of the Proclamation directs the Secretary of Labor to, ''as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action . . . to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit . . . pursuant to an EB–2 or EB–3 immigrant status or an H–1B nonimmigrants visa does not disadvantage United States workers.''[255]

The Department is therefore amending its regulations at Sections 656.40 and 655.731 to reflect the methodology it will use to determine prevailing wages using wage data from the BLS OES survey for job opportunities in the H–1B, H–1B1, E–3, and permanent labor certification programs. The reports discussed and analyses provided in the preamble above expose how the application of the current wage levels for the four-tier OES prevailing wage structure fail to produce prevailing wages at a level consistent with the wages of U.S. workers similarly employed, and has a suppressive effect on the wages of similarly employed U.S. workers. The Department has a statutory mandate to protect the wages and working conditions of similarly employed U.S. workers from adverse effect caused by the employment of foreign workers in the United States on a permanent or temporary basis. The regulatory changes contained in this IFR are urgently needed as the country continues to recover from the economic crisis caused by the COVID–19 public health emergency in order to more effectively protect the recruitment and wages of U.S. workers and eliminate any economic incentive or advantage in hiring foreign workers on a permanent or temporary basis in the United States through these visa programs.

2. Analysis Considerations

The Department estimated the costs and transfer payments of the IFR relative to the existing baseline (*i.e.,* the current practices for complying, at a minimum, with the regulations governing permanent labor certifications at 20 CFR part 656 and labor condition applications at 20 CFR part 655, subpart H).

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the IFR (*i.e.,* costs and transfer payments that accrue to entities affected). The analysis covers 10 years (from 2021 through 2030) to ensure it captures major costs and transfer payments that accrue over time. The Department expresses all quantifiable impacts in 2019 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A–4.

Exhibit 2 presents the number of entities affected by the IFR. The number of affected entities is calculated using OFLC performance data from fiscal years (FYs) 2018 and 2019. The Department uses them throughout this analysis to estimate the costs and transfer payments of the IFR.

EXHIBIT 2—NUMBER OF AFFECTED ENTITIES BY TYPE

[FY 2018–2019 average]

Entity type	Number
Unique H–1B Program Certified Employers[256]	64,462
H–1B Program Certified Worker Positions with Prevailing Wage Set by OES[257]	965,885
Unique PERM Employers[258]	26,226

[253] As explained, *infra,* the Department did not quantify transfer payments associated with certifications under the Permanent Labor Certification Program (*e.g.,* EB–2 and EB–3 classifications) because they are expected to be *de minimis.*

[254] Proclamation 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,* 85 FR 38263 (June 25, 2020); *see also* Proclamation 10054 of June 29, 2020, *Amendment to Proclamation 10052,* 85 FR 40085 (July 2, 2020).

[255] *Id.*

[256] The total unique LCA employers in 2018 and 2019 were 64,875 and 64,049, respectively.

[257] The total number of worker positions associated with LCA certifications that use OES prevailing wages in 2018 and 2019 were 1,023,552 and 908,218, respectively.

[258] The unique employers in 2018 and 2019 were 28,856 and 23,596, respectively.

Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of applicants and the change in burden hours required for rule familiarization in section III.B.3 (Subject-by-Subject Analysis).

Compensation Rates

In section III.B.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with implementation of the provisions contained in this IFR. Exhibit 3 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the IFR. The Department used the BLS mean hourly wage rate for private sector human resources specialists.[259] We adjust the wage rates to reflect total compensation, which includes non-wage factors such as overhead and fringe benefits (*e.g.,* health and retirement benefits). We use an overhead rate of 17 percent [260] and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2019. For the private sector employees, we use a fringe benefits rate of 42 percent.[261]

The Department used the hourly compensation rates presented in Exhibit 3 throughout this analysis to estimate the labor costs for each provision.

EXHIBIT 3—COMPENSATION RATES

[2019 dollars] [262]

Position	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
HR Specialist	$32.58	$13.81 ($32.58 × 0.42)	$5.54 ($32.58 × 0.17)	$51.93

3. Subject-by-Subject Analysis

The Department's analysis below covers the estimated costs and transfer payments of the IFR. In accordance with Circular A–4, the Department considers transfer payments as payments from one group to another that do not affect total resources available to society. The regulatory impact analysis focuses on the costs and transfer payments that can be attributed exclusively to the new requirements in the IFR.

Costs

The following section describes the costs of the IFR.

Rule Familiarization

When the IFR takes effect, existing employers of foreign workers with H–1B, H–1B1, E–3 visas, and those employers sponsoring foreign workers for permanent employment, will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost for existing employers in the temporary and permanent visa programs in the first year. Each year, there are new employers that participate in the temporary and permanent visa programs. Therefore, in each year subsequent to the first year, new employers will need to familiarize themselves with the new regulations.

To estimate the first-year cost of rule familiarization, the Department calculated the average (90,688) number of unique employers requesting H–1B certifications and PERM certifications in FY18 (64,875 + 28,856 = 93,731) and FY19 (64,049 + 23,596 = 87,645). The average number of unique H–1B and PERM employers (90,688) was multiplied by the estimated amount of time required to review the rule (1 hour).[263] This number was then multiplied by the hourly, fully loaded compensation rate of Human Resources Specialists ($51.93 per hour). This calculation results in an initial cost of $4,709,218 in the first year after the IFR takes effect. Each year after the first year the same calculation is done for the number of new unique employers requesting H–1B and PERM certifications (34,164 H–1B + 15,499 PERM = 49,663) in FY19.[264] This calculation results in a continuing annual undiscounted cost of $2.58 million in years 2–10 of the analysis. The one-time and continuing cost yields a total average annual undiscounted cost of $2.79 million. The annualized cost over the 10-year period is $2.91 million and $3.06 million at discount rates of 3 and 7 percent, respectively.

Transfer Payments

Quantifiable Transfer Payments

This section discusses the quantifiable transfer payments related to changes to the computation of the prevailing wage levels.

As discussed in the preamble, the Department determined that current wage levels result in prevailing wage rates for H–1B workers that are far below what their U.S. counterparts are likely paid, which has a suppressive effect on the wages of similarly employed U.S. workers. While allowing employers to access high-skilled workers to fill specialized positions can help U.S. workers' job opportunities in some instances, the benefits of this policy diminish or disappear when the prevailing wage levels do not accurately reflect the wages paid to similarly situated workers in the U.S. labor market. The resulting distortions from a poor calculation of the prevailing wage allow some firms to replace qualified U.S. workers with lower-cost foreign workers.

Therefore, the Department is amending § 656.40(b) by codifying the practice of using four prevailing wage levels and the computations of those wage levels. Specifically, new paragraph (b)(2)(i) stipulates that the ''prevailing wage shall be provided by the OFLC

[259] Bureau of Labor Statistics. (2019). May 2019 National Occupational Employment and Wage Estimates: 13–1071—Human Resources Specialist. Retrieved from: *https://www.bls.gov/oes/current/oes131071.htm.*

[260] Cody Rice, U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program,'' June 10, 2002, *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[261] BLS. (2019). ''2019 Employer Costs for Employee Compensation.'' Retrieved from: *https://www.bls.gov/news.release/ecec.toc.htm.* Ratio of total compensation to wages and salaries for all private industry workers.

[262] Numbers may slightly differ due to rounding.

[263] This estimate reflects the nature of the IFR. As an IFR to amend parts of an existing regulation, rather than to create a new rule, the 1-hour estimate assumes a high number of readers familiar with the existing regulation.

[264] FY19 is the only full year of data with new unique entities. In Q1–Q3 of FY20 has a partial year the same percentage of total employers are new as FY19.

Administrator at four levels.'' This paragraph specifies the four new levels (Levels I through IV) to be applied. Level I—currently calculated as the mean of the bottom third of the OES wage distribution—will be calculated as the mean of the fifth decile of the wage distribution. Roughly speaking, this means that the Level I prevailing wage will be adjusted from the 17th percentile to the 45th percentile. Level IV—currently calculated as the mean of the upper two thirds of the OES wage distribution—will now be calculated as the mean of the upper decile of the distribution. This means the fourth wage level will increase approximately from the 67th percentile to the 95th percentile.

Consistent with the formula provided in the INA, Level II will be calculated by dividing by three, the difference between Levels I and IV, and adding the quotient to the computed value for Level I. Level III will be calculated by dividing by three the difference between Levels I and IV, and subtracting the quotient from the computed value for Level IV. This yields a Level II prevailing wage at approximately the 62nd percentile and a Level III prevailing wage at approximately the 78th percentile, as compared to the current computation, which places Level II at approximately the 34th percentile and Level III at approximately the 50th percentile.

Finally, the Department is revising § 655.731 to explain that it will use the BLS's OES survey wage data to establish the prevailing wages in the H–1B, H–1B1, and E–3 visa classifications and added a sentence to explain that these determinations will be made by the OFLC NPC in a manner consistent with § 656.40(b)(2).

The Department calculated the impact on wages that would occur from implementation of the prevailing wage computation changes contained in the IFR. It is expected that the increase in prevailing wages under the IFR will induce some employers to employ U.S. workers instead of foreign workers from the H–1B program, but nonetheless the Department still expects that the same number of H–1B visas will be granted under the annual caps. For many years, the Department has observed that the number of petitions exceeds the numerical cap, as the annual H–1B cap was reached within the first five business days each year from FY2014 through FY2020, and higher prevailing wage levels do not necessarily mean that demand for temporary foreign labor will fall below the available supply of visas. Under existing prevailing wage levels, which the Department has shown are too low and do not accurately reflect the wages paid to similarly situated U.S. workers, demand for temporary foreign labor far exceeds the statutory limits on supply. Usually prices rise in a market when demand exceeds supply. However, given the statutory design of the H–1B system, along with the lower wages for comparable work in many other countries and the non-pecuniary benefits of participating the H–1B program, prices for temporary foreign labor under the H–1B program have stayed too low to depress overall employer demand.

The IFR is still inducing a wage transfer under these cases where U.S. workers are employed instead of H–1B workers and therefore no adjustments to the wage estimates are necessary due to this effect. However, it is possible that prevailing wage increases will induce some employers to train and provide more working hours to incumbent workers, resulting in no increase in employment but an increase in earnings. It is also possible that prevailing wage increases will induce some employers to not hire a worker at all (either U.S. worker or worker from the H–1B program that is subject to the annual cap or not subject to the annual cap), resulting in a decrease in employment of guest workers. However, given that participation in temporary labor certification programs is voluntary and there exists an alternative labor market of U.S. workers who are not being prevented from accepting work offered at potentially lower market-based wages, there is some reason to doubt whether an increase in prevailing wages will lead to an efficiency loss from decreased labor demand. Due to data limitations on the expected change in labor demand and supply of U.S. workers, the Department cannot measure accurately the efficiency gains or losses to the U.S. labor market created by the new prevailing wage system. While the Department discusses this potential impact qualitatively, it welcomes comments on how to estimate changes to efficiency from the new prevailing wage levels.

For each H–1B certification in FY 2018, FY 2019, and FY 2020, the Department used the difference between the estimated prevailing wage level under the IFR and the wage offered under the current baseline to establish the wage impact of the prevailing wage computation changes in each calendar year of the certification's employment period. Under the H–1B visa classification, employment periods for certifications can last for up to three years in length and generally begin up to six months after a certification is issued by the Department. Therefore, a given fiscal year can have wage impacts that start in that calendar year and last up to three years, or could start in the following calendar year and have an end-date up to four calendar years past the fiscal year. For example, an employment start date in March of 2019 may be associated with an H–1B application certified by the Department during FY 2018 and, if that certified application contains a three-year employment period, the wage impacts on the employer will extend through March of 2022. The IFR does not retroactively impact certified wages, so there will be new H–1B applications certified by the Department during FY 2020 that may extend well into the analysis period. Therefore, the first year of the rule will only impact new certifications, the second year new and continuing certifications from year 1 will be impacted, and the third year and beyond both new and continuing certifications from years 1 and 2 will be impacted.

To account for this pattern of wage impacts we classify certifications into three length cohorts and calculate annual wage impacts for each cohort based on FY 2018–FY 2020 data. Those cohorts are: Certifications lasting less than 1 year, certifications lasting 1–2 years, and certifications lasting 2–3 years.

H–1B, H–1B1, or E–3 applications certified by the Department do not necessarily result in employment and employer wage obligations. After obtaining a certification, employers must then submit a Form I–129, Petition for a Nonimmigrant Worker, for approval by U.S. Citizenship and Immigration Services (USCIS). USCIS may approve or deny the H–1B visa petition. USCIS approval data represents approvals of petitions based on both certifications issued by the Department that used OES data for the prevailing wage or that were based on other approved sources to determine the prevailing wage (*e.g.,* Collective Bargaining Agreements, employer-provided surveys). In FY 2020, approximately 92 percent of workers associated with H–1B, H–1B1, and E–3 certifications had prevailing wages based on the OES survey. Therefore, we adjusted the USCIS approvals downward by 8 percent, and then computed the approval rates. Exhibit 4 summarizes FY 2018 and FY 2019 data on H–1B, H–1B1, and E–3 certifications with their prevailing wage based on the OES survey, adjusted USCIS approvals,

and approval rate.[265] To account for approval rates that may differ by geographic location and whether a certification is new or continuing, we adjust each certification's wage impact by the approval rate of the state of intended employment for the employer's certification and whether it is a new or continuing application.[266]

EXHIBIT 4—LCA AND I–129 H–1B, H–1B1, AND E–3 APPROVALS AND DENIALS

	FY 2018			FY 2019			Average percent approved
	LCA certified	USCIS approved +	Percent approved	LCA certified	USCIS approved +	Percent approved	
Total	1,023,552	308,147	30	908,218	368,811	41	35
New	423,174	80,855	19	378,175	132,965	35	27
Continuing *	600,378	227,292	38	530,043	235,846	44	41

* Includes: ''Continued Employment'', ''Change Previous Employment'', ''Change Employer'', ''Amended Petition'', ''New Concurrent Employment''
+ Approval numbers adjusted by 92% to account for approvals with prevailing wages set by sources other than OES.

To estimate the wage impacts of new percentiles contained in this IFR, the Department used publicly available BLS OES data that reports the 10th, 25th, 50th, 75th, and 90th percentile wages by SOC code and metropolitan or non-metropolitan area.[267] In order to estimate wages for the new IFR levels of 45th, 62nd, 78th, and 95th percentiles, the Department linearly interpolated between relevant percentiles for reported wages at each SOC code and geographic area combination.[268] For the 95th percentile, the Department used OES wages reported for the 90th percentile at each SOC code and geographic area combination.

For an illustrative example in Exhibit 5, to calculate projected wage impacts under the IFR, the Department first multiplied the number of certified workers by the number of hours worked in each calendar year (2,080 hours) and the new prevailing wage for the level the workers were certified at for the particular SOC and the geographic area combination. The examples in Exhibit 5 set forth how the Department calculated the IFR wage impact for an individual case of each length cohort.

EXHIBIT 5—PREVAILING WAGE UNDER THE IFR
[Example cases]

Length cohort	Number of certified workers	Prevailing wage (hour)	Number of hours worked in 2018	Number of hours worked in 2019	Number of hours worked in 2020	Total wages 2018	Total wages 2019	Total wages 2020	Total wages 2018–2020	USCIS approval rate (percent)	Adjusted total wages
	(a)	(b)	(c)	(d)	(e)	(a * b * c) = (f)	(a * b * d) = (g)	(a * b * e) = (h)	(f + g + h) = (i)	(j)	(i * j)
<1 Year	100	$39.56	648	1032	0	$2,563,488	$4,082,592	$0	$6,646,080	19	$1,262,755
1–2 Years	100	27.13	1048	1032	0	2,843,224	2,799,816	0	5,643,040	25	1,410,760
2–3 Years	100	27.92	528	2080	1568	1,474,176	5,807,360	4,377,856	11,659,392	18	2,098,691

After the total wages for the IFR was determined, the wage calculation under the current offered wage levels was calculated. The currently offered wage is always equal to or greater than the current prevailing wage because some certifications offer a wage higher than the prevailing wage. The methodology is the same as that used to estimate the projected wages under the IFR: Number of certified workers is multiplied by the number of hours worked in each calendar year (based on 2,080 hours in a full year) of certified employment and the actual offered wage for the certified workers (Exhibit 6 provides an example of the calculation of the baseline wages for the same case as in Exhibit 5).

EXHIBIT 6—CURRENT PREVAILING WAGE
[Example cases]

Length cohort	Number of certified workers	Prevailing wage (year)	Prevailing wage	Number of hours worked in 2018	Number of hours worked in 2019	Number of hours worked in 2020	Total wages 2018	Total wages 2019	Total wages 2020	Total wages 2018–2020	USCIS approval rate (percent)	Adjusted total wages
	(a)	(b)	(b/2080) = (c)	(d)	(e)	(f)	(a * c * d) = (g)	(a * c * e) = (h)	2020 (a * c * f) = (i)	(g + h + i) = (j)	(k)	(j * k)
<1 Year	100	$77,459.00	$37.24	648	1032	0	$2,413,146	$3,843,158	$0	$6,256,304	19	$1,188,698
1–2 Years	100	50,316.00	24.19	1048	1032	0	2,535,152	2,496,448	0	$5,031,600	25	1,257,900
2–3 Years	100	48,432.00	23.28	528	2080	1568	1,229,428	4,843,200	3,651,028	9,723,655	18	1,750,258

Once the baseline offered wage was obtained, the Department estimated the wage impact of the IFR prevailing wage levels by subtracting the baseline offered wage for each calendar year from the IFR prevailing wage. The total wage impact was then multiplied by the average USCIS petition beneficiary approval rate for the state of intended employment. Estimating wage impacts is calculated here for the examples in Exhibits 5 and 6, above. For the length cohort less than 1 year, the impact in 2018 was $28,565 (($2,563,488 − $2,413,146) * 0.19) and

[265] Form I–129 data for H–1B is obtained from the USCIS H–1B data hub. Retrieved from: *https://www.uscis.gov/tools/reports-and-studies/h-1b-employer-data-hub.*

[266] Both USCIS H–1B data and LCA data indicate the state for which the work is to be completed. Therefore, approval rates are calculated separately for each state and used in the analysis.

[267] BLS OES data for Metropolitan and Nonmetropolitan Areas acquired for each year required for the analysis: May 2016–May 2019. Retrieved from *https://www.bls.gov/oes/current/oessrcma.htm.*

[268] For example, if OES reports a wage of $30 per hour at the 25th percentile and $40 per hour at the 50th percentile then the 45th percentile is interpolated as $30 + ($40 − $30) * ((45–25)/(50–25)) = $38 per hour.

$45,492 in 2019 (($4,082,592 – $3,843,158) * 0.19). For the length cohort of 1–2 years, the impact in 2018 was $77,018 (($2,843,224 – $2,535,152) * 0.25), and in 2019 was $75,842 (($2,799,816 – $2,496,448) * 0.25). The example for length cohort 2–3 years had wage impacts in 2018, 2019, and 2020. In the 2018 the wage impact was $44,055 (($1,474,176 – $1,229,428) * 0.18), $173,549 in 2019 (($5,807,360 – $4,843,200) * 0.18), and $130,829 in 2020 (($4,377,856 – $3,651,028) * 0.18).

To base the estimated wage impacts on three years of data, and to include the most recent data (*i.e.,* FY 2020), this process was done for each certification using the FY 2018–FY 2020 certification data. FY 2020 certification data only consists of three quarters of data as of the publication date of this IFR. Therefore, to estimate wage transfers for three full years of data, FY 2020 Q4 data was simulated based on FY 2019 data. The Department used the Employment Cost Index (ECI) to inflate the FY 2019 Q4 total wage impacts by length cohort to be representative of the potential FY 2020 Q4 total wage impacts. The most recent annual growth rate of the ECI, from June 2019 to June 2020 (2.7 percent), was used to inflate the 2019 Q4 total wage impacts. Total wage impacts were inflated in each calendar year for each length cohort, separated by whether the wages in each calendar year and cohort were paid to new workers for the first time in that year, or if the wages were being paid to workers whose employment was continuing from prior calendar years. The estimated FY 2020 Q4 wage impacts were summed with the FY 2020 Q1–Q3 wage impacts to create an estimate of the total wage impact for the fiscal year.

Existing prevailing wage data from the Foreign Labor Certification (FLC) Data Center, accessible at *http://www.flcdatacenter.com*, contains wage data for each SOC code and geographic area combination that are not readily available in the public OES data used to estimate new prevailing wage levels. For example, when a wage is not releasable for a geographic area, the prevailing wage available through the FLC Data Center may be computed by BLS for the geographic area plus its contiguous areas. Additionally, in publicly available OES data, some percentiles are missing for certain combinations of SOC codes and geographic areas. These two factors result in a small number of certifications having no match with a new prevailing wage level.[269] To estimate wage impacts for workers associated with these certifications, the average wage impact per worker, for the given cohort and fiscal year the certification is associated with, is calculated and then applied to the number of workers associated with the certification that does not match. This produces a series of estimated wage impacts for workers that are not matched with new prevailing wages in the public OES data for each calendar year for which they have employment. These wage impacts are then estimated to the calculated wage impact to produce a final total wage impact for each cohort in each calendar year.

The Department determined the total impact of the IFR prevailing wage levels for each length cohort in each calendar year by summing the wage impacts for all certifications in each year and averaging the totals. The wage impacts for each cohort and calendar year are presented in Exhibit 7. Some calendar years do not have values because the cohort, based on FY 2018–FY 2020 data, does not have a full year of data for those years. For example, calendar year 2021 does have new entries from FY 2020 data but it is not a complete year of data as FY 2021 would also have new entries, and therefore it is not included.

EXHIBIT 7—ESTIMATED WAGE TRANSFERS (FY18–FY20 DATA)

[Million 2019$]

	CY 18	CY 19	CY 20	CY 21	CY 22	Annual average
<1 Year:						
New	$24.8	$16.8	$17.2	N/A	N/A	$19.6
Continuing	7.0	13.5	8.3	4.2	N/A	8.3
1–2 Years:						
New	86.2	61.7	54.0	N/A	N/A	67.3
Continuing	N/A	144.6	119.6	75.4	N/A	113.2
2–3 Years:						
New	6,965	3,502	2,806	N/A	N/A	4,424
Continuing	N/A	13,910	7,401	5,655	N/A	8,989
Continuing 3+	N/A	N/A	15,790	14,031	8,794	12,872

The annual average for each length cohort is used to produce the total transfers over the 10-year horizon. Each cohort enters in each year and has continuing wage impacts based on its cohort length. Therefore, in years 3–10 (2023–2030), the annual wage impact is equal to the sum of each cohort's annual average. This series is presented below in Exhibit 8.

EXHIBIT 8—TOTAL TRANSFER PAYMENTS OF THE IFR

[2019$ millions]

Cohort	<1		1–2 Years		2–3 Years			Total
	New	Continuing	New	Continuing	New	Continuing	Continuing 3+	
2021	$19.6	$0.0	$67.3	$0.0	$4,424	$0	$0	$4,511

[269] In FY 2018, 6 percent of certifications do not match, in FY 2019 9 percent, and FY 2020 6 percent.

EXHIBIT 8—TOTAL TRANSFER PAYMENTS OF THE IFR—Continued

[2019$ millions]

Cohort	<1		1–2 Years		2–3 Years			Total
	New	Continuing	New	Continuing	New	Continuing	Continuing 3+	
2022	19.6	8.3	67.3	113	4,424	8,989	0	13,621
2023	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2024	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2025	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2026	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2027	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2028	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2029	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
2030	19.6	8.3	67.3	113	4,424	8,989	12,872	26,493
10-year total	196	74	673	1,019	44,245	80,898	102,973	230,077

The changes in prevailing wage rates constitute a transfer payment from employers to employees. The Department estimates the total transfer over the 10-year period is $198.29 billion and $165.09 billion at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is $23.25 billion and $23.5 billion at discount rates of 3 and 7 percent, respectively.

With the increases in prevailing wage levels under this IFR, some employers may decide not to hire a U.S. worker or a foreign worker on a temporary or permanent basis. The prevailing wage increase may mitigate labor arbitrage and induce some employers to train and provide more working hours to incumbent workers, resulting in no increase in employment. The Department is unable to quantify the extent to which these two factors will occur and therefore discusses them qualitatively.

The labor economics literature has a significant volume of research on the impact of wages on demand for labor. Of interest in the context of the H–1B program is the long-run own-wage elasticity of labor demand that describes how firms demand labor in response to marginal changes in wages. There is significant heterogeneity in estimates of labor demand elasticities that can depend on industry, skill-level, region, and more.[270] A commonly cited value of average long-run own-wage elasticity of labor demand is −0.3.[271] This would mean that a one percent increase in wage would reduce demand for labor by 0.3 percent. The average annual increase in wage transfers is a 25.8 percent increase in wage payments,[272] which would imply a potential reduction in labor demand by 7.74 percent (25.8 * .3). It is likely that U.S. employers will pay higher wages to H–1B workers or replace them with U.S. workers to the extent that is possible. However, we can approximate that, if U.S. employers were limited in the ability to pay higher wages and did reduce demand, it would reduce the transfer payment by approximately 7.74 percent. The annual average undiscounted wage transfer estimate of $23.0 billion would therefore be reduced to $21.2 billion.

Non-Quantifiable Transfer Payments

This section discusses the non-quantifiable transfer payments related to changes to the computation of the prevailing wage levels. Specifically, the Department did not quantify transfer payments associated with certifications under the Permanent Labor Certification Program because they are expected to be *de minimis.*

The PERM programs have a large proportion of certifications issued annually to foreign beneficiaries that are working in the U.S. at the time of certification and would have changes to wages under the IFR prevailing wage. Prior to the PERM certification, these beneficiaries are typically working under H–1B, H–1B1, and E–3 temporary visas and wage transfers for these PERM certifications are therefore already factored into our wage transfer calculations for H–1B, H–1B1, and E–3 temporary visas. Below, Exhibit 9 illustrates the percentage of PERM certifications that are on H–1B, H–1B1, or E–3 temporary visas, the percent that are not on a temporary visa and/or are not currently in the U.S. and would therefore enter on an EB–2 or EB–3 visa, and all other visa classes.

EXHIBIT 9—PERM CERTIFICATIONS BY CLASS OF ADMISSION, FY18–FY20

Category	FY18	FY19	FY20	Average percent of total
Not on a temporary visa/not currently residing in the United States	10,047	9,841	5,311	9.7
H–1B visa	74,454	63,976	44,887	71.7
H–1B1 visa	109	81	54	0.1
E–3 visa	471	280	160	0.3
All other visa classifications *	24,469	12,907	10,520	18.1

[270] For a full discussion of labor demand elasticity heterogeneity see Lichter, A., Peichl, A., & Siegloch, S. (2015). The own-wage elasticity of labor demand: A meta-regression analysis. European Economic Review, 94–119: Retrieved from: *https://www.econstor.eu/bitstream/10419/93299/1/dp7958.pdf.*

[271] This value is the best-guess in seminal work by Hamermesh, D.H. (1993). Labor Demand. Princeton University Press. Values around −0.3 have been further estimated by additional studies including in meta-analysis studies as cited in footnote 10.

[272] The average unadjusted total wages paid to employees impacted by the IFR in the FY18–FY20 datasets is $209.1 billion. The average unadjusted total wages paid to those same employees in the baseline in the FY18–FY20 datasets is $263.2 billion. This represents a 25.8 percent increase in wages. Not all of these wages are paid due to USCIS approval rates, but the wages would adjust proportionally (*i.e.,* the percentage increase would remain the same).

EXHIBIT 9—PERM CERTIFICATIONS BY CLASS OF ADMISSION, FY18–FY20—Continued

Category	FY18	FY19	FY20	Average percent of total
Total	109,550	87,085	60,932	100

Other visa classes include: A1/A2, L–1, F–1, A–3, B–1, C–1, TN, C–3, E–2, B–2, D–1, D–2, H–4, O–1, E–1, EWI, J–1, TPS, F–2, L–2, G–4, H–2A, G–1, G–5, H–1A, Parolee, P–1, J–2, H–3, I, M–1, R–1, O–2, M–2, P–3, O–3, VWT, TD, P–2, P–4, Q, VWB, R–2, N, S–6, T–1, V–2, T–2, K–4, U–1.

About 10 percent of PERM certifications are issued annually by OFLC to foreign beneficiaries who do not currently reside in the U.S. and would enter on immigrant visas in the EB–2 or EB–3 preference category. Employment-based immigrant visa availability and corresponding wait times change regularly for different preference categories and countries. Foreign workers from countries with significant visa demand consistently experience delays, at times over a decade. Therefore, employers would not have wage obligations until at the earliest, the very end of the 10-year analysis period and the number of relevant certifications is a relatively small percent of all PERM certifications; the Department therefore has not included associated wage transfers in the analysis.

Benefits Discussion

This section discusses the non-quantifiable benefits related to changes to the computation of the prevailing wage levels.

The Department's increase in the prevailing wages for the four wage levels is expected to result in multiple benefits that the Department is unable to quantify but discusses qualitatively. One benefit of the IFR's increase in prevailing wages is the economic incentive to increase employee retention, training, and productivity which will increase benefits to both employers and U.S. workers. The increase in prevailing wages is expected to induce employers—particularly those using the permanent and temporary visa programs—to fill critical skill shortages, to minimize labor costs by implementing retention initiatives to reduce employee turnover, and/or to increase the number of work hours offered to similarly employed U.S. workers. Furthermore, for employers in the technology and health care sectors, this could mean using higher wages to attract and hire the industry's most productive U.S. workers and to provide them with the most advanced equipment and technologies to perform their work in the most efficient manner.

This high-wage, high-skill approach to minimizing labor costs is commonly referred to as the ''efficiency wage'' theory in labor economics; a well-established strategy that allows companies employing high-wage workers to minimize labor costs and effectively compete with companies employing low-wage workers. The efficiency wage theory supports the idea that increasing wages can lead to increased labor productivity because workers feel more motivated to work at higher wage levels. Where these jobs offer wages that are significantly higher than the wages and working conditions of alternative jobs, workers will have a greater incentive to be loyal to the company, impress their supervisors with the quality of their work, and exert an effort that involves no shirking. Thus, if employers increase wages, some, or all, of the higher wage costs can be recouped through increased staff retention, lower costs of supervision, and higher labor productivity.

Strengthening prevailing wages will also help promote and protect jobs for American workers. By ensuring that the employment of any foreign worker is commensurate with the wages paid to similarly employed U.S. workers, the Department will be protecting the types of white-collar, middle-class jobs that are critical to ensuring the economic viability of communities throughout the country.

There is some evidence that the existing prevailing wage levels offer opportunities to use lower-cost alternatives to U.S. workers doing similar jobs by offering two wage levels below the median wage. For example, in FY 2019, 60 percent of H–1B workers were placed at either the first or second wage level, meaning a substantial majority of workers in the program could be paid wages well below the median wage for their occupational classification.[273] By setting the Level I wage level at the 45th percentile, employers using the H–1B and PERM programs will have less of an incentive to replace U.S. workers doing similar jobs at lower wage rates when there are available U.S. workers. This will increase earnings and standards of living for U.S. workers. It also will level the playing field by reducing incentives to replace similarly employed U.S. workers with a low-cost foreign alternative.

In addition, because workers with greater skills tend to be more productive, and as a result can command higher wages, raising the prevailing wage levels will lead to the limited number of H–1B visas going to higher-skilled foreign workers, which will likely increase the spillover economic benefits associated with high-skilled immigration.

Finally, ensuring that skilled occupations are not performed at below-market wage rates by foreign workers will provide greater incentives for firms to expand education and job training programs. These programs can attract and develop the skills of a younger generation of U.S. workers to enter occupations that currently rely on elevated levels of foreign workers.

4. Summary of the Analysis

Exhibit 10 below summarizes the costs and transfer payments of the IFR. The Department estimates the annualized cost of the IFR at $3.06 million and the annualized transfer payments (from H–1B, H–1B1, and E–3 employers to workers) at $23.5 billion, at a discount rate of 7 percent. The Department did not estimate any cost savings. For the purpose of E.O. 13771, the annualized cost, when perpetuated, is $1.95 million at a discount rate of 7 percent in 2016 dollars.

[273] Costa and Hira (2020), H–1B Visas and Prevailing Wage Levels, Economic Policy Institute: Retrieved August 12, 2020 from *https://files.epi.org/pdf/186895.pdf.*

EXHIBIT 10—ESTIMATED MONETIZED COSTS AND TRANSFER PAYMENTS OF THE IFR

[2019$ millions]

	Costs	Transfer payments
2021	$4.71	$4,511
2022	2.58	13,621
2023	2.58	26,493
2024	2.58	26,493
2025	2.58	26,493
2026	2.58	26,493
2027	2.58	26,493
2028	2.58	26,493
2029	2.58	26,493
2030	2.58	26,493
Undiscounted Total	27.92	230,077
10-Year Total with a Discount Rate of 3%	24.79	198,292
10-Year Total with a Discount Rate of 7%	21.51	165,090
10-Year Average	2.79	23,008
Annualized with a Discount Rate of 3%	2.91	23,246
Annualized with a Discount Rate of 7%	3.06	23,505
Perpetuated Net Costs with a Discount Rate of 7% (2016$ Millions)		1.95

5. Regulatory Alternatives

The Department considered two alternatives to the chosen approach of establishing the prevailing wage for Levels I through IV, respectively, at approximately the 45th percentile, the 62nd percentile, the 78th percentile, and the 95th percentile.

First, the Department considered an alternative that would modify the number of wage tiers from four levels to three levels. Under this alternative, prevailing wages would be set for Levels I through III at the 45th, 75th, and 95th percentile, respectively. Modifying the number of wage tiers to three levels would allow for more manageable wage assignments that would be easier for employers and employees to understand due to decreased complexity to matching wage tiers with position experience. A three-tiered prevailing wage structure would maintain the minimum entry-level and fully competent experience levels and simplify the intermediate level of experience by combining the current qualified and experienced distinctions. The Department prefers the chosen methodology over this alternative because the chosen four-tiered prevailing wage structure is likely to produce more accurate prevailing wages than a three-tiered structure due to the ability to have two intermediate wage levels. In addition, creating a three-tiered prevailing wage structure would require a statutory change.

The Department considered a second alternative that would modify the geographic levels for assigning prevailing wages for the SOC code within the current four-tiered prevailing wage structure, which ranges from local MSA or BOS areas to national, to a two-tiered geographic area structure containing only statewide or national area estimates. By assigning prevailing wages at a statewide or, where statewide averages cannot be reported by the BLS, national geographic area, this second alternative would again simplify the prevailing wage determination process by reducing the number of distinct wage computations reported by the BLS and provide employers with greater certainty regarding their wage obligations, especially where the job opportunity requires work to be performed in a number of different worksite locations within a state or regional area. This process would also reduce variability in prevailing wages within a state for the same occupations across time, making prevailing wages more consistent and uniform. However, this method would not account for wage variability that may occur within states and that can account for within-state differences in labor market dynamics, industry competitiveness, or cost of living.

The Department prefers the chosen methodology because it preserves important differences in county and regional level prevailing wages and better aligns with the statutory requirement that the prevailing wage be the wage paid in the area of employment. The Department also seeks public comments to help us to identify any other regulatory alternatives that should be considered.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.*

However, if an agency determines that a proposed or final rule is unlikely to have a significant economic impact on a substantial number of small entities, the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required.[274] The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department expects that this IFR will likely have a significant economic impact on a substantial number of small entities and is therefore publishing this Initial Regulatory Flexibility Analysis (IRFA), as required by the RFA. The Department invites public comment on all aspects of this IRFA, including the estimates related to the number of small entities affected by the IFR and expected

[274] *See* 5 U.S.C. 605.

costs. The Department also invites public comment on whether viable alternatives exist that would reduce the burden on small entities while remaining consistent with statutory requirements and the objectives of the IFR.

1. Why the Department Is Considering Action

The Department has determined that new rulemaking needed to will better protect the wages and job opportunities of U.S. workers, minimize incentives to hire foreign workers over U.S. workers on a permanent or temporary basis in the United States under the H–1B, H–1B1, and E–3 visa programs and the PERM program, and further the goals of Executive Order 13788, Buy American and Hire American. In addition, this IFR is consistent with the aims of the Presidential ''Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak,'' which found that the entry of additional foreign workers in certain immigrant and nonimmigrant classifications ''presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID–19 outbreak.'' Accordingly, this IFR revises the computation of wage levels under the Department's four-tiered wage structure based on the OES wage survey administered by the BLS to ensure that wages paid to immigrant and nonimmigrant workers are commensurate with the wages of U.S. workers with comparable levels of education, experience, and levels of supervision in the occupation and area of employment.

2. Objectives of and Legal Basis for the IFR

The Department is amending its regulations at Sections 656.40 and 655.731 to reflect the methodology the Department will use to determine prevailing wages based on the BLS's OES survey for job opportunities in the H–1B and PERM programs. The revised methodology will establish the prevailing wage for Levels I through IV, respectively, at approximately the 45th percentile, the 62nd percentile, the 78th percentile, and the 95th percentile.

The INA assigns responsibilities to the Secretary relating to the entry and employment of certain categories of employment-based immigrants and nonimmigrants. This rule relates to the labor certifications that the Secretary issues for certain employment-based immigrants and to the LCAs that the Secretary certifies in connection with the temporary employment of foreign workers under the H–1B, H–1B1, and E–3 visa classifications.[275] The Department has a statutory mandate to protect the wages and working conditions of similarly-employed U.S. workers from adverse effects caused by the employment of foreign workers in the U.S. on a permanent or temporary basis. This, in turn, will protect jobs of U.S. workers as a part of responding to the coronavirus public health emergency, and facilitate the Nation's economic recovery.

3. Estimating the Number of Small Entities Affected by the Rulemaking

The Department collected employment and annual revenue data from the business information provider Data Axle and merged those data into the H–1B, H–1B1, and E–3 visa program disclosure data (H–1B disclosure data) for FY 2019.[276] This process allowed the Department to identify the number and type of small entities using the H–1B program and their annual revenues. A single employer can apply for H–1B workers multiple times; therefore, unique employers were identified. The Department was able to obtain data matches for 34,203 unique H–1B employers. Next, the Department used the SBA size standards to classify 26,354 of these employers (or 77.1 percent) as small.[277] These unique small employers had an average of 75 employees and average annual revenue of approximately $18.61 million. Of these unique employers, 22,430 of them had revenue data available from Data Axle. The Department's analysis of the impact of this IFR on small entities is based on the number of small unique employers (22,430 with revenue data).

To provide clarity on the types of industries impacted by this regulation, Exhibit 11 shows the number of unique H–1B small entity employers with certifications in FY 2019 within the top 10 most prevalent industries at the 6-digit and 4-digit NAICS code level. Depending on when their employment period starts and the length of the employment period (up to 3 years), small entities with certifications in FY 2019 can have wage obligations in calendar years 2018 through 2023,three.

EXHIBIT 11—NUMBER OF H–1B SMALL EMPLOYERS BY NAICS CODE

	Description	Number of employers					
		2018	2019	2020	2021	2022	2023
6-Digit NAICS:							
511210	Software Publishers	468 (13%)	1,570 (6%)	1,578 (6%)	1,557 (6%)	1,477 (6%)	127 (14%)
541511	Custom Computer Programming Services.	413 (11%)	1,149 (4%)	1,155 (4%)	1,141 (5%)	1,082 (5%)	101 (11%)
621111	Offices of Physicians (except Mental Health Specialists).	138 (4%)	1,092 (4%)	1,097 (4%)	1,082 (4%)	1,004 (4%)	34 (4%)
541330	Engineering Services	94 (3%)	971 (4%)	977 (4%)	964 (4%)	913 (4%)	13 (1%)
611310	Colleges, Universities, and Professional Schools.	104 (3%)	637 (2%)	644 (2%)	627 (2%)	588 (3%)	39 (4%)
541110	Offices of Lawyers	58 (2%)	607 (2%)	606 (2%)	596 (2%)	549 (2%)	13 (1%)
611110	Elementary and Secondary Schools	45 (1%)	625 (2%)	621 (2%)	577 (2%)	509 (2%)	11 (1%)
541310	Architectural Services	24 (1%)	501 (2%)	503 (2%)	499 (2%)	465 (2%)	1 (0%)
541714	Research and Development in Biotechnology (except Nano biotechnology).	53 (1%)	444 (2%)	445 (2%)	437 (2%)	411 (2%)	15 (2%)

[275] *See* 8 U.S.C. 1101(a)(5), 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i)(b), 1101(a)(15)(H)(i)(b1), 1182(n), 1182(t)(1), 1184(c).

[276] The PERM program has a large proportion of certifications issued annually to foreign beneficiaries that are working in the U.S. at the time of certification. Prior to the PERM certification, these beneficiaries are typically working under H–1B, H–1B1, and E–3 temporary visas. Therefore, the Department has not included estimates for PERM employers in the IRFA, consistent with the analysis and estimates contained in the E.O. 12866 section. The Department considered PERM employers for purposes of calculating one–time costs in the E.O. 12866 section but did not consider these employers for purposes of cost transfers.

[277] Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes.* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

EXHIBIT 11—NUMBER OF H–1B SMALL EMPLOYERS BY NAICS CODE—Continued

	Description	Number of employers					
		2018	2019	2020	2021	2022	2023
541614	Process, Physical Distribution, and Logistics Consulting Services.	89 (2%)	394 (2%)	399 (2%)	392 (2%)	369 (2%)	25 (3%)
Other NAICS		2,197 (60%)	17,695 (69%)	17,755 (69%)	17,395 (69%)	15,841 (68%)	556 (59%)
4-Digit NAICS:							
5112	Software Publishers	468 (13%)	1,570 (6%)	1,578 (6%)	1,557 (6%)	1,477 (6%)	127 (14%)
5413	Architectural, Engineering, and Related Services.	128 (3%)	1,677 (7%)	1,687 (7%)	1,667 (7%)	1,572 (7%)	17 (2%)
5415	Computer Systems Design and Related Services.	521 (14%)	1,518 (6%)	1,526 (6%)	1,508 (6%)	1,427 (6%)	128 (14%)
5416	Management, Scientific, and Technical Consulting Services.	320 (9%)	1,437 (6%)	1,449 (6%)	1,427 (6%)	1,318 (6%)	70 (7%)
6211	Offices of Physicians	138 (4%)	1,092 (4%)	1,097 (4%)	1,082 (4%)	1,004 (4%)	34 (4%)
5417	Scientific Research and Development Services.	101 (3%)	660 (3%)	663 (3%)	652 (3%)	606 (3%)	28 (3%)
6113	Colleges, Universities, and Professional Schools.	104 (100%)	637 (2%)	644 (2%)	627 (2%)	588 (3%)	39 (4%)
5239	Other Financial Investment Activities	73 (2%)	635 (2%)	638 (2%)	629 (2%)	572 (2%)	21 (2%)
5411	Legal Services	59 (2%)	615 (2%)	614 (2%)	604 (2%)	556 (2%)	13 (1%)
5412	Accounting, Tax Preparation, Bookkeeping, and Payroll Services.	41 (1%)	596 (2%)	599 (2%)	589 (2%)	558 (2%)	12 (1%)
Other NAICS		1,730 (47%)	15,248 (59%)	15,285 (59%)	14,925 (59%)	13,530 (58%)	446 (48%)

4. Compliance Requirements of the IFR, Including Reporting and Recordkeeping

The Department has considered the incremental costs for small entities from the baseline (*i.e.,* the current practices for complying, at a minimum, with the regulations governing permanent labor certifications at 20 CFR part 656 and labor condition applications at 20 CFR part 655, subpart H) to this IFR. We estimated the cost of (a) the time to read and review the IFR and (b) wage costs. These estimates are consistent with those presented in the E.O. 12866 section.

5. Calculating the Impact of the IFR on Small Entities

The Department estimates that small entities using the H–1B program, 22,430 unique employers would incur a one-time cost of $51.93 to familiarize themselves with the rule.[278] [279]

In addition to the total first-year cost above, each small entity using the H–1B program may have an increase in the annual wage costs due to the revisions to the wage structure if they currently offer a wage lower than the IFR prevailing wage levels. For each small entity, we calculated the likely annual wage cost as the sum of the total IFR wage minus the total baseline wage for each small entity identified from the H–1B disclosure data in FY 2019. We added this change in the wage costs to the total first-year costs to measure the total impact of the IFR on the small entity. Small entities with certifications in FY 2019 can have wage obligations in calendar years 2018 through 2023, depending on when their employment period starts and the length of the employment period (up to 3 years). Because USCIS does not approve all certifications, the estimated wage obligations for some small entities may be overestimated. The Department is unable to determine which small entities had certifications approved or not approved by USCIS and therefore estimates the total wage obligation with no adjustment for USCIS approval rates. As a result estimates of the total cost to small entities are likely to be inflated. The Department seeks public comments on how to best estimate which small entities had certifications approved by USCIS. Exhibit 12 presents the number of small entities with a wage impact in each year, as well as the average wage impact per small entity in each year.

EXHIBIT 12—WAGE IMPACTS ON H–1B PROGRAM SMALL ENTITIES

Proportion of revenue impacted	2018	2019	2020	2021	2022	2023
Number of H–1B Small Entities with Wage Impacts	2,790	20,418	20,503	20,158	18,756	717
Average Wage Impact per Small Entity	$14,664	$110,504	$216,187	$212,130	$112,563	$19,044

The Department determined the proportion of each small entity's total revenue affected by the costs of the IFR to determine if the IFR would have a significant and substantial impact on small entities. The cost impacts included estimated first-year costs and the wage costs introduced by the IFR. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact, and assumed that 15 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities generally.

[278] $51.93 = 1 hour × $51.93, where $51.93 = $32.58 + ($32.58 × 42%) + ($32.58 × 17%).

[279] The Department considered PERM employers for purposes of calculating one-time costs in the E.O. 12866 section.

The Department has used a threshold of three percent of revenues in prior rulemakings for the definition of significant economic impact.[280] This threshold is also consistent with that sometimes used by other agencies.[281] The Department also believes that its assumption that 15 percent of small entities will be substantially affected experiencing a significant impact to determine whether the rule has a substantial impact on small entities is appropriate. The Department has used the same threshold in prior rulemakings for the definition of substantial number of small entities.[282]

Of the 22,430 unique small employers with revenue data, up to 16 percent of employers would have more than 3 percent of their total revenue affected in 2019, 28 percent in 2020 and 2021, and up to 21 percent in 2022. Exhibit 13 provides a breakdown of small employers by the proportion of revenue affected by the costs of the IFR.

EXHIBIT 13—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

Proportion of revenue impacted	2018	2019	2020	2021	2022	2023
<1%	2,708 (85%)	15,098 (69%)	11,748 (54%)	11,748 (54%)	12,411 (62%)	737 (94%)
1%–2%	232 (7%)	2,215 (10%)	2,475 (11%)	2,475 (11%)	2,274 (11%)	18 (2%)
2%–3%	75 (2%)	1,119 (5%)	1,464 (7%)	1,464 (7%)	1,182 (6%)	10 (1%)
3%–4%	64 (2%)	615 (3%)	965 (4%)	965 (4%)	730 (4%)	8 (1%)
4%–5%	29 (1%)	429 (2%)	674 (3%)	674 (3%)	568 (3%)	1 (0%)
>5%	89 (3%)	2,538 (12%)	4,363 (20%)	4,363 (20%)	2,815 (14%)	10 (1%)
Total >3%	182 (6%)	3,582 (16%)	6,002 (28%)	6,002 (28%)	4,113 (21%)	19 (2%)

6. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the IFR

The Department is not aware of any relevant Federal rules that conflict with this IFR.

7. Alternative to the IFR

The RFA directs agencies to assess the effects that various regulatory alternatives would have on small entities and to consider ways to minimize those effects. Accordingly, the Department considered two regulatory alternatives to the chosen approach of establishing the prevailing wage for Levels I through IV, respectively, at approximately the 45th percentile, the 62nd percentile, the 78th percentile, and the 95th percentile.

First, the Department considered an alternative that would modify the number of wage tiers from four levels to three levels. Under this alternative, the Department attempted to set the prevailing wages for Levels I through III, respectively, at the 45th, 75th, and 95th percentile. Modifying the number of wage tiers to three levels would allow for more manageable wage assignments that would be easier for small entities and their employees to understand due to decreased complexity to matching wage tiers with position experience. The Department decided not to pursue this alternative because the chosen four-tiered wage methodology is likely to be more accurate than the three-tiered wage level because it has two intermediate wage levels. In addition, creating a three-tiered wage level would require a statutory change. Although the Department recognizes that legal limitations prevent this alternative from being actionable, the Department nonetheless presents it as a regulatory alternative in accord with OMB guidance.[283]

The Department considered a second alternative that attempted to modify the geographic levels for assigning prevailing wages for the occupation from the current four-tiered structure, which ranges from local MSA or BOS areas to national, to a two-tiered structure containing statewide or national levels. By assigning prevailing wages at a statewide or national level (depending on whether statewide averages can be reported by BLS), this second alternative attempted to simplify the prevailing wage determination process by reducing the number of distinct wage computations reported by the BLS. It would also provide small entities with greater certainty regarding their wage obligations, especially where the job opportunity requires work to be performed in a number of different worksite locations within a state or regional area. The Department decided not to pursue this alternative because the chosen methodology preserves important differences in county and regional level prevailing wages, and it would require a statutory change.

The Department invites public comments on these alternatives and other alternatives to reduce the burden on small entities while remaining consistent with the objectives of the proposed rule.

D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value equivalent of $100 million in 1995 adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI–U) is approximately $168 million based on the Consumer Price Index for All Urban Consumers.[284]

[280] *See, e.g.,* 79 FR 60634 (October 7, 2014, Establishing a Minimum Wage for Contractors), 81 FR 39108 (June 15, 2016, Discrimination on the Basis of Sex), and 84 FR 36178 (July 26, 2019, Proposed Rule for Temporary Agricultural Employment of H–2A Nonimmigrants in the United States).

[281] *See, e.g.,* 79 FR 27106 (May 12, 2014, Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant).

[282] *See, e.g.,* 79 FR 60633 (October 7, 2014, Establishing a Minimum Wage for Contractors) and 84 FR 36178 (July 26, 2019, Proposed Rule for Temporary Agricultural Employment of H–2A Nonimmigrants in the United States).

[283] OMB Circular A–4 advises that agencies ''should discuss the statutory requirements that affect the selection of regulatory Approach. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, [agencies] should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act.''

[284] *See* U.S. Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items, available at https://www.bls.gov/cpi/tables/supplemental-files/*

Continued

While this IFR rule may result in the expenditure of more than $100 million by the private sector annually, the rulemaking is not a ''Federal mandate'' as defined for UMRA purposes.[285] The cost of obtaining prevailing wages, preparing labor condition and certification applications (including all required evidence) and the payment of wages by employers is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary Federal program, applying for immigration status in the United States.[286] This IFR does not contain such a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DOL has not prepared a statement under UMRA. Therefore, no actions were deemed necessary under the provisions of the UMRA.

E. Congressional Review Act

The Office of Information and Regulatory Affairs, of the Office of Management and Budget, has determined that this IFR is a major rule as defined by 5 U.S.C. 804, also known as the ''Congressional Review Act,'' as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868 *et seq.* In the preceding APA section of this preamble, the Department explained that it has for good cause found that notice and public procedure thereon are impracticable and contrary to the public interest. Accordingly, this rule shall take effect immediately, as permitted by 5 U.S.C. 808(2).

F. Executive Order 13132 (Federalism)

This IFR would 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. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this IFR does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This IFR meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Regulatory Flexibility Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This IFR does not have ''tribal implications'' because it 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. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This IFR does not require a collection of information subject to approval by OMB under the PRA, or affect any existing collections of information.

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Australia, Chile, Employment, Employment and training, Immigration, Labor, Migrant labor, Wages.

20 CFR Part 656

Administrative practice and procedure, Employment, Foreign workers, Labor, Wages.

DEPARTMENT OF LABOR

Accordingly, for the reasons stated in the preamble, the Department of Labor amends parts 655 and 656 of chapter V, title 20, Code of Federal Regulations, as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), (p), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), (p), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. Amend § 655.731 by revising paragraphs (a)(2)(ii) introductory text, (a)(2)(ii)(A), and (a)(2)(ii)(A)(*2*) to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

* * * * *

(a) * * *

(2) * * *

(ii) If the job opportunity is not covered by paragraph (a)(2)(i) of this section, the prevailing wage shall be based on the wages of workers similarly employed as determined by the wage component of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey (OES) in accordance with 20 CFR 656.40(b)(2)(i); a current wage as determined in the area under the Davis–Bacon Act, 40 U.S.C. 276a *et seq.* (see 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.* (see 29 CFR part 4); an independent authoritative source in accordance with paragraph (a)(2)(ii)(B) of this section; or another legitimate source of wage data in accordance with paragraph (a)(2)(ii)(C) of this section. If an employer uses an independent authoritative source or other legitimate source of wage data, the prevailing wage shall be the arithmetic

historical-cpi-u-202003.pdf (last visited June 2, 2020).

Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2019 − Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(255.657 − 152.383)/152.383] * 100 = (103.274/152.383) *100 = 0.6777 * 100 = 67.77 percent = 68 percent (rounded).

Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.68 = $168 million in 2019 dollars.

[285] *See* 2 U.S.C. 658(6).

[286] *See* 2 U.S.C. 658(7)(A)(ii).

mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(*2*), and (b)(3)(iii)(C)(*2*) of this section. The prevailing wage rate shall be based on the best information available. The following prevailing wage sources may be used:

(A) *OFLC National Processing Center (NPC) determination.* The NPC shall receive and process prevailing wage determination requests in accordance with these regulations and Department guidance. Upon receipt of a written request for a PWD, the NPC will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arm's length, and, if not, determine the wages of workers similarly employed using the wage component of the BLS OES and selecting an appropriate wage level in accordance with 20 CFR 656.40(b)(2)(i), unless the employer provides an acceptable survey. The NPC shall determine the wage in accordance with secs. 212(n), 212(p), and 212(t) of the INA and in a manner consistent with 20 CFR 656.40(b)(2). If an acceptable employer-provided wage survey provides an arithmetic mean then that wage shall be the prevailing wage; if an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the NPC will follow 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

* * * * *

(*2*) If the employer is unable to wait for the NPC to produce the requested prevailing wage for the occupation in question, or for the CO and/or the BALCA to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the PWD from the NPC, that the information relied upon produced a wage below the final PWD and the employer was not paying the NPC-determined wage, no wage violation will be found if the employer retroactively compensates the H–1B nonimmigrant(s) for the difference between wage paid and the prevailing wage, within 30 days of the employer's receipt of the PWD.

* * * * *

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

■ 3. The authority citation for part 656 is revised to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A), 1182(p); sec.122, Pub. L. 101–649, 109 Stat. 4978; and Title IV, Pub. L. 105–277, 112 Stat. 2681.

■ 4. Amend § 656.40 by revising paragraphs (a) and (b)(2) and (3), to read as follows:

§ 656.40 Determination of prevailing wage for labor certification purposes.

* * * * *

(a) *Application process.* The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. The NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(p) of the INA. Unless the employer chooses to appeal the center's PWD under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) * * *

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be based on the wages of workers similarly employed using the wage component of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey (OES) in accordance with paragraph (b)(2)(i) of this section, unless the employer provides an acceptable survey under paragraphs (b)(3) and (g) of this section or elects to utilize a wage permitted under paragraph (b)(4) of this section.

(i) The BLS shall provide the OFLC Administrator with the OES wage data by occupational classification and geographic area, which is computed and assigned at four levels set commensurate with the education, experience, and level of supervision of similarly employed workers, as determined by the Department. Based on this determination, the prevailing wage shall be provided by the OFLC Administrator at four levels:

(A) The Level I Wage shall be computed as the arithmetic mean of the fifth decile of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(B) The Level II Wage shall be determined by first dividing the difference between Level I and IV by three and then adding the quotient to the computed value for Level I and assigned for the most specific occupation and geographic area available.

(C) The Level III Wage shall be determined by first dividing the difference between Level I and IV by three and then subtracting the quotient from the computed value for Level IV and assigned for the most specific occupation and geographic area available.

(D) The Level IV Wage shall be computed as the arithmetic mean of the upper decile of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(ii) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the prevailing wage levels under paragraph (b)(2)(i) of this section as a notice posted on the OFLC website.

(3) If the employer provides a survey acceptable under paragraph (g) of this section, the prevailing wage for labor certification purposes shall be the arithmetic mean of the wages of workers similarly employed in the area of intended employment. If an otherwise acceptable survey provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

* * * * *

John Pallasch,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2020–22132 Filed 10–6–20; 4:15 pm]

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Part VIII

Department of Homeland Security

8 CFR Part 214

Strengthening the H–1B Nonimmigrant Visa Classification Program; Interim Final Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

[CIS No. 2658–20 DHS Docket No. USCIS–2020–0018]

RIN 1615–AC13

Strengthening the H–1B Nonimmigrant Visa Classification Program

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Interim final rule (IFR) with request for comments.

SUMMARY: The Department of Homeland Security (DHS or the Department), is amending certain DHS regulations governing the H–1B nonimmigrant visa program. Specifically, DHS is: Revising the regulatory definition of and standards for a ''specialty occupation'' to better align with the statutory definition of the term; adding definitions for ''worksite'' and ''third-party worksite''; revising the definition of ''United States employer''; clarifying how U.S. Citizenship and Immigration Services (USCIS) will determine whether there is an ''employer-employee relationship'' between the petitioner and the beneficiary; requiring corroborating evidence of work in a specialty occupation; limiting the validity period for third-party placement petitions to a maximum of 1 year; providing a written explanation when the petition is approved with an earlier validity period end date than requested; amending the general itinerary provision to clarify it does not apply to H–1B petitions; and codifying USCIS' H–1B site visit authority, including the potential consequences of refusing a site visit. The primary purpose of these changes is to better ensure that each H–1B nonimmigrant worker (H–1B worker) will be working for a qualified employer in a job that meets the statutory definition of a ''specialty occupation.'' These changes are urgently necessary to strengthen the integrity of the H–1B program during the economic crisis caused by the COVID–19 public health emergency to more effectively ensure that the employment of H–1B workers will not have an adverse impact on the wages and working conditions of similarly employed U.S. workers. In addition, in strengthening the integrity of the H–1B program, these changes will aid the program in functioning more effectively and efficiently.

DATES: This interim final rule is effective on December 7, 2020. Written comments must be submitted on this interim final rule on or before December 7, 2020. Comments on the collection of information (see Paperwork Reduction Act section) must be received on or before November 9, 2020. Comments on both the interim final rule and the collection of information received on or before November 9, 2020 will be considered by DHS and USCIS. Only comments on the interim final rule received between November 9, 2020 and December 7, 2020 will be considered by DHS and USCIS. Note: Comments received after November 9, 2020 only on the information collection will not be considered by DHS and USCIS.

ADDRESSES: You may submit comments on the entirety of this interim final rule package, identified by DHS Docket No. USCIS–2020–0018, through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the website instructions for submitting comments. Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the interim final rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. Due to COVID–19, USCIS is also not accepting mailed comments at this time. If you cannot submit your comment by using *http://www.regulations.gov,* please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at 202–272–8377 for alternate instructions.

FOR FURTHER INFORMATION CONTACT: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave. NW, Suite 1100, Washington, DC 20529–2120. Telephone Number (202) 272–8377 (not a toll-free call). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

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II. Public Participation

DHS invites all interested parties to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this interim final rule. DHS also invites comments that relate to the economic, environmental, or federalism effects that might result from this interim final rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to DHS in implementing these changes will: Reference a specific portion of the interim final rule; explain the reason for any recommended change; and include data, information, or authority that supports such a recommended change. Comments submitted in a manner other than those listed in the **ADDRESSES** section, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the interim final rule. Please note that DHS and USCIS cannot accept any comments that are hand delivered or couriered. In addition, USCIS cannot accept mailed comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives.

Instructions: If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS–2020–0018 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at *http://www.regulations.gov.*

Docket: For access to the docket and to read background documents or comments received, go to *http://www.regulations.gov,* referencing DHS Docket No. USCIS–2020–0018. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

III. Executive Summary

A. Purpose and Summary of the Regulatory Action

Congressional intent behind creating the H–1B program was, in part, to help U.S. employers fill labor shortages in positions requiring highly skilled or educated workers using temporary workers.[1] A key goal of the program at its inception was to help U.S. employers obtain the temporary employees they need to meet their business needs.[2] To address legitimate countervailing concerns of the adverse impact foreign workers could have on U.S. workers, Congress put in place a number of measures intended to protect U.S. workers to ensure that H–1B workers would not adversely affect them. Immigration and Nationality Act (INA) section 212(n) and (p); 8 U.S.C. 1182(n) and (p). However, over time, legitimate concerns have emerged that indicate that the H–1B program is not functioning as originally envisioned and that U.S. workers are being adversely affected. On April 18, 2017, the President of the United States issued Executive Order (E.O.) 13788, *Buy American and Hire American,* instructing DHS to ''propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of U.S. workers in the administration of our immigration system.''[3] E.O. 13788 specifically directed DHS and other agencies to ''suggest reforms to help ensure that H–1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.''[4]

In response to the directives of E.O. 13788, DHS undertook a comprehensive review of all rules and policies regarding nonimmigrant visa classifications for temporary foreign workers, including the H–1B visa program. Although the H–1B program was intended to allow employers to fill gaps in their workforce and remain competitive in the global economy, it has expanded far beyond that, often to the detriment of U.S. workers. Data shows that the H–1B program has been used to displace U.S. workers and has led to reduced wages in a number of industries in the U.S. labor market.[5] The economic crisis caused by the COVID–19 public health emergency has compounded those detrimental effects.

The President of the United States addressed those harms in *Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak* and directed DHS to pursue rulemaking that ensures that U.S. workers are not disadvantaged by H–1B workers.[6] This interim final rule is consistent not only with that directive, but also with the aims of the Presidential Proclamation *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak.*[7] Section 5

[1] *See* H.R. Rep. 101–723(I) (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6710, 6721 (stating ''The U.S. labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages.'').

[2] Bipartisan Policy Council, *Immigration in Two Acts,* Nov. 2015, at 7, *https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-Immigration-Legislation-Brief.pdf,* citing 1990 U.S.C.C.A.N. *supra* at 6721 (stating ''At the time [1990], members of Congress were also concerned about U.S. competitiveness in the global economy and sought to use legal immigration as a tool in a larger economic plan, stating that ''it is unlikely that enough U.S. workers will be trained quickly enough to meet legitimate employment needs, and immigration can and should be incorporated into an overall strategy that promotes the creation of the type of workforce needed in an increasingly global economy.'').

[3] *See* Executive Order 13788, *Buy American and Hire American,* 82 FR 18837, sec. 5 (Apr. 18, 2017).

[4] *See id.* at sec. 5(b).

[5] *See e.g.,* Ron Hira and Bharath Gopalaswamy, Atlantic Council, *Reforming US' High-Skilled Guestworker Program* (2019), available at *https://www.atlanticcouncil.org/in-depth-research-reports/report/reforming-us-high-skilled-immigration-program/.*

[6] Proclamation 10014 of April 22, 2020, *Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,* 85 FR 23441 (Apr. 27, 2020).

[7] Proclamation 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery*

Continued

of Proclamation 10052 directs the Secretary of DHS to, ''as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action . . . ensuring that the presence in the United States of H–1B nonimmigrants does not disadvantage United States workers.'' In addition, this rule will further the policy objective of E.O. 13927, *Accelerating the Nation's Economic Recovery from the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities.*[8]

Consistent with Congressional intent of the H–1B program, the *Buy American and Hire American* E.O. 13788, Presidential Proclamations 10014 and 10052, and to ensure that U.S. workers are protected under U.S. immigration laws, DHS is proposing a number of revisions and clarifications, which are detailed below. As noted above, these changes are urgently needed to strengthen the H–1B program during the economic crisis caused by the COVID–19 public health emergency to more effectively ensure that the employment of H–1B workers will not negatively affect the wages and working conditions of similarly employed U.S. workers.

By reforming key aspects of the H–1B nonimmigrant visa program, this rule will improve program integrity and better ensure that only petitioners who meet the statutory criteria for the H–1B classification are able to employ H–1B workers who are qualified for the classification. This, in turn, will protect jobs of U.S. workers as a part of responding to the national emergency, and facilitate the Nation's economic recovery.

B. Legal Authority

The Secretary of Homeland Security's authority for these regulatory amendments is found in various sections of the INA, 8 U.S.C. 1101 *et seq.,* and the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* General authority for issuing this rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws, as well as section 102 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations. *See also* 6 U.S.C. 202(4) (charging the Secretary with ''[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States''). Further authority for these regulatory amendments is found in:

- Section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), which classifies as nonimmigrants aliens coming temporarily to the United States to perform services in a specialty occupation or as a fashion model with distinguished merit and ability;
- Section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe by regulation the terms and conditions of the admission of nonimmigrants;
- Section 214(c) of the INA, 8 U.S.C. 1184(c), which, *inter alia,* authorizes the Secretary to prescribe how an importing employer may petition for an H nonimmigrant worker and the information that an importing employer must provide in the petition;
- Section 214(i) of the INA, 8 U.S.C. 1184(i), which defines the term ''specialty occupation;'' and
- Section 287(b) of the INA, 8 U.S.C. 1357(b), which authorizes USCIS to administer oaths and to take and consider evidence concerning any matter which is material and relevant to the administration and enforcement of the INA.

Finally, under section 101 of HSA, 6 U.S.C. 111(b)(1)(F), a primary mission of the Department is to ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.''

C. Summary of Costs and Benefits

This interim final rule will impose new annual costs of $24,949,861 for petitioners completing and filing H–1B petitions[9] with an additional time burden of 30 minutes. The changes in the H–1B petition, resulting from this interim final rule, result in additional time to complete and file the petition as compared to the time burden to complete the current form. By reducing uncertainty and confusion surrounding disparities between the statute and the regulations, this rule will better ensure that approvals are only granted for positions adhering more closely to the statutory definition. This rule will also result in more complete petitions and allow for more consistent and efficient adjudication decisions.

DHS estimates $17,963,871 in annual costs to petitioners to submit contractual documents, work orders, or similar evidence required by this rule to establish an employer-employee relationship and qualifying employment. The petitioner must establish, at the time of filing, that it has actual work in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. In addition, all H–1B petitions for beneficiaries who will be placed at a third-party worksite must submit evidence showing that the beneficiary will be employed in a specialty occupation, and that the petitioner will have an employer-employee relationship with the beneficiary.

DHS estimates $1,042,702 for the total annual opportunity cost of time for worksite inspections of H–1B petitions. This interim final rule is codifying DHS' existing authority to conduct site visits and other compliance reviews and clarifying consequences for failure to allow a site visit. Conducting on-site inspections and other compliance reviews is critical to detecting and deterring fraud and noncompliance. Failure or refusal of the petitioner or third-party worksite parties to cooperate in a site visit or verify facts may be grounds for denial or revocation of any H–1B petition for workers performing services at locations which are a subject of inspection, including any third-party worksites.

DHS estimates cost savings of $4,490,968 annually in eliminating the general itinerary requirement for H–1B petitions. Relative to the current regulation, this provision reduces the cost for petitioners who file on behalf of beneficiaries performing services in more than one location and submit itineraries.

While the maximum validity period for a specialty occupation worker is

Following the 2019 Novel Coronavirus Outbreak, 85 FR 38263 (Jun. 25, 2020).

[8] *See* Executive Order 13927, *Accelerating the Nation's Economic Recovery from the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities,* 85 FR 35165, sec. 2 (Jun. 9, 2020) (ordering that ''agencies should take all reasonable measures to . . . speed other actions . . . that will strengthen the economy and return Americans to work'').

[9] DHS estimates the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (''Fee Schedule Final Rule''), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20–cv–5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this rule may reflect overstated transfers, costs, and opportunity costs associated with the filing of the Form I–129.

currently 3 years, this interim final rule will limit the maximum validity period to 1 year for workers placed at third-party worksites. DHS estimates costs of $0 in FY 2021, $376,747,030 in FY 2022, $502,330,510 for each of FY 2023 through FY 2027, and $349,127,070 for each of FY 2028 through FY 2030, for the increasing number of Form I–129H1 petitions to request authorization to continue H–1B employment for workers placed at third-party worksites. DHS will have greater oversight in such cases, which are most likely to involve noncompliance, fraud, or abuse, thereby strengthening the H–1B program.

DHS estimates a one-time total regulation familiarization cost of $11,941,471 in FY2021. For the 10-year implementation period of the rule (FY 2021 through FY 2030), DHS estimates the annual net societal costs to be $51,406,937 (undiscounted) in FY 2021, $416,212,496 (undiscounted) in FY 2022, $541,795,976 (undiscounted) from FY 2023 through FY 2027 each year, $388,592,536 (undiscounted) from FY 2028 through FY 2030 each year. DHS estimates the annualized net societal costs of the rule to be $430,797,915, annualized at 3-percent and $425,277,621, annualized at 7-percent discount rates.

IV. Background

A. History and Purpose of the H–1B Visa Program

The H–1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations, defined by statute as occupations that require the theoretical and practical application of a body of highly specialized knowledge, and a bachelor's or higher degree in the specific specialty, or its equivalent. *See* INA sections 101(a)(15)(H)(i)(b) and 214(i); 8 U.S.C 1101(a)(15)(H)(i)(b) and 1184(i). The H–1B visa program also includes workers performing services related to a Department of Defense (DOD) cooperative research and development project or coproduction project, and services of distinguished merit and ability in the field of fashion modeling. *See* INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); 8 CFR 214.2(h)(4)(i)(A).

The number of aliens who may be issued initial H–1B visas or otherwise provided initial H–1B nonimmigrant status during any fiscal year has been capped at various levels by Congress over time, with the current numerical limit generally being 65,000 per fiscal year. *See* INA section 214(g)(1)(A); 8 U.S.C. 1184(g)(1)(A). Congress has also provided for various exemptions from the annual numerical allocations, including an exemption for 20,000 aliens who have earned a master's or higher degree from a United States institution of higher education. *See* INA section 214(g)(5) and (7); 8 U.S.C. 1184(g)(5) and (7). Additionally, Congress has exempted from the annual numerical allocations H–1B workers who are or will be employed at a nonprofit or public institution of higher education or a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization. *See* INA section 214(g)(5)(A)–(B), 8 U.S.C. 1184(g)(5)(A)–(B). The 5-year average annual number of H–1B petitions approved outside the numerical limitations established by Congress, which also includes petitions for continuing H–1B workers who were previously counted toward an annual numerical allocation and who have time remaining on their 6-year period of authorized admission, *see* INA section 214(g)(7), 8 U.S.C. 1184(g)(7), was approximately 214,371 based on DHS data.[10] As of September 30, 2019, the total H–1B authorized-to-work population was approximately 583,420.[11] The total H–1B authorized-to-work population, rather than the yearly cap, is more indicative of the scope of the H–1B nonimmigrant program and the urgent need to strengthen it to protect the economic interests of U.S. workers.

Despite Congress' efforts to protect the interest of U.S. workers to ensure that H–1B workers will not adversely affect them,[12] data show that the H–1B program has been subject to abuse or otherwise adversely affected U.S. workers from its inception.[13] When the Immigration Act of 1990 (IMMACT 90) was introduced, Congress specifically sought to address ''the problem of H-visa abuse.'' [14] As early as 1992, the U.S. Government Accountability Office (GAO) published a report noting concerns by representatives of organized labor that H–1B nonimmigrants were adversely affecting the wages and working conditions of U.S. workers, and were allowing U.S. employers to excessively rely on foreign labor.[15] In September 2000, the GAO published another report highlighting documented allegations of and concerns relating to program misuse—such as employers paying workers less than comparable wages or employees using false credentials—and questioning whether the program adequately serves employers or protects workers.[16] This report concluded that the H–1B ''program is vulnerable to abuse—both by employers who do not have bona fide jobs to fill or do not meet required labor conditions, and by potential workers who present false credentials.'' [17] Such abuse threatens the wages and job opportunities of qualified U.S. workers. More GAO reports followed in 2003, 2006, and 2011, all continuing to report on the pervasive abuses and shortcomings in the H–1B program. For instance, the 2006 report highlighted common violations such as employers not paying their H–1B workers the required wage and owing them back wages.[18] The 2011 reports cited to the high incidence of wage-related complaints against staffing companies, and concluded that the involvement of staffing companies in the H–1B program further weakens U.S. labor protections.[19] Several news alerts and

[10] Office of Policy and Strategy, Policy Research Division (PRD) Claims 3 and USCIS analysis. July 29, 2020.

[11] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, H–1B Authorized to Work Population Estimate, available at *https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf* (reflecting that not all of the 583,420 H–1B workers were approved in the same fiscal year as the data used to estimate the population as of September 30, 2019, was pulled on October 9, 2019).

[12] *See* INA section 212(n) and (p); 8 U.S.C. 1182(n) and (p).

[13] *See, e.g., How H–1B Visas Have Been Abused Since the Beginning,* CBS News, Aug. 13, 2017, *https://www.cbsnews.com/news/how-h-1b-visas-have-been-abused-since-the-beginning/.*

[14] 1990 U.S.C.C.A.N. 6710, 6724.

[15] U.S. Gov't Accountability Off., GAO/PEMD–92–17, Immigration and the Labor Market Nonimmigrant Alien Workers in the United States, at 17 (1992), *https://www.gao.gov/assets/160/151654.pdf.*

[16] U.S. Gov't Accountability Off., GAO/HEHS–00–157, H–1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers, at 4 (2000), *https://www.gao.gov/new.items/he00157.pdf.*

[17] GAO/HEHS–00–157, at 19.

[18] U.S. Gov't Accountability Off., GAO–06–901T, H–1B Visa Program: More Oversight by Labor can Improve Compliance with Program Requirements (2006), *https://www.gao.gov/new.items/d06901t.pdf.*

[19] U.S. Gov't Accountability Off., GAO–11–26, Reforms are Needed to Minimize the Risks and Costs of Current Program 60 (2011), *https://www.gao.gov/assets/320/314501.pdf* (''The involvement of staffing companies, whose share of H–1B workers is not precisely known but is likely not trivial, further weakens enforcement efforts because the end-user of the H–1B worker is not liable for complying with labor protection requirements.''); U.S. Gov't Accountability Off., GAO–11–505T, H–1B Visa Program Multifaceted Challenges Warrant Re-examination of Key Provisions 12 (2011), *https://www.gao.gov/assets/90/82421.pdf* (''Another factor that weakens protection for U.S. workers is the fact that the H–1B program lacks a legal provision to hold employers accountable to program requirements when they obtain H–1B workers through staffing

Continued

investigative newsletters released in 2019 and 2020 by the Department of Labor (DOL) and Department of Justice (DOJ) highlighted convictions of individuals using their companies to engage in fraud through the H–1B program.[20]

DHS believes that the same concerns have persisted in recent years, as highlighted by certain petitions filed by entities within the information technology (IT) industry. In recent years, there has been a 75 percent increase in the proportion of IT workers in the population of H–1B approved petitions—from 32 percent in FY 2003 to 56 percent in FY 2019.[21] As a comparison, there has been a 16 percent increase in the proportion of IT workers in the U.S. civilian workforce—from 2.5 percent in 2000 to 2.9 percent in 2014.[22] At the same time, wages have largely remained flat in IT fields.[23] For instance, the average IT wage was 189 percent of the national average in FY 2003 and 182 percent in FY 2019.[24] The disproportionate growth of H–1B petitions for computer-related occupations versus the percentage growth of IT positions in the U.S. economy, and the stagnation of IT wages, demands DHS seriously consider whether petitioners are using the H–1B program in a way that disproportionally benefits foreign IT workers and the companies who petition for them to the detriment of U.S. IT workers. DHS must also consider whether there is a correlation between the large flow of H–1B workers into the economy and the stagnation of wages for U.S. IT workers generally.[25] If the employment of H–1B workers is having an adverse effect on similarly employed U.S. workers by way of reducing their wages or displacing U.S. workers by hiring H–1B workers, that adverse effect likely will be proportionately greater in the IT industry.

Moreover, many H–1B petitions for IT workers are filed by companies, including staffing companies,[26] that place the H–1B workers at worksites of third-parties, *i.e.,* companies that did not directly petition USCIS for H–1B workers. From FY 2018 to FY 2019 an average of 71 percent of all approved H–1B petitions in the IT industry involved third-party worksites (compared to 36 percent for all approved H–1B petitions across industries).[27] As noted in the 2011 GAO report and evidenced by the recent convictions highlighted in the DOL and DOJ reports, the extensive involvement and lack of accountability of staffing companies within the H–1B program is a major factor that makes the program vulnerable to fraud and weakens protection for U.S. workers.[28] DOL has received a large number of complaints about staffing companies and participated in several investigations that led to convictions of technology staffing companies for fraudulent involvement in the H–1B program.[29]

Some staffing companies may also be described as outsourcing companies, *i.e.,* companies that are hired to perform services or produce goods for another company and, in some cases, also seek to transfer work from the United States to workers based abroad to reduce the overall costs of the services they provide to clients in the United States.[30]

companies'' and ''Wage and Hour investigators reported that a large number of the complaints they receive about H–1B employers were related to the activities of staffing companies.'').

[20] *See, e.g., OIG Investigations Newsletter* (U.S. Dep't of Lab., Off. of Inspector Gen.) (Dec. 1, 2019—Jan. 30, 2020), *https://www.oig.dol.gov/public/oinewsletter/DOL-OIG%20Investigations%20Newsletter%20December%202019%20-%20January%202020.pdf* (last visited Aug. 11, 2020); *OIG Investigations Newsletter* (U.S. Dep't of Lab., Off. of Inspector Gen.) (Oct. 1, 2019–Nov. 30, 2019), *https://www.oig.dol.gov/public/oinewsletter/DOL-OIG%20Investigations%20Newsletter%20October%20-%20November%202019.pdf* (last visited June 23, 2020); *News Release* (U.S. Dep't of Just., U.S. Att'y's Off.) (Feb. 19, 2020), *https://www.justice.gov/usao-ednc/pr/corporate-president-kronsys-inc-cygtec-inc-and-arkstek-inc-sentenced-conspiracy-commit* (last visited June 23, 2020); *News Release* (U.S. Dep't of Just., U.S. Att'y's Off.) (Mar. 17, 2020), *https://www.justice.gov/usao-nj/pr/owner-information-technology-companies-sentenced-15-months-prison-visa-fraud-and-tax* (last visited June 23, 2020).

[21] Characteristics of H–1B Specialty Occupation Workers (H–1B): Fiscal Year 2004 Issued November 2006. *https://www.uscis.gov/sites/default/files/document/reports/h1b_fy04_characteristics.pdf* (last visited Sept. 18,2020), Table 13A. IT related industry (IT industry number of petition approved is 70,189 and total number of petition approved is 217,340); Characteristics of H–1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018—September 30, 2019 (Mar. 5, 2020), *https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf* (last visited Aug. 11, 2020), Table 13A. IT related industry (IT industry number of petition approved is 217,447 and total number of petition is 388,403). Calculations: 75% = 56%/32% − 1. 32% rounded = (70,189/217,340) * 100%, 56% rounded = (217,447/388,403) * 100%.

[22] U.S. Census Bureau, Occupations in Information Technology (Aug. 16, 2016), available at *https://www.census.gov/content/dam/Census/library/publications/2016/acs/acs-35.pdf,* p2. Figure 1.

[23] Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell, Economic Policy Institute, *Guestworkers in the High-Skill U.S. Labor Market: An analysis of supply, employment, and wage trends,* Apr. 24, 2013, at 2, 23, available at *https://files.epi.org/2013/bp359-guestworkers-high-skill-labor-market-analysis.pdf* (''However, following the crash of 2001, wages declined and have been essentially flat for the decade.''); Sean McLain and Dhanya Ann Thoppil, *Bulging Staff Cost, Shrinking Margins,* CRISIL Research, (2019), available at *https://www.crisil.com/en/home/our-analysis/reports/2019/05/bulging-staff-cost-shrinking-margins.html* (analyzing local wages for computer-based occupations, along with H–1B wage rates prevalent for the same computer-based occupations across the U.S., and concluding that the average per hour rate for an H–1B-based employee is ~$33 while a locally-based employee is ~$42). *See generally* Hira and Gopalaswamy, *supra* note 5, at 11 (''H–1B workers are underpaid and placed in substandard working conditions, while U.S. workers' wages are depressed, and they lose out on job opportunities'').

[24] *See* U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *May 2003 National (XLS),* available at *https://www.bls.gov/oes/tables.htm* (last visited Sept. 22, 2020) (showing that the annual mean wage for SOC code 00–0000 was $36,210 in May 2003); U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *May 2019 National (XLS),* available at *https://www.bls.gov/oes/tables.htm* (last visited Sept. 22, 2020) (showing that the annual mean wage for SOC code 00–0000 was $53,490 in May 2019); U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *May 2003 National industry-specific (XLS),* available at *https://www.bls.gov/oes/tables.htm* (last visited Sept. 28, 2020) (showing that the annual mean wage for SOC code 15–0000 and NAICS code 541000 was $68,420 in May 2003); U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *May 2019 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 541000—Professional, Scientific, and Technical Services,* available at *https://www.bls.gov/oes/2019/may/naics3_541000.htm* (last visited Sept. 28, 2020) (showing that the annual mean wage for SOC code 15–0000 was $97,230 in May 2019). We calculated the percentages by dividing the 2019 figures by the 2003 figures for the respective SOC codes (189% = ($68,420/$36,210) * 100%, 182% = ($97,230/$53,490) * 100%).

[25] Salzman, *supra* note 22, at 26 (''In other words, the data suggest that current U.S. immigration policies that facilitate large flows of guestworkers appear to provide firms with access to labor that will be in plentiful supply at wages that are too low to induce a significantly increased supply from the domestic workforce.'').

[26] The term ''staffing companies'' refers to ''employers that apply for H–1B workers but ultimately place these workers at the worksites of other employers as part of their business model.'' GAO–11–26, at 19.

[27] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, Systems: C3 database, Database Queried: 05/20/2020, Report Created: 05/20/2020. This data is based on H–1B approvals where the petitioner reported ''off-site [work] at another company or organization's location'' on the Form I–129. The term ''off-site'' which is used on the Form I–129 has the same meaning as ''third-party worksite.'' The I–129 does not ask a petitioner seeking to place a beneficiary ''off-site'' to specify whether it is a staffing company.

[28] GAO–11–505T, at 12; *OIG Investigations Newsletter* (Dec. 1, 2019–Jan. 30, 2020), *supra; OIG Investigations Newsletter* (Oct. 1, 2019–Nov. 30, 2020), *supra; News Release* (Feb. 19, 2020, *supra; News Release* (Mar. 17, 2020), *supra.*

[29] *See supra* note 17.

[30] Merriam-Webster. (n.d.). Outsource. In *Merriam-Webster.com dictionary.* Retrieved August 3, 2020, from *https://www.merriam-webster.com/dictionary/outsource* (''to procure (something, such as some goods or services needed by a business or organization) from outside sources and especially from foreign or nonunion suppliers: To contract for work, jobs, etc., to be done by outside or foreign workers.''). While the word ''outsourcing'' can refer to the practice of locating work overseas, *see e.g.,* GAO–11–26 at FN 48, it can also be used

Outsourcing companies have been criticized as ''gaming the system'' so that they have a ready pool of low-paid temporary workers, which ultimately hurts the wages of U.S. workers.[31] The ''outsourcing'' business model involves using H–1B visas to bring relatively low-cost foreign workers into the United States and then contracting them out to other U.S. companies seeking their services.[32] These H–1B workers are relatively ''low-paid'' or ''low-cost'' in the sense that they are often paid less than the local median salary for workers in the same occupation, in other words, often paid less than what the worker would command in a truly competitive open job market.[33] H–1B employers are able to ''take advantage of program rules in order to legally pay many of their H–1B workers below the local median wage for the jobs they fill.'' [34] By bringing in lower-paid foreign workers, U.S. companies, in turn, may be incentivized to avoid hiring more U.S. workers or, even worse, lay off their own, higher-paid U.S. workers who previously performed those services adequately and replace them with lower-paid H–1B workers of lesser qualifications employed by a staffing company.[35] An employer's preference for hiring H–1B workers based on their citizenship, immigration status, or national origin could violate the INA's anti-discrimination provision at INA section 274B, 8 U.S.C. 1324b.[36] Further still, the outsourcing companies may ultimately send their H–1B nonimmigrant workers back to their home countries to perform their jobs or move a significant amount of work overseas to capitalize on lower costs of business, taking away even more U.S. jobs.[37] As a result, DHS is concerned that the current regulatory regime encourages some companies to use the H–1B visa as a tool to lower business costs at the expense of U.S. workers.[38]

U.S.-based companies that are not traditionally in the staffing or outsourcing business also have exploited the H–1B program in ways not contemplated by Congress.[39] In recent years, U.S. companies such as The Walt Disney Company, Hewlett-Packard, University of California San Francisco, Southern California Edison, Qualcomm, and Toys ''R'' Us have reportedly laid off their qualified U.S. workers and replaced them with H–1B workers provided by H–1B-dependent outsourcing companies.[40] In some cases, the replaced U.S. workers were even forced to train the foreign workers who were taking their jobs and sign nondisclosure agreements about this treatment as a condition of receiving any form of severance.[41] These examples illustrate how the current regulatory regime of the H–1B program allows employers, whether staffing, outsourcing, or other types of companies, to exploit the H–1B program in ways not contemplated by Congress.

Employers that pay below-median wages to their H–1B workers (in other words, any employer not paying at least Level III wages) are not necessarily in violation of the law. Section 212(n)(1)(A) of the Act requires employers to pay at least the actual wage level paid to other similarly situated employees or the prevailing wage, whichever is higher. Since the

interchangeably with the word ''staffing'' to refer to the general practice of contracting out H–1B workers to third-party clients, *see* Daniel Costa and Ron Hira, Economic Policy Institute, *H–1B Visas and Prevailing Wage Levels,* May 4, 2020, at 4, available at *https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/* (describing the ''outsourcing business model'' as ''plac[ing] H–1B hires at third-party client sites.'').

[31] *See, e.g .,* Costa and Hira, *supra* note 30; Sarah Pierce and Julia Gelatt, Migration Policy Institute, *Evolution of the H–1B: Latest Trends in a Program on the Brink of Reform,* March 2018, at 2, available at *https://www.migrationpolicy.org/research/evolution-h-1b-latest-trends-program-brink-reform;* Karen Pedersen, Peter Eckstein, Sandra Candy Robinson, *Commentary: The H–1B Visa Problem as IEEE–USA Sees It,* Mar. 6, 2017, available at *https://spectrum.ieee.org/view-from-the-valley/at-work/tech-careers/commentary-the-h1b-problem-as-ieeeusa-sees-it;* HaeYoun Park, *How Outsourcing Companies are Gaming the Visa System,* N.Y. Times, Nov. 10, 2015, available at *https://www.nytimes.com/interactive/2015/11/06/us/outsourcing-companies-dominate-h1b-visas.html;* Julia Preston, *Large Companies Game H–1B Program, Costing the U.S. Jobs,* N.Y. Times, Nov. 10, 2015, available at *https://www.nytimes.com/2015/11/11/us/large-companies-game-h-1b-visa-program-leaving-smaller-ones-in-the-cold.html?action=click&contentCollection=U.S.&region=Footer&module=WhatsNext&version=WhatsNext&contentID=WhatsNext&moduleDetail=undefined&pgtype=Multimedia.*

[32] Pedersen, Eckstein, and Robinson, *supra* note 33.

[33] Costa and Hira, *supra* note 30 (explaining that ''the market wage is the wage a U.S. worker would command for a position'' and that ''the most reasonable and closest proxy for a market wage is the median wage for an occupation in a local area''); Youyou Zhou, *Most H–1B Workers are Paid Less, But It Depends on the Type of Job,* The Associated press, Apr. 18, 2017, available at *https://apnews.com/afs:Content:873580003* (workers in high-tech jobs such as computer science are often paid less than their American counterparts).

[34] Costa and Hira, *supra* note 30. As this article explains, these actions comport with the existing legal framework in which H–1B employers are only required to pay the higher of the actual wage level for similarly situated employees or the prevailing wage. *See* section 212(n)(1)(A) of the Act. Further, based on the way the four wage levels are set, the lowest two permissible H–1B wage levels fall below the local median salaries. *See* section 212(p)(4) of the Act. For more general information on wage levels and how they are calculated, *see* Amy Marmer Nice, *Wages and High-Skilled Immigration: How the Government Calculates Prevailing Wages and Why It Matters,* American Immigration Council, Dec. 2017, available at *https://www.americanimmigrationcouncil.org/sites/default/files/research/wages_and_high-skilled_immigration.pdf.*

[35] Preston, *supra* note 33.

[36] *See* U.S. Department of Justice, Justice News, *Justice Department Settles Claim Against Virginia-Based Staffing Company for Improperly Favoring Temporary Visa Workers Over U.S. Workers* (July 27, 2020), *https://www.justice.gov/opa/pr/justice-department-settles-claim-against-virginia-based-staffing-company-improperly-favoring* (announcing a settlement agreement with a provider of IT staffing and consulting services resolving a claim that one of the provider's offices ''discriminated against U.S. workers because of their citizenship status when it posted a job advertisement specifying a preference for non-U.S. citizens who held temporary work visas. . . . Under the INA, employers cannot discriminate based on citizenship, immigration status or national origin at any stage of their hiring process, including the posting of job advertisements, regardless of whether it affects the final hiring outcome.'').

[37] Preston, *supra* note 33.

[38] Maria L. Ontiveros, H–1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers, 38 Berkeley J. Emp. & Lab. L. 1, 17 (2017); Grace Martinez, Comment, Legal Immigrants Displacing American Workers: How U.S. Corporations are Exploiting H–1B Visas to the Detriment of Americans, 86 UMKC L. Rev. 209 (2017).

[39] Paayal Zaveri and Aditi Roy, *Big American Tech Companies are Snapping up Foreign-Worker Visas, Replacing Indian Outsourcing Firms,* CNBC, Apr. 20, 2018, available at *https://www.cnbc.com/2018/04/20/big-american-tech-companies-are-snapping-up-h1-b-visas.html. See also* H.R. REP. 105–657, 20–21 (stating ''[b]ecause the bill is so dramatically increasing the supply of foreign workers without there being firm evidence of a domestic labor shortage, it is imperative that we build into the H–1B program adequate protections for U.S. workers'').

[40] *See Pierce* and Gelatt, *supra* note 33, at 24; Hira and Gopalaswamy, *supra* note 22; Patrick Thibodeau, *Southern California Edison IT Workers ''Beyond Furious'' Over H–1B Replacements,* Computerworld, Feb. 4, 2015, available at *https://www.computerworld.com/article/2879083/southern-california-edison-it-workers-beyond-furious-over-h-1b-replacements.html;* DHS, Office of Inspector General, OIG–18–03, USCIS Needs a Better Approach to Verify H–1B Visa Participants, at 3 (Oct. 20, 2017), available at *https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-18-03-Oct17.pdf.*

[41] *See Perrero* v. *HCL Am., Inc.,* No. 616CV112ORL31TBS, 2016 WL 5943600, at 1 (M.D. Fla. Oct. 13, 2016) (''According to the allegations of the Complaint (Doc. 1), which are accepted in pertinent part as true for purposes of resolving the instant motions, Perrero is a former employee of [Disney]'s information technology (''IT'') department. (Doc. 1 at 6). HCL is an IT services provider. (Doc. 27 at 1). In January 2015, he and several hundred other [Disney] IT workers were fired; their responsibilities were filled by IT workers employed by HCL. (Doc. 1 at 6). The workers who replaced the Plaintiff and his co-workers were foreign nationals holding H–1B visas. (Doc. 1 at 7) [Disney] management told Perrero and his co-workers of their imminent firing more than 90 days in advance, and informed them that if they did not stay and train the HCL IT workers during that period, they would not get a bonus and severance pay.''). *See also Costa and Hira, supra* note 30 (''the laid-off U.S. workers were required to train their H–1B replacements to do their former jobs—and in some cases sign nondisclosure agreements saying they would not speak publicly about their experiences—as a condition of receiving severance pay.'').

lowest two prevailing wage levels are currently set lower than the local median salary, employers offering wages at the two lowest permissible wage levels (Levels I and II) may be able to lawfully pay below-median wages.[42] In FY 2019, 60 percent of all H–1B jobs were certified at the two lowest prevailing wage levels.[43]

Moreover, H–1B employers that displace U.S. workers are not necessarily violating the law, either. While section 212(n)(1)(E) through (G) of the Act, 8 U.S.C. 1182(n)(1)(E)–(G), requires H–1B-dependent employers [44] to make certain attestations such as not displacing U.S. workers and taking good faith steps to recruit U.S. workers, the statute also offers broad exceptions to these requirements that, over time, have effectively gutted the U.S. worker recruitment requirement such as by utilizing third-party contractors [45] or paying a $60,000 annual salary, among other things.[46] DOL data establishes that 99.3 percent of all H–1B-dependent employers claim exemption from these attestation requirements,[47] showing how easily and frequently H–1B-dependent employers are able to bypass statutory requirements intended to protect U.S. workers. In addition, these purported U.S. worker protections only apply to employers who are H–1B-dependent employers or have been found by DOL to have committed a willful failure to meet their Labor Condition Application (LCA) obligations or material misrepresentation in its application.[48] However, employment discrimination in favor of H–1B visa holders over qualified U.S. workers may violate another part of the INA, at INA section 274B, 8 U.S.C. 1324b.[49]

Overall, these reports and studies expose significant gaps in the ability of the H–1B program, as currently structured, to serve its original intent to supplement the U.S. workforce with a limited number of highly skilled workers while protecting the economic interests of U.S. workers. The President's recent ''Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak'' notes that the entry of additional workers through the H–1B program ''presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID–19 outbreak.'' [50] The changes made in the interim final rule will extend beyond the duration of the proclamation, but the threats described in the proclamation highlight the urgent need for strengthening of the H–1B program to protect U.S. workers. The Department's responsibility to ensure the safety and security of our country includes the protection of American workers.[51] This responsibility includes ensuring, as much as possible, that American workers are not negatively affected by H–1B workers. Therefore, the Department believes it is imperative to issue this rule to strengthen the integrity of the H–1B program and make more certain that petitions are only approved for qualified beneficiaries and petitioners.

B. Implementation of This Interim Final Rule

This rule only will apply to petitions filed on or after the effective date of the regulation, including amended petitions or petition extensions. DHS will not apply the new regulations to any pending petitions nor to previously approved petitions, either through reopening or through a notice of intent to revoke.

V. Discussion of the Provisions To Strengthen the H–1B Program

A. Amending the Definition and Criteria for a ''Specialty Occupation''

1. Amending the Definition of a ''Specialty Occupation''

DHS is revising the regulatory definition and standards for a ''specialty occupation'' to align with the statutory definition of ''specialty occupation.''

Section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), describes, among others, nonimmigrants coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1) states, in relevant part, ''the term 'specialty occupation' means an occupation that requires—(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.'' Currently, 8 CFR 214.2(h)(4)(ii) defines ''specialty occupation'' as an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

First, this rule amends the definition of a ''specialty occupation'' at 8 CFR 214.2(h)(4)(ii) to clarify that there must be a direct relationship between the required degree field(s) and the duties of the position. Consistent with existing USCIS policy and practice, a position

[42] Costa and Hira, *supra* note 30 (explaining how the two lowest permissible H–1B prevailing wage levels are significantly lower than the local median salaries).

[43] *Id.* at 18.

[44] The term ''H–1B-dependent employer'' is defined at section 212(n)(3) of the Act, 8 U.S.C. 1182(n)(3). As stated in H.R. REP. 105–657, H.R. REP. 105–657, 23 (1998), H–1B-dependent companies ''often do nothing but contract their foreign workers out to other companies—often after the other companies have laid off American workers. H–1B-dependent companies have been accused of a disproportionate share of H–1B abuses.''

[45] *See e.g. Perrero* v. *HCL Am., Inc., supra* at 3–4. (The Court rejected Plaintiff's argument that, because he and his Disney co-workers were replaced by contracted HCL H–1B workers, ''HCL must have lied when it made the '''displacement' certification on the LCA.'' The Court found that the only way for HCL's certification on the LCA to be false would have been if the working conditions of HCL's U.S. worker employees, not Disney's, were adversely affected by HCL's H–1B hiring. Thus, by contracting through HCL as opposed to hiring directly, Disney and HCL circumvented worker protections, exploiting a loophole in the system designed to protect U.S. workers.). *See also* 144 Cong. Rec. E2323–01, 144 Cong. Rec. E2323–01, E2323, 1998 WL 785735 (stating ''[t]he employers most prone to abusing the H–1B program are called 'job contractors' or 'job shops'. . . the[se] companies don't have to shoulder the obligations of being the legally recognized employers—the job contractors/shops remain the official employers'') (statement of Rep. Lamar Smith, then chairman of the Subcommittee on Immigration and Claims).

[46] For example, section 212(n)(3)(B) of the Act defines ''exempt H–1B nonimmigrant'' as an H–1B nonimmigrant who receives annual wages equal to at least $60,000 or has attained a master's or higher degree (or its equivalent) in a related specialty. The $60,000 salary threshold was set in 1998 through the American Competitiveness and Workforce Improvement Act and has not been adjusted to date. If adjusted for inflation, the salary threshold for the exception to the U.S. worker recruitment would be over $93,000. *See,* U.S. Dep't of Labor, Bureau of Labor Statistics, *CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm* (comparing data from October 1998 to May 2020).

[47] U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Public Disclosure File: LCA Data, Federal Fiscal Year: 2019.

[48] *See* INA section 212(n)(1)(E)(ii) and (G), 8 U.S.C. 1182(n)(1)(E)(ii) and (G).

[49] *See supra* note 36.

[50] *See* Proclamation 10052 of June 22, 2020, Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, 85 FR 38263 (Jun. 25, 2020), available at *https://www.govinfo.gov/content/pkg/FR-2020-06-25/pdf/2020-13888.pdf.*

[51] *Cf.* section 101 of the Homeland Security Act of 2002, 6 U.S.C. 111(b)(1)(F), stating that a primary mission of the Department is to ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.''

for which a bachelor's degree in any field is sufficient to qualify for the position, or for which a bachelor's degree in a wide variety of fields unrelated to the position is sufficient to qualify, would not be considered a specialty occupation as it would not require the application of a body of highly specialized knowledge.[52] Similarly, the amended definition clarifies that a position would not qualify as a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position. This is consistent with the statutory requirement that a degree be ''in the specific specialty'' and has long been the position of DHS and its predecessor, Immigration and Naturalization Service (INS).[53]

Under this new rule, the petitioner will have the burden of demonstrating that there is a direct relationship between the required degree in a specific specialty (in other words, the degree field(s) that would qualify someone for the position) and the duties of the position. In many cases, the relationship will be clear and relatively easy to establish. For example, it should not be difficult to establish that a required medical degree is directly correlated to the duties of a physician. Similarly, a direct relationship may be established between the duties of a lawyer and a required law degree, and the duties of an architect and a required architecture degree. In other cases, the direct relationship may be less readily apparent, and the petitioner may have to explain and provide documentation to meet its burden of demonstrating the relationship. To establish a direct relationship, the petitioner would need to provide information regarding the course(s) of study associated with the required degree, or its equivalent, and the duties of the proffered position, and demonstrate the connection between the course of study and the duties and responsibilities of the position.

The requirement of a direct relationship between a degree in a specific specialty, or its equivalent, and the position should not be misconstrued as necessarily requiring a singular field of study. Section 214(i)(1) of the INA allows the ''attainment of a bachelor's or higher degree in the specific specialty *(or its equivalent)*'' (emphasis added). The placement of the phrase ''or its equivalent'' after the phrase ''in the specific specialty'' means that USCIS may accept the equivalent to a degree in a specific specialty, as long as that equivalent provides the same (or essentially the same) body of specialized knowledge.[54] In general, provided the required fields of study are closely related, for example, electrical engineering and electronics engineering for the position of an electrical engineer, a minimum of a bachelor's or higher degree, or its equivalent, in more than one field of study may be recognized as satisfying the ''degree in the specific specialty (or its equivalent)'' requirement of section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B). In such a case, the ''body of highly specialized knowledge'' required by section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), essentially would be the same, and each field of study would be in a ''specific specialty'' directly related to the position consistent with section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B).

In cases where the petitioner lists degrees in multiple disparate fields of study as the minimum entry requirement for a position, the petitioner would have to establish how each field of study is in a specific specialty providing ''a body of highly specialized knowledge'' directly related to the duties and responsibilities of the particular position to meet the requirements of sections 214(i)(1)(A) and (B) of the INA, 8 U.S.C. 1184(i)(1)(A) and (B), the regulatory definition, and one of the four criteria at new 8 CFR 214.2(h)(4)(iii)(A).

As such, a minimum entry requirement of a bachelor's or higher degree, or its equivalent, in multiple disparate fields of study would not automatically disqualify a position from being a specialty occupation. For example, a petitioner may be able to establish that a bachelor's degree in the specific specialties of either education or chemistry, each of which provide a body of highly specialized knowledge, is directly related to the duties and responsibilities of a chemistry teacher. In such a scenario, the ''body of highly specialized knowledge'' requirement of section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), and the ''degree in the specific specialty'' requirement of section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), would both be met and the chemistry teacher position listing multiple disparate fields of study would be in a specialty occupation.

In determining specialty occupation, USCIS interprets the ''specific specialty'' requirement in section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), to relate back to the body of highly specialized knowledge requirement referenced in section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), required by the specialty occupation in question, such that section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), is only met if the purported degree in a specific specialty or specialties, or its equivalent, provides a body of specialized knowledge directly related to the duties and responsibilities of the particular position as required by section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A).

If the minimum entry requirement for a position is a general degree without further specialization or an explanation as to what type of degree is required, the ''degree in the specific specialty (or its equivalent)'' requirement of section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B), would not be satisfied. For example, a requirement of a *general* engineering degree for a position of software developer would not satisfy the specific specialty requirement. In such an instance, the petitioner would not satisfactorily demonstrate how a required general engineering degree provides a body of highly specialized knowledge that is directly related to the duties and responsibilities of a software developer position.[55]

Similarly, a petition with a requirement of an engineering degree in any or all fields of engineering for a position of software developer would not suffice unless the record establishes how each or every field of study within an engineering degree provides a body of highly specialized knowledge directly relating to the duties and responsibilities of the software

[52] *See Caremax Inc* v. *Holder,* 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014).

[53] *See Royal Siam Corp.* v. *Chertoff,* 484 F.3d 139, 147 (1st Cir. 2007) (stating ''[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H–1B specialty occupation visa''); *see also Shanti, Inc.* v. *Reno,* 36 F. Supp. 2d 1151, 1166 (D. Minn.1999) (the proffered position's requirement of a business administration degree is a general degree requirement, and therefore, INS did not abuse its discretion in denying the H–1B petition); *All Aboard Worldwide Couriers, Inc.* v. *Attorney General,* 8 F. Supp. 2d 379, 381 (S.D.N.Y. 1998) (INS did not abuse its discretion in determining that the proffered position did not qualify as a specialty occupation based on ''an absence of evidence that [the petitioner] require[s] job candidates to have a B.A. in a specific, *specialized* area.'').

[54] *See, e.g., Relx, Inc.* v. *Baran,* 397 F. Supp. 3d 41, 54 (D.D.C. 2019) (''There is no requirement in the statute that only one type of degree be accepted for a position to be specialized.''); *Residential Fin. Corp.* v. *U.S. Citizenship & Immigration Servs.,* 839 F. Supp. 2d 985, 997 (S.D. Ohio 2012) (stating that when determining whether a position is a specialized occupation ''knowledge and not the title of the degree is what is important.'').

[55] *See supra* note 54.

developer position.[56] The issue is whether a proffered position requires the application of a body of highly specialized knowledge as required by section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), and attainment of at least a bachelor's degree in the specific specialty (or its equivalent) as required by section 214(i)(1)(B) of the INA, 8 U.S.C. 1184(i)(1)(B). If an individual could qualify for a software developer position based on having a seemingly unrelated degree in any engineering field or in general engineering, or its equivalent, then it cannot be concluded that the position requires the application of a body of highly specialized knowledge and a degree in a specific specialty because someone with an entirely or largely unrelated degree may qualify to perform the job.[57] In such a scenario, the requirements of sections 214(i)(1)(A) and (B) of the INA, 8 U.S.C. 1184(i)(1)(A) and (B), would not be satisfied.

Similarly, a requirement of a bachelor's degree in an unspecified ''quantitative field'' (which could include mathematics, statistics, economics, accounting, or physics) for a software developer position would be insufficient to meet the requirements of a specialty occupation unless the record identifies specific specialties within the wide variety of ''quantitative fields'' and establishes how each identified degree in a specific specialty provides a body of highly specialized knowledge, consistent with section 214(i)(1)(A) of the INA, 8 U.S.C. 1184(i)(1)(A), that is directly related to the duties and responsibilities of the software developer position. While a position may allow a range of degrees, and apply multiple bodies of highly specialized knowledge, each of those qualifying degree fields must be directly related to the proffered position.

2. Amending the Criteria for Specialty Occupation Positions

As quoted above, under section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1), a ''specialty occupation'' requires attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. However, the current regulatory criteria at 8 CFR 214.2(h)(4)(iii)(A) states that a bachelor's degree be ''normally'' required, or ''common to the industry,'' or that the knowledge required for the position is ''usually associated'' with at least a bachelor's degree or equivalent. The words ''normally,'' ''common,'' and ''usually'' are not found in the statute, and therefore, should not appear in the regulation. To conform to the statutory definition of a ''specialty occupation'' and promote consistent adjudications, DHS is eliminating the terms ''normally,'' ''common,'' and ''usually'' from the regulatory criteria. *See* new 8 CFR 214.2(h)(4)(iii)(A). This change means that the petitioner will have to establish that the bachelor's degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the United States by showing that this is always the requirement for the occupation as a whole, the occupational requirement within the relevant industry, the petitioner's particularized requirement, or because the position is so specialized, complex, or unique that it is necessarily required to perform the duties of the specific position.

The wording of the current regulatory criteria creates ambiguity. For example, the dictionary definition of ''normally'' is ''usually, or in most cases,'' and ''usually'' is defined as ''in the way that most often happens.''[58] ''Most'' is defined as ''the biggest number or amount (of), or more than anything or anyone else,''[59] and is a synonym for ''normally'' or ''usually.'' These definitions could be read to encompass anything from 51 percent to 99 percent, and possibly a broader range depending on the interpretation, highlighting how ambiguous they are. Use of these terms, if interpreted to mean that a position is a specialty occupation if merely 51 percent of positions within a certain occupation require at least a certain bachelor's degree, is inconsistent with the most natural read of, and arguably runs directly contrary to the statutory definition of, a ''specialty occupation'' which imposes a minimum entry requirement of a bachelor's or higher degree in the specific specialty (or its equivalent). *See* section 214(i)(1) of the INA, 8 U.S.C. 1184(i)(1). Thus, DHS believes that it is imperative to align the regulatory language with the statutory language and clarify that a bachelor's (or higher) degree in a directly related specific specialty is required. It will no longer be sufficient to show that a degree is normally, commonly, or usually required. In FY 2018, USCIS frequently issued Requests for Evidence (RFEs) in H–1B cases, requesting more evidence or explanations to establish that proffered positions qualified as specialty occupations.[60] DHS believes that the revisions in this rule will clarify the requirements for establishing a specialty occupation and reduce the need for RFEs in future adjudications.

In addition, DHS is replacing the phrase, ''To qualify as a specialty occupation,'' with the phrase ''A proffered position does not meet the definition of specialty occupation unless it also satisfies'' prior to setting forth the regulatory criteria. *See* new 8 CFR 214.2(h)(4)(iii)(A). This change will clarify that meeting one of the regulatory criteria is a necessary part of—but not necessarily sufficient for—demonstrating that a position qualifies as a specialty occupation. This is not new; the criteria at current 8 CFR 214.2(h)(4)(iii)(A) must be construed in harmony with and in addition to other controlling regulatory provisions and with the statute as a whole. In 2000, the U.S. Court of Appeals for the Fifth Circuit highlighted the ambiguity of the regulatory provision's current wording, and petitioners have misinterpreted the criteria in 8 CFR 214.2(h)(4)(iii)(A) as setting forth both the necessary and sufficient conditions to qualify as a specialty occupation, a reading that resulted in some positions meeting one condition of 8 CFR 214.2(h)(4)(iii)(A), but not the definition as a whole.[61]

[56] The requirement of any engineering degree could include, for example, a chemical engineering degree, marine engineering degree, mining engineering degree, or any other engineering degree in a multitude of unrelated fields.

[57] In these examples, the educational credentials are referred to by the title of the degree for expediency. However, USCIS separately evaluates whether the beneficiary's actual course of study is directly related to the duties of the position, rather than merely the title of the degree. When applicable, USCIS will consider whether the beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation.

[58] Cambridge Dictionary, normally, *https://dictionary.cambridge.org/us/dictionary/english/normally* (last visited Sept. 9, 2020); Cambridge Dictionary, usually, *https://dictionary.cambridge.org/us/dictionary/english/usually* (last visited Sept. 9, 2020).

[59] Cambridge Dictionary, most, *https://dictionary.cambridge.org/us/dictionary/english/most* (last visited Sept. 9, 2020).

[60] *See* USCIS report *Understanding Requests for Evidence (RFEs): A Breakdown of Why RFEs were Issued for H–1B Petitions in Fiscal Year 2018,* available at *https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/understanding-requests-for-evidence-h-1b-petitions-in-fiscal-year-2018.pdf.*

[61] *Defensor* v. *Meissner,* 201 F.3d 384, 387 (5th Cir. 2000) (stating that current 8 CFR 214.2(h)(4)(iii)(A) ''appears to implement the statutory and regulatory definition of specialty occupation through a set of four different standards. However, this section might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition. The ambiguity stems from the regulation's use of the phrase 'to qualify as.' In common usage, this phrase suggests that whatever conditions follow are both necessary and sufficient conditions. Strictly speaking, however, the language logically entails only that whatever conditions follow are necessary conditions. . . . If § 214.2(h)(4)(iii)(A) is read to create a necessary and

These changes will eliminate this source of confusion.

DHS also is amending 8 CFR 214.2(h)(4)(iii)(A)(*1*) by replacing the word ''position'' with ''occupation,'' so that it sets forth ''the minimum requirement for entry into the particular occupation in which the beneficiary will be employed.'' *See* new 8 CFR 214.2(h)(4)(iii)(A)(*1*). DHS believes that replacing ''position'' with ''occupation'' will clarify that the first criterion can be satisfied if the petitioner can show that its position falls within an occupational category for which all positions within that category have a qualifying minimum degree requirement.[62] DHS further believes that this revision provides added clarity to the regulatory criteria as the criteria will flow from general to specific (*i.e.,* occupation level to industry to employer to position). If the occupation requires at least a bachelor's degree in a specific specialty (*e.g.,* lawyer or doctor) then it necessarily follows that a position in one of those occupations would require a degree and qualify as a specialty occupation. If that is not applicable, then the petitioner could submit evidence to show that at least a bachelor's degree in a specific specialty (or its equivalent) is required based on industry norms, the employer's particular requirement, or because of the particulars of the specific position. USCIS will continue its practice of consulting DOL's *Occupational Outlook Handbook* and other reliable and informative sources submitted by the petitioner, to assist in its determination regarding the minimum entry requirements for positions located within a given occupation.

DHS further is amending 8 CFR 214.2(h)(4)(iii)(A)(*2*) by consolidating this criterion's second prong into the fourth criterion. *See* new 8 CFR 214.2(h)(4)(iii)(A)(*2*). The second prong of current 8 CFR 214.2(h)(4)(iii)(A)(*2*), which focuses on a position's complexity or uniqueness, is similar to current 8 CFR 214.2(h)(4)(iii)(A)(*4*), which focuses on a position's complexity and specialization. In practice, they are frequently consolidated into the same analysis. This amendment streamlines both criteria, as well as the explanation and analysis in written decisions issued by USCIS pertaining to specialty occupation determinations, as such decisions discuss all four criteria and are necessarily repetitive because of the existing overlap between 8 CFR 214.2(h)(4)(iii)(A)(*2*) and (*4*). This amendment also simplifies the analysis because petitioners may now demonstrate eligibility under this criterion if the position is ''so specialized, complex, *or* unique'' (emphasis added), as opposed to ''so complex *or* unique'' under current 8 CFR 214.2(h)(4)(iii)(A)(*2*) and ''so specialized *and* complex'' under current 8 CFR 214.2(h)(4)(iii)(A)(*4*) (emphasis added). Notwithstanding these amendments, the analytical framework of the first prong of 8 CFR 214.2(h)(4)(iii)(A)(*2*) generally will remain the same. Thus, a petitioner will satisfy new 8 CFR 214.2(h)(4)(iii)(A)(*2*) if it demonstrates that the specialty degree requirement is the minimum entry requirement for (1) parallel positions (2) at similar organizations (3) within the employer's industry in the United States. This criterion is intended for the subset of positions with minimum entry requirements that are determined not necessarily by occupation, but by specific industry standards. For example, registered nurses (RNs) generally do not qualify for H–1B classification because most RN positions normally do not require a U.S. bachelor's or higher degree in nursing (or a directly related field), or its equivalent, as the minimum for entry into these particular positions.[63] However, advanced practice registered nurses generally would be specialty occupations due to the advanced level of education and training required for certification.[64] For this criterion, DHS would continue its practice of consulting the DOL's *Occupational Outlook Handbook* and other reliable and informative sources, such as information from the industry's professional association or licensing body, submitted by the petitioner.

The third criterion at 8 CFR 214.2(h)(4)(iii)(A)(*3*) essentially will remain the same, other than the deletion of ''normally.'' This criterion still will recognize an employer's valid employment practices, provided that those practices reflect actual requirements. The additional sentence, ''The petitioner also must establish that the proffered position requires such a directly related specialty degree, or its equivalent, to perform its duties,'' simply will reinforce the existing requirements for a specialty occupation, in other words, that the position itself must require a directly related specialty degree, or its equivalent, to perform its duties. *See* new 8 CFR 214.2(h)(4)(iii)(A)(*3*). Employers requiring degrees as a proxy for a generic set of skills will not meet this standard. Employers listing a specialized degree as a hiring preference will not meet this standard either. If USCIS were constrained to recognize a position as a specialty occupation merely because an employer has an established practice of demanding certain educational requirements for the proffered position—without consideration of whether the position requires the application of a body of highly specialized knowledge consistent with the degree requirement—then any beneficiary with a bachelor's degree in a specific specialty could be brought into the United States to perform work in a non-specialty occupation if the employer arbitrarily imposed such a degree requirement for the non-specialty occupation position.[65] With respect to the first part of this criterion, a petitioner could submit evidence of an established recruiting and hiring practice for the position to establish its requirements for the position. DHS is leaving the term ''established practice'' undefined to allow more flexibility for petitioners, although it notes that petitioners seeking to fill a position for the first time generally would not be able to demonstrate an ''established practice.''[66]

As discussed above, the criterion at the new 8 CFR 214.2(h)(4)(iii)(A)(*4*) incorporates the second prong of current 8 CFR 214.2(h)(4)(iii)(A)(*2*). *See* new 8 CFR 214.2(h)(4)(iii)(A)(*4*). No other substantive changes are being made to this criterion. Thus, the fourth criterion can be satisfied if the petitioner

sufficient condition for being a specialty occupation, the regulation appears somewhat at odds with the statutory and regulatory definitions of 'specialty occupation.' ").

[62] DHS generally determines a position's occupation or occupational category by looking at the standard occupational classification (SOC) code designated on the LCA.

[63] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook,* ''Registered Nurses,'' *https://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4* (indicating that nurses can have a bachelor's or associate's degree in nursing, or a diploma from an approved nursing program) (last visited Jun. 25, 2020).

[64] USCIS Policy Memorandum PM–602–0104, Adjudication of H–1B Petitions for Nursing Occupations (Feb. 18, 2015), available at *https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015-0218_EIR_Nursing_PM_Effective.pdf.*

[65] *Defensor,* 201 F.3d at 388 (noting ''If only [the employer]'s requirements could be considered, then any alien with a bachelor's degree could be brought into the United States to perform a non-specialty occupation, so long as that person's employment was arranged through an employment agency which required all clients to have bachelor's degrees. Thus, aliens could obtain six-year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit H1–B [sic] visas to positions which require specialized experience and education to perform.'')

[66] First-time hirings are not precluded from qualifying under one of the other criteria.

demonstrates that the proffered position's job duties are so specialized, complex, or unique that they necessitate the attainment of a U.S. bachelor's degree in a directly related specific specialty, or its equivalent.

DHS acknowledges that some petitioners may believe they have a reliance interest in retaining the existing regulatory framework for specialty occupation. For example, by eliminating the word ''normally'' from the regulatory criterion at 8 CFR 214.2(h)(4)(iii)(A)(*1*), some occupations that previously qualified under this criterion may no longer qualify because a bachelor's degree in a specific specialty or its equivalent is not always a minimum requirement for entry. To the extent that petitioners may have a reliance interest in retaining the current regulations, the government's interests in having the regulations conform to the best reading of the statutory definition and creating clearer standards to facilitate more consistent adjudications [67] far outweigh any such reliance interest. It is important to note that, although some occupations will no longer qualify under 8 CFR 214.2(h)(4)(iii)(A)(*1*), the petitioner may still establish that the proffered position satisfies any one of the other criteria at 8 CFR 214.2(h)(4)(iii)(A)(*2*)–(*4*). None of the revised provisions categorically prevent any particular position from qualifying as a specialty occupation.

Further, DHS recognizes the possibility that some petitions for H–1B nonimmigrant classification might have been approved in error under the current regulation even though the petitions indicated that an alien could qualify to perform the relevant position based on a general degree. USCIS has generally denied such petitions on the basis that such petitions do not meet the statutory and regulatory definition of specialty occupation under the current regulation, but recognizes that a small number might have been approved in error and that similar petitions will be denied as a result of this Rule's clarification of the definition of ''specialty occupation.'' For example, by adding the phrase ''A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position'' at new 8 CFR 214.2(h)(4)(ii), positions where a general degree may qualify someone to perform the job, and that may have been erroneously approved as specialty occupations because of confusion created by the ambiguous wording in the current regulations, may now be denied. But again, to the extent that the revised regulations would result in the denial of some petitions that were erroneously approved under the current regulatory scheme, the government's interests in better adhering to the statute and better ensuring consistent adjudication far outweigh any interests petitioners may have in receiving continued petition approvals in a small number of cases based on error resulting from imprecise regulatory text. DHS notes that each case is decided on its own merits, and simply because a petition was approved previously does not guarantee that a similar petition would be approved in the future as prior approvals are not binding on USCIS.[68] The burden of proof remains on the petitioner, even where an extension of stay in H–1B nonimmigrant status is sought.[69]

B. Defining ''Worksite'' and ''Third Party Worksite''

DHS will add definitions for ''worksite'' and ''third-party worksite'' to the existing list of definitions at 8 CFR 214.2(h)(4)(ii). *See* new 8 CFR 214.2(h)(4)(ii). First, DHS will define ''worksite'' similar to the DOL definition of ''place of employment'' in 20 CFR 655.715 as ''the physical location where the work is actually performed by the H–1B nonimmigrant.'' A ''worksite'' will not include any location that would not be considered a ''worksite'' for LCA purposes, meaning that DHS will apply the same exclusions and examples of ''non-worksite locations'' as set forth in DOL's regulations.[70] As H–1B petitioners and USCIS officers should already be familiar with the concept of ''worksite'' because it also applies in the LCA context, DHS believes that this definition does not represent a significant change. Second, DHS will define ''third-party worksite'' as ''a worksite, other than the beneficiary's residence in the United States, that is not owned or leased, and not operated, by the petitioner.'' *See* new 8 CFR 214.2(h)(4)(ii).[71] This definition is similar to the ''owned or operated'' test commonly used in the LCA context.[72] Again, as this concept should already be familiar to H–1B petitioners and USCIS officers, this definition should not be a significant change.

The newly added definitions are helpful because the terms ''worksite'' and ''third-party worksite'' are used elsewhere in the amended regulations. As explained below, the new employer-employee relationship definition specifically refers to the beneficiary's worksite as a relevant factor in determining whether such relationship exists (*e.g.,* ''where the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision,'' *see* new 8 CFR 214.2(h)(4)(ii)). Further, a 1-year maximum validity period will apply whenever the beneficiary will be working at a third-party worksite. *See* new 8 CFR 214.2(h)(9)(iii)(A)(*1*). Finally, the new site visit provisions will clarify that inspections may include any third-party worksites, as applicable. *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*).

C. Clarifying the Definition of ''United States Employer''

Currently, the term ''United States employer'' is defined at 8 CFR 214.2(h)(4)(ii) as ''a person, firm, corporation, contractor, or other association, or organization in the United States'' which, among other things, ''[e]ngages a person to work within the United States'' and ''[h]as an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.'' Through this rule, DHS is changing this definition by: (1) Striking the word ''contractor'' from the general definition of ''United States employer''; (2) inserting the word ''company'' in that general definition; (2) expanding upon the existing requirement to engage the beneficiary to work within the United

[67] *See* GAO/HEHS–00–157, at 25 (finding that ''a petition previously submitted and denied can be approved by another adjudicator, even if the denying adjudicator determined that the employer does not meet H–1B requirements'' owing to inconsistently available reasons for denials and information system limitations); GAO–11–26, at 27 (noting examples of instances in which ''[e]xecutives at several companies'' experienced inconsistencies in the adjudication process, including decisions to deny or grant H–1B classification based on whether projects required ''specialty occupation'').

[68] *Louisiana Philharmonic Orchestra* v. *INS,* 2000 WL 282785 (E.D. La.), aff'd 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct. 51 (2001); *Matter of Church Scientology Intl,* 19 I&N Dec. 593, 597 (Comm'r 1988).

[69] *See* 8 CFR 103.2(b)(1) (''An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication); 8 CFR 214.1(c)(5) (''Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service.'').

[70] *See* 20 CFR 655.715 (definition of ''place of employment'').

[71] While the definition of ''third-party worksite'' will exclude the beneficiary's U.S. residence, employment of the beneficiary from home must still be in accordance with all applicable laws.

[72] *See* 20 CFR 655.734(a)(1)(ii)(A) (the petitioner's obligation requires proper notice at each place of employment ''whether such place of employment is owned or operated by the employer or by some other person or entity'').

States; and (3) expanding upon the employer-employee relationship and the factors used to determine if a valid ''employer-employee relationship'' between the petitioner and the beneficiary exists or will exist. *See* new 8 CFR 214.2(h)(4)(ii).

DHS believes these revisions are necessary to clarify the requirements to qualify as an employer for purpose of the H–1B classification. As previously discussed, the current regulation at 8 CFR 214.2(h)(4)(ii) defines ''United States employer'' as an entity that has an ''employer-employee relationship'' with an ''employee.'' But these terms are not adequately defined. Section 101(a)(15)(H)(i)(*b*) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(*b*), defines an H–1B nonimmigrant as a worker coming temporarily to the United States to perform services in a specialty occupation, and for whom the intending ''employer'' has filed a labor condition application. Section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1), states in relevant part that the question of importing any alien as an H–1B nonimmigrant shall be determined after consultation with appropriate agencies of the Government, upon petition of the importing employer. Congress continued using the term ''employer'' and ''employment'' in subsequent amendments, but without specifically defining those terms. *See, e.g.,* section 214(n) of the INA, 8 U.S.C. 1184(n), as amended by the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106–313, 114 Stat. 1251 (authorizing the H–1B nonimmigrant to accept new ''employment'' upon the filing of an H–1B petition by the ''prospective employer''). DHS believes the revisions in this rule are necessary to clarify and strengthen the requirements to qualify as a United States employer for the H–1B program.

1. Replacing ''contractor'' With ''company''

First, striking ''contractor'' will avoid potential confusion as the term ''contractor'' in the definition is misleading. The inclusion of ''contractors'' in the regulatory language could be read to suggest that contractors should generally qualify under the definition of a ''United States employer.'' While a contractor is certainly not excluded from qualifying as a ''United States employer'' for purposes of an H–1B petition, the contractor, like any petitioner, must establish the requisite ''employer-employee relationship'' with the H–1B beneficiary. This revision will also update the definition to include reference to ''company,'' as that term is commonly used to describe various types of business entities, such as limited liability companies.

DHS acknowledges that third-party arrangements involving one or more contractors may be a legitimate business model.[73] However, these types of business arrangements generally make it more difficult to assess whether the petitioner and the beneficiary have or will have the requisite employer-employee relationship. Typically, these types of business arrangements require the beneficiary to be placed at one or more third-party worksites, which are not owned or leased and not operated, by the petitioner. This placement, in itself, potentially dilutes the petitioner's control over the beneficiary. The difficulty of assessing control is increased in situations where there are one or more intermediary contractors (often referred to as ''vendors'')[74] involved in the contractual chain. Overall, the more parties there are in the contractual chain, the more likely those other parties exert control over the beneficiary's work, and more importantly, potentially limit the amount of control, if any, that the petitioner would have over the beneficiary's employment. As a result, the relationship between the petitioner and the beneficiary becomes more attenuated.

By removing the word ''contractor'', DHS seeks to avoid any confusion or mistaken belief that contractors should generally qualify as ''United States employers.'' Petitioners that are contractors are reminded of their burden, similar to all other H–1B petitioners, whether they are a person, corporation, or company, to establish the employer-employee relationship for each H–1B petition they file.

Nevertheless, it is important to note that the deletion of the term ''contractor'' from the regulatory definition does not mean that a contractor never would qualify as a ''United States employer'' for the purpose of filing an H–1B petition. A contractor may be a person, firm, company, corporation, or other association or organization, and the contractor (whatever the form) still may qualify as a U.S. employer of the H–1B beneficiary if the contractor demonstrates the requisite employer-employee relationship with the beneficiary.[75] Because this change will not impact a contractor's continued ability to establish a valid employer-employee relationship on a case-by-case basis, DHS does not believe that removing the term ''contractor'' will have a substantive impact on the eligibility determination. The change is simply intended to remove a term that is typically associated with work arrangements that typically do not involve an employer and employee.

2. Engaging the Beneficiary To Work

As currently written in 8 CFR 214.2(h)(4)(ii), the requirement for a petitioner to ''[engage] a person to work within the United States'' has limited practical value. It does not specify that the petitioner should engage the beneficiary (rather than ''a person''). And it does not qualify the work to be performed within the United States. By stating in new 8 CFR 214.2(h)(4)(ii) that an employer must ''[engage] the beneficiary to work within the United States, and ha[ve] a bona fide, non-speculative job offer for the beneficiary,'' DHS seeks to provide more meaningful requirements for the definition of ''United States employer,'' consistent with statutory references to the intending or importing employer petitioning for an alien to perform services in a specialty occupation.[76]

[73] Karen Jensen, *Barriers to H–1B Visa Sponsorship in the IT Consulting Industry: The Economic Incentive to Alter H–1B Policy,* 35 Fordham International Law Journal Volume 1027, 1036 (2017).

[74] The ''vendor'' concept is frequently referenced in H–1B petitions that involve the information technology (IT) industry. While the term is not precisely defined, petitions commonly refer to ''primary vendors,'' who have an established or preferred relationship with a client, or ''implementing vendors,'' who bid on an IT project with a client and then implement the contract using their own staff. Primary or implementing vendors may turn to secondary vendors to fill staffing needs on individual projects. *See, e.g., Acclaim Systems, Inc.* v. *Infosys,* No. Civ.A. 13–7336, 2016 WL 974136 at *2 (E.D. Pa. Mar. 11, 2016). As a result, the ultimate client project may be staffed by a team of H–1B beneficiaries who were petitioned for by different, unrelated employers.

[75] DHS recognizes that this change will result in a definition of ''United States employer'' that is slightly different from DOL's definition of ''employer.'' 20 CFR 655.715 states in pertinent part: ''*Employer* means a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H–1B . . . nonimmigrants and/or U.S. worker(s).'' However, DHS does not believe this disparity would be significant, particularly because the DOL definition still requires the contractor to have an employment relationship with the H–1B nonimmigrant based on the common law. Furthermore, DHS definitions are separate from, and generally serve different purposes than, DOL definitions. While DOL may deem the person or entity filing an H–1B petition to be the employer for purpose of enforcing wage and other obligations, DHS must determine whether the petitioner qualifies as the intending or importing United States employer. *See, e.g.,* 20 CFR 655.705 (DOL administers the LCA process and most enforcement provisions).

[76] Consistent with the existing rule, this language does not and will not prohibit H–1B nonimmigrants from travelling internationally.

New 8 CFR 214.2(h)(4)(ii) will make it clear that a petitioner must have non-speculative employment for the beneficiary at the time of filing.[77] At the time of filing, the petitioner must establish that a bona fide job offer exists and that actual work will be available as of the requested start date.[78] If the petitioner does not have any work available, then it cannot reasonably engage the beneficiary ''to work within the United States'' in order to qualify as a United States employer at the time of filing. *See* 8 CFR 214.2(h)(4)(ii).

The agency long held and communicated the view that speculative employment is not permitted in the H–1B program. For example, a 1998 proposed rule documented this position, stating that historically, USCIS (or the Service, as it was called at the time) has not granted H–1B classification on the basis of speculative, or undetermined, prospective employment.[79] This proposed rule explained that the H–1B classification was not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts.[80] Speculative employment undermines the integrity and a key goal of the H–1B program, which is to help U.S. employers obtain the skilled workers they need to meet their business needs, subject to annual numerical limitations, while protecting the wages and working conditions of U.S. workers. Further, USCIS cannot reasonably ascertain whether the beneficiary will be employed in a specialty occupation if the employment is speculative.

Note, however, that establishing non-speculative employment does not amount to demonstrating non-speculative daily work assignments through the duration of the requested validity period. DHS is not by this rule requiring employers to establish non-speculative and specific assignments for each and every day of the proposed period of employment.[81] Again, under new 8 CFR 214.2(h)(4)(ii), a petitioner must demonstrate, at the time of filing, availability of actual work as of the requested start date.

3. Clarifying the ''Employer-Employee Relationship''

Third, DHS will remove the phrase ''as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee'' from the current definition of ''United States employer,'' and replace that phrase with a separate, more extensive definition of ''employer-employee relationship'' based on USCIS' interpretation of existing common law. *See* new 8 CFR 214.2(h)(4)(ii). These revisions will clarify the test for establishing the requisite ''employer-employee relationship'' and eliminate the ambiguity and confusion created by the existing regulation.

The term ''employer-employee relationship'' at 8 CFR 214.2(h)(4)(ii) is not adequately defined. The phrase in that provision which reads, ''as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee,'' does not give sufficient guidance. For example, it is unclear whether the five factors are entirely disjunctive, such that the test is met if any one factor is met, or whether the last factor (''or otherwise control'') is merely disjunctive of the fourth factor (''supervision''), such that the first three factors (''hire, pay, fire'') must always be met.[82] Although some courts have viewed this phrase as establishing that any single listed factor, such as pay, in and of itself is sufficient to establish the requisite control,[83] DHS agrees with the Fifth Circuit's statement in *Defensor* that the conjunctive interpretation, where ''hire, pay, fire, supervise'' are read together ''as one prong of the test and 'otherwise control the work' is . . . viewed as an independent prong of the test *accords better with the commonsense notion of employer.*''[84] DHS firmly disagrees with the disjunctive interpretation because it leads to the illogical result of virtually any petitioner satisfying the definition, because H–1B petitioners are generally required to submit an LCA that includes an attestation that the petitioner will pay the beneficiary at least the required wage. If the regulation is read to set forth a five-factor disjunctive test, then arguably all petitioners who submit an LCA would satisfy the pay factor, such that reference to other factors would be superfluous in any case where the petitioner is required to submit an LCA.

In the absence of specific, clear, and relevant statutory or regulatory definitions, USCIS has interpreted these terms consistent with its understanding of current common law. In 2010, USCIS provided clarifying policy guidance regarding the employer-employee regulation and factors based on the common law that USCIS officers should consider when adjudicating H–1B

[77] *Cf.* 8 CFR 103.2(b)(1) (eligibility must be established at the time of filing).

[78] The requested start date as indicated on the H–1B petition in this context may differ from when an H–1B nonimmigrant is considered to ''enter into employment'' for purposes of receiving required pay under DOL regulations. *See* 20 CFR 655.731(c)(6), section 212(n) of the INA. While DOL regulations provide for a limited period of time for the employer to place the beneficiary on the payroll, that is a separate rule pertaining to the employer's wage obligation under section 212(n) of the INA and does not pertain to the petitioner's obligation under section 214 of the INA and new 8 CFR 214.2(h)(4)(ii) to establish that work is available for the beneficiary to perform as of the start date requested by the petitioner. The requirement in new 8 CFR 214.2(h)(4)(ii) will be met if work is available for the beneficiary as of the start date of intended employment requested on the H–1B petition.

[79] *Petitioning Requirements for the H Nonimmigrant Classification,* 63 FR 30419, 30419–20 (proposed June 4, 1998) (to be codified at 8 CFR part 214).

[80] *Id. See also* GAO/HEHS–00–157, *supra* at 10 (''The petition is required to contain the necessary information to show that a bona fide job exists . . . .''); *Serenity Info Tech* v. *Cuccinelli,* 2020 WL 2544534, at *13 (N.D. Ga. 2020) (''Demonstrating that the purported employment is actually likely to exist for the beneficiary is a basic application requirement . . . .'').

[81] *See ITServe Alliance, Inc.* v. *Cissna,* 443 F.Supp.3d 14, 19 (D.D.C. Mar. 10, 2020) (the U.S. District Court for the District of Columbia, in considering a requirement that an H–1B petitioner establish non-speculative assignments for the entire time requested in a petition, explained that ''very few, if any, U.S. employers would be able to identify and prove daily assignments for the future three years for professionals in a specialty occupation'' and that ''[n]othing in [the definition of 'specialty occupation'] requires specific and non-speculative qualifying day-to-day assignments for the entire time requested in the petition.''); *Serenity,* 2020 WL 2544534, at *13 (citing *ITServe*). Speculative employment should not be confused with employment that is contingent on petition approval, visa issuance (when applicable), and the grant of H–1B status. DHS recognizes that employment may be actual, but contingent on petition approval and the alien being granted H–1B status.

[82] *See, e.g., Defensor,* 201 F.3d at 388 (''Under § 214.2(h)(4)(ii)(2), an employer is someone who '[h]as an employer-employee relationship with respect to the employees . . . , as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.' It is unclear whether Vintage's ability to simply 'hire' or 'pay' an employee is sufficient standing alone to grant Vintage employer status under this definition. Another interpretation would be that 'hire, pay, fire, supervise' are to be read conjunctively as one prong of the test and 'otherwise control the work' is to be viewed as an independent prong of the test. Under the latter interpretation, merely being able to 'hire' or 'pay' an employee, by itself, would be insufficient to grant employer status to an entity that does not also supervise or actually control the employee's work . . . . [T]he second interpretation accords better with the commonsense notion of employer . . .'')

[83] *See, e.g., ITServe,* 2020 WL 1150186, at *17 (''The use of 'or' distinctly informs regulated employers that a single listed factor can establish the requisite 'control' to demonstrate and employer-employee relationship. This formulation makes evidence that there are multiple ways to demonstrate employer control, that is, by hiring or paying or firing or supervising or 'otherwise' showing control.'').

[84] *See Defensor,* 201 F.3d at 388 (emphasis added).

petitions.[85] While the listed factors were based on the agency's interpretation of the common law, they were specifically tailored to the H–1B program based on the agency's expertise and experience dealing with challenges posed particularly by cases where the beneficiary was placed at a third-party worksite.[86] This policy guidance remained in effect for more than a decade and was only recently rescinded in response to a recent court decision finding the policy guidance, as applied, to be a new substantive rule that required rulemaking in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*[87] This interim final rule will restore, with additional clarification, the policy that existed since 2010 and only recently was rescinded due to a judicial ruling on procedural grounds.

USCIS interprets the term ''employer-employee relationship'' to be the ''conventional master-servant relationship as understood by common-law agency doctrine.'' [88] That doctrine, as explained by the Supreme Court, requires an evaluation of the hiring party's right to control the manner and means by which the product is accomplished ''among the other factors'' relevant to the employer-employee relationship.[89] As the common law test contains ''no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'' [90]

Foremost, in addition to restoring through this rule the longstanding policy that USCIS has applied until recently but had rescinded in order to reduce the potential for additional APA-based litigation, the revised regulation will make clear that USCIS will assess and weigh all relevant aspects of the relationship. *See* new 8 CFR 214.2(h)(4)(ii). DHS does not believe that any one factor should be decisive. To do otherwise could be construed as contrary to the Supreme Court's declaration in *Nationwide Mutual Ins. Co.* v. *Darden* that ''all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'' [91]

Paragraph (*1*) of the revised ''employer-employee'' definition lists non-exhaustive factors to be considered in the totality of the circumstances in cases where the H–1B beneficiary does not possess an ownership interest in the petitioning organization or entity. The revised regulation lists the following factors: (*i*) Whether the petitioner supervises the beneficiary and, if so, where such supervision takes place; (*ii*) where the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision; (*iii*) whether the petitioner has the right to control the work of the beneficiary on a day-to-day basis and to assign projects; (*iv*) whether the petitioner provides the tools or instrumentalities needed for the beneficiary to perform the duties of employment; (*v*) whether the petitioner hires, pays, and has the ability to fire the beneficiary; (*vi*) whether the petitioner evaluates the work-product of the beneficiary; (*vii*) whether the petitioner claims the beneficiary as an employee for tax purposes; (*viii*) whether the petitioner provides the beneficiary any type of employee benefits; (*ix*) whether the beneficiary uses proprietary information of the petitioner in order to perform the duties of employment; (*x*) whether the beneficiary produces an end-product that is directly linked to the petitioner's line of business; and (*xi*) whether the petitioner has the ability to control the manner and means in which the work product of the beneficiary is accomplished. By listing these factors out, DHS is making clear that no single factor is dispositive and that all factors must be taken into consideration to the extent applicable and appropriate to the facts of the specific case.

While the new regulation will clarify the employer-employee relationship test, it is largely consistent with past USCIS policy and practice and the standard familiar to USCIS officers and H–1B petitioners.[92] Specifically and as mentioned earlier, in 2010, USCIS issued a policy memorandum, ''Determining Employer-Employee Relationship for Adjudication of H–1B Petitions, Including Third-Party Site Placements'' [93] which explained the agency's approach of relying on common law doctrine, as articulated by the Supreme Court, to interpret the existing regulatory provision. This memorandum elaborated on a number of factors that USCIS considers particularly relevant in the H–1B context, based on its interpretation of the common law and the facts typically present in H–1B adjudications based on USCIS' experience. New 8 CFR 214.2(h)(4)(ii) incorporates the same factors listed in this memorandum with two exceptions, neither of which would have a significant impact on the adjudication of H–1B petitions. More specifically, the 2010 memorandum stated the third factor as, ''Does the petitioner have the right to control the beneficiary on a day-to-day basis if such control is required?'' In clarifying the factors in this regulation, DHS is not including the misleading phrase, ''if such control is required,'' that was previously included in the 2010 USCIS policy guidance because this phrase implies that control is not necessarily required. DHS believes that the petitioner should be required to demonstrate control, which includes, but is not limited to, the inquiry of whether the petitioner has the right to control day-to-day.

The 2010 memorandum contained another potentially confusing or inaccurate statement in footnote 6 that the employer-employee relationship ''hinges upon the right to control.'' USCIS now believes that this statement places an undue emphasis on the right to control and that the best interpretation of existing case law is that

[85] USCIS Policy Memorandum HQ 70/6.2.8, Determining Employer-Employee Relationship for Adjudication of H–1B Petitions, Including Third-Party Site Placements (Jan. 8, 2010). This memorandum was superseded and archived on June 17, 2020. Therefore, it can be found in the Supporting Documents accompanying this interim final rule.

[86] For example, the 2010 memorandum's listed factor of ''does the petitioner supervise the beneficiary and is such supervision off-site or on-site'' was an elaboration of the common-law factor of ''the location of the work,'' *Darden,* 503 U.S. at 323–24, but was tailored to issues commonly presented by H–1B cases where the petitioner claimed to supervise the beneficiary, but was not physically located at the same worksite as the beneficiary and end-client.

[87] *See, e.g., ITServe,* 2010 WL 1150186, at *2 (''The current CIS interpretation of the employer-employee relationship requirement is inconsistent with its regulation, was announced and applied without rulemaking, and cannot be enforced.'').

[88] *See Clackamas Gastroenterology Assocs., P.C.* v. *Wells,* 538 U.S. 440, 445 (2003); *Nationwide Mutual Ins. Co.* v. *Darden,* 503 U.S. 318, 323 (1992) (quoting *Cmty. for Creative Non-Violence* v. *Reid,* 490 U.S. 730 (1989)).

[89] *Darden,* 503 U.S. at 323–24.

[90] *Id.* at 324 (quoting *NLRB* v. *United Ins. Co. of Am.,* 390 U.S. 254, 258 (1968)); *see also Clackamas,* 538 U.S. at 445.

[91] 503 U.S. at 324.

[92] As early as 2009, various Administrative Appeals Office (AAO) non-precedent decisions began relying on the common law doctrine, as articulated by the Supreme Court, to analyze the regulatory provision for employer-employee relationship at 8 CFR 214.2(h)(4)(ii). *See, e.g.,* (Identifying Information Redacted by Agency) Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. S 1101, 2009 WL 3555560, at *2–3 (applying the common law test as described by the Supreme Court to determine the employer-employee relationship); (Identifying Information Redacted by Agency) Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. S 1101, 2009 WL 3555481, at *2–3 (same); (Identifying Information Redacted by Agency) Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. S 1101, 2009 WL 4982248, at *7–8 (same).

[93] *See supra* note 85.

''right to control'' is just one factor in the overall common law analysis rather than the determinative test. Specifically, the Supreme Court in *Darden* stated:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. *Among the other factors* relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party (emphasis added).[94]

While the first sentence suggests that the test is right to control, the second sentence suggests that right to control is one of many factors, rather than the test. Further, in *Clackamas Gastroenterology Assocs., P.C.* v. *Wells,* the Supreme Court focused on ''the common-law element of control [a]s the principal guidepost that should be followed in this case,'' and proceeded to analyze '''the extent of control' that one may exercise over the details of the work of the other,''[95] which again suggests that the test does not hinge on the right to control. In *Clackamas,* the Supreme Court also emphasized that the employer-employee relationship depends on all incidents of the relationship, with no one factor being decisive.[96] As the quoted language in these cases suggests, the employer-employee relationship does not hinge upon any single factor. Thus, the 2010 memorandum's emphasis on the right to control arguably is in tension with these Supreme Court decisions. DHS believes that the new definitions in 8 CFR 214.2(h)(4)(ii), along with this explanation, will clarify that the right to control is not determinative and will not, in itself, be sufficient to demonstrate an employer-employee relationship, consistent with common law.

DHS believes that this clarification of ''right to control'' as one factor rather than a determinative factor is not a clear departure from the way USCIS has generally applied the common law test over many years. While the rescinded 2010 memorandum indicated that the determination hinges on the right to control, the analysis has always required an evaluation of the totality of the facts involved, including, in part, the degree to which the petitioner exercises actual control over the beneficiary's work. Some officers have placed more weight on the relevance of the actual control exercised, or to be exercised, when making the determination. For example, various Administrative Appeals Office (AAO) non-precedent decisions, citing the rule established in *Darden,* have stated that we ''. . . must examine who has actual control, not just the right to control, the beneficiary's work.''[97] Other officers may have placed less weight on the relevance of the actual control exercised, or to be exercised, and more weight on the petitioner's legal right to control the beneficiary's work. In 2018, USCIS provided further clarification on its website regarding the implementation of the 2010 policy memorandum interpreting the employment relationship regulatory requirement:

> Although the 2010 memorandum states that the ''employer-employee relationship hinges on the *right* to control'' the beneficiary's employment, the factors that are generally taken into consideration when assessing the relationship primarily focus on who actually takes/will take the action rather than the right to take certain action. For example, when assessing whether the petitioner provides or will provide the tools or instrumentalities for the beneficiary, the primary focus is not whether the petitioner has the right to provide such tools or instrumentalities, but whether the petitioner actually provides or will provide such items.[98]

Accordingly, as reflected on the USCIS website in the 2018 clarification, whether the petitioner actually controls the beneficiary's employment has been an important factor in the overall analysis.

Therefore, DHS believes that this provision will not represent a clear change in longstanding past practice.[99] The revised provision, however, will clarify that the employer-employee relationship determination will be based on the totality of the circumstances. USCIS will analyze the applicability of the relevant factors listed in the definition based on the specific evidence provided by the petitioner when making the employment relationship determination, consistent with its historical past practice. USCIS will assess and weigh each factor as it exists or will exist ''in the reality of the actual working relationship.''[100] Thus, even though the ''right to control the work of the beneficiary'' is listed as a relevant factor, it is one among many factors that will be weighed. USCIS will also consider other factors, as noted above, including the petitioner's ability to control the manner and means in which the work product of the beneficiary is accomplished. Similarly, when assessing whether the petitioner provides or will provide the tools or instrumentalities for the beneficiary, USCIS believes that the primary focus should not be on whether the petitioner has the right to provide such tools or instrumentalities, but whether the petitioner actually provides or will provide such items.[101] While another person or entity may have the right to provide tools or instrumentalities to the worker, the relevant point of focus is on who will actually provide the tools or instrumentalities. For example, if the tools or instrumentalities will be provided by the H–1B beneficiary or end-client, that fact may weigh against a finding that the petitioner will be the employer. If, however, the petitioner will provide the tools and instrumentalities for the beneficiary to perform the work, that fact would weigh in favor of a finding that the petitioner will be the employer. Overall, the petitioner will be required to demonstrate that it can actually take the claimed actions when it comes to these factors. It will not be enough for a petitioner to simply show that it retains the right to control.[102]

[94] *Darden,* 503 U.S. at 323–24.

[95] *Clackamas,* 538 U.S. at 448.

[96] 538 U.S. at 451 (quoting *Darden* and *NLRB*).

[97] *See, e.g., Matter of K–I–S- Inc.,* 2019 WL 2090064, at *4 (AAO Apr. 24, 2019) (citing *Darden,* 503 U.S. at 323); *Matter of A- Inc.,* 2017 WL 3034820, at *6 (AAO June 29, 2017) (observing that ''if mid-vendors or the end-client exercise *actual* control over his work on a daily basis, then we cannot find the Petitioner to be the Beneficiary's 'employer' for H–1B purposes'' (emphasis in original)).

[98] *See https://www.uscis.gov/news/public-releases-topic/business-immigration/questions-answers-memoranda-establishing-employer-employee-relationship-h-1b-petitions.*

[99] While USCIS rescinded the 2010 and 2018 policy guidance on June 17, 2020, and has abstained from applying the common law analysis in its adjudication of employer-employee relationship, this is merely a temporary change to allow for rulemaking to occur and avoid continued litigation of this issue. *See* USCIS Policy Memorandum PM–602–0114, Rescission of Policy Memoranda (June 17, 2020), available at *https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/PM-602-0114_ITServeMemo.pdf.* This interim practice, however, has only been for a short period of time and certainly not long enough to create any reliance interests based on this interim practice.

[100] *NLRB,* 390 U.S. at 259; *see Darden,* 503 U.S. at 323–24.

[101] *See Darden,* 503 U.S. at 323–324 (listing ''the source of the instrumentalities and tools,'' as opposed to *the right to* provide such instrumentalities and tools).

[102] DHS believes that this new regulation is not necessarily inconsistent with the DOL definition of ''Employed, employed by the employer, or employment relationship'' at 20 CFR 655.715.

Paragraph (*2*) of the revised provision lists additional factors that would be considered in cases where the H–1B beneficiary possesses an ownership interest in the petitioning organization or entity. These factors include: (*i*) Whether the petitioning entity can hire or fire the beneficiary or set the rules and parameters of the beneficiary's work, (*ii*) whether and, if so, to what extent the petitioner supervises the beneficiary's work, (*iii*) whether the beneficiary reports to someone higher in the petitioning entity, (*iv*) whether and, if so, to what extent the beneficiary is able to influence the petitioning entity, (*v*) whether the parties intended that the beneficiary be an employee, as expressed in written agreements or contracts, and (*vi*) whether the beneficiary shares in the profits, losses, and liabilities of the organization or entity. All of these are additional factors, meaning that they would supplement, not replace, the other factors listed in paragraph (*1*) of the revised definition. These additional factors mirror the Supreme Court's analysis in *Clackamas,* consistent with DHS's position that the term ''employer,'' undefined in the statute, should be interpreted consistent with the common law. These additional factors, as provided in *Clackamas,* are also familiar to USCIS officers and H–1B petitioners given the specific references to *Clackamas* in the 2010 policy guidance that was in effect until June 2020.[103]

DHS recognizes that, as a general principle of law, a corporation is a separate legal entity from its shareholders.[104] Nevertheless, DHS may look beyond the corporate entity to assess whether a valid employment relationship exists between the petitioner and the beneficiary such that the petitioner, rather than the beneficiary, truly qualifies as an ''employer'' pursuant to the statute. Absent unusual factual circumstances, a beneficiary who is the sole or majority shareholder of the petitioning entity, does not report to anyone higher within the organization, is not subject to the decisions made by a separate board of directors, and has veto power over decisions made by others on behalf of the organization, will likely not be considered an ''employee'' of that entity for H–1B purposes. On the other hand, if a beneficiary is bound by decisions (including the decision to terminate the beneficiary's position) made by a separate board of directors or similar managing authority, and does not have veto power (including negative veto power) over those decisions, then the mere fact of his or her ownership interest will not necessarily preclude the beneficiary from being considered an employee.

USCIS considered alternatives for defining the term ''employer[,]'' including revising the current regulatory definition to delete and replace the disjunctive ''or'' with ''and[,]'' or listing the common law factors verbatim from existing case law. USCIS declined to simply delete and replace the disjunctive ''or[,]'' and otherwise retain the current regulation, as it fails to provide the same level of clarification and guidance as the new definition listing factors relevant to employer-employee relationship determinations, including those where the beneficiary has an ownership interest in the petitioner. USCIS also declined simply to cite to the existing case law or list the factors verbatim from the existing case law. USCIS believes that its officers and H–1B petitioners are most familiar with the general factors as articulated in the rescinded 2010 policy memorandum. USCIS seeks to restore the policy that has guided H–1B adjudications of this issue for more than a decade, with certain changes for added clarity, and believes that the definition in this interim final rule best accomplishes that goal with the least amount of potential disruption for USCIS officers and H–1B petitioners. USCIS rescinded the 2010 policy memorandum because of a recent court decision finding the memorandum, as applied, imposed a substantive rule that departs from the existing regulation, thereby failing to comply with the APA's rulemaking requirements. This interim final rule will restore the policy as articulated in the 2010 memorandum, with additional clarifications, in compliance with the APA.

DHS recognizes that some petitioners may have developed a reliance interest based on H–1B adjudications subsequent to the June 2020 rescission of the 2010 policy memorandum. DHS believes, however, that the reliance interest some petitioners may have based on recent adjudications does not outweigh the importance of restoring guidance, with additional clarification, that has existed since 2010 and on which USCIS officers and H–1B petitioners have relied to assess eligibility for H–1B classification. The disjunctive wording of the current regulation is confusing for USCIS officers and H–1B petitioners alike, and DHS believes that any reliance interest that may have developed in the short time since June 2020 should yield to restoring guidance that is more detailed and less ambiguous for all involved in the H–1B program.

D. Corroborating Evidence of Work in a Specialty Occupation

Pursuant to section 101(a)(15)(H)(i)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(i)(b), an H–1B nonimmigrant must be coming temporarily to the United States to perform services in a specialty occupation. USCIS interprets this statutory provision to require that the petitioner must actually have work in the specialty occupation listed in the H–1B petition available for the beneficiary as of the start date of intended employment. Therefore, DHS is making it clear at new 8 CFR 214.2(h)(4)(iv)(C) that the petitioner must establish, at the time of filing, that it has actual work in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. New 8 CFR 214.2(h)(4)(iv)(C) complements the revised definition of ''United States employer'' at new 8 CFR 214.2(h)(4)(ii) requiring evidence of a bona fide, non-speculative job offer. Read together, both new provisions reinforce that speculative employment is not permitted in the H–1B program. As stated earlier, USCIS cannot reasonably ascertain whether the beneficiary will be employed in a specialty occupation if the employment is speculative.[105] USCIS must assess the actual services to be performed to determine whether the alien will be performing services in a specialty occupation. That determination necessarily requires review and analysis

Although the DOL regulation states that ''the key determinant is the putative employer's right to control the means and manner in which the work is performed,'' it also recognizes that ''[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'' Further, in promulgating the regulation, DOL acknowledged that a list of factors based on the common law provided a ''useful framework'' for analyzing an employment relationship. *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States,* 65 FR 80110, 80139 (Dec. 20, 2000). To the extent that there are inconsistencies, DHS believes the common law supports the proposition that right to control alone is not sufficient to establish an employer-employee relationship, and that all incidents of the relationship must be considered in making the determination.

[103] 538 U.S. at 448–449.

[104] *See Matter of Aphrodite Invs. Ltd.,* 17 I&N Dec. 530 (Comm'r 1980); *Matter of Tessel, Inc.,* 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980).

[105] Again, speculative employment should not be confused with employment that is contingent on petition approval, visa issuance (when applicable), and the grant of H–1B status. DHS recognizes that employment may be actual, but contingent on petition approval and the alien being granted H–1B status.

of the actual work to be performed and cannot be based on speculation.

Importantly, new 8 CFR 214.2(h)(4)(iv)(C) clarifies the types of corroborating evidence petitioners must submit in third-party placement cases. Based on USCIS' program experience, petitioners who regularly place their workers at third-party worksites often submit uncorroborated statements describing the role the H–1B beneficiary will perform at the third-party worksite. Such statements, without additional evidence, are generally insufficient to establish by a preponderance of the evidence that the H–1B beneficiary will actually perform work in a specialty occupation. Moreover, such uncorroborated statements are generally insufficient to establish that the petitioner will have and maintain an employer-employee relationship while the beneficiary works at the third-party worksite.[106] Therefore, where a beneficiary will be placed at one or more third-party worksites, DHS will require the petitioner to submit evidence such as contracts, work orders, or other similar evidence (such as a detailed letter from an authorized official at the third-party worksite) to establish that the beneficiary will perform services in a specialty occupation at the third-party worksite(s), and that the petitioner will have an employer-employee relationship with the beneficiary. *See* new 8 CFR 214.2(h)(4)(iv)(C).

If submitting contracts, the petitioner should include both the master services agreement and the accompanying work order(s), statement(s) of work, or other similar legally-binding agreements under different titles. These contracts should be signed by an authorized official of the third-party entity that will use the beneficiary's services. In general, the master services agreement (also commonly called a supplier agreement) sets out the essential contract terms and provides the basic framework for the overall relationship between the parties.[107] The work order or statement of work provides more specific information, such as the scope of services to be performed, details about the services, and the allocation of responsibilities among the parties.[108] The petitioner may also submit a detailed letter signed by an authorized official of the ultimate end-client company or companies where the beneficiary will actually work. Other types of corroborating evidence may include technical documentation, milestone tables, marketing analyses, cost-benefit analyses, brochures, and funding documents, insofar as this evidence corroborates that the petitioner will have an employer-employee relationship with the beneficiary, and that the beneficiary will perform services in a specialty occupation at the third-party worksite(s). Overall, the totality of the evidence submitted by the petitioner must be detailed enough to provide a sufficiently comprehensive view of the work available and substantiate, by a preponderance of the evidence, the terms and conditions under which the work will be performed. Documentation that merely sets forth the general obligations of the parties to the agreement, or which do not provide specific information pertaining to the actual work to be performed, would generally be insufficient.[109]

Further, in cases where the beneficiary is staffed to a third-party, the submitted corroborating documents should generally demonstrate the requirements of the position as imposed by the third-party entity (commonly referred to as the ''end-client'') that will use the beneficiary's services. As noted in *Defensor* v. *Meissner,* if only the petitioner's requirements are considered, ''then any beneficiary with a bachelor's degree could be brought into the United States to perform work in a non-specialty occupation, so long as that person's employment was arranged through an employment agency that required all [staffed workers] to have bachelor's degrees.'' [110] This result would be completely opposite of the plain purpose of the statute and regulations, which is to limit H–1B visas to positions which require specialized education to perform duties that require theoretical and practical application of a body of highly specialized knowledge.[111] However, not all third-party placements would necessarily require such evidence. For example, where the beneficiary is placed at a third-party's worksite, but performs work as part of a team of the petitioner's employees, including an on-site supervisor employed by the petitioner and who manages the work of the petitioner's employees, the requirements of the position as established by the petitioner may be determinative. USCIS will make the determination as to whether the requirements of the petitioner or third-party entity are controlling on a case-by-case basis, taking into consideration the totality of the relevant circumstances, as described above.

Finally, new 8 CFR 214.2(h)(4)(iv)(C) will also state that, in accordance with 8 CFR 103.2(b) and 214.2(h)(9), USCIS may request copies of contracts, work orders, or other similar corroborating evidence on a case-by-case basis in all cases, regardless of where the beneficiary will be placed. While USCIS already has general authority to request any document it deems necessary, this additional provision will make it clear that USCIS has authority to specifically request contracts and other similar evidence. This provision will apply to any H–1B petition, including a petition where the petitioner indicates that the beneficiary will exclusively work in-house. For example, if a petitioner indicates that the beneficiary will develop system software for a client but will perform such work exclusively at the petitioner's premises, USCIS may request a copy of the client contract or other corroborating evidence to confirm that the relevant work exists to ensure that the beneficiary will be employed in a specialty occupation.

E. Maximum Validity Period for Third-Party Placements

While DHS recognizes that third-party arrangements may generally be part of a legitimate business model, this business model presents more challenges in the context of the H–1B program and USCIS' ability to better ensure eligibility and compliance. Accordingly, DHS will

[106] *See* Part II.A. above, for descriptions of program violations and other issues arising with third-party placements. *See also* 144 Cong. Rec. E2323–01, E2323, 1998 WL 785735 (stating ''[t]he employers most prone to abusing the H–1B program are called 'job contractors' or 'job shops'. Much, or all, of their workforces are composed of foreign workers on H–1B visas. Many of these companies make no pretense of looking for American workers and are in business to contract their H–1Bs out to other companies. The companies to which the H–1Bs are contracted benefit in that the wages paid to the foreign workers are often well below what comparable Americans would receive. Also, the companies don't have to shoulder the obligations of being the legally recognized employers-the job contractors/shops remain the official employers'') (statement of Rep. Lamar Smith, then chairman of the Subcommittee on Immigration and Claims).

[107] *See* § 49:35. Contract scope—Master services agreement, 3 Successful Partnering Between Inside and Outside Counsel § 49:35.

[108] *See* § 49:37. Contract scope—Statements of work, 3 Successful Partnering Between Inside and Outside Counsel § 49:37.

[109] When requested evidence may contain trade secrets, for example, the petitioner may redact or sanitize the relevant sections to provide a document that is still sufficiently detailed and comprehensive, yet does not reveal sensitive commercial information. Although a petitioner may always refuse to submit confidential commercial information if deemed too sensitive, the petitioner must also satisfy the burden of proof. *Cf. Matter of Marques,* 16 I&N Dec. 314, 316 (BIA 1977) (''The respondent had every right to assert his claim under the Fifth Amendment. However, in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application for discretionary relief.'').

[110] 201 F.3d at 387–88.

[111] *Id.*

set a 1-year maximum validity period for all H–1B petitions in which the beneficiary will be working at a third-party worksite. *See* new 8 CFR 214.2(h)(9)(iii)(A)(*1*). To make the determination of whether a beneficiary will be working or placed at a third-party worksite, USCIS will rely on information contained in the H–1B petition and any accompanying LCA, which must identify each worksite where the beneficiary will work and the name of any third-party entity (secondary entity) at each worksite.[112]

Although the maximum period of authorized admission for an H–1B nonimmigrant has been established by Congress in section 214(g)(4) of the INA, 8 U.S.C. 1184(g)(4), Congress did not specify the validity period for an approved H–1B visa petition. Congress authorized DHS to promulgate regulations setting the validity period, including a range of validity periods not to exceed the maximum period of authorized admission. *Id.* In relevant part, section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), states, ''the admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe . . . .'' *See also* section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1) (''The question of importing any alien as [an H–1B nonimmigrant] in any specific case or specific cases shall be determined by [DHS] . . . upon petition of the importing employer . . . . The petition shall be in such form and contain such information as [DHS] shall prescribe.''). Under current regulations at 8 CFR 214.2(h)(9)(iii), the maximum validity period an H–1B petition may be approved is ''up to three years,'' which necessarily allows for lesser periods as well. USCIS has an established practice of approving H–1B petitions for less than 3 years for various reasons, such as to conform to the dates of the accompanying LCA. *See id.* Further, DHS regulations already limit the validity period to 1 year in cases of temporary licensure. *See* 8 CFR 214.2(h)(4)(v)(C). Likewise, DHS will now limit the validity period for third-party placement petitions to a maximum of 1 year.

DHS believes that the 1-year limit is reasonable given the nature of third-party placements. In general, the nature of contracting work leads to beneficiaries being more transient, as well as greater potential for changes to the terms and conditions of employment. Specifically, these are situations where the petitioner is not the end-user of the H–1B worker's services, and the beneficiary performs work for another entity at that other entity's worksite. DHS believes that enhanced monitoring of compliance is valuable and needed to ensure that the beneficiary is being employed consistent with the terms and conditions of the petition approval.[113] The fact that 6 to 12 month work orders are common in petitions involving third-party placements, based on USCIS' program experience and review of evidence in such cases,[114] supports DHS's belief that limiting the validity period to up to one year is reasonable as it more closely aligns with the length of time that a beneficiary would generally be assigned under a particular work order. It is also common based on USCIS' program experience that, despite the requirement that the petitioner must file an amended or new H–1B petition with the corresponding LCA when there is a material change in the terms and conditions of employment,[115] once a certain work order expires, a petitioner may obtain another work order under changed terms and conditions, including a different work location, or even assign the beneficiary to a different client, without timely filing the required amended or new petition. Such unaccounted changes increase the risk of violations of H–1B program requirements. DHS believes that continuing to approve third-party petitions for longer periods of time, including the maximum three-year validity period, would greatly diminish USCIS' ability to properly monitor program compliance in cases where fraud and abuse are more likely to occur.

DHS considered an alternative of limiting validity periods only when the beneficiary would ''primarily'' work at a third-party worksite. DHS believes that this alternative would allow petitioners to easily avoid the limited validity period provision. For example, if ''primarily'' were defined to mean more than half of the time, the petitioner could claim that a beneficiary would not work 51% of the time (and thus not ''primarily'') at a third-party worksite to circumvent this limitation. This would undermine the effectiveness of the rule. It would also create additional burdens on DHS in that it would require adjudicators to review and evaluate evidence regarding where a beneficiary would ''primarily'' be placed. Further, DHS believes that excluding any location that would not require an LCA from the definition of ''worksite'' provides sufficient flexibility in the application of this rule.[116] Therefore, DHS rejected the alternative of limiting validity periods only when the beneficiary would ''primarily'' work at a third-party worksite.

DHS believes that limiting approvals for third-party placement petitions to a maximum of 1 year will allow the agency to more consistently and thoroughly monitor a petitioner's and beneficiary's continuing eligibility, including whether the beneficiary has maintained H–1B status, whether the beneficiary's position remains a specialty occupation (*e.g.,* whether the terms of the contract or placement have changed), and whether any changes in the nature of the placement interfere with the necessary employer-employee relationship between the petitioner and the beneficiary, through the adjudication of more frequent petitions

[112] The Labor Condition Application for H–1B, H–1B1 and E–3 Nonimmigrant Workers Form ETA–9035CP—General Instructions for the 9035 & 9035E, defines ''secondary entity'' as ''another entity at which or with which LCA workers will be placed during the period of certification.'' *See https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Form%20ETA-9035CP%20Instructions.pdf.*

[113] This includes, among other terms and conditions, that the petitioner is maintaining the required employer-employee relationship with the beneficiary. Enhanced monitoring of the employer-employee relationship is particularly important in cases where a staffing company uses H–1B workers to fill positions previously occupied by the petitioner's in-house employees.

[114] *See, e.g., Matter of I–S–S- LLC,* Appeal of California Service Center Decision Form I–129, Petition for a Nonimmigrant Worker, 2017 WL 959844, at *5 (the Petitioner stated in its support letter that ''industry convention is to issue work orders for a short duration and continue extending them through project completion.''); *Matter of K–T-, Inc.* Appeal of Vermont Service Center Decision Form I–129, Petition for a Nonimmigrant Worker, 2019 WL 1469913, at *4 (the Petitioner asserted that contract extensions for six-month intervals are common within the IT consulting industry); (Identifying Information Redacted by Agency) Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. S 1101, 2013 WL 4775077, at *8 (on appeal, counsel states that in the petitioner's industry, it is standard to issue work orders or statements of work for short-term project, which typically last for six to nine months, and that it ''is neither typical nor normal for a company to have a [statement of work] that covers a three-year period of time.'').

[115] *See* 8 CFR 214.2(h)(2)(i)(E) (requiring that a petitioner file an amended or new petition to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition), (h)(11)(i)(A) (requiring the petitioner to ''immediately notify the [agency] of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility''); *Matter of Simeio Solutions, LLC,* 26 I&N Dec. 542, 547 (AAO 2015).

[116] For example, DOL's definition of worksite (which DHS adopts) excludes locations where an H–1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location, such as jobs that are peripatetic in nature. *See* 20 CFR 655.715.

requesting an extension of status.[117] Additionally, it will reduce the potential for employer violations. Based on the agency's experience in administering the H–1B program, significant employer violations, including placing beneficiaries in non-specialty occupation jobs, may be more likely to occur when petitioners place beneficiaries at third-party worksites.[118] In many instances, the relationship between the petitioning employer and the H–1B beneficiary is more attenuated when the beneficiary is working at a third-party worksite. Petitioners who contract H–1B workers out to another company at a third-party worksite generally have less visibility into the actual work being performed, including whether it is the appropriate work for a specialty occupation, the hours worked, and the relationship between the beneficiary and his or her on-site supervisor. As the GAO stated in its 2011 report to Congress, DOL's Wage and Hour investigators reported that a large number of the complaints they received were related to the activities of staffing companies, where the H–1B beneficiary is placed at a third-party worksite.[119]

DHS believes that fraud and abuse is more likely to occur in cases involving third-party placements, as evidenced by the higher rate of noncompliance in those cases. Noncompliance is determined when an immigration officer conducts a compliance review to ensure that the petitioner (employer) and beneficiary (job applicant or other potential employee) follow the terms and conditions of their petition.[120] This process includes reviewing the petition and supporting documents, researching information in public records and government systems, and, where possible, interviewing the petitioner and beneficiary through unannounced site visits.[121] DHS analyzed a sampling of H–1B petitions filed during FYs 16–19 (through March 27, 2019) and found that the noncompliance rate for petitioners who indicated the beneficiary works at an off-site or third-party location is much higher compared to worksites where the beneficiary does not work off-site (21.7 percent vs 9.9 percent).[122] DHS believes that limiting the maximum validity period for petitions where beneficiaries are placed at third-party worksites is reasonable given this significantly higher noncompliance rate, and so will also encourage compliance with the regulations and improve the program's overall integrity.

When approving an H–1B petition involving third-party placement, USCIS will generally consider granting the maximum validity period of 1 year, barring a separate consideration consistent with the controlling statutes and DHS regulations (such as the beneficiary reaching the 6-year maximum period of authorized admission pursuant to section 214(g)(4) of the INA, and not being eligible for an exemption from that 6-year limit) compelling a shorter approval period. This general practice will have the added benefit of providing petitioners who provide sufficient evidence a degree of certainty with respect to what validity period to request and to expect, if approved. If a petitioner indicates in the H–1B petition or LCA that the beneficiary will be working at a third-party worksite, then the maximum validity period the petitioner should request is 1 year. And if USCIS approves such petition for the maximum period of 1 year after making a determination that the petitioner has met its burden of proof, then there should be no reason to dispute the length of the validity period since it is set by regulation.[123]

As with any petition requesting an extension of stay, a petition requesting a 1-year extension of stay for a beneficiary who will work at a third-party worksite may be accompanied by either a new, or a photocopy of the prior, LCA from DOL that the petitioner continues to have on file, provided that the LCA is still valid for the period of time requested and properly corresponds to the petition. *See* 8 CFR 214.2(h)(15)(ii)(B). In this sense, a prior LCA is still valid if the validity period does not expire before the end date of the extension petition's requested validity period.[124] However, note that a new LCA is required if there are any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. *See* 8 CFR 214.2(h)(2)(i)(E) (requiring that a petitioner file an amended or new petition to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition, and that ''this requirement includes a new labor condition application'').

DHS recognizes that new 8 CFR 214.2(h)(9)(iii)(A)(*1*) will require those affected petitioners to submit extension petitions more frequently, thereby incurring more filing costs. DHS further recognizes that some of these affected petitioners may incur significantly higher filing costs with each extension petition, namely, the 9–11 Response and Biometric Entry-Exit Fee (Pub. L. 114–113 Fee) of $4,000.[125] If the Fee Schedule Final Rule takes effect, the Public Law 114–113 Fee would apply to any petitioner filing an H–1B petition that employs 50 or more employees in the United States if more than 50 percent of the petitioner's employees in the aggregate are in H–1B, L–1A or L–1B nonimmigrant status, including filing an extension of stay request.[126] DHS recognizes the increased cost on this population of affected petitioners, but believes this increased cost is justified due to the importance of better ensuring compliance with the terms and conditions of the petition approval in these instances, as explained above. Additionally, nothing in this rulemaking limiting the maximum

[117] The approval of a new or amended petition for a beneficiary placed at a third-party worksite will also be limited to a maximum of 1 year. *See* 8 CFR 214.2(h)(2)(i)(E); *see also Matter of Simeio Solutions, LLC, supra at* 547.

[118] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Research Division (2019). Summary of H–1B Site Visits Data (showing a higher rate of noncompliance for petitioners who indicated the beneficiary works at an off-site or third-party location compared to worksites where the beneficiary does not work off-site). *See also, e.g.,* U.S. Gov't Accountability Office, GAO–11–26, H–1B Visa Program: Reforms are Needed to Minimize the Risks and Costs of Current Program (2011) (describing the lack of accountability and types of common violations for staffing companies).

[119] GAO–11–26, *supra.*

[120] *See* U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Administrative Site Visit and Verification Program* (last updated Sept. 9, 2019), *https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program* (last visited Sept. 18, 2020).

[121] *Id.*

[122] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Research Division (2019). Summary of H–1B Site Visits Data.

[123] Note, however, that a petitioner is not precluded from filing a motion or appeal.

[124] Because the maximum validity period of a certified LCA is three years, *see* 20 CFR 655.750(a), DHS recognizes that the validity date of the LCA and the requested validity date in the extension petition will not always match. DHS will accept a prior LCA as long as that LCA is still valid, as explained above.

[125] Consolidated Appropriations Act, 2016, Public Law 114–113, December 18, 2015, 129 Stat 2242.

[126] Presently, the Public Law 114–113 fee is required for H–1B petitions filed by certain petitioners only when the Fraud Fee also applies, meaning that it is not currently required for H–1B extensions. The Fee Schedule Final Rule will require payment of the Public Law 114–113 fee for all H–1B petitions filed by those petitioners, unless the petition is an amended petition without an extension of stay request. While implementation of the Fee Schedule Final Rule has been enjoined, DHS nevertheless estimates costs of this interim final rule based on the fees that will be required if the injunction is lifted and the Fee Schedule Final Rule takes effect so as to avoid underestimating potential costs of this interim final rule. *See supra* note 9.

validity period to 1 year for H–1B aliens placed at third-party worksites would directly result in such alien worker being unable to obtain the statutory maximum six years of H–1B status. Instead, through this rulemaking, petitioners with this business model will have to pay more filing costs for the continued use of H–1B workers than they currently do. It is valuable to note that the amount and parameters of the Public Law 114–113 Fee is mandated by Congress. In creating the Public Law 114–113 Fee, the goal was to impose this additional fee on employers that overly rely on H–1B or L nonimmigrant workers.[127]

F. Written Explanation for Certain H–1B Approvals

DHS is amending its regulations to require its issuance of a brief explanation when an H–1B nonimmigrant petition is approved but USCIS grants an earlier end validity date than requested by the petitioner. *See* new 8 CFR 214.2(h)(9)(i)(B). Providing such an explanation will help ensure that the petitioner is aware of the reason for the limited validity approval.

G. Revising the Itinerary Requirement for H–1B Petitions

DHS is revising the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) (for service or training in more than one location) to specify that this particular provision will not apply to H–1B petitions. *See* new 8 CFR 214.2(h)(2)(i)(B). DHS is making this revision in response to a recent court decision specific to H–1B petitions.[128] The itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) will still apply to other H classifications. In addition, DHS will still apply the itinerary requirement at 8 CFR 214.2(h)(2)(i)(F)(*1*) for H–1B petitions filed by agents.

H. Site Visits

Pursuant to its general authority under sections 103(a) and 287(b) of the INA, 8 U.S.C. 1103(a) and 1357(b), and 8 CFR 2.1, USCIS conducts inspections, evaluations,-verifications, and compliance reviews to ensure that an alien is eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. These inspections and other compliance reviews may be conducted telephonically or electronically, as well as through physical on-site inspections (site visits). The existing authority to conduct inspections is vital to the integrity of the immigration system as a whole, including the H–1B program specifically, and protecting American workers. In this rule, DHS is adding regulations specific to the H–1B program to codify its existing authority and clarify the scope of inspections—particularly on-site inspections—and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections.[129] *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*). The authority of USCIS to conduct on-site inspections or other compliance reviews to verify information does not relieve the petitioner of its burden of proof or responsibility to provide information in the petition (and evidence submitted in support of the petition) that is complete, true, and correct.

In 2008, USCIS conducted a review of 246 randomly selected H–1B petitions filed between October 1, 2005, and March 31, 2006, and found violations ranging from ''document fraud to deliberate misstatements regarding job locations, wages paid, and duties performed'' in 20.7 percent of the cases reviewed.[130] Following this, in July 2009, USCIS started the Administrative Site Visit and Verification Program as an additional way to verify information in certain visa petitions. Under this program, USCIS Fraud Detection and National Security (FDNS) officers make unannounced site visits to collect information as part of a compliance review. A compliance review verifies whether petitioners and beneficiaries are following the immigration laws and regulations that are applicable in a particular case. This process includes researching information in government databases, reviewing public records and evidence accompanying the petition, and interviewing the petitioner and beneficiary.[131] It also includes conducting site visits.

In addition, beginning in 2017, USCIS began taking a more targeted approach in conducting site visits related to the H–1B program. USCIS started focusing on H–1B-dependent employers (those who have a high ratio of H–1B workers as compared to U.S. workers, as defined in section 212(n) of the INA), cases in which USCIS cannot validate the employer's basic business information through commercially available data, and employers petitioning for H–1B workers who work off-site at another company or organization's location.

The site visits conducted by USCIS through the Administrative Site Visit and Verification Program have uncovered a significant amount of noncompliance in the H–1B program. From Fiscal Year (FY) 2013 through FY 2016, USCIS conducted 30,786 H–1B compliance reviews. Of those, 3,811 (12 percent) were found to be noncompliant.[132] From FY 2016 through March 27, 2019, USCIS conducted 20,492 H–1B compliance reviews and found 2,341 (11.4 percent) to be noncompliant.[133] Further, DHS analyzed the results of the compliance reviews from FY16–FY19 and found that the noncompliance rate for petitioners who indicated the beneficiary works at an off-site or third-party location is much higher compared to worksites where the beneficiary does not work off-site (21.7 percent versus 9.9 percent, respectively).[134]

Site visits are important to maintaining the integrity of the H–1B program and in detecting and deterring fraud and noncompliance with H–1B program requirements.[135] By better

[127] 85 FR at 46867.

[128] *See ITServe,* 2020 WL 1150186, at *21 (''the itinerary requirement in the INS 1991 Regulation [codified at 8 CFR 214.2(h)(2)(i)(B)] . . . has been superseded by statute and may not be applied to H–1B visa applicants'').).

[129] Although DHS is only revising H–1B regulations at this time, DHS reiterates that it has the same authority to conduct on-site inspections and other compliance reviews for other nonimmigrant and immigrant categories.

[130] Written Testimony of Donald Neufeld, Associate Director, Service Center Operations Directorate, USCIS (March 31, 2011), available at *https://www.uscis.gov/sites/default/files/USCIS/Resources/Congress/Testimonies/2011/testimony_2011331_H-1B_Neufeld.pdf.*

[131] Outside of the Administrative Site Visit and Verification Program, USCIS conducts forms of compliance review in every case, whether it is by researching information in relevant government databases or by reviewing public records and evidence accompanying the petition.

[132] USCIS, Fiscal Year 2017 Report to Congress: *H–1B and L–1A Compliance Review Site Visits,* Fraud Detection and National Security Compliance Review Data (October 1, 2012 to September 30, 2016), p. 7 (January 17, 2018), available at *https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20H-1B%20and%20L-1A%20Compliance%20Review%20Site%20Visits.pdf* (last visited Aug. 11, 2020).

[133] Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Research Division (PRD) (2019). Summary of H–1B Site Visits Data.

[134] *Id.*

[135] DHS acknowledges the 2017 Office of Inspector General report that addressed concerns with the H–1B site visit program and made recommendations for improvement. OIG–18–03, *supra.* Since the issuance of this report, USCIS has greatly improved its site visit program pursuant to the report's recommendations, such that USCIS believes the concerns addressed in the 2017 report no longer pertain. Specifically, the report's assessment that ''USCIS site visits provide minimal assurance that H–1B visa participants are compliant and not engaged in fraudulent activity'' no longer pertains. As of March 31, 2019, the recommendations have been resolved. *See* DHS, Office of Inspector General, DHS Open Unresolved Recommendations Over Six Months Old, as of March 31, 2019, *https://www.oig.dhs.gov/sites/default/files/DHS-Open-Recommendations-As-Of-033119_053019.pdf* (not listing OIG–18–03 as an ''open unresolved'' report). DHS maintains that site visits, generally, are an important and effective tool

Continued

ensuring program integrity and detecting and deterring fraud and noncompliance, DHS will better ensure that the H–1B program is used appropriately and that the economic interests of U.S. workers are protected. Therefore, as noted above, DHS is adding regulations specific to the H–1B program to set forth the scope of on-site inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections. The new regulations make clear that inspections may include, but are not limited to, an on-site visit of the petitioning organization's facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the H–1B petition, such as facts relating to the petitioner's and beneficiary's H–1B eligibility and compliance. *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*)(*i*). The new regulation also clarifies the possible scope of an inspection, which may include the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable. DHS believes that the ability to inspect various locations is critical since the purpose of a site inspection is to confirm information related to the H–1B petition, and any one of these locations may have information relevant to a given petition.

The new regulation also states that, if USCIS is unable to verify facts related to an H–1B petition or to compliance with H–1B petition requirements due to the failure or refusal of the petitioner or third-party to cooperate with a site visit,[136] then such failure or refusal may be grounds for denial or revocation of any H–1B petition for H–1B workers performing services at the location or locations which are a subject of inspection, including any third-party worksites. *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*)(*iii*). This new provision will put petitioners on notice of the specific consequences for noncompliance, whether by them or by a contractual third-party. It has long been established that, in H–1B visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought.[137] If USCIS conducts a site visit in order to verify facts related to the H–1B petition or to verify that the beneficiary is being employed consistent with the terms of the petition approval, and is unable to verify relevant facts and otherwise confirm compliance, then DHS believes that it would be reasonable to conclude that the petitioner will not have met its burden of proof and the petition may be properly denied or revoked. This would be true whether the unverified facts relate to a petitioner worksite or a third-party worksite at which a beneficiary has been or will be placed by the petitioner. It would also be true whether the failure or refusal to cooperate is by the petitioner or a third-party.

In addition, with respect to a failure or refusal to cooperate by a third-party, DHS believes this provision is reasonable because the third-party is benefiting from the services performed by the H–1B worker at its location. The third-party should not be permitted to benefit from the services performed by the H–1B worker if it simultaneously refuses to allow DHS access to verify that those services are being performed in accordance with the law. Additionally, if this provision did not apply to third-party worksites, such that a third-party's failure to cooperate with a site visit could not be grounds for denial or revocation, then this would create an unfair loophole with respect to third-party worksites, which could be exploited by unscrupulous petitioners and undermine the integrity of the H–1B program.

As with all other new provisions in this interim final rule, new 8 CFR 214.2(h)(4)(i)(B)(*7*)(*iii*) will apply to petitions filed on or after the effective date of the regulation. If, for example, a third-party refuses to cooperate with a site visit conducted after the effective date of the regulation, but in connection with a petition that was filed before the effective date of the regulation, USCIS will make a final decision on that petition under the legal framework in effect at the time the petition was filed.

I. Severability

Finally, DHS has added a clause to clarify its intent with respect to the provisions being amended or added by this rule; DHS intends that all the provisions covered by this rule function separately from one another and be implemented as such. Therefore, in the event of litigation or other legal action preventing the implementation of some aspect of this rule, DHS intends to implement all others to the greatest extent possible.

VI. Statutory and Regulatory Requirements

A. Administrative Procedure Act

The COVID–19 pandemic is an unprecedented ''economic cataclysm.'' [138] This is one of the direst national emergencies the United States has faced in its history. In just one week, unemployment claims skyrocketed from ''a historically low number'' to the most extreme unemployment ever recorded: Nearly quintuple the previous worst-ever level of unemployment claims, observed during the 1982 recession.[139] DHS must respond to this emergency immediately.

Accordingly, this rule is being issued without prior notice and opportunity to comment pursuant to 5 U.S.C. 553(b)(B). The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B). The good cause exception for forgoing notice and comment rulemaking ''excuses notice and comment in emergency situations, . . . or where delay could result in serious harm.'' *Jifry* v. *FAA,* 370 F.3d 1174, 1179 (D.C. Cir. 2004). Although the good cause exception is ''narrowly construed and only reluctantly countenanced,'' the Department has appropriately invoked the exception in this case, for the reasons set forth below.[140]

The pandemic emergency's economic impact is an ''obvious and compelling fact'' that justifies good cause to forgo regular notice and comment. Such good cause is ''justified by obvious and compelling facts that can be judicially noticed.'' *Mobil Oil Corp.* v. *Dep't of Energy,* 728 F.2d 1477, 1490 (Temp. Emer. Ct. App. 1983).

The reality of the COVID–19 national emergency is omnipresent and

for the H–1B program. The new site visit provisions at 8 CFR 214.2(h)(4)(i)(B)(*7*)(*i*) will directly support USCIS' continued efforts to strengthen the effectiveness of the site visit program and the integrity of the H–1B program overall.

[136] In the context of a FDNS field inquiry, failure to cooperate means that contact with the petitioner or third party was made, the FDNS officer had the chance to properly identify her/himself, and the petitioner or third party refused to speak to the officer or agreed to speak, but did not provide the information requested within the time period specified.

[137] *See* section 291 of the INA, 8 U.S.C. 1361; *Matter of Otiende,* 26 I&N Dec. 127, 128 (BIA 2013).

[138] Ben Casselman et al., *New Data Shows Staggering Toll of Outbreak,* N.Y. Times, Mar. 27, 2020, at A1.

[139] *Front Page of the New York Times,* N.Y. Times, Mar. 27, 2020, at A1; Casselman et al., *supra* note 140, at A1. *See also id.* tbl. 1.

[140] *Tenn. Gas Pipeline Co.* v. *FERC,* 969 F.2d 1141, 1144 (D.C. Cir. 1992) (quoting *New Jersey* v. *EPA,* 626 F.2d 1038, 1046 (D.C. Cir.1980)).

undeniable. In addition to ''obvious and compelling facts'' known to virtually all Americans during this pandemic, multiple executive orders and declarations further establish the fact of a ''crisis,'' ''fiscal calamity,'' and unprecedented national emergency. *Sorenson Commc'ns Inc.* v. *F.C.C.,* 755 F.3d 702, 707 (D.C. Cir. 2014) (''Though no particular catechism is necessary to establish good cause, something more than an unsupported assertion is required.''). Good cause to forgo notice and comment in this instance is consistent with the principle that ''use of these exceptions by administrative agencies should be limited to emergency situations.'' *Am. Fed'n of Gov't Emp., AFL–CIO* v. *Block,* 655 F.2d 1153, 1156 (D.C. Cir. 1981). ''Emergencies, though not the only situations constituting good cause, are the most common.'' *Riverbend Farms, Inc.* v. *Madigan,* 958 F.2d 1479, 1484 n.2 (9th Cir. 1992).

On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act in response to COVID–19.[141] On March 13, 2020, President Trump declared a National Emergency concerning the COVID–19 outbreak, retroactive to March 1, 2020, to control the spread of the virus in the United States.[142] On June 4, the President issued the E.O. 13927 Accelerating the Nation's Economic Recovery from the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities, which among other things urges agencies to ''take all appropriate steps to use their lawful emergency authorities and other authorities to respond to the national emergency and to facilitate the Nation's economic recovery . . . [including] other actions . . . that will strengthen the economy and return Americans to work.'' [143] On June 22, 2020, the President issued a *Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak.*[144] On June 29, 2020, the President issued further clarification in a *Proclamation on Amendment to Proclamation 10052.*[145] Subject to certain exceptions, the proclamation, as amended, restricts the entry of certain immigrants and nonimmigrants, including certain H–1B nonimmigrants, into the United States through December 31, 2020 as their entry would be detrimental to the interests of the United States. The proclamation notes that ''between February and April of 2020 . . . more than 20 million United States workers lost their jobs in key industries where employers are currently requesting H–1B and L workers to fill positions.'' While the proclamation only restricts new entries (with certain exceptions) by aliens who do not have H–1B visas or other listed travel documents on the effective date of the proclamation, Section 5 of the proclamation directs the Secretary of Homeland Security to ''as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action regarding . . . ensuring that the presence in the United States of H–1B nonimmigrants does not disadvantage United States workers.'' The issuance of this interim final rule to strengthen the integrity of the H–1B nonimmigrant visa program is thus also consistent with the aims of the new proclamation.

H–1B workers comprise a much larger share of the U.S. labor market than the 65,000 annual numerical limitations and therefore have the potential to impact the availability of job opportunities for similarly situated U.S. workers who may be competing for jobs with H–1B workers as well as their wages and working conditions, particularly in industries where H–1B workers are predominantly employed. In recent years, the overwhelming majority of H–1B petitions have been filed for positions in the one industry, the IT industry—the share of H–1B workers in computer-related occupations grew from 32 percent in FY 2003 to 56 percent in FY2019.[146] The 5-year average annual number of H–1B petitions approved outside the numerical limitations established by Congress, which includes petitions for continuing H–1B workers who were previously counted toward an annual numerical allocation and who have time remaining on their 6-year period of authorized admission, *see* INA section 214(g)(7), 8 U.S.C. 1184(g)(7), was approximately 214,371 based on DHS data.[147] As of September 30, 2019, the total H–1B authorized-to-work population was approximately 583,420.[148] The total H–1B authorized-to-work population, rather than the yearly cap, is more indicative of the scope of the H–1B program and the urgent need to strengthen it to protect the economic interests of U.S. workers. This is particularly urgent given the exceptionally high unemployment rate in the United States—10.2 percent as of August 7, 2020.[149] In addition to high unemployment generally, there has been a significant jump in unemployment due to COVID–19 between August 2019 and August 2020 in two industry sectors where a large number of H–1B workers are employed, from 4.7 percent to 8.6 percent in the Information sector, and from 3.2 to 7.2 percent in the Professional and Business Services sector.[150]

The changes being made through this rule clarify statutory requirements and limit the potential for fraud and abuse in the H–1B program, thereby protecting the wages, working conditions, and job opportunities of U.S. workers, while continuing to provide U.S. employers with access to qualified workers consistent with congressional intent. Namely, this rule clarifies the requirements for petitioners to prove that H–1B workers will be employed in a specialty occupation, as required by 8 U.S.C. 1182(i). This requirement is

[141] HHS, Determination that a Public Health Emergency Exists, *https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx* (last reviewed Aug. 11, 2020). *See also* HHS, Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020).

[142] Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID–19) Outbreak, 85 FR 15337 (Mar. 18, 2020). *See also* White House, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak, *https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/* (last visited Aug. 11, 2020).

[143] *See* Executive Order 13927, *Accelerating the Nation's Economic Recovery from the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities,* 85 FR 35165, sec. 2 (Jun. 9, 2020).

[144] Proclamation 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,* 85 FR 38263 (Jun. 25, 2020).

[145] Proclamation 10054 of June 29, 2020, Amendment to Proclamation 10052, 85 FR 40085 (Jul. 2, 2020).

[146] *See supra* note 1.

[147] Office of Policy and Strategy, Policy Research Division (PRD) Claims 3 and USCIS analysis. July 29, 2020.

[148] *See supra* note 11.

[149] U.S. Dep't of Labor, Bureau of Labor Statistics, Economic News Release, *Employment Situation News Release* (Aug. 7, 2020), available at *https://www.bls.gov/news.release/archives/empsit_08072020.htm* (last visited Aug. 11, 2020).

[150] *See, e.g.,* U.S. Dep't of Labor, Bureau of Labor Statistics, Economic News Release, *Table A–14. Unemployed Persons by Industry and Class of Worker, Not Seasonally Adjusted* (last modified Sept. 23, 2020), available at *https://www.bls.gov/news.release/empsit.t14.htm* (last visited Sept. 29, 2020); United States Census Bureau, Industry and Occupation Code Lists & Crosswalks, *Census 2017 Industry List with Crosswalk,* available at *https://www.census.gov/topics/employment/industry-occupation/guidance/code-lists.html* (last visited Aug. 11, 2020). ''Information'' sector includes internet publishing and broadcasting and web search portals, and Data processing, hosting, and related services. ''Professional and Business Services, *i.e.* Professional, Scientific, and Management, and Administrative and Waste Management Services'' includes Computer systems design and related services, and Management, scientific, and technical consulting services.

intended to ensure that the H–1B classification is used as intended by Congress while ensuring that H–1B workers are not negatively affecting U.S. workers. The rule revises the definition of ''United States employer'' and defines the term ''employer-employee relationship'' to more clearly establish what it means for the petitioner to be a U.S. employer for purposes of H–1B petition eligibility. In addition, the rule limits the petition validity period for third-party placements to a maximum of 1 year. Finally, this rule includes consequences for the failure to comply with USCIS site visits—one of the key ways in which USCIS verifies information provided by the petitioner and ensures compliance with statutory and regulatory requirements. The rule makes clear that if USCIS is denied access to a worksite to conduct a site visit, USCIS can deny or revoke any H–1B petition for workers performing services at that worksite. These changes cumulatively limit the potential for fraud and abuse, particularly in third-party worksite cases, and better ensure that petitioners have insight into and a tangible connection to the work H–1B beneficiaries will be doing in order to ensure that H–1B beneficiaries will be employed by the petitioning employers in specialty occupations to fill structural skill and employment gaps in the U.S. labor force. Given exceptionally high unemployment in the United States—highest since the Great Depression,[151] including in the industries where a large share of H–1B workers is employed—these regulatory changes are urgently needed to ensure that the Nation continues toward economic recovery without disadvantaging U.S. workers.

Courts have found ''good cause'' under the APA when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. For example, an agency may rely upon the good-cause exception to address ''a serious threat to the financial stability of [a government] benefit program,'' *Nat'l Fed'n of Fed. Emps.* v. *Devine,* 671 F.2d 607, 611 (D.C. Cir. 1982), and ''[c]ourts have upheld a 'good cause' exception when notice and comment could result in serious damage to important interests. *Id.* at 611–12.

Here, delay in responding to the COVID–19 economic emergency and its cataclysmic unemployment crisis threatens a ''weighty, systemic interest'' that this rule protects: Ensuring the employment of H–1B workers is consistent with the statutory requirements for the program and thus is not disadvantaging U.S. workers. *Mack Trucks, Inc.* v. *E.P.A.,* 682 F.3d 87, 94 (D.C. Cir. 2012). Already, the impact of the COVID–19 unemployment crisis is projected to last a decade.[152] Loss or prolonged lack of employment reduces or eliminates an unemployed person's income, and therefore has the tendency to reduce that person's demand for goods and services as a consumer. This reduced demand can cause further job losses among the producers that would otherwise supply the unemployed person's demands. Therefore, the faster the United States can address high unemployment, the better it can protect future employment. But the slower unemployment recovers in the present, the longer it will languish into the future. Good cause to forego notice and comment rulemaking in this case is ''an important safety valve to be used where delay would do real harm.'' *U.S. Steel Corp.* v. *E.P.A.,* 595 F.2d 207, 214 (5th Cir. 1979). Each effort to strengthen the United States labor market for U.S. workers during this emergency, however marginal in isolation, is necessary to accomplish the goal of facilitating an economic recovery in the aggregate.

Furthermore, the relatively limited scope of this rule also conforms it to the proper application of the ''good cause'' exception. First, this rule operates as an interim rule, not yet a final rule, and thus may be subject to change in the future. ''[T]he interim status of the challenged rule is a significant factor'' favoring the good cause ''determination.'' *Mid-Tex Elec. Co-op., Inc.* v. *F.E.R.C.,* 822 F.2d 1123, 1132 (D.C. Cir. 1987). Second, the rule only affects several discrete aspects of the H–1B program, as discussed above.''[T]he less expansive the interim rule, the less the need for public comment.'' *Tennessee Gas Pipeline Co.* v. *F.E.R.C.,* 969 F.2d 1141, 1144 (D.C. Cir. 1992) (citing *AFL–CIO* v. *Block,* 655 F.2d at 1156). ''The more expansive the regulatory reach of these rules, of course, the greater the necessity for public comment.'' 655 F.2d at 1156.

Therefore, consistent with the above authorities, the Department is bypassing notice and comment requirements of 5 U.S.C. 553(b) and (c) to urgently respond to the COVID–19 resulting economic crises, including high unemployment. Instead of amending its regulations through notice and comment rulemaking which is generally a lengthy process, DHS is taking post-promulgation comments and providing a 60-day delayed effective date to ensure that the regulated public has advanced notice to adjust to these regulatory changes.

B. Executive Orders 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs, benefits, and transfers of available alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Pursuant to E.O. 12866 (Regulatory Planning and Review), the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget has determined that this is an economically significant regulatory action. However, OIRA has waived review of this regulation under E.O. 12866, section 6(a)(3)(A).

1. Summary of Economic Impacts

DHS is amending its regulations governing H–1B specialty occupation nonimmigrant workers in this interim final rule. DHS is implementing a number of revisions and clarifications to better ensure that each H–1B nonimmigrant worker will be working for a qualified petitioner and in a job which meets the statutory definition of specialty occupation, and to help protect the wages and working conditions of U.S. workers while improving the integrity of the H–1B program. This interim final rule amends the relevant sections of DHS regulations to reflect these changes.

For this analysis, DHS uses the term ''H–1B petition'' or ''Form I–129 H–1B'' to generally refer to the historical *Form I–129 (H Classification Supplement, H–1B and H–1B1 data collection)* and the planned *Form I–129H1* that may replace the historical form. Where it is more

[151] Andrew Soergel, Unemployment Highest Since Great Depression as Coronavirus Collapses Labor Market, U.S. News & World Report, May 8, 2020, *https://www.usnews.com/news/national-news/articles/2020-05-08/unemployment-highest-since-great-depression-as-coronavirus-collapses-labor-market.*

[152] *See, e.g.,* Annekin Tappe, *Unemployment rate won't recover for the next decade, CBO projects,* CNN, July 2, 2020, *https://www.cnn.com/2020/07/02/economy/congressional-budget-office-projections-economy/index.html;* Congressional Budget Office, *An Update to the Economic Outlook: 2020 to 2030* (July 2, 2020), available at *https://www.cbo.gov/system/files/2020-07/56442-CBO-update-economic-outlook.pdf* (last visited Aug. 11, 2020).

accurate to specifically refer to the Form I–129H1 that will take effect if the Fee Schedule Final Rule takes effect, DHS uses the term ''Form I–129H1.'' [153]

For the 10-year implementation period of the rule (FY2021 to FY2030), DHS estimates the annual net societal costs to be $51,406,937 (undiscounted) in FY2021, $416,212,496 (undiscounted) in FY2022, $541,795,976 (undiscounted) from FY2023 to FY2027 each year, $388,592,536 (undiscounted) from FY2028 to FY2030 each year. DHS estimates the annualized net societal costs of the rule to be $430,797,915, annualized at 3-percent and $425,277,621, annualized at 7-percent discount rates.

Table 1 provides a detailed summary of the regulatory changes and their impacts.

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS OF THE INTERIM FINAL RULE

Provision	Description of change to provision	Estimated costs of provisions	Estimated benefits of provisions
(a) Revising the regulatory definition and standards for specialty occupation so they align more closely with the statutory definition of the term.	The changes in the Form I–129H1 result in additional time to complete and file Form I–129H1 as compared to the time burden to complete the current Form I–129. The time burden will change to 4.5 hours from the current 4.0 hours. DHS applies the additional time burden to complete and file Form 1–129H1 (0.5 hours per petition).	Quantitative: Petitioners— • $24,949,861 costs annually for petitioners completing and filing Form I–129H1 petitions with an additional time burden of 30 minutes. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • By reducing uncertainty and confusion surrounding disparities between the statute and the regulations, this rule will better ensure that approvals are only granted for positions adhering more closely to the statutory definition. This rule will also result in more complete petitions and allow for more consistent and efficient adjudication decisions.
(b) Requiring corroborating evidence of work in a specialty occupation 8 CFR 214.2(h)(4)(iv).	The petitioner must establish, at the time of filing, that it has actual work in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. In addition, all H–1B petitions for beneficiaries who will be placed at a third-party worksite must submit evidence showing that the beneficiary will be employed in a specialty occupation, and that the petitioner will have an employer-employee relationship with the beneficiary. USCIS may request copies of contracts, work orders, or other similar corroborating evidence on a case-by-case basis in all cases, regardless of where the beneficiary will be placed.	Quantitative: Petitioners— • $17,963,871 in costs annually to petitioners to submit contractual documents, work orders, or similar evidence required by this rule to establish an employer-employee relationship and qualifying employment. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • Written evidentiary requirements would serve the critical purpose of informing USCIS of the terms and conditions of the work to be performed.

[153] DHS estimates the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (''Fee Schedule Final Rule''), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this rule may reflect overstated transfers, costs, and opportunity costs associated with the filing of the Form I–129.

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS OF THE INTERIM FINAL RULE—Continued

Provision	Description of change to provision	Estimated costs of provisions	Estimated benefits of provisions
(c) Codifying in regulations existing authority to conduct site visits and other compliance reviews, and clarifying consequences for failure to allow a site visit 8 CFR 214.2(h)(4)(i)(B)(7).	DHS is clarifying that inspections and other compliance reviews may include, but are not limited to, a visit of the petitioning organization's facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS considers pertinent to the petitioner's H–1B eligibility and compliance. An inspection may be conducted at locations including the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable.	Quantitative: Petitioners— • $1,042,702 annually for the total annual opportunity cost of time for worksite inspections of H–1B petitions. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— Conducting on-site inspections and other compliance reviews is critical to detecting and deterring fraud and noncompliance. Failure or refusal of the petitioner or third-party worksite parties to cooperate in a site visit or verify facts may be grounds for denial or revocation of any H–1B petition for workers performing services at locations which are a subject of inspection, including any third-party worksites.
(d) Eliminating the general itinerary requirement for H–1B petitions 8 CFR 214.2(h)(2)(i)(B).	This provision change eliminates the general itinerary requirement for H–1B petitions.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • Cost savings $4,490,968 annually. • Total cost savings over 10-year ranges. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.
(e) Limiting maximum validity period for third-party placement 8 CFR 214.2(h)(9)(iii)(A)(1).	Under current regulations at 8 CFR 214.2(h)(9)(iii), the maximum validity period an H–1B petition may be approved is "up to three years". While the maximum validity period for a specialty occupation worker is currently 3 years, this interim final rule will limit the maximum validity period to 1 year for workers placed at third-party worksites. This provision will result in more extension petitions from petitioners with beneficiaries who work at third-party worksites.	Quantitative: Petitioners— • Costs $0 in FY2021, $376,747,030 in FY2022, $502,330,510 in FY2023–FY2027 each year, $349,127,070 in FY2028–FY2030 each year for the increasing Form I–129H1 petitions to request authorization to continue H–1B employment for workers placed at third-party worksites. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • USCIS would have greater oversight for those H–1B petitions most likely to involve fraud and abuse, thereby strengthening the H–1B program.
(f) Providing a Written Explanation for Certain H–1B Limited Approvals 8 CFR 214.2(h)(9)(i).	DHS will revise the regulations to require issuance of a brief explanation when an H–1B nonimmigrant petition is approved but USCIS grants an earlier validity period end date than requested by the petitioner.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • Providing a written explanation for limited validity period will help ensure that the petitioner is aware of the reason for shorter validity periods. DHS/USCIS— • None.

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS OF THE INTERIM FINAL RULE—Continued

Provision	Description of change to provision	Estimated costs of provisions	Estimated benefits of provisions
(g) Familiarization Cost	Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule in order to fully comply with the new regulation(s).	Quantitative: Petitioners— • One-time cost of $11,941,471 in FY2021. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.	Quantitative: Petitioners— • None. DHS/USCIS— • None. Qualitative: Petitioners— • None. DHS/USCIS— • None.

In addition to the impacts summarized above, Table 2 presents the accounting statement and as required by Circular A–4.[154]

TABLE 2—OMB A–4 ACCOUNTING STATEMENT

[$, 2019 for FY2021–FY2030]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
BENEFITS				
Annualized Monetized Benefits (discount rate in parenthesis).	(3 percent) N/A	N/A	N/A	RIA.
	(7 percent) N/A	N/A	N/A	RIA.
Annualized quantified, but un-monetized, benefits.	N/A			RIA.
Unquantified Benefits	The purpose of the changes in this interim final rule is to ensure that each H–1B nonimmigrant beneficiary will be working for a qualified petitioner and in a job that meets the statutory definition of specialty occupation. In addition, these changes will strengthen U.S. worker protections while improving the integrity of the H–1B program by preventing fraud and abuse			RIA.
COSTS				
Annualized monetized costs (discount rate in parenthesis).	(3 percent) $430,797,915			RIA.
	(7 percent) $425,277,621			RIA.
Annualized quantified, but un-monetized, costs.	N/A			
Qualitative (unquantified) costs	N/A			
TRANSFERS				
Annualized monetized transfers: "on budget".	N/A	N/A	N/A	
From whom to whom?				
Annualized monetized transfers: "off-budget".	N/A	N/A	N/A	
From whom to whom?	N/A	N/A	N/A	
Miscellaneous Analyses/Category	Effects			Source Citation
Effects on state, local, and/or tribal governments.	N/A			
Effects on small businesses	N/A			
Effects on wages	N/A			
Effects on growth	N/A			

[154] White House, Office of Management and Budget, *Circular A–4 (Sept. 17, 2003)*, available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf* (last visited Aug. 11, 2020).

2. Provisions of the Interim Final Rule With Economic Impacts

The H–1B nonimmigrant visa program helps U.S. employers meet their business needs by temporarily employing foreign workers in specialty occupations. A specialty occupation is defined as an occupation that requires (1) theoretical and practical application of a body of highly specialized knowledge, and (2) the attainment of a bachelor's degree (or higher) in the specific specialty (or its equivalent) as a minimum qualification for entry into the occupation in the United States.[155] The H–1B visa program also includes workers performing services related to a Department of Defense (DOD) cooperative research and development project or coproduction project, and services of distinguished merit and ability in the field of fashion modeling.

As discussed in detail in the preamble, the purpose of the changes in the rule is to better ensure that each H–1B nonimmigrant worker will be working for a qualified petitioner and in a job that meets the statutory definition of specialty occupation. Additionally, the changes help strengthen the integrity of the H–1B program and better ensure that visas are only awarded to qualified beneficiaries and petitioners.

DHS is amending its regulations governing H–1B specialty occupation workers by providing revisions and clarifications that will better align the regulations with Congressional intent and will strengthen the integrity of the H–1B program. DHS is making the following amendments to the H–1B regulations through this interim final rule:

(a) Revising the regulatory definition and criteria for determining whether the job the H–1B beneficiary will be employed in is in a specialty occupation, so they align more closely with the statutory definition of the term;

(b) Requiring corroborating evidence of work in a specialty occupation;

(c) Codifying in regulations existing authority to conduct site visits and other compliance reviews, and consequences for failure to allow a site visit; and

(d) Eliminating the general itinerary requirement for H–1B petitions.

(e) Limiting maximum validity period for third-party placements;

(f) Providing a written explanation for certain H–1B approvals.

In the sections that follow, DHS discusses the quantified economic impacts of each provision listed above except for provision f) which has no quantifiable economic impact. Provision f) is qualitatively discussed in benefits section vi.

3. Population

In order to estimate the economic effects of this interim final rule, DHS forecasts the affected population for the ten-year period from the beginning of fiscal year (FY) 2021. The affected population is defined as the annual population of Form I–129H1[156] petitions for specialty occupation workers. DHS assumes that there are three primary components that determine the population forecast: The historical number of H–1B petitions, the expected change in the number of petitions due to macroeconomic changes, and the expected changes in the number of petitions due to provisions in this interim final rule.

The historical number of H–1B petitions is summarized in Table 3 below. In each year between FY2015 and FY2019, DHS received between 123,203 and 141,190 initial H–1B petitions, with an annual average of 133,451 initial petitions received. In addition, DHS received between 235,566 and 279,946 H–1B extension petitions, with an annual average of 268,405 extension petitions received. Ignoring macroeconomic effects and any effects of this interim final rule, DHS does not expect the number of initial petitions approved to trend upwards or downwards. This is borne out in the data: Neither the annual number of initial petitions nor the annual number of extension petitions exhibit a trend; both series rise and fall over the five-year historical period. Absent changes in macroeconomic conditions and changes due to this interim final rule, DHS would expect similar numbers in FY2021 to FY2030.

[155] *See* INA 214(i)(l), 8 U.S.C. 1184(i)(l).

[156] *See supra* notes 9 and 153.

TABLE 3—TOTAL RECEIPTS, APPROVALS OF FORM I–129 H–1B BY TYPE OF PETITION, FY 2015 TO FY 2019

Fiscal year	Number of petitions received	Number of initial petitions received	Number of extension petitions received	Number of petitions approved	Number of initial petitions approved	Number of extension petitions approved
	A = B + C	B	C	D = E + F	E	F
2015	368,160	132,594	235,566	238,956	91,267	147,689
2016	398,800	129,098	269,702	304,911	87,765	217,146
2017	403,149	123,203	279,946	326,798	82,041	244,757
2018	418,596	141,190	277,406	298,625	76,747	221,878
2019	420,574	141,170	279,404	365,199	124,816	240,383
Total	2,009,279	667,255	1,342,024	1,534,489	462,636	1,071,853
5-yr average	401,856	133,451	268,405	306,898	92,527	214,371

Source: Office of Policy and Strategy, Policy Research Division (PRD), Claims 3 and USCIS analysis. July 29, 2020.

The number of H–1B petition submissions is partially dependent on macroeconomic conditions. For example, a drastic improvement in U.S. economic conditions may result in higher demand from U.S. employers for H–1B specialty occupation workers. DHS acknowledges future uncertainty surrounding the impacts of the COVID pandemic on the U.S. economy but does not expect this to significantly alter the affected population described. Consequently, the impacts of this interim final rule are evaluated based on an assumed continuation of the conditions observed in the historical data period (FY2015–2019) over the projected period (FY2021–2030). Thus, DHS does not incorporate any macroeconomic changes in its population forecast.

Finally, the number of H–1B petitions may also change due to behavioral responses to provisions in the interim final rule. For example, provisions that increase filing costs may discourage potential petitioners from filing, and provisions that decrease the term of the H–1B validity period may result in increased filings by the same petitioners. DHS examined each of the provisions and determined that one provision would materially change the filing behavior of potential petitioners: This interim final rule will reduce the maximum validity period for third-party placement to one year compared to the three-year current maximum validity period. This provision will result in more petitions from petitioners with beneficiaries who work at third-party worksites. DHS incorporates this increase in its FY2021–2030 forecasts of the affected population. A detailed discussion of this provision's effect on the forecasted population of petition is provided in the corresponding cost analysis subsection.

DHS acknowledges that changes to the H–1B program may impact dependent H–4 nonimmigrants. DHS is unable to quantify the number of H–1B workers that will be ineligible or no longer apply for a visa due to this interim final rule and is therefore unable to quantify the costs to the dependent H–4 nonimmigrants. H–1B nonimmigrant workers who are the beneficiaries of petitions that are denied as a result of the petitioner's failure to establish eligibility or noncompliance with the changes made by this rule would be required to seek eligible employment to avoid additional impacts to their dependents.

DHS acknowledges that some industries may be affected more than others. According to FY2019 Annual Report to Congress,[157] approximately half of H–1B petitions approved are for industries related to computers, software, or data processing. These industries would be most affected by this rule.

i. Historical Population of H–1B Specialty Occupation Worker Program

Table 4 shows the number of receipts, approvals, and denials for all Form I–129 H–1B petitions including initials and extensions from FY2015 to FY2019.[158] During this period, the total annual receipts for Form I–129 H–1B petitions have steadily increased each year and ranged from a low of 368,160 in FY 2015 to a high of 420,574 in FY 2019. Accordingly, over the 5-year period, USCIS received an average of 401,856 Form I–129 H–1B petitions and approved an average of 306,898 petitions annually. DHS estimates the approval rate for Form I–129 H–1B petitions is about 78 percent and the denial rate is about 22 percent.

[157] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Characteristics of H–1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress October 1, 2018–September 30, 2019, 19–21* (Mar. 5, 2020), *https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf* (last visited Aug. 11, 2020).

[158] The number of petitions approved is based on the validity start date. If validity start date is unavailable, approval is based on approval date. The number of petitions denied is based on the date the application was denied irrespective of the initial date of submission.

TABLE 4—TOTAL RECEIPTS, APPROVALS, AND DENIALS OF FORM I–129 H–1B PETITIONS WITH AN H–1B CLASSIFICATION, FY 2015 TO FY 2019

Fiscal year	Number of petitions received [a]	Number of petitions approved	Number of petitions denied	Number of petitions approved or denied [b]	Approval rate (%)	Denial rate (%)
	A	B	C	D = B + C	E = B/D	F = C/D
2015	368,160	238,956	69,179	308,135	77.5	22.5
2016	398,800	304,911	78,782	383,693	79.5	20.5
2017	403,149	326,798	82,316	409,114	79.9	20.1
2018	418,596	298,625	104,174	402,799	74.1	25.9
2019	420,574	365,199	106,311	471,510	77.5	22.5
Total	2,009,279	1,534,489	440,762	1,975,251	.....	.....
5-yr average	401,856	306,898	88,152	395,050	77.7	22.3

Source: Office of Policy and Strategy, Policy Research Division (PRD), Claims 3 and USCIS analysis. July 29, 2020. Number of Petition Denied data is pulled on April 22, 2020.
[a] The number of petitions received includes all initial petitions and petitions for extension.
[b] The sum of petitions approved or denied does not equal the number of petitions received because some petitions are revoked, withdrawn, or still pending.

To determine the cost of preparing and filing a petition, DHS assumes that petitioners may use human resources (HR) specialists (or others that provide equivalent services) (hereafter HR specialist) or use lawyers or accredited representatives [159] to complete and file Form I–129 H–1B petitions. A lawyer or accredited representative appearing before DHS must file Notice of Entry of Appearance as Attorney or Accredited Representative (Form G–28) to establish the eligibility and authorization of a lawyer or accredited representative to represent a client (applicant, petitioner, requestor, beneficiary or derivative, or respondent) in an immigration matter before DHS. Table 5 presents the total number of Form G–28 filings by petitioners who filed Form I–129 H–1B. DHS estimates that about 74 percent (73.5 percent rounded up) of Form I–129 H–1B petitions were completed and filed by a lawyer or other accredited representative (hereafter lawyer). DHS assumes the remaining 26 percent of Form I–129 H–1B petitions were completed and filed by HR specialists.

TABLE 5—TOTAL NUMBER OF FORMS G–28 [a] FILED WITH FORM I–129 H–1B PETITIONS, FY 2015 TO FY 2019

Fiscal year	Receipts of form I–129 H–1B Petitions	Number of form G–28 Filed with form I–129 H–1B petitions	Percent of form I–129 H–1B petitions filed with form G–28 (%)
	A	B	C = B/A
2015	368,160	257,771	70.0
2016	398,800	273,497	68.6
2017	403,149	292,390	72.5
2018	418,596	324,206	77.5
2019	420,574	329,399	78.3
Total	2,009,279	1,477,263	.....
5-year Average	401,856	295,453	73.5

**Source: Office of Policy and Strategy, Policy Research Division (PRD) and USCIS analysis. April 22, 2020.
[a] Form G–28 has no filing fee.

[159] Accredited representatives are defined in 8 CFR 292.1(a)(4) as a person representing an organization described in 8 CFR 292.2 who has been accredited by the Board. USCIS limited its analysis to HR specialists, in-house lawyers, and outsourced lawyers to present estimate cost. However, USCIS understands that not all occupations employ individuals with these occupations and; therefore, recognizes equivalent occupations may also prepare and file these petitions.

Petitioners who use lawyers or accredited representatives to complete and file Form I–129 H–1B petitions may either use an in-house lawyer or hire an outsourced lawyer.[160] Of the total number of Form I–129 H–1B petitions filed between FY2015 and FY2019 by lawyers or accredited representatives (74 percent), DHS estimates that 24 percent of Form I–129 H–1B petitions filed by lawyers were filed by in-house lawyers while the remaining 50 percent were filed by outsourced lawyers.[161]

ii. Population Affected by the Rule

DHS uses the estimates derived from the historical data shown in tables 4 and 5 to estimate the baseline population. Accordingly, the baseline population consists of 401,856 Form I–129 H–1B petitions received annually, which is disaggregated into the percent of Form I–129 H–1B petitions filed by HR specialists (26 percent), in-house lawyers (24 percent), or outsourced lawyer (50 percent). Additionally, DHS uses these percentage shares to disaggregate the 306,898 H–1B petitions approved annually. For each provision, DHS further estimates the subpopulation that is affected by that particular provision using the same proportion of HR specialist, in-house lawyer, and outsourced lawyer. These estimates are detailed in the separate provision discussed in the cost analysis of this interim final rule.

TABLE 6—SUMMARY OF ESTIMATED AVERAGE NUMBER OF PETITIONS RECEIVED ANNUALLY BY TYPE OF FILER

Affected population	Estimated average population affected A	Number of petitions filed by HR specialists B = A × 26%	Number of petitions filed by in-house lawyers C = A × 24%	Number of petitions filed by outsourced lawyers D = A × 50%
Estimated average number of Form I–129 H–1B petitions received annually	401,856	104,483	96,445	200,928
Estimated average number of petitions approved annually	306,898	79,793	73,656	153,449

Source: USCIS analysis.

As discussed above, DHS forecasts an increase in the affected population due to the new interim final rule. Table 7 below summarizes this increase for FY2021–FY2030. The forecasted increase is discussed in detail in section ''Limiting maximum validity period for third-party placements.''

TABLE 7—FORECASTING TOTAL RECEIPTS OF FORM I–129H1 FOR FY2021 TO FY2030

Fiscal year	Historical baseline: [a] number of petitions received	Estimated increase in number of petitions received	Total estimated number of petitions received
2021	401,856	0	401,856
2022	401,856	110,483	512,339
2023	401,856	147,311	549,167
2024	401,856	147,311	549,167
2025	401,856	147,311	549,167
2026	401,856	147,311	549,167
2027	401,856	147,311	549,167
2028	401,856	147,311	549,167
2029	401,856	147,311	549,167
2030	401,856	147,311	549,167

Source: USCIS analysis.
[a] Historical Baseline is the 5-year averages of received H–1B petitions for FY2015–2019 from Table 4.

[160] DHS uses the terms ''in-house lawyer'' and ''outsourced lawyer'' to differentiate between the types of lawyers that may file Form I–129H1 on behalf of an employer petitioning for an H–1B beneficiary.

[161] DHS uses data from the longitudinal study conducted in 2003 and 2007 on legal career and placement of lawyers, which found that 18.6, 55, and 26.2 percent of lawyers practice law at government (federal and local) institutions, private law firms, and private businesses (as inside counsel), respectively. *See* Dinovitzer et al (2009). *After the JD II: Second Results from a National Study of Legal Careers,* The American Bar Foundation and the National Association for Law Placemen (NALP) Foundation for Law Career Research and Education, Table 3.1, p. 27. *https://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf.*

Among those working in private law firms and private businesses (55 and 26.2 percent, respectively), DHS estimates that while 67.7 percent of lawyers practice law in private law firms, the remaining 32.3 percent practice in private businesses (55 percent + 26.2 percent = 81.2 percent, 67.7 percent = 55/81.2 *100, 32.2 percent = 26.2/81.2*100). Because 74 percent of the H–1B petitions are filed by lawyers or accredited representatives, DHS multiplies 74 percent by 32.3 and 67.7 percent to estimate the proportion of petitions filed by in-house lawyers (working in private businesses) and outsourced lawyer (working in private law firms), respectively.

24 (rounded) percent of petitions filed by in-house lawyers = 74 percent of petitions filed by lawyers or accredited representatives × 32.3 percent of lawyers work in private businesses.

50 (rounded) percent of petitions filed by in-house lawyers = 74 percent of petitions filed by lawyers or accredited representatives × 67.7 percent of lawyers work in private law firms.

4. Costs and Cost Savings of Regulatory Changes to Petitioners

i. Estimated Wage by Type of Filers

As previously discussed, DHS assumes that a petitioner will use an HR specialist, in-house lawyer, or outsourced lawyer to complete and file Form I–129H1 petitions.[162] In this analysis, DHS estimates the opportunity cost of time for these occupations using average hourly wage rates of $32.58 for HR specialists and $69.86 for lawyers.[163] These average hourly wage rates do not account for worker benefits such as paid leave, insurance, and retirement. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the most recent DOL, Bureau of Labor Statistics (BLS) report detailing average compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.46.[164]

For petitioners filing Form I–129 H1, DHS calculates the average total rate of compensation as $47.57 per hour for an HR specialist, where the average hourly wage is $32.58 per hour worked and average benefits are $14.99 per hour.[165] Additionally, DHS calculates the average total rate of compensation as $102.00 per hour for an in-house lawyer, where the average hourly wage is $69.86 per hour worked and average benefits are $32.14 per hour.[166] Moreover, DHS recognizes that a petitioner may choose, but is not required, to hire an outsourced lawyer to prepare and file the H–1B petition. Therefore, DHS calculates the average total rate of compensation as $174.65 per hour for an outsourced lawyer, where the average hourly wage is $69.86 per hour worked and the average benefits are $104.79 per hour.[167] Table 6 shows the compensation rates used in this analysis.

TABLE 8—SUMMARY OF ESTIMATED WAGES FOR FORM I–129 H–1B PETITION FILERS BY TYPE OF FILER

	Hourly compensation rate
Human Resources (HR) Specialist	$47.57
In-house Lawyer	102.00
Outsourced Lawyer	174.65

Source: USCIS analysis.

ii. Baseline Estimate of Current Costs

In the current filing process, an employer petitioning on behalf of an H–1B specialty occupation worker must complete and file Form I–129H1. The filing fee for Form I–129H1 is $555 per petition and the time burden to review instructions and complete and submit Form I–129H1 is 4.0 hours per petition.[168] To estimate petitioners' postage cost of mailing a package containing a completed Form I–129H1 petition and all required supporting documents to USCIS, DHS uses the shipping price of United States Postal Service (USPS) Domestic Priority Mail Express Flat Rate Envelopes, which is priced at $27.55 per package.[169]

Public Law 114–113 requires payment of $4,000 for certain H–1B petitions filed by employers that meet the statute's 50 employee/50 percent test. The Fee Schedule Final Rule, if it takes effect, would extend applicability of the Public Law 114–113 fee, such that it would be required for all H–1B petitions filed by those employers, unless the petition is an amended petition without an extension of stay request.[170] In order to estimate the number of petitions that would require the Public Law 114–113 fee, DHS uses the estimated percentage of H–1B petitions filed by petitioners that have 50 or more employees and 50 percent of the employees are in the H–1B or L–1 visa classification: 26 percent. This fee applies to certain petitions filed on or before September 30, 2027.[171] The affected population to which the $4,000 fee is applied is 104,483, which is 26 percent of 401,856, the average number of petitions received annually from FY2015 to FY2019.

DHS applies a fraud prevention and detection fee of $500 to certain H–1B petitions.[172] In order to estimate the number of petitions that will be filed with the fraud prevention and detection fee DHS uses the percentage of H–1B petitions filed with the fraud prevention and detection fee in FY2018 (52 percent) and multiplied by the 5-year average number of petitions received annually from FY2015 to FY2019 in Table 9 below (401,856). Therefore, the fraud prevention and detection fee is applied to 208,965 petitions.

[162] DHS limits its analysis to HR specialists, in-house lawyers, and outsourced lawyer to present estimated costs. However, DHS acknowledges that not all entities employ individuals with these occupations and, therefore, recognizes equivalent occupations may also prepare and file these petitions.

[163] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2019 National Occupational Employment and Wage Estimates-National, SOC 13–1071—Human Resources Specialist and SOC 23–1011—Lawyers, available at *https://www.bls.gov/oes/2019/may/oes_nat.htm* (last visited Aug. 11, 2020).

[164] The benefits-to-wage multiplier is calculated as follows: ($37.10 Total Employee Compensation per hour) ÷ ($25.47 Wages and Salaries per hour) = 1.457 = 1.46 (rounded) *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Economic News Release, *Employer Cost for Employee Compensation (December 2019),* Table 1 (Mar. 19, 2020), available at *https://www.bls.gov/news.release/archives/ecec_03192020.pdf* (last visited Aug. 11, 2020). Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group.

[165] Calculation of the weighted mean hourly wage for HR specialists: $32.58 per hour × 1.46 = $47.566 = $47.57 (rounded) per hour.

[166] Calculation of weighted mean hourly wage for in-house lawyers: $102.00 average hourly total rate of compensation for in-house lawyer = $69.86 average hourly wage rate for lawyer (in-house) × 1.46 benefits-to-wage multiplier.

[167] Calculation of weighted mean hourly wage for outsourced lawyer: $174.65 average hourly total rate of compensation for outsourced lawyer = $69.86 average hourly wage rate for lawyer (in-house) × 2.5 conversion multiplier. DHS uses a conversion multiplier of 2.5 to estimate the average hourly wage rate for outsourced lawyer based on the hourly wage rate for an in-house lawyer. DHS has used this conversion multiplier in various previous rulemakings. For example, the DHS analysis in, *Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program,* 83 FR 24905 (May 31, 2018), used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages.

[168] *See supra* notes 9 and 153.

[169] Although petitioners may choose other means of shipping, for the purposes of this analysis, DHS uses the shipping prices of United States Postal Service (USPS) Domestic Priority Mail Express Flat Rate Envelopes, which is currently priced at $27.55 per package, as a proxy estimate for the postage cost of mailing a package containing completed Form I–129H1. DHS also assumes that the package on average weighs three pounds and ships locally or in zone 1 or 2. *See* U.S. Postal Service, Price List, Notice 123, Effective January 26, 2020, available at *https://pe.usps.com/text/dmm300/Notice123.htm#_c011* (last visited Aug. 11, 2020).

[170] *See supra* note 126. Currently, the Public Law 114–113 fee is required for H–1B petitions filed by certain petitioners only when the Fraud Fee also applies, meaning that it is not currently required for H–1B extensions. While implementation of the Fee Schedule Final Rule has been enjoined, DHS nevertheless estimated costs of this interim final rule based on the fees that will be required if the injunction is lifted and the Fee Schedule Final Rule takes effect so as to avoid underestimating potential costs of this interim final rule.

[171] *See supra* note 126.

[172] *See* section 214(c)(12)(A) of the INA, 8 U.S.C. 1184(c)(12)(A).

TABLE 9—NUMBER OF H–1B PETITION FILED FOR FRAUD PREVENTION AND DETECTION FEE AND ACWIA FEE OR EXEMPTION FROM ACWIA FEE FOR FY 2018

	FY2018	Percentage	Estimated petitions
Total Petitions Filed	418,799		401,856 *
Fraud Prevention and Detection Fee			
Total Petitions Filed with Fee	218,333	52% [b]	208,965 [g]
ACWIA Fee			
Total Petitions Filed:			
Without any fee exemptions	277,979	66% [c]	265,225 [h]
With at least one exemption	140,820	34% [d]	136,631 [i]
Size of Employer:			
Full time employees <26	39,333	11% [e]	29,175 [j]
Full time employees >25	316,972	89% [f]	235,946 [k]
Number of employees unknown	62,494		
Total without unknown	356,305 [a]		

Source: Report on H–1B Petitions, Fiscal Year 2018 Annual Report to Congress, March 18, 2019 (Table 2 and Table 4).

* 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) is from Table 4.

[a] Total without unknown (356,305) = Total Petitions Filed FY2018 (418,799) − Number of employees unknown (62,494).

[b] Percentage of Total Petitions filed with Fraud Fee FY2018 (52%) = Total petitions filed with Fee FY2018/Total petitions filed FY2018 = 218,333/418,799.

[c] Percentage of Total petitions filed without any ACWIA fee exemptions FY2018 (66%) = Total petitions filed without any ACWIA fee exemption FY2018/Total petitions filed FY2018 = 277,979/418,799.

[d] Percentage of Total petitions filed with at least one ACWIA fee exemptions FY2018 (34%) = Total petitions filed with at least one ACWIA fee exemption FY2018/Total petitions filed FY2018 = 140,820/418,799.

[e] Percentage of Full-time employees <26 FY2018 (11%) = Full time employees <26 FY2018/Total without unknown FY2018 = 39,333/356,305.

[f] Percentage of Full-time employees >25 FY2018 (89%) = Full time employees >25 FY2018/Total without unknown FY2018 = 316,972/356,305.

[g] Total estimated petitions filed with Fraud Fee (208,965) = 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) * Percentage of Total Petitions filed with Fraud Fee FY2018 (52%).

[h] Total estimated petitions filed without any ACWIA fee exemptions (265,225) = 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) * Percentage of Total petitions filed without any ACWIA fee exemptions FY2018 (66%).

[i] Total estimated petitions filed with at least one ACWIA fee exemptions FY2019 (136,631) = 5-year average number of petitions received annually from FY2015 to FY2019 (401,856) * Percentage of Total petitions filed with at least ACWIA fee exemptions FY2018 (34%).

[j] Estimated Full-time employees <26 (29,175) = Total estimated petitions filed without any ACWIA fee exemptions (265,225) * Percentage of Full-time employees <26 FY2018 (11%).

[k] Estimated Full-time employees >25 (235,946) = Total estimated petitions filed without any ACWIA fee exemptions (265,225) * Percentage of Full-time employees >25 FY2018 (89%).

DHS also applies the American Competitiveness and Workforce Improvement Act (ACWIA) fee.[173] Certain petitions are exempt from the ACWIA fee and, when required, the amount of the fee depends on the size of the entity. It is $750 for employers with 25 or fewer full-time employees or $1,500 for employers with 26 or more full-time employees. In order to estimate the number of petitions that will be filed with the ACWIA fee, DHS uses the percentage of H–1B petitions filed with the ACWIA fee in FY2018 (66 percent) and the 5-year average of the annual number of H–1B petitions received (401,856) from Table 9 above. Total estimated petitions filed with the ACWIA fee is 265,225 as described in Table 9. Among the estimated petitions filed with the ACWIA fee (265,225) using the percentage of H–1B petitions filed with the ACWIA fee in FY2018 there are 29,175 (11 percent) employers with 25 or fewer full-time employees and 235,946 (89 percent) employers with 26 or more full-time employees also as described in Table 9. Based on these estimated annual number of petitions, DHS estimates that 29,175 petitions would require an ACWIA fee of $750 and 235,946 petitions would require an ACWIA fee of $1,500 for each fiscal year for FY2021 to FY2030.

Table 10 shows the total annual cost of filing Form I–129 H–1B using the historical data on petitions received for FY2015 to FY2019. The baseline population is estimated using the 5-year average of the annual number of H–1B petitions received from FY2015 to FY2019 (401,856) in Table 4. Various fees are applied to the proportion of the baseline population as described in Table 9. DHS estimates the total annual cost under current regulation is $1,331,915,275, or an average of $3,314 per petition received. This baseline cost per petition received is applied to the baseline population for FY2021 to FY2027.[174] Since the Public Law 114–113 Fee of $4,000 is currently set to expire at the end of FY2027, DHS removes this fee from its baseline per petition cost in fiscal years FY2028 to FY2030. For those years, the baseline cost per petition received is estimated to be $2,274 per petition received.[175]

[173] *See* INA 214(c)(9), 8 U.S.C. 1184(c)(9).

[174] Average per petition received cost ($3,314, rounded) = Total annual cost ($1,331,915,275)/5-year average petition received annually (401,856) for FY2015 to FY2019.

[175] Average per petition received cost without Public Law 114–113 Fee of $4,000 ($2,274, rounded) = Total annual cost without Public Law 114–113 Fee of $4,000 ($913,983,275)/5-year average petition received annually (401,856) for FY2015 to FY2019; Total annual cost without Public Law 114–113 Fee of $4,000 ($913,983,275) = Total annual cost ($1,331,915,275)—Public Law 114–113 fee ($417,932,000) from Table 10.

TABLE 10—ESTIMATED ANNUAL BASELINE (CURRENT) COST OF FILING FORM I–129 H–1B PETITIONS

Cost items	Affected population	Time burden (hours)	Compensation rate	Total annual cost
	A	B	C	D = A × B × C
Opportunity cost of time to complete Form I–129 petitions by:				
HR specialist	104,483	4.0	$47.57	$19,881,025
In-house lawyer	96,445	4.0	102.00	39,349,560
Outsourced lawyer	200,928	4.0	174.65	140,368,301
Form I–129 filing fee cost	401,856		555	223,030,080
Public Law 114–113 fee	104,483		4,000	417,932,000
Fraud prevention and detection fee	208,965		500	104,482,500
ACWIA fee <26	29,175		750	21,881,059
ACWIA fee >25	235,946		1,500	353,919,617
Postage cost per package to mail completed Form I–129	401,856		27.55	11,071,133
Total Baseline Cost				1,331,915,275

Source: USCIS analysis.

DHS estimates the total annual additional costs of the regulatory changes or cost savings from the regulatory changes. DHS presents each of these costs/cost savings separately in sections that follow.

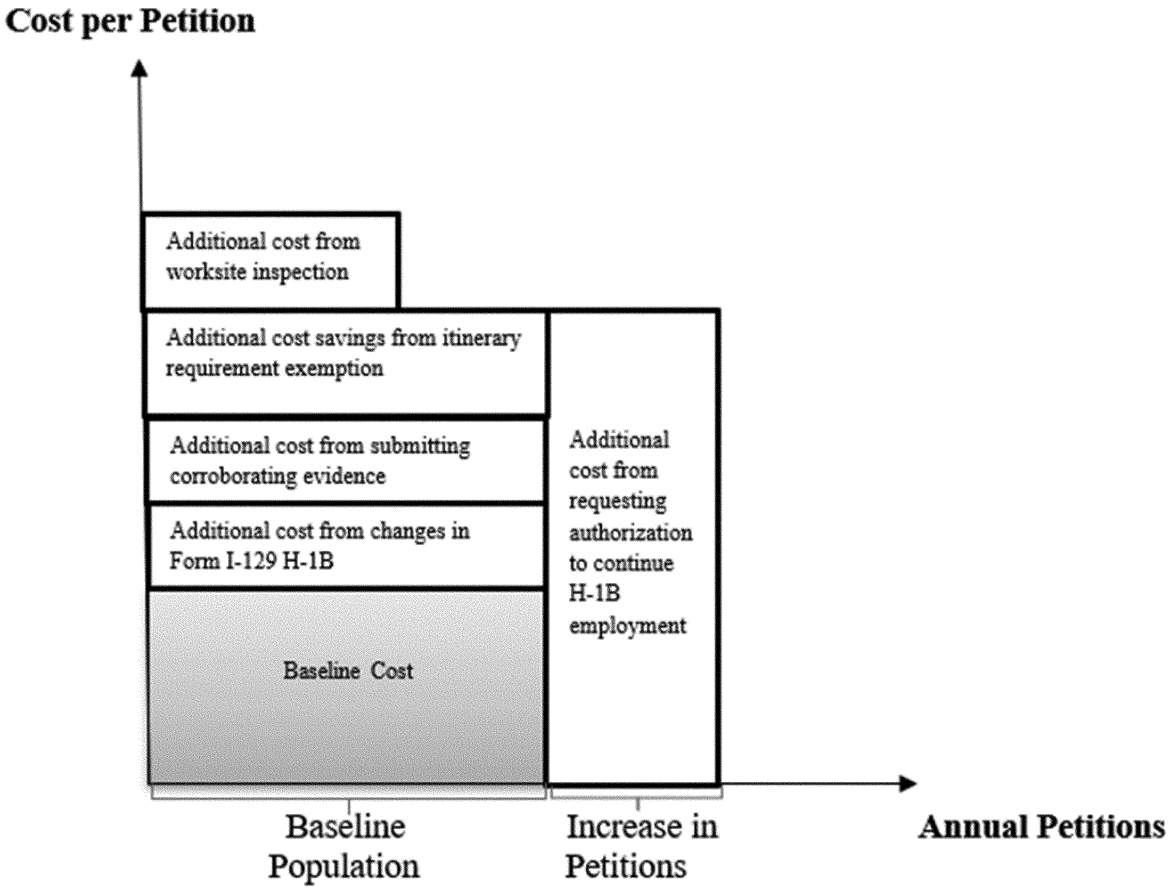
iii. Detailed Economic Effects of Each Provision in the Interim Final Rule

The interim final rule changes the requirements governing the petitioning process for H–1B specialty occupation workers, which will result in additional costs for petitioners. The additional costs include increase in time burden of completing and filing an H–1B petition, submitting contractual documents, work orders, or similar documentary evidence if the beneficiary will work at a third-party worksite, requesting authorization to continue H–1B employment beyond 1 year for a subset of petitioners, codifying existing authority for conducting worksite inspections, and clarifying petition denials or revocations for failure to cooperate with a site inspection. In addition, the interim final rule will eliminate the general itinerary requirement for H–1B petitions which will result in cost savings for petitioners.

The additional cost and cost savings discussed above reflect changes to per petition costs. In addition, the interim final rule will also increase the affected population. To better illustrate the effects of each provision, DHS disentangles the effects of changes in per-petition costs from the effects of changes in the affected population. This is illustrated in the Diagram 1 below.[176] In Diagram 1, the vertical axis denotes per-petition costs and the horizontal axis denotes the affected population. The area of the shaded rectangle thus represents the current, baseline cost of preparing and filing H–1B petitions to petitioners. The provisions that affect the per-petition cost, including additional costs changes in Form I–129 H–1B, submitting corroborating evidence, and additional cost savings from itinerary requirement exemption, are represented as rectangles above the baseline population, denoting that the additional costs are calculated based on the baseline population. Separately, DHS adds a rectangle to the right of the baseline cost rectangle to represent the additional costs resulting from population changes due to the provision to limit the maximum validity period for third-party worksites. As the rectangle illustrates, DHS incorporates the per-petition cost increases into the cost calculation of the population increase. Finally, DHS separately estimates the cost of worksite inspections, which is represented by the small rectangle on the top. The number of worksite inspections does not depend on the number of H–1B petitions received and is not expected to be affected by the provision that limits the validity period.

[176] Diagram 1 excludes a one-time familiarization cost.

Diagram 1. Breakdown of the Total Cost of the IFR



a. Revising the Regulatory Definition and Standards for Specialty Occupation So They Align More Closely With the Statutory Definition of the Term

1. Additional Costs Due To Changes in Form I–129 for H–1B Petitions

DHS is amending its regulations governing H–1B specialty occupation workers by making a number of revisions and clarifications to strengthen the integrity of the H–1B program, thereby better protecting the wages and working conditions of U.S. workers. DHS is amending Form I–129H1, which must be filed by petitioners on behalf of H–1B beneficiaries, in order to align them with the regulatory changes DHS is making in the interim final rule. The changes to Form I–129H1 will result in an increased time burden to complete and submit the form.

As discussed, the current estimated time burden to complete and file Form I–129H1 takes a total of 4.0 hours per petition.[177] As a result of the changes in this interim final rule, DHS estimates the total time burden to complete and file Form I–129H1 will be 4.5 hours per petition, to account for the additional time petitioners will spend on reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request. DHS estimates the time burden will increase by a total of 30 minutes (0.5 hours) per petition.[178]

To estimate the additional cost of filing due to changes in Form I–129H1 petitions, DHS applies the additional estimated time burden to complete and file Form I–129H1 (0.583 hours) to the respective total population and compensation rate of who may file, including an HR specialist, in-house lawyer, or outsourced lawyer.

The total affected population for this provision is the number of petitions, including both initial and continuing petitions, for FY2021–2030. The total affected population for FY2021–2030 is estimated using the 5-year average of the annual number of H–1B petitions received for FY2015–FY2019, as listed in Table 4. Although the provision's increase in time burden may affect the total affected population, DHS believes that any effect would be de minimis: The estimated cost of the additional 30 minutes of time burden per petition is $62,[179] which is less than 0.06 percent of $107,000,[180] the average annual

[177] *See supra* note 9.

[178] 0.5 hours additional time to complete and file new Form I–129H1 = (4.5 hours to complete and file new Form I–129 H1)—(4.0 hours to complete and file current Form I–129H1).

[179] Calculation: The estimated cost of the additional 30 minutes of time burden per petition ($72, rounded) = ($47.57 (HR specialist hourly wage rate, Table 6) * 26% (percent of H–1B petitions filed by HR specialist, Table 5) + $102 (In-house lawyer hourly wage rate, Table 6) * 24% (percent of H–1B petitions filed by in-house lawyer, Table 5) + $174.65 (Outsourced lawyer hourly wage rate, Table 6) *50% (percent of H–1B petitions filed by outsourced lawyer, Table 5))*0.5 (30 minute increase in time burden).

[180] This is the annual average earning of all H–1B nonimmigrant workers in all industries with known occupations (excluding industries with unknown occupations) for FY 2019. It is what employers agreed to pay the nonimmigrant workers at the time the petitions were filed and estimated based on full-time employment for 12 months, even if the nonimmigrant worker worked fewer than 12 months. Source: USCIS, March 5, 2020. *See* Characteristics of H–1B Specialty Occupation

Continued

earnings of all H–1B nonimmigrant workers. DHS believes that this cost increase may lead to *de minimis* changes on the margin to the set of petitioners.

As shown in Table 11, DHS estimates the total additional annual cost to petitioners of completing and filing Form I–129H1 petitions will be approximately $24,949,861, or an average of $62 per petition received.[181]

TABLE 11—ADDITIONAL OPPORTUNITY COSTS OF TIME TO PETITIONERS FOR FILING FORM I–129H1 PETITIONS FROM AN INCREASE IN TIME BURDEN

Cost items	Total affected population	Additional time burden to complete form I–129H (hours)	Compensation rate	Total cost
	A	B	C	D = A × B × C
Opportunity cost of time to complete Form I–129 H1 petitions by:				
HR specialist	104,483	0.5	$47.57	$2,485,128
In-house lawyer	96,445	0.5	102.00	4,918,695
Outsourced lawyer	200,928	0.5	174.65	17,546,038
Total	401,856			24,949,861

Source: USCIS analysis.

b. Requiring Corroborating Evidence of Work in a Specialty Occupation

1. Costs of Submitting Contracts, Work Orders, or Similar Evidence Establishing Specialty Occupation and Employer-Employee Relationship

Petitioners who regularly place their workers at third-party worksites often submit uncorroborated statements describing the role the H–1B beneficiary will perform at the third-party worksite. Such statements by the petitioner, without additional corroborating evidence, are generally insufficient to establish by a preponderance of the evidence that the H–1B beneficiary will actually perform specialty occupation work, and that the petitioner will have an employer-employee relationship with the beneficiary. Therefore, where a beneficiary will be placed at one or more third-party worksites, DHS will require the petitioner to submit evidence such as contracts, work orders, or other similar evidence to establish that the beneficiary will perform services in a specialty occupation at the third-party worksite(s), and that the petitioner will have an employer-employee relationship with the beneficiary.[182]

DHS estimates the time burden required to gather and submit corroborating evidence (such as contracts, work orders, or similar evidence) for petitioners with third-party worksite beneficiaries. DHS notes that corroborating evidence will have to be detailed enough to provide a sufficiently comprehensive view of the work available, and the terms and conditions under which the work will be performed at the third-party worksite. Since these petitioners will generally need to provide more documentation than petitioners who do not seek to employ H–1B workers at third-party worksite locations, DHS estimates the time burden for petitioners will be approximately 1 hour to gather and submit these documents as required under this interim final rule.[183] DHS requests public comment on this time burden estimate.

Since the terms ''worksite'' and ''third-party worksite'' are referenced in the new regulations, this interim final rule defines these terms. For example, the new regulation defining an employer-employee relationship refers to the ''worksite'' where the beneficiary will be employed as a relevant factor. The term ''off-site'' used on the Form I–129 H–1B has the same meaning as ''third-party worksite.''[184] Therefore, DHS uses the data on off-site locations to forecast the number of petitions involving a third-party worksite. To estimate the population impacted by the requirements for third-party worksites, DHS uses data on approved Form I–129 H–1B petitions. DHS uses available data for FY 2018 and FY 2019 to estimate the percentage of petitions that are approved for third-party worksites. Accordingly, Table 12 shows the average number of Form I–129 H–1B petitions approved in FY 2018 and FY 2019 for workers placed at off-site location. Nearly 36 percent of petitions were approved for workers placed at off-site locations.[185] DHS uses the estimated 36 percent as the proportion of both the population of received petitions and the population of approved petitions that are third-party worksite.

TABLE 12—FORM I–129 H–1B PETITIONS FOR WORKERS PLACED AT OFF-SITE LOCATIONS

Fiscal year	Total approved petitions for workers placed at off-site locations	Total approved petitions	Percent placed at off-site locations (%)
2018	112,071	302,159	37.1

Workers, Fiscal Year 2019, p.16, Table 10, *supra* note 21.

[181] Additional annual cost per petition received for completing and filing Form I–129 H–1B petitions ($62, rounded) = Total baseline cost ($24,949,861)/5-year average petition received annually (401,856).

[182] *See* new 8 CFR 214.2(h)(4)(iv)(C).

[183] DHS notes that it is using approximate time burden estimates in this analysis because DHS does not have relevant information on how much time it would take affected petitioners to gather and submit corroborating evidence as required in the interim final rule. Therefore, DHS assumes 1 hour for the time to gather and submit written evidentiary document requirements.

[184] *See supra* note 27.

[185] Estimate based on data obtained from the Office of Policy and Strategy, Policy Research Division (PRD). 36 (rounded) percent petitions approved for off-site locations in FY 2018 and FY2019 = 239,916 total petitions approved for off-site locations in FY 2018 and FY2019 ÷ 671,209 total petitions approved in FY 2018 and FY2019.

TABLE 12—FORM I–129 H–1B PETITIONS FOR WORKERS PLACED AT OFF-SITE LOCATIONS—Continued

Fiscal year	Total approved petitions for workers placed at off-site locations	Total approved petitions	Percent placed at off-site locations (%)
2019	127,845	369,050	34.6
Total	239,916	671,209	71.7
2-year Average	119,958	335,605	35.8

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD). May 27, 2020.

Based on DHS' previous estimate of the average annual total number of receipts of Form I–129 H–1B petitions (401,856), we estimate that approximately 144,668 petitions would be filed requesting workers to be placed at third-party worksites.[186] To estimate the total cost of submitting documentary evidence as per the requirements of this provision, DHS multiplies the rate of compensation according to who would file the petition (an HR specialist, in-house lawyer, or outsourced lawyer, respectively) among the affected population by the estimated time burden to submit the documents. As shown in Table 13, DHS estimates that the total annual cost of submitting corroborating evidence (such as contracts, work orders or similar documents) required by this rule is $17,963,871 for the population of 144,668 petitions of workers placed at third-party worksites.

To estimate the effect of this provision in conjunction with other provisions that change the forecasted population, DHS calculates the cost of this provision on a per-petition-received basis. The annual cost of this provision, divided amongst the entire population of received petitions, would average out to approximately $45 per received petition.[187]

TABLE 13—FORM I–129 H1 PETITIONERS' COST FOR SUBMITTING CORROBORATING EVIDENCE TO ESTABLISH THAT THE BENEFICIARY WILL BE EMPLOYED BY THE PETITIONER IN A SPECIALTY OCCUPATION AT THE THIRD-PARTY WORKSITE

Cost items	Affected population	Time burden (hours)	Compensation rate	Total cost
	A	B	C	D = A × B × C
Opportunity cost of time to complete Form I–129 H1 petitions by:				
HR specialist [a]	37,614	1	$47.57	$1,789,298
In-house lawyer [b]	34,720	1	102.00	3,541,440
Outsourced lawyer [c]	72,334	1	174.65	12,633,133
Total	144,668			17,963,871

Source: USCIS Analysis.
[a] 37,614 petitions filed by HR specialist annually = 144,668 petitions request workers to be placed at third-party worksite annually × 26 percent.
[b] 34,720 petitions filed by in-house lawyers annually = 144,668 petitions request workers to be placed at third-party worksites annually × 24 percent.
[c] 72,334 petitions filed by outsourced lawyer annually = 144,668 petitions request workers to be place at third-party worksites annually × 50 percent.

Although the provision's increase in time burden may affect the total affected population, DHS believes that any effect would be de minimis: The estimated cost of the additional one hour of time burden per petition involving third-party worksites is $124,[188] which is less than 0.12 percent of $107,000,[189] the average annual earnings of all H–1B nonimmigrant workers. DHS believes that this cost increase is so small that no potential petitioner would change their decision to file based solely on this change.

c. Codifying in Regulations Existing Authority To Conduct Site Visits and Other Compliance Reviews and Clarifying Consequences for Failure To Allow a Site Visit

1. Cost of Worksite Inspections

Using its general authority, USCIS may conduct audits, on-site inspections, compliance reviews, or investigations to help verify a petitioner's and beneficiary's H–1B eligibility and better ensure that all laws have been complied with before and after approval of such benefits.[190] The existing authority to

[186] DHS uses the proportion of workers approved for off-site locations petitions (36 percent) as an approximate measure to estimate the number of workers to be placed at third-party worksites from the total number of petitions filed. 144,668 petitions filed requesting workers to be placed at third-party worksites = 401,856 petitions filed annually × 36 percent.

[187] The annual cost of the provision per received petition ($45) = Total annual cost of submitting corroborating evidence ($17,963,871)/Total number of H–1B petitions filed annually (401,856).

[188] Calculation: The estimated cost of the additional one hour of time burden per petition ($124, rounded) = $47.57 (HR specialist hourly wage rate, Table 6) * 26% (percent of H–1B petitions filed by HR specialist, Table 5) + $102 (In-house lawyer hourly wage rate, Table 6) * 24% (percent of H–1B petitions filed by in-house lawyer, Table 5) + $174.65 (Outsourced lawyer hourly wage rate, Table 6) * 50% (percent of H–1B petitions filed by outsourced lawyer, Table 5).

[189] This is the annual average earning of all H–1B nonimmigrant workers in all industries with known occupations (excluding industries with unknown occupations) for FY 2019. It is what employers agreed to pay the nonimmigrant workers at the time the petitions were filed and estimated based on full-time employment for 12 months, even if the nonimmigrant worker worked fewer than 12 months. *See* Characteristics of H–1B Specialty Occupation Workers, Fiscal Year 2019, p.16, Table 10, *supra* note 21.

[190] *See* Section 103 of the INA and 8 CFR part 2.1. As stated in subsection V.A.5.ii(d) of this analysis,

Continued

conduct on-site inspection is critical to the integrity of the H–1B program to detect and deter fraud and noncompliance. In this rule, DHS is adding regulations specific to the H–1B program to codify its existing authority and clarify the scope of inspections—particularly on-site inspections—and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections.

To be clear, USCIS has historically conducted site visits and has had the authority to deny or revoke petitions for reasons including noncompliance with a site visit request. However, the authority to conduct a site visit is not currently codified in CFR for the H–1B program. Since this interim final rule newly codifies this authority, DHS quantitatively estimates the costs associated with conducting site visits. Also, the provision delineates that failure or refusal to cooperate with a site visit request and allow USCIS to verify facts may result in denial or revocation. DHS considers this part of the provision as a clarification to existing regulations [191] and discusses the benefits of this clarification qualitatively.

In July 2009, USCIS started the Administrative Site Visit and Verification Program (ASVVP) [192] as an additional method to verify information in certain visa petitions under scrutiny. Under this program, Fraud Detection and National Security (FDNS) officers were authorized to make unannounced site visits to collect information as part of a compliance review, which verifies whether petitioners and beneficiaries are following the immigration laws and regulations that are applicable in a particular case. This process includes researching information in government databases, reviewing public records and evidence accompanying the petition, interviewing the petitioner and/or beneficiary, and conducting site visits. Once the site visit is completed, the FDNS officers write a Compliance Review Report, identifying any indicators of fraud or noncompliance to assist USCIS in subsequent final adjudicative decisions (for example, a notice of intent to revoke the petition approval).

Site visits conducted by USCIS have uncovered noncompliance in the H–1B program. From FY 2013 to 2016, USCIS conducted 30,786 H–1B compliance reviews, of which 3,811 (12.4 percent) were found to be noncompliant.[193] From FY 2016 to March 27, 2019, USCIS conducted 20,492 H–1B compliance reviews and found 2,341 (11.4 percent) to be noncompliant.[194] However, when disaggregated by worksite location, the noncompliance rate is found to be higher for workers placed at an off-site or third-party location compared to workers placed at a petitioner's onsite location (21.7 percent and 9.9 percent, respectively).[195] As a result, starting in 2017, USCIS began conducting more targeted site visits related to the H–1B program, focusing on the cases of H–1B-dependent employers (employers who have a high ratio of H–1B workers compared to U.S. workers, as defined by statute) for whom USCIS cannot validate the employer's basic business information through commercially available data, and on employers petitioning for H–1B workers who work off-site at another company or organization's location.

DHS seeks to ensure that the H–1B program is used appropriately and the interests of U.S. workers are protected. Hence, the interim final rule codifies in regulation USCIS' existing authority to conduct site visits and other compliance reviews and will make clear that inspections and other compliance reviews may include, but are not limited to, worksite visits including petitioners' headquarters, satellite locations, or third-party worksites, and interviews or review of records, as applicable.

The interim final rule will also clarify the consequences of a petitioner's or third party's refusal or failure to cooperate with these inspections. This interim final rule will make clear that inspections may include, but are not limited to, a visit of the petitioning organization's facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS considers pertinent to the petitioner's H–1B eligibility and compliance.[196] The interim final rule also explains the possible scope of an inspection, which may include the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable. Additionally, the new regulation states that if USCIS is unable to verify facts related to an H–1B petition due to the failure or refusal of the petitioner or a third-party to cooperate with a site visit, then such failure or refusal may be grounds for denial or revocation of any H–1B petition for H–1B workers performing services at the location or locations which are a subject of inspection, including any third-party worksites.[197] This provision further strengthens the integrity of the H–1B program and helps to detect and prevent fraud and abuse.

In order to estimate the population impacted by site visits, DHS uses historical site inspection data. The site inspections were conducted at Form I–129 H–1B petitioners' on-site locations and third-party worksites from FY2015 to FY2019. Table 14 shows the number of worksite inspections conducted each year and the average duration of time for conducting each worksite inspection. During this period, the annual number of worksite inspections has increased each year and ranged from a low of 4,413 in FY2015 to a high of 10,384 in FY2019.

TABLE 14—TOTAL NUMBER OF WORKSITE INSPECTIONS CONDUCTED FOR FORM I–129 H–1B PETITIONERS AND AVERAGE INSPECTION TIME, FY 2015 TO FY 2019

Fiscal year	Number of worksite inspections	Average duration for worksite inspection (hours)
2015	4,413	0.94

this interim final rule will also clarify the possible scope of an inspection, which may include the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable.

[191] *See* 8 CFR 214.2(h)(11)(iii)(A).

[192] *See* U.S. Citizenship and Immigration Services—Administrative Site Visit and Verification Program, available at *https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program* (last visited Aug. 11, 2020).

[193] *See supra* note 132.

[194] USCIS, Office of Policy and Strategy, Policy Research Division (OP&S PRD), Summary of H–1B Site Visits Data.

[195] *Id.*

[196] *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*)(*i*).

[197] *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*)(*iii*).

TABLE 14—TOTAL NUMBER OF WORKSITE INSPECTIONS CONDUCTED FOR FORM I–129 H–1B PETITIONERS AND AVERAGE INSPECTION TIME, FY 2015 TO FY 2019—Continued

Fiscal year	Number of worksite inspections	Average duration for worksite inspection (hours)
2016	7,046	0.91
2017	7,174	1.04
2018	7,718	1.16
2019	10,384	1.23
Total	36,735	5.28

Source: USCIS, Fraud Detection & National Security (FDNS), DS database, May 28, 2020.

The number of worksite inspections does not depend on the number of H–1B petitions received. It depends on DHS resources to conduct the site visits. DHS uses the highest annual number of worksite inspections in past five years (10,384 in FY2019) as the estimated annual population of worksite visits for the next 10 years. DHS also uses 1.23 hours from FY2019 historical data for the estimated duration for worksite inspection, which includes interviewing the beneficiary, the on-site supervisor or manager and other workers, as applicable, and reviewing all records pertinent to the H–1B petitions available to USCIS when requested during inspection.

DHS assumes that a supervisor or manager would be present on behalf of a petitioner while a USCIS immigration officer conducts the worksite inspection in addition to the beneficiary. The beneficiary would be interviewed to verify the date employment started, work location, hours, salary, or other terms of employment, to corroborate the information provided in an approved petition. The supervisor or manager would be the most qualified employee at the location who could answer all questions pertinent to the petitioning organization and its H–1B nonimmigrant workers. They would also be able to gather and provide the proper records considered pertinent to USCIS immigration officers. Consequently, for the purposes of this economic analysis, DHS assumes that on average two individuals will be interviewed during each worksite inspection: The beneficiary and the supervisor or manager. DHS uses their respective compensation rates in the estimation of the worksite inspection costs.[198] However, if any other worker or on-site manager is interviewed, the same compensation rates would apply.

DHS uses hourly compensation rates to estimate the opportunity cost of time a beneficiary and supervisor or manager would incur during worksite inspections. Based on data obtained from a USCIS report for Fiscal Year 2019, DHS estimates that an H–1B worker earned an average of $107,000 per year, or $51.44 hourly wage in FY 2019.[199] The annual salary does not include non-cash compensation and benefits, such as health insurance and transportation. DHS adjusts the average hourly wage rate using a benefits-to-wage multiplier to estimate the average hourly compensation of $75.11 for an H–1B nonimmigrant worker.[200] DHS uses an average compensation rate of $85.96 for a supervisor or manager in the estimation of the opportunity cost of time he or she would incur during worksite inspections.[201] Of the 1.23 hours of worksite inspection time (see Table 14), DHS has no information on how long a USCIS immigration officer would take to interview a beneficiary, or supervisor, or manager. In this analysis, DHS assumes that it would take 0.49 hours to interview a beneficiary and 0.74 hours to interview a supervisor or manager.[202]

In Table 15, DHS estimates the total annual opportunity cost of time for worksite inspections of H–1B petitions by multiplying the average annual number of worksite inspections (10,384) by the average duration the interview would take for a beneficiary (0.49) or supervisor or manager (0.74) and their respective compensation rates. DHS obtains the total annual cost of the H–1B worksite inspections to be $1,042,702 for this provision.

[198] Any other USCIS costs associated with the worksite inspections (*i.e.,* travel and deskwork relating to other research, review and document write up) are not estimated here because these costs are covered by fees collected from petitioners filing Form I–129 for H–1B petitions. All such costs are discussed under the Federal Government Cost section.

[199] This is the annual average earning of all H–1B nonimmigrant workers in all industries with known occupations (excluding industries with unknown occupations) for FY 2019. It is what employers agreed to pay the nonimmigrant workers at the time the applications were filed and estimated based on full-time employment for 12 months, even if the nonimmigrant worker worked fewer than 12 months. *See* Characteristics of H–1B Specialty Occupation Workers, Fiscal Year 2019, p.16, Table 10, at *supra* note 21. $51.44 hourly wage = $107,000 annual pay ÷ 2,080 annual work hours. According to U.S. Department of Labor (DOL) that certifies the Labor Condition Application of the H–1B worker, a full-time H–1B employee works 40 hours per week for 52 weeks for a total of 2,080 hours in a year. DOL, Wage and hour Division: Fact Sheet #68—What Constitutes a Full-Time Employee Under H–1B Visa Program? July 2009. *See https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs68.pdf* (last visited Aug. 11, 2020).

[200] Hourly compensation of $75.11 = $51.44 average hourly wage rate for H–1B worker × 1.46 benefits-to-wage multiplier. *See* section V.A.5. for estimation of the benefits-to-wage multiplier.

[201] Hourly compensation of $85.96 = $58.88 average hourly wage rate for Management Occupations (national) × 1.46 benefits-to-wage multiplier. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2019 National Occupational Employment and Wage Estimates National, SOC 11–0000—Management Occupations, available at *https://www.bls.gov/oes/current/oes110000.htm* (last visited Aug. 11, 2020).

[202] DHS assumes that an interview with the beneficiary takes 40% of the inspection duration, while an interview with the supervisor or manager takes 60%. In addition to the inspection, DHS assumes the supervisor or manager will need additional time to gather and discuss the records/documents provided to the USCIS Immigration Officer. Duration of interview hours for beneficiaries (0.49) = Inspection duration (1.23) × 40% = 0.42 (rounded). Duration of interview hours for supervisors or managers (0.74) = Inspection duration (1.23) × 60% = 0.74.

TABLE 15—ESTIMATED ANNUAL PETITIONERS' COST OF WORKSITE INSPECTION FOR H–1B PETITIONS

Cost item	Number of worksite inspections	Average duration of interview (hours)	Compensation rate	Total cost
	A	B	C	D = A × B × C
Beneficiaries' opportunity cost of time during worksite inspections	10,384	0.49	$75.11	$382,172
Supervisors or managers' opportunity cost of time during worksite inspections	10,384	0.74	85.96	660,530
Total		1.23		1,042,702

Source: USCIS analysis.

If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition. In this interim final rule, it may be grounds for denial or revocation of any H–1B petition for H–1B workers performing services at the location or locations which are subject of inspection, including any third-party worksites, if USCIS is unable to verify relevant facts due to failure or refusal of the petitioner or third-party worksite parties to cooperate in a site visit.[203]

DHS notes that the site visit provision could create an incentive for employers to cooperate, and to provide further evidence to support the Form I–129 H–1B petition, for an adjudicative decision. The new provision will notify petitioners of the specific consequences for noncompliance, whether by them or by officials at the third-party worksite. If USCIS conducts a site visit in order to verify facts related to the H–1B petition, including whether the beneficiary is being employed consistent with the terms of the petition approval, then DHS believes that it would be reasonable to conclude that the petitioner will not have met its burden of proof and the petition may be properly denied or revoked if USCIS is unable to verify relevant facts to determine compliance or because of failure or refusal to comply with the site inspection. This would be true whether the unverified facts relate to a petitioner worksite or a third-party worksite at which a beneficiary has been or will be placed by the petitioner. It would also be true whether the failure or refusal to cooperate is by the petitioner or a third-party.

d. Eliminating the General Itinerary Requirement for H–1B Petitions

1. Cost Savings of Itinerary Requirement Exemption

Current regulations require an itinerary with the dates and locations of the services to be provided if a Form I–129 H–1B petition indicates that the beneficiary will be performing services in more than one location.[204] This interim final rule eliminates this requirement for H–1B petitioners. DHS is revising 8CFR 214.2(h)(2)(i)(B) to specify that the itinerary requirement for service or training in more than one location will not apply to H–1B petitions. *See* new 8CFR 214.2(h)(2)(i)(B). DHS is making this revision in response to a recent court decision specific to H–1B petitions.[205] The itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) will still apply to other H classifications. In addition, DHS will still apply the itinerary requirement at 8 CFR 214.2(h)(2)(i)(F) for H–1B petitions filed by agents.

DHS calculates economic impacts of this provision relative to the current regulation. Relative to the current regulation this provision reduces the cost for the petitioners who file on behalf of beneficiaries performing services in more than one location and submitting itineraries. However, due to the absence of detailed data on the number of petitioners who file on behalf of beneficiaries performing services in more than one location, DHS uses the number of petitions filed annually for workers placed at off-site locations as a proxy for petitioners with beneficiaries performing services in multiple locations. DHS assumes the petitions filed for workers placed at off-site locations are likely to indicate that beneficiaries will be performing services at multiple locations and, therefore, petitioners are likely to submit itineraries. DHS estimates that the number of petitions filed annually for workers placed at off-site locations who may submit itineraries using average number of petitions received annually from FY2015 to FY2019 and the proportion of off-site workers approved petitions. The estimated number of petitions filed annually for workers placed at off-site location is 144,668.[206] DHS estimates the cost savings based on the opportunity cost of time of preparing and submitting an itinerary by multiplying the estimated time burden to gather itinerary information (0.25 hours)[207] by the compensation rate of an HR specialist, in-house lawyer or outsourced lawyer, respectively. Table 16 shows that the estimated annual cost savings due to the elimination of the itinerary requirement, $4,490,968. Since the itinerary is normally submitted with the Form I–129 H–1B package, there would be no additional postage savings.

To estimate the effect of this provision in conjunction with other provisions that change the forecasted population, DHS calculates the cost savings of this provision on a per-petition-received basis. The annual cost savings of this provision, divided amongst the entire population of received petitions, would average out to approximately $11 per received petition.[208]

[203] *See* new 8 CFR 214.2(h)(4)(i)(B)(*7*)(*ii*) and (*iii*).

[204] *See* current 8 CFR 214.2(h)(2)(i)(B).

[205] *See, ITServe All., Inc.* v. *Cissna,* No. CV 18–2350 (RMC), 2020 WL 1150186 (D.D.C. Mar. 10, 2020).

[206] DHS uses the proportion of workers placed at off-site location (36 percent from Table 12) as an approximate measure to estimate the number of petitions received annually for workers performing services in multiple locations from the total number of petitions filed. 144,528 petitions filed for workers performing services in multiple locations = 401,468 total petitions filed annually × 36 percent.

[207] DHS assumes that it would not take more than 0.25 hours (or 15 minutes) because this itinerary information should be readily available from the petitioners' records during the time of filing the petitions.

[208] Additional annual cost savings per petition received for itinerary requirement exemption for H–1B petitions ($11, rounded) = Total baseline cost savings ($4,490,968)/5-year average petition received annually (401,856).

TABLE 16—ESTIMATED COST SAVINGS TO FORM I–129H1 PETITIONERS DUE TO THE ELIMINATION OF THE ITINERARY REQUIREMENT

	Affected population [a] A	Time burden (hours) B	Compensation rate C	Total annual cost A × B × C
Opportunity cost of time to complete Form I–129H1 petitions by:				
HR specialist	37,614	0.25	$47.57	$447,325
In-house lawyer	34,720	0.25	102.00	885,360
Outsourced lawyer	72,334	0.25	174.65	3,158,283
Total	144,668			4,490,968

Source: USCIS analysis.
[a] The estimated number of petitions filed annually for workers placed at off-site location 144,668.
HR specialist (37,614) = 144,668 × Percent of petitions filed by HR specialist (26%).
In-house lawyer (34,720) = 144,668 × Percent of petitions filed by in-house lawyer (24%).
Outsourced lawyer (72,334) = 144,668 × Percent of petitions filed by outsourced lawyer (50%).

e. Limiting Maximum Validity Period for Third-Party Placement

1. Costs of Requesting Authorization To Continue H–1B Employment

DHS is amending the maximum validity period for a petition approved for workers placed at third-party worksites. Under current regulations at 8 CFR 214.2(h)(9)(iii), the maximum validity period an H–1B petition may be approved is ''up to three years''. This interim final rule will limit the maximum validity period to 1 year for workers placed at third-party worksites.[209] This provision will result in more extension petitions from petitioners with beneficiaries who work at third-party worksites.

DHS estimates the increase in petitions for FY2021 to FY2030 due to the reduction in maximum validity period. Although the maximum validity period for a specialty occupation worker is 3 years, the average validity period for approved H–1B beneficiaries is 28 months.[210] Since the interim final rule limits the validity period for petitions indicating that the beneficiary will work at a third-party worksite to up to 1 year (12 months), petitioners seeking to continue the employment of beneficiaries placed at third-party worksites will have to file extension petitions more frequently to request authorization to continue such H–1B employment. The reduction in average validity period from 28 months to 12 months or less will increase the frequency of petitions by 28/12 times annually for FY 2023 and onwards. There is a transition period in FY2021 and FY2022, which is explained in detail below.

To determine the number of petitions under the current regulations, DHS uses the historical 5-year average number of petitions approved for FY2015 to FY2019 (306,898)[211] and the proportion of workers approved for off-site locations petitions (36 percent) as an approximate measure to estimate the number of workers to be placed at third-party worksites.[212] DHS estimates the number of petitions approved annually for workers placed at third-party worksite as 110,483[213] under the 28 month average validity period. DHS assumes that 110,483 petitions are approved uniformly across 12 months, or 9,207[214] petitions per month.

For FY2021 DHS estimates no additional increase in petitions due to this provision because any associated costs would occur at the end of the petition validity period when the petitioner seeks to file an extension petition. Any petition filed in FY2021 under the provision's maximum validity period of 12 months for workers placed at third party worksites would have otherwise been filed under the current regulations, which is up to 3 years. The baseline population already accounts for these petitions. The reduction in maximum validity period from 3 years to 12 months would increase the number of filed petitions starting 12 months after the effective date of this interim final rule, which would be in FY2022. Those petitions pending or approved prior to the effective date of this interim final rule would still be subject to the current regulation maximum validity period of 3 years, unless an amended petition is filed.

For FY2022, DHS estimates an additional 110,483 extension petitions due to this provision. These additional extension petitions would be filed by petitioners who had third-party worksite petitions filed in FY2021 that require an extension under the interim final rule's 12 month maximum validity period but would not have required an extension under the current 28 month average validity period.

For each year between FY2023 and FY2030, DHS estimates an additional 147,311 extension petitions due to this provision. These additional extension petitions represent the sum of 110,483 petitions filed in the previous fiscal year plus 36,828[215] extension petitions from four months of the fiscal year prior to the previous fiscal year, all of which may have maintained their validity under the current 28 month average validity period.[216] The summary table is presented above in section ''Population Affected by the Rule'' in Table 7.

DHS estimates the additional costs resulting from the population changes due to the limiting maximum validity period for third-party worksites using the forecasted increase in the number of petitions received as discussed above. The cost per additional petition is the sum of the baseline cost per petition received, additional annual cost per petition received for completing and

[209] *See* new 8 CFR 214.2(h)(9)(iii)(A)(*1*).

[210] *See supra* note 11.

[211] Table 4. Total Receipts, Approvals, and Denials of Form I–129 Petitions with an H–1B Classification, FY 2015 to FY 2019.

[212] Table 12. Form I–129 H–1B petitions for Workers placed at Off-site Locations.

[213] Calculation: Estimated number of petitions approved annually for workers placed at third-party worksite 110,483 = 5-year average number of petitions approved for FY2015 to FY2019 (306,898) * Percentage of workers approved for off-site locations petitions 36%.

[214] Calculation: 9,207 = Estimated number of petitions approved annually for workers placed at third-party worksite 110,483/12 months.

[215] For example, in FY2025 extension petitions consist of those petitions filed in FY2024 whose maximum 12 month validity period would expire in FY2025 and 4 month worth of petitions filed in FY2023 that would have had their 28 month average validity period expire in FY2025. Therefore, 4 month worth of petition (36,828, rounded) = 4 months * (Estimated number of petitions approved annually for workers placed at third-party worksite 110,483/12 months).

[216] Additional 147,311 extension petitions = 110,483 Petitions filed in the previous fiscal year + 36,828 Extension petitions from four months of the fiscal year prior to the previous fiscal year.

filing Form I–129H1 petitions, additional annual cost per petition received for submitting corroborating evidence for H–1B petitions, and the annual cost savings per petition received for itinerary requirement exemption for H–1B petitions. Arithmetically, this is obtained by adding $3,314, $62, $45, and ($11) to equal $3,410 for FY2021 to FY2027. Due to the expiration of the Public Law 114–113 Fee at the end of FY2027, the cost for FY2028 to FY2030 is obtained by adding $2,274, $62, $45, and ($11) to equal $2,370.[217]

This provision's estimated annual increase in costs to petitioners is the product of the estimated additional population and estimated cost per petition received, both described above. Table 17 delineates these costs for each fiscal year between FY2021 and FY2030.

TABLE 17—FORECASTING INCREASE IN COST DUE TO POPULATION INCREASE FOR FY2021 TO FY2030

Fiscal year	Estimated increase in number of petitions received A	Cost per petition received B	Estimated increase in cost due to population increase A × B
2021	0	$3,410	0
2022	110,483	3,410	$376,747,030
2023	147,311	3,410	502,330,510
2024	147,311	3,410	502,330,510
2025	147,311	3,410	502,330,510
2026	147,311	3,410	502,330,510
2027	147,311	3,410	502,330,510
2028	147,311	2,370	349,127,070
2029	147,311	2,370	349,127,070
2030	147,311	2,370	349,127,070

Source: USCIS Analysis.

f. Familiarization Cost

Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule in order to fully comply with the new regulation(s). To the extent that an individual or entity directly regulated by the rule incurs familiarization costs, those familiarization costs are a direct cost of the rule. The entities directly regulated by this rule are the employers who file H–1B petitions. There were 48,084 unique employers who filed H–1B petitions in FY2019.[218] DHS assumes that the petitioners require approximately two hours to familiarize themselves with the rule. Using the average total rate of compensation of HR specialists, In-house lawyer, and Outsourced lawyer from Table 8 and assuming one person at each entity familiarizes his or herself with the rule, DHS estimates a one-time total familiarization cost of $11,941,471 in FY2021.

TABLE 18—FAMILIARIZATION COSTS TO THE PETITIONERS

Cost items	Total affected population A	Additional time burden to familiarize (hours) B	Compensation rate C	Total cost D = A × B × C
Opportunity cost of time to familiarize the rule by:				
HR specialist	12,502	2	$47.57	$1,189,440
In-house lawyer	11,540	2	102.00	2,354,160
Outsourced lawyer	24,042	2	174.65	8,397,871
Total	48,084			11,941,471

Source: USCIS analysis.

[217] Additional annual cost per petition received for each provision is calculated in the relevant section. Sum of cost per petition received for each provision ($3,410) = Additional annual cost per petition received for completing and filing Form I–129 H–1B petitions ($62) + Additional annual cost per petition received for submitting corroborating evidence for H–1B petitions ($45) − Additional annual cost savings per petition received for itinerary requirement exemption for H–1B petitions ($11) + Baseline cost per petition received ($3,314) for FY2021 to FY2027. Sum of cost per petition received for each provision ($2,370) = Additional annual cost per petition received for completing and filing Form I–129 H–1B petitions ($62) + Additional annual cost per petition received for submitting corroborating evidence for H–1B petitions ($45) − Additional annual cost savings per petition received for itinerary requirement exemption for H–1B petitions ($11) + Baseline cost per petition received ($2,274) for FY2028 to FY2030.

[218] Source: Office of Policy and Strategy, Policy Research Division (PRD), Claims 3 and USCIS analysis, August 18, 2020.

5. Total Estimated and Discounted Net Costs of Regulatory Changes to Petitioners

DHS presents the total annual estimated costs and cost savings annualized over a 10-year implementation period resulting from regulatory changes in this interim final rule. Table 19 shows the total annual cost of the rule to be $55,897,905 in FY2021, $420,703,464 in FY2022, $546,286,944 in each of FY2023 to FY2027, and $393,083,504 in each of FY2028 to FY2030 to the petitioners. DHS also estimates the total annual savings of the rule to petitioners to be $4,490,968. Therefore, the estimated total annual net costs to petitioners to be $51,406,937 in FY2021, $416,212,496 in FY2022, $541,795,976 in each of FY2023 to FY2027, and $388,592,536 in each of FY2028 to FY2030.

TABLE 19—SUMMARY OF ESTIMATED ANNUAL NET COSTS TO PETITIONERS IN THE INTERIM FINAL RULE FOR FY2021 TO FY2030

Costs or cost savings (provision)	Total estimated annual cost FY2021	Total estimated annual cost FY2022	Total estimated annual cost FY2023–FY2027	Total estimated annual cost FY2028–FY2030
(a) Petitioners' additional cost of filing Form I–129H1 petitions	$24,949,861	$24,949,861	$24,949,861	$24,949,861
(b) Petitioners' cost of submitting evidence establishing employer-employee relationship and specialty occupation work when the beneficiary will be working at a third-party worksite	17,963,871	17,963,871	17,963,871	17,963,871
(c) Petitioners' cost of worksite inspection	1,042,702	1,042,702	1,042,702	1,042,702
(e) Petitioners' cost of requesting authorization to continue H–1B employment more frequently because of limitation on validity period for third-party worksite petitions	0	376,747,030	502,330,510	349,127,070
(f) Petitioners' cost of familiarization to the rule	11,941,471	0	0	0
Total Annual Costs	55,897,905	420,703,464	546,286,944	393,083,504
(d) Petitioners' cost savings due to eliminating general H–1B itinerary requirement	4,490,968	4,490,968	4,490,968	4,490,968
Total Annual Cost Savings	4,490,968	4,490,968	4,490,968	4,490,968
Total Annual Net Costs	51,406,937	416,212,496	541,795,976	388,592,536

Source: USCIS analysis.
Calculation: Total annual net costs = Total annual costs − Total annual cost savings.

To compare costs over time, DHS applies a 3 percent and a 7 percent discount rate to the total estimated costs associated with this interim final rule. Table 20 shows the summary undiscounted and discounted total net costs to Form I–129H1 petitioners over a 10-year period. DHS estimates the 10-year total net cost of the rule to petitioners to be approximately $4,342,376,923 undiscounted, $3,674,793,598 discounted at 3-percent, and $2,986,972,052 discounted at 7-percent. Over the 10-year implementation period of the rule, DHS estimates the annualized costs of the rule to be $430,797,915 annualized at 3-percent, $425,277,621 annualized at 7-percent.

TABLE 20—TOTAL ESTIMATED NET COSTS OF THIS INTERIM FINAL RULE

[FY 2021–FY 2030]

Fiscal year	Total net costs (undiscounted)	Total net costs (discounted at 3 percent)	Total net costs (discounted at 7 percent)
2021	$51,406,937	$49,909,648	$48,043,867
2022	416,212,496	392,320,196	363,536,113
2023	541,795,976	495,820,069	442,266,905
2024	541,795,976	481,378,707	413,333,556
2025	541,795,976	467,357,968	386,293,043
2026	541,795,976	453,745,600	361,021,536
2027	541,795,976	440,529,709	337,403,304
2028	388,592,536	306,758,536	226,164,394
2029	388,592,536	297,823,822	211,368,593
2030	388,592,536	289,149,342	197,540,741
Total	4,342,376,923	3,674,793,598	2,986,972,052
Annualized		430,797,915	425,277,621

Source: USCIS analysis.

E.O. 13771 directs agencies to reduce regulation and control regulatory costs. This interim final rule is considered an E.O. 13771 regulatory action. DHS estimates the total cost of this rule is $292,051,988 annualized using a 7

percent discount rate over a perpetual time horizon in 2016 dollars and discounted back to 2016.

6. Costs to the Federal Government

DHS is revising the regulations to require issuance of a brief explanation when an H–1B nonimmigrant petition is approved, but the validity period end date is earlier than the end date requested by the petitioner at the time of filing. The cost for providing a written explanation of the rationale for limiting the approval validity end date in such cases will be borne by USCIS.

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services by DHS, including administrative costs and services provided without charge to certain applicants and petitioners.[219] DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs such as clerical, officers, and managerial salaries and benefits, plus an amount to recover unassigned overhead (such as facility rent, IT equipment and systems, or other expenses) and immigration services provided without charge. Consequently, since USCIS immigration fees are based on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS notes the time necessary for USCIS to review the information submitted with the forms relevant to this interim final rule includes the time to adjudicate the benefit request. These costs are captured in the fees collected for the benefit request from petitioners. DHS notes that this rule may increase USCIS' costs associated with adjudicating immigration benefit requests. Future adjustments to the fee schedule may be necessary to recover these additional operating costs and will be determined during USCIS' next comprehensive biennial fee review.

7. Benefits of the Regulatory Changes

This rule specifies the conditions under which DHS intends to implement the changes in the current rule regarding petitions for H–1B specialty occupation workers filed using Form I–129H1. Although the H–1B program was intended to allow employers to fill gaps in their workforce and remain competitive in the global economy, it has in fact expanded far beyond that, often to the detriment of U.S. workers. As discussed above, the H–1B program has been used to displace U.S. workers, and has led to reduced wages in a number of industries in the U.S. labor market. In this interim final rule, DHS is implementing revisions and clarifications to ensure that each H–1B nonimmigrant beneficiary is working for a qualified petitioner and in a job meeting the statutory requirements of a specialty occupation. The benefits of each provision in the interim final rule is discussed in detail below.

DHS is updating Form I–129H1 for H–1B petitions to incorporate the regulatory changes in this interim final rule. Although this will result in petitioners incurring additional costs while filing H–1B petitions, USCIS can use the additional credible evidence requested in the H–1B petitions to potentially reduce the number of Requests for Evidence (RFEs) sent to petitioners, which ultimately would allow for more efficient and timely adjudication decisions.

Where a beneficiary will be placed at one or more third-party worksites, DHS will require the petitioner to submit evidence such as contracts, work orders, or other similar evidence to establish that the petitioner will have an employer-employee relationship with the beneficiary, and that the beneficiary will perform services in a specialty occupation at the third-party worksite(s). While USCIS already has general authority to request any document it deems necessary, this interim final rule states that USCIS may request copies of contracts, work orders, or other similar corroborating evidence on a case-by-case basis in all cases, regardless of where the beneficiary will be placed. This supporting evidence will allow USCIS to confirm that beneficiaries working at third-party worksites will have a valid employment relationship with the petitioner and will be performing qualifying specialty occupation services while working at the third-party worksite.

Based on the noncompliance uncovered by USCIS site visits,[220] DHS is adding additional requirements specific to the H–1B program to set forth the scope of on-site inspections and the consequences of a petitioner's or third-party's refusal or failure to fully cooperate with these inspections. DHS believes that site visits are important to maintain the integrity of the H–1B program by detecting and deterring fraud and noncompliance. As a result, USCIS can ensure that the H–1B program is used appropriately and the economic interests of U.S. workers are protected. The ability to detect and deter fraud and noncompliance will strengthen the H–1B program and hence outweigh any overall adjudication delays resulting from the worksite visits. Under this rule, such failure or refusal to cooperate and allow USCIS to verify facts may be grounds for denial or revocation of any H–1B petition for workers performing services at the location or locations which are subjects of inspection, including any third-party worksites. DHS is clarifying that failure or refusal to cooperate with a site visit or other compliance review may be grounds for denial or revocation of a petition.

DHS believes that limiting approvals for third-party placement petitions to a maximum of 1-year would allow the agency to more consistently and thoroughly monitor a petitioner's and beneficiary's continuing eligibility. DHS believes that limiting the validity period for petitions where beneficiaries are placed at third-party worksites, where fraud and abuse is more likely to occur, would also increase compliance with the regulations and improve the program's overall integrity. This general practice will have the added benefit of providing a degree of certainty to petitioners with respect to what validity period to request and to expect, if approved.

DHS will revise the regulations to require issuance of a brief explanation when an H–1B nonimmigrant petition is approved but USCIS grants an earlier validity period end date than requested by the petitioner. Providing a written explanation for limited validity period will help ensure that the petitioner is aware of the reason for shorter validity periods.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 605(b), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. ''Small entities'' are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. A regulatory flexibility analysis is not required when a rule is exempt from notice and comment rulemaking. This IFR is exempt from the notice and comment rulemaking, as stated in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* of the preamble.

[219] *See* INA section 286(m), 8 U.S.C. 1356(m).

[220] *See supra* note 132.

Therefore, a regulatory flexibility analysis is not required for this rule.

D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value equivalent of $100 million in 1995 adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI–U) is approximately $168 million based on the Consumer Price Index for All Urban Consumers.[221]

While this interim final rule may result in the expenditure of more than $100 million by the private sector annually, the rulemaking is not a ''Federal mandate'' as defined for UMRA purposes.[222] The cost of preparation of H–1B petitions (including required evidence) and the payment of H–1B nonimmigrant petition fees by petitioners or other private sector entities is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary Federal program, applying for immigration status in the United States.[223] This interim final rule does not contain such a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. Therefore, no actions were deemed necessary under the provisions of the UMRA.

E. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this interim final rule is a major rule as defined by 5 U.S.C. 804, also known as the ''Congressional Review Act,'' as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868 *et seq.* Accordingly, this rule will be effective at least 60 days after the date on which Congress receives a report submitted by DHS under the Congressional Review Act, or 60 days after the IFR's publication, whichever is later.

F. Executive Order 13132 (Federalism)

This interim final rule would 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. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this interim final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This interim final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This interim final rule does not have ''tribal implications'' because it 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. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

I. National Environmental Policy Act

DHS analyzes actions to determine whether the National Environmental Policy Act, Public Law 91–190, 42 U.S.C. 4321 through 4347 (NEPA), applies to them and, if so, what degree of analysis is required. DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01, *Implementation of the National Environmental Policy Act* (Instruction Manual) establish the policies and procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii), 1508.4. Categorical exclusions established by DHS are set forth in Appendix A of the Instruction Manual. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)–(c).

This rule amends regulations governing the H–1B temporary nonimmigrant specialty occupation program to improve the integrity of the program, and more closely conform the regulatory framework to that of the Act. Specifically, DHS is revising the regulatory definition and standards for determining whether an alien will be employed in a ''specialty occupation'' to align with the statutory definition of the term. The rule is also revising the definition of ''United States employer,'' and ''employer-employee relationship,'' to clarify how USCIS will determine whether there is an employer-employee relationship between the petitioner and the beneficiary. In addition, the rule is limiting the validity period for third-party placement petitions to a maximum of 1 year; providing for a written explanation for certain approved petitions where the validity period is limited to 1 year or less; amending the itinerary provision applicable to petitioners of temporary nonimmigrant workers to clarify it does not apply to H–1B petitioners; and codifying USCIS' H–1B site visit authority, including addressing the potential consequences of refusing a site visit. The primary purpose of these changes is to better ensure that each H–1B nonimmigrant worker will be working for a qualified employer and in a position that meets the statutory definition of a ''specialty occupation.'' While this rule tightens regulatory eligibility criteria and may result in denials of some H–1B

[221] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items, available at https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf* (last visited Aug. 11, 2020).

Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2019 − Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(255.657 − 152.383)/152.383] * 100 = (103.274/152.383) *100 = 0.6777 * 100 = 67.77 percent = 68 percent (rounded).

Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.68 = $168 million in 2019 dollars.

[222] *See* 2 U.S.C. 658(6).

[223] *See* 2 U.S.C. 658(7)(A)(ii).

petitions, this rule does not change the number of H–1B workers that may be employed by U.S. employers; the rule leaves unchanged the statutory numerical limitations and cap exemptions. It also does not change rules for where H–1B nonimmigrants may be employed.

Generally, DHS believes NEPA does not apply to a rule intended to strengthen an immigration program because any attempt to analyze its potential impacts would be largely speculative, if not completely so. DHS cannot reasonably estimate how many petitions will be filed for workers to be employed in specialty occupations following the changes made by this rule or whether the regulatory amendments herein will result in an overall change in the number of H–1B petitions that are ultimately approved, and the number of H–1B workers who are employed in the United States in any fiscal year. DHS has no reason to believe that the amendments to H–1B regulations would change the environmental effect, if any, of the existing regulations. Therefore, DHS has determined that even if NEPA were to apply to this action, this rule clearly fits within categorical exclusion A3(d) in the Instruction Manual, which provides an exclusion for ''promulgation of rules . . . that amend an existing regulation without changing its environmental effect.'' This rule maintains the current human environment by making improvements to the H–1B program during the economic crisis caused by COVID–19 in a way that will more effectively prevent the employment of H–1B workers from negatively impacting the working conditions of U.S. workers who are similarly employed. This rule is not a part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

J. Paperwork Reduction Act

1. USCIS Form I–129 [224]

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The revised information collection has been submitted to OMB for review and approval as required by the PRA.

DHS invites comment on the impact of this rule to the collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument. Comments are encouraged and will be accepted until November 9, 2020. All submissions received must include the agency name and OMB Control Number 1615–0009 in the body of the submission. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and Public Participation sections of this interim final rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for a Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for an alien to temporarily enter as a nonimmigrant in certain classifications. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the alien worker. The form serves the purpose of standardizing requests for certain nonimmigrant workers and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection I–129 is 294,751 and the estimated hour burden per response is 2.84 hours; the estimated total number of respondents for the information collection E–1/E–2 Classification Supplement to Form I–129 is 4,760 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I–129 is 3,057 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection H Classification Supplement to Form I–129 is 96,291 and the estimated hour burden per response is 2.5 hours; the estimated total number of respondents for the information collection H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement is 96,291 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I–129 is 37,831 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I–129 is 22,710 and the estimated hour burden per

[224] As indicated elsewhere in this rule, DHS estimated the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (''Fee Schedule Final Rule''), and related form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20–cv–5883 (N.D. Cal. Sept. 29, 2020). While DHS intends to vigorously defend this lawsuit and is not changing the economic baseline for this rule as a result of the litigation, it is using the currently approved Form I–129, and not the form version associated with the enjoined Fee Schedule Final Rule for the purpose of seeking OMB approval of form changes associated with this rule. Should DHS prevail in the Fee Schedule Final Rule litigation and is able to implement the form changes associated with that rule, DHS will comply with the Paperwork Reduction Act and seek approval of the information collection changes associated with this rule, based on the version of the Form I–129 that is in effect at that time.

response is 1 hour; the estimated total number of respondents for the information collection Q–1 Classification Supplement to Form I–129 is 155 and the estimated hour burden per response is 0.34 hours; the estimated total number of respondents for the information collection R–1 Classification Supplement to Form I–129 is 6,635 and the estimated hour burden per response is 2.34 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection of information is 1,268,331 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is $70,681,290.

2. USCIS H–1B Registration Tool

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The revised information collection has been submitted to OMB for review and approval as required by the PRA.

DHS invites comment on the impact to the collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument. Comments are encouraged and will be accepted until November 9, 2020. All submissions received must include the agency name and OMB Control Number 1615–0144 in the body of the submission. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and Public Participation sections of this interim final rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* H–1B Registration Tool.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* OMB–64; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS will use the data collected through the H–1B Registration Tool to select a sufficient number of registrations projected to meet the applicable H–1B cap allocations and to notify registrants whether their registration was selected.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection H–1B Registration Tool is 275,000 and the estimated hour burden per response is 0.583 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection of information is 160,325 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $0.

K. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218.

■ 2. Amend § 214.2 by:
■ a. Revising paragraph (h)(2)(i)(B);
■ b. Adding paragraph (h)(4)(i)(B)(*7*);
■ c. In paragraph (h)(4)(ii):
■ i. Adding a definition for ''Employer-employee relationship'' in alphabetical order;
■ ii. Revising the definition of ''Specialty occupation;''
■ ii. Adding a definition for ''Third-party worksite'' in alphabetical order;
■ iii. Revising the definition of ''United States employer;'' and
■ iv. Adding a definition for ''Worksite'' in alphabetical order;
■ d. Revising paragraph (h)(4)(iii)(A);
■ e. Adding paragraph (h)(4)(iv)(C);
■ f. Redesignating paragraph (h)(9)(i) introductory text as paragraph (h)(9)(i)(A);
■ g. Adding paragraph (h)(9)(i)(B);
■ h. Revising paragraph (h)(9)(iii)(A)(*1*); and
■ i. Adding paragraph (h)(24).

The revisions and additions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(B) *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training. The itinerary must be submitted to USCIS with the Petition for a Nonimmigrant Worker, or successor form, as provided in the form instructions. The address that the petitioner specifies as its location on the Petition for a Nonimmigrant Worker must be where the petitioner is located for purposes of this paragraph (h)(2)(i)(B). This paragraph (h)(2)(i)(B) does not apply to H–1B petitions.

* * * * *

(4) * * *

(i) * * *

(B) * * *

(*7*)(*i*) The information provided on an H–1B petition and the evidence submitted in support of such petition may be verified by USCIS through lawful means as determined by USCIS, including telephonic and electronic verifications and on-site inspections. Such inspections may include, but are not limited to, a visit of the petitioning organization's facilities, interviews with the petitioning organization's officials, review of the petitioning organization's records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the H–1B petition, such as facts relating to the petitioner's and beneficiary's H–1B eligibility and compliance. An inspection may be conducted at locations including the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable.

(*ii*) USCIS may conduct on-site inspections or other compliance reviews as described in paragraph (h)(4)(i)(B)(*7*)(*i*) of this section at any time after the filing of an H–1B petition. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of such inspection will be a condition for approval of any petition.

(*iii*) USCIS conducts on-site inspections or other compliance reviews to verify facts related to the adjudication of the petition and compliance with H–1B petition requirements. If USCIS is unable to verify such facts due to the failure or refusal of the petitioner or a third-party worksite party to cooperate in an inspection or other compliance review, then such failure or refusal to cooperate and allow USCIS to verify facts may result in denial or revocation of any H–1B petition for H–1B workers performing services at the location or locations which are a subject of inspection or compliance review, including any third-party worksites.

* * * * *

(ii) * * *

Employer-employee relationship means the conventional master-servant relationship consistent with the common law. The petitioner must establish that its offer of employment as stated in the petition is based on a valid employer-employee relationship that exists or will exist. In considering whether the petitioner has established that a valid ''employer-employee relationship'' exists or will exist, USCIS will assess and weigh all relevant aspects of the relationship with no one factor being determinative.

(*1*) In cases where the H–1B beneficiary does not possess an ownership interest in the petitioning organization or entity, the factors that USCIS may consider to determine if a valid employment relationship will exist or continue to exist include, but are not limited to:

(*i*) Whether the petitioner supervises the beneficiary and, if so, where such supervision takes place;

(*ii*) Where the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision;

(*iii*) Whether the petitioner has the right to control the work of the beneficiary on a day-to-day basis and to assign projects;

(*iv*) Whether the petitioner provides the tools or instrumentalities needed for the beneficiary to perform the duties of employment;

(*v*) Whether the petitioner hires, pays, and has the ability to fire the beneficiary;

(*vi*) Whether the petitioner evaluates the work-product of the beneficiary;

(*vii*) Whether the petitioner claims the beneficiary as an employee for tax purposes;

(*viii*) Whether the petitioner provides the beneficiary any type of employee benefits;

(*ix*) Whether the beneficiary uses proprietary information of the petitioner in order to perform the duties of employment;

(*x*) Whether the beneficiary produces an end-product that is directly linked to the petitioner's line of business; and

(*xi*) Whether the petitioner has the ability to control the manner and means in which the work product of the beneficiary is accomplished.

(*2*) In cases where the H–1B beneficiary possesses an ownership interest in the petitioning organization or entity, additional factors that USCIS may consider to determine if a valid employment relationship will exist or continue to exist include, but are not limited to:

(*i*) Whether the petitioning entity can hire or fire the beneficiary or set the rules and parameters of the beneficiary's work;

(*ii*) Whether and, if so, to what extent the petitioner supervises the beneficiary's work;

(*iii*) Whether the beneficiary reports to someone higher in the petitioning entity;

(*iv*) Whether and, if so, to what extent the beneficiary is able to influence the petitioning entity;

(*v*) Whether the parties intended that the beneficiary be an employee, as expressed in written agreements or contracts; and

(*vi*) Whether the beneficiary shares in the profits, losses, and liabilities of the organization or entity.

* * * * *

Specialty occupation means an occupation that requires:

(*1*) The theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor, such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, or the arts; and

(*2*) The attainment of a U.S. bachelor's degree or higher in a directly related specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. The required specialized studies must be directly related to the position. A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. While a position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, each of those qualifying degree fields must be directly related to the proffered position.

Third-party worksite means a worksite, other than the beneficiary's residence in the United States, that is not owned or leased, and not operated, by the petitioner.

United States employer means a person, firm, corporation, company, or other association or organization in the United States which:

(*1*) Engages the beneficiary to work within the United States, and has a bona fide, non-speculative job offer for the beneficiary;

(*2*) Has an employer-employee relationship with respect to employees under this part; and

(*3*) Has an Internal Revenue Service Tax identification number.

Worksite means the physical location where the work actually is performed by the H–1B nonimmigrant. A ''worksite'' will not include any location that would not be considered a ''worksite'' for Labor Condition Application (LCA) purposes.

(iii) * * *

(A) *Criteria for specialty occupation position.* A proffered position does not meet the definition of specialty occupation in paragraph (h)(4)(ii) of this section unless it also satisfies at least one of the following criteria:

(*1*) A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is the minimum requirement for entry into the particular occupation in which the beneficiary will be employed;

(*2*) A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is the minimum requirement for entry into parallel positions at similar organizations in the employer's United States industry;

(*3*) The employer has an established practice of requiring a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, for the position. The petitioner must also establish that the proffered position requires such a directly related specialty degree, or its equivalent, to perform its duties; or

(*4*) The specific duties of the proffered position are so specialized, complex, or unique that they can only be performed by an individual with a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent.

* * * * *

(iv) * * *

(C) The petitioner must establish, at the time of filing, that it has actual work in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. When a beneficiary will be placed at one or more third-party worksites, the petitioner must submit evidence such as contracts, work orders, or other similar corroborating evidence showing that the beneficiary will perform services in a specialty occupation at the third-party worksite(s), and that the petitioner will have an employer-employee relationship with the beneficiary. In accordance with 8 CFR 103.2(b) and paragraph (h)(9) of this section, USCIS may request copies of contracts, work orders, or other similar corroborating evidence on a case-by-case basis in all cases, regardless of where the beneficiary will be placed.

* * * * *

(9) * * *

(i) * * *

(B) Where the petition is approved with an earlier validity period end date than requested by the petitioner, the approval notice will provide or be accompanied by a brief explanation for the validity period granted.

* * * * *

(iii) * * *

(A)(*1*) *H–1B petition in a specialty occupation.* The maximum validity period for an approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation is 3 years. However, where the beneficiary will be working at a third-party worksite, the maximum validity period for an approved petition is 1 year. In all instances, the approved petition may not exceed the validity period of the labor condition application.

* * * * *

(24) *Severability.* (i) [Reserved]

(ii) The following provisions added or revised by the changes made to the H–1B nonimmigrant visa classification program, as of December 7, 2020, are intended to be implemented as separate and severable from one another: paragraphs (h)(2)(i), (h)(4)(i)(B)(*7*), (h)(4)(ii) (definitions of employer-employee, specialty occupation, third-party worksite, U.S. employer, and worksite), (h)(4)(iii)(A), (h)(4)(iv)(C), (h)(9)(i)(B), and (h)(9)(iii)(A)(*1*) of this section. If one or more of the paragraphs in the preceding sentence is not implemented, DHS intends that the remaining paragraphs will remain valid and be implemented to the greatest extent possible.

* * * * *

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.

[FR Doc. 2020–22347 Filed 10–6–20; 4:15 pm]

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FEDERAL REGISTER

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Part IX

The President

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Proclamation 10093—Made in America Day and Made in America Week, 2020

Proclamation 10094—Child Health Day, 2020

Executive Order 13954—Saving Lives Through Increased Support for Mental- and Behavioral-Health Needs

Presidential Permit of October 3, 2020—Authorizing Express Pipeline, LLC, To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Canada

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Presidential Permit of October 3, 2020—Authorizing NuStar Logistics, L.P., To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Mexico

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Presidential Documents

Title 3—

The President

Proclamation 10092 of October 3, 2020

Fire Prevention Week, 2020

By the President of the United States of America

A Proclamation

During Fire Prevention Week, we are reminded to keep doing our part to prevent fires before they tragically claim lives and destroy homes, businesses, and natural resources. Every American can play a role in raising awareness about preventing fires and taking simple precautions to help prevent fire-related deaths and injuries. We also commend our Nation's brave firefighters and emergency workers who risk their health and safety each day, and we solemnly remember those who gave their lives in service to protect Americans and our communities. This week, I encourage all Americans to take steps to prepare their family, property, and community on what to do before, during, and after a fire.

This year, courageous firefighters and other brave Americans have confronted one of the worst fire seasons in our history. We have seen more than 43,500 wildfires, lost more than 10,000 buildings, and 35 people have tragically died. In the Western States, more than 30,000 firefighters—the largest deployment in history—have battled these fires, risking their lives for their fellow Americans' safety. My Administration is thankful for the assistance from our National Guard, Navy, Marine Corps, and international partners from Canada and Mexico to help end this devastation.

This tragic fire season is another reminder of the importance of effective forest management, which can play a big role in helping prevent forest fires. Proactive steps such as cleaning forest floors to remove flammable limbs and leaves can help reduce the risk of large fires and improve the health of our Nation's forests. In 2020, I have approved more than 30 Stafford Act Declarations, including Fire Management Assistance Grants, to help multiple States stop fires, and we continue to encourage active forest management efforts throughout the country.

This year, we also give special recognition to the many American firefighters who joined the valiant efforts of our Australian allies in fighting bushfires that killed hundreds of people and countless animals and destroyed thousands of homes. Tragically, three Americans perished in this courageous effort. These heroes, all veterans of the United States Armed Forces, embodied the very best of the American spirit in their desire to help others, and we will always honor their memory.

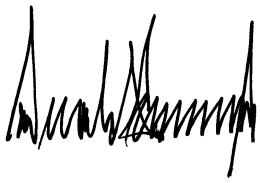
Home fires are also a cause for significant concern. Cooking fires are one of the most common types of residential fires, and fires in the home can start easily if the right precautions are not taken. I recommend that Americans take active steps to protect themselves and their families at home, including by testing smoke alarms once a month and replacing them after 10 years, as recommended by the United States Fire Administration. Additionally, it is important to have a fire escape route in place so all are prepared for how to leave the home if a fire does occur. We can all do our part to prevent fires in and around our homes to protect the lives of our families and neighbors.

Throughout this Fire Prevention Week, we come together to recognize the threat posed by fire, honor the lives it claims each year, and recommit to preventing fires in our homes, businesses, and across this great Nation's

wildlands. I encourage all Americans to reduce fire deaths, injuries, and property loss through prudent preparation.

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 October 4 through October 10, 2020, as Fire Prevention Week. On Sunday, October 4, 2020, in accordance with Public Law 107–51, the flag of the United States will be flown at half-staff at all Federal office buildings in honor of the National Fallen Firefighters Memorial Service. I call on all Americans to participate in this observance with appropriate programs and activities and by renewing their efforts to prevent fires and their tragic consequences.

IN WITNESS WHEREOF, I have hereunto set my hand this third day of October, 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.



[FR Doc. 2020–22498
Filed 10–7–20; 11:15 am]
Billing code 3295–F1–P

Presidential Documents

Proclamation 10093 of October 3, 2020

Made in America Day and Made in America Week, 2020

By the President of the United States of America

A Proclamation

The ''Made in America'' stamp stands for excellence in craftsmanship. It is a testament to the expertise of our millions of inventors, craftsmen, tradesmen, and laborers who make up the most skilled, innovative, and dedicated workforce in the world. On Made in America Day, and throughout Made in America Week, we commend these hardworking men and women and recommit ourselves to strengthening American manufacturing as we rebuild the greatest economy in our Nation's history for a second time.

For too long, politicians failed to recognize the critical importance of using American labor to make American goods, so that the profits and jobs stay here at home. They enabled American companies to ship their jobs overseas and sat by while foreign companies ripped off our products. They fostered in our country a dangerous reliance on foreign countries while neglecting American workers and American families. These days are over. Under my Administration, these forgotten men and women are forgotten no longer. I pledged to always put American workers first, and as President, I have delivered on that promise, vigorously implementing trade and manufacturing policies that encourage the building, creating, and growing of more products right here at home. As a result, we are creating jobs, improving lives, and strengthening our families, our neighbors, and our Nation.

This year, the coronavirus pandemic has exposed the profound failures of past trade and manufacturing policies. It has never been clearer that foreign dependence is not only the antithesis of the American spirit, but it also endangers our national security in times of crisis. To ensure domestic resilience moving forward, my Administration has renegotiated international trade agreements and enacted manufacturing policies that encourage buying American and hiring American like never before. Earlier this year, the landmark United States-Mexico-Canada Agreement took effect—reopening factories, bringing home hundreds of thousands of jobs, and reasserting America's manufacturing might. I have also signed Executive Orders that strengthen production standards under the Buy American Act and ensure the Federal Government maximizes its use of American-made products.

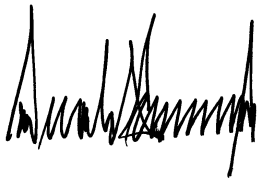
As our Nation continues to reopen our economy, I call on businesses to sign our Pledge to America's Workers. The programs involved will be essential to getting Americans back to work by educating, training, and reskilling workers of all ages. More businesses taking the Pledge will further our economic comeback and ensure we regain the strides we had made under my Administration.

''Made in America'' is not a slogan. It is a solemn pledge. It is the foundation of our renewed success. On every front, my Administration will continue to fight for American workers, American jobs, and American businesses to ensure prosperity today and for America's future generations.

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 October 5, 2020, as Made in America Day and this week, October 4 through October 10, 2020, as Made in America Week. I call upon all Americans to pay special

tribute to builders, ranchers, crafters, entrepreneurs, and all those who work with their hands every day to make America great.

IN WITNESS WHEREOF, I have hereunto set my hand this third day of October, 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.



[FR Doc. 2020–22506
Filed 10–7–20; 11:15 am]
Billing code 3295–F1–P

Presidential Documents

Proclamation 10094 of October 3, 2020

Child Health Day, 2020

By the President of the United States of America

A Proclamation

Children are one of life's greatest blessings. They bring boundless joy to families and enrich our communities. On Child Health Day, we are reminded of our solemn obligation to love and protect these precious lives, and we recommit to helping America's youth reach their full potential.

Our Nation is home to the greatest doctors and medical professionals in the world, and yet, the health of too many American children is compromised at the earliest stages of life. To end this tragedy, my Administration is taking action to empower doctors and families so that children thrive at every stage of development. To reduce the rate of infant death, we have invested more than $100 million in the Healthy Start initiative, which particularly targets minority communities. We have also updated and improved clinical guidelines that healthcare professionals use for prenatal checkups, leading to safer births and healthier babies. As President, and as a father and grandfather, I will continue to work to ensure that every American family has the ability to raise healthy children, regardless of their income, education, or racial or ethnic background.

It is also vitally important to safeguard the mental, spiritual, and physical health of our children as they grow up. To this end, the First Lady launched her BE BEST initiative in 2018, an effort that has promoted whole-of-person wellness for children since its inception. BE BEST encourages character development and respect for others and provides education, awareness, and coping skills to help youth navigate issues they may face, including online safety and opioid and drug misuse. The positive habits encouraged by the BE BEST program have and will continue to develop future leaders, strengthening our Nation and affecting positive change in communities throughout the United States.

This year, we also celebrate 10 years of success in the Maternal, Infant, and Early Childhood Home Visiting (MIECHV) program, which helps prevent child neglect and provides families with the tools they need to raise children who are physically, socially, and emotionally healthy. The First Lady and I recognize the importance of creating a healthy environment in which to raise a child, and my Administration will always support children in need.

In recent months, we have also seen the effects of the coronavirus on the health of our Nation's children. While children are at a very low risk from the coronavirus itself, lockdowns and school closures pose significant risks to the health and wellbeing of our young people. My Administration recognizes that extended school closures cause students to fall behind academically and can have devastating effects on the long-term prospects for school-aged children. Many children, especially those from low-income and minority communities, rely on schools for resources that they do not have access to when schools are closed. Schools provide meals, counseling, physical activity, social interaction, and other experiences that play a crucial role in the development of our young people. For these reasons, lockdowns and school closures can often pose a greater risk to children than the coronavirus, and we must take action to both empower parents and students

to take control of their education and equip teachers to best ensure the wellbeing of their students.

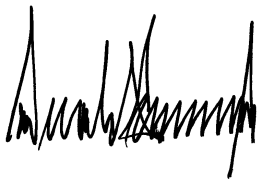
In recognition of the vital role schools play in the health of our Nation's children, my Administration has taken aggressive action to help our schools open safely. The bipartisan Coronavirus Aid, Relief, and Economic Security Act, which I signed into law in March, designates $750 million—in addition to the $10.6 billion already appropriated—in funding to the Head Start and Early Head Start programs, which help prepare low-income children for kindergarten. Furthermore, we have provided school districts with $25 billion for personal protective equipment and other resources to lower the risk of the spread of coronavirus, and I have called on the Congress to provide an additional $105 billion toward this effort. We have also provided every State with revolutionary point-of-care tests that deliver results in under 15 minutes. In preparation for the imminent delivery of a safe, effective coronavirus vaccine, last month I also directed the Department of Health and Human Services to issue guidance under the Public Readiness and Emergency Preparedness Act which allows State-licensed pharmacy professionals to administer vaccines to individuals ages three and older. This action will greatly expand vaccine access, especially among children, and will expedite our ongoing recovery effort. As one Nation, we will continue our push to safely reopen while also protecting the most vulnerable among us.

Our Nation's children are the hope and promise of our future. Parents, educators, clergy members, mentors, and community volunteers all influence and shape the lives of young people. On this Child Health Day, let us renew our commitment to the vital role we all share in raising, nurturing, protecting, empowering, and encouraging America's youth so that they may enjoy healthy, happy, and fulfilled lives.

The Congress, by a joint resolution approved May 18, 1928, as amended (36 U.S.C. 105), has called for the designation of the first Monday in October as Child Health Day and has requested that the President issue a proclamation in observance of this day.

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 Monday, October 5, 2020, as Child Health Day. I call upon families, child health professionals, faith-based and community organizations, and governments to help ensure that America's children stay safe and healthy.

IN WITNESS WHEREOF, I have hereunto set my hand this third day of October, 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.



[FR Doc. 2020–22507
Filed 10–7–20; 11:15 am]
Billing code 3295–F1–P

Presidential Documents

Executive Order 13954 of October 3, 2020

Saving Lives Through Increased Support for Mental- and Behavioral-Health Needs

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Purpose.* My Administration is committed to preventing the tragedy of suicide, ending the opioid crisis, and improving mental and behavioral health. Before the COVID–19 pandemic, these urgent issues were prioritized through significant initiatives, including the President's Roadmap to Empower Veterans and End a National Tragedy of Suicide (PREVENTS), expanded access to medication-assisted treatment and life-saving naloxone, and budget requests for significant investments in the funding of evidence-based treatment for mental- and behavioral-health needs.

During the COVID–19 pandemic, the Federal Government has dedicated billions of dollars and thousands of hours in resources to help Americans, including approximately $425 million in emergency funds to address mental and substance use disorders through the Substance Abuse and Mental Health Services Administration. The pandemic has also exacerbated mental- and behavioral-health conditions as a result of stress from prolonged lockdown orders, lost employment, and social isolation. Survey data from the Centers for Disease Control and Prevention show that during the last week of June, 40.9 percent of Americans struggled with mental-health or substance-abuse issues and 10.7 percent reported seriously considering suicide. We must enhance the ability of the Federal Government, as well as its State, local, and Tribal partners, to appropriately address these ongoing mental- and behavioral-health concerns.

Sec. 2. *Policy.* It is the policy of the United States to prevent suicides, drug-related deaths, and poor behavioral-health outcomes, particularly those that are induced or made worse by prolonged State and local COVID–19 shutdown orders. I am therefore issuing a national call to action to:

(a) Engage the resources of the Federal Government to address the mental- and behavioral-health needs of vulnerable Americans, including by:

(i) providing crisis-intervention services to treat those in immediate life-threatening situations; and

(ii) increasing the availability of and access to quality continuing care following initial crisis resolution to improve behavioral-health outcomes;

(b) Permit and encourage safe in-person mentorship programs; support-group participation; and attendance at communal facilities, including schools, civic centers, and houses of worship;

(c) Increase the availability of telehealth and online mental-health and substance-use tools and services; and

(d) Marshal public and private resources to address deteriorating mental health, such as factors that contribute to prolonged unemployment and social isolation.

Sec. 3. *Establishment of a Coronavirus Mental Health Working Group.* The Coronavirus Mental Health Working Group (Working Group) is hereby established to facilitate an ''all-of-government'' response to the mental-health conditions induced or exacerbated by the pandemic, including issues related to suicide prevention. The Working Group will be co-chaired by the Secretary of Health and Human Services, or his designee, and the Assistant to the

President for Domestic Policy, or her designee. The Working Group shall be composed of representatives from the Department of Defense, the Department of Justice, the Department of Agriculture, the Department of Labor, the Department of Housing and Urban Development, the Department of Education, the Department of Veterans Affairs, the Small Business Administration, the Office of National Drug Control Policy, the Office of Management and Budget (OMB), and such representatives of other executive departments, agencies, and offices as the Co-Chairs may, from time to time, designate with the concurrence of the head of the department, agency, or office concerned. All members of the Working Group shall be full-time, or permanent part-time, officers or employees of the Federal Government.

Sec. 4. *Responsibilities of the Coronavirus Mental Health Working Group.* (a) As part of the Working Group's efforts, it shall consider the mental- and behavioral-health conditions of those vulnerable populations affected by the pandemic, including: minorities, seniors, veterans, small business owners, children, and individuals potentially affected by domestic violence or physical abuse; those living with disabilities; and those with a substance use disorder. The Working Group shall examine existing protocols and evidence-based programs that may serve as models to better support these at-risk groups, including implementation and broader application of the PREVENTS, and the Department of Labor's Employer Assistance and Resource Network on Disability Inclusion's Mental Health Toolkit and Centralized Accommodation Programs.

(b) Within 45 days of the date of this order, the Working Group shall develop and submit to the President a report that outlines a plan for improved service coordination between all relevant public and private stakeholders and executive departments and agencies (agencies) to assist individuals in crisis so that they receive effective treatment and recovery services.

Sec. 5. *Grant Funding for States and Organizations that Permit In-Person Treatment and Recovery Support Activities for Mental and Behavioral Health.* The heads of agencies, in consultation with the Director of OMB, shall:

(a) Examine their existing grant programs that fund mental-health, medical, or related services and, consistent with applicable law, take steps to encourage grantees to consider adopting policies, where appropriate, that have been shown to improve mental health and reduce suicide risk, including the following:

(i) Safe in-person and telehealth participation in support groups for people in recovery from substance use disorders, mental-health issues, or other ailments that benefit from communal support; and peer-to-peer services that support underserved communities;

(ii) Safe face-to-face therapeutic services, including group therapy, to remediate poor behavioral health; and

(iii) Safe participation in communal support—both faith-based and secular—including educational programs, civic activities, and in-person religious services.

(b) Maximize use of existing agency authorities to award contracts or grants to community organizations or other local entities to enhance mental-health and suicide-prevention services, such as outreach, education, and case management, to vulnerable Americans.

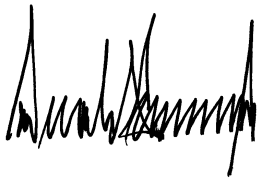
Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
October 3, 2020.

[FR Doc. 2020–22510
Filed 10–7–20; 11:15 am]
Billing code 3295–F1–P

Presidential Documents

Presidential Permit of October 3, 2020

Authorizing Express Pipeline, LLC, To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Canada

By virtue of the authority vested in me as President of the United States of America (the ''President''), I hereby grant this Presidential permit, subject to the conditions herein set forth, to Express Pipeline, LLC (the ''permittee''). The permittee is a limited liability corporation incorporated in the State of Delaware. Permission is hereby granted to the permittee to operate and maintain existing pipeline Border facilities, as described herein, at the international border of the United States and Canada near Wild Horse, Montana, for the transport between the United States and Canada of all hydrocarbons and petroleum products of every description, refined or unrefined (inclusive of, but not limited to, crude oil, naphtha, liquefied petroleum gas, natural gas liquids, jet fuel, gasoline, kerosene, and diesel), but not including natural gas subject to section 3 of the Natural Gas Act, as amended (15 U.S.C. 717b).

This permit supersedes and revokes the Presidential permit issued to the permittee, dated July 9, 2015, *see* 80 FR 45695 (July 31, 2015); the Presidential permit issued to the permittee, dated September 27, 2004; and the Presidential permit issued to the permittee's predecessor in interest, Express Pipeline Partnership, dated August 30, 1996.

This permit does not affect the applicability of any otherwise-relevant laws and regulations. As confirmed in Article 2 of this permit, the Border facilities shall remain subject to all such laws and regulations.

The term ''Facilities,'' as used in this permit, means the portion in the United States of the international pipeline project associated with the permittee's November 6, 2019, application for an amendment to its existing permit, and any land, structures, installations, or equipment appurtenant thereto.

The term ''Border facilities,'' as used in this permit, means those parts of the Facilities consisting of a 24-inch diameter pipeline in existence at the time of this permit's issuance extending from the international border between the United States and Canada near Wild Horse, Montana, to and including the first mainline shut-off valve located in the United States, approximately 5.89 miles from the international border, and any land, structures, installations, or equipment appurtenant thereto.

This permit is subject to the following conditions:

Article 1. The Border facilities herein described, and all aspects of their operation, shall be subject to all the conditions, provisions, and requirements of this permit and any subsequent Presidential amendment to it. This permit may be terminated, revoked, or amended at any time at the sole discretion of the President, with or without advice provided by any executive department or agency (agency). The permittee shall make no substantial change in the Border facilities, in the location of the Border facilities, or in the operation authorized by this permit unless the President has approved the change in an amendment to this permit or in a new permit. Such substantial changes do not include, and the permittee may make, changes to the average daily throughput capacity of the Border facilities to any volume of products

that is achievable through the Border facilities, and to the directional flow of any such products.

Article 2. The standards for, and the manner of, operation and maintenance of the Border facilities shall be subject to inspection by the representatives of appropriate Federal, State, and local agencies. Officers and employees of such agencies who are duly authorized and performing their official duties shall be granted free and unrestricted access to the Border facilities by the permittee. The Border facilities, including the operation and maintenance of the Border facilities, shall be subject to all applicable laws and regulations, including pipeline safety laws and regulations issued or administered by the Pipeline and Hazardous Materials Safety Administration of the U.S. Department of Transportation.

Article 3. Upon the termination, revocation, or surrender of this permit, unless otherwise decided by the President, the permittee, at its own expense, shall remove the Border facilities within such time as the President may specify. If the permittee fails to comply with an order to remove, or to take such other appropriate action with respect to, the Border facilities, the President may direct an appropriate official or agency to take possession of the Border facilities—or to remove the Border facilities or take other action—at the expense of the permittee. The permittee shall have no claim for damages caused by any such possession, removal, or other action.

Article 4. When, in the judgment of the President, ensuring the national security of the United States requires entering upon and taking possession of any of the Border facilities or parts thereof, and retaining possession, management, or control thereof for such a length of time as the President may deem necessary, the United States shall have the right to do so, provided that the President or his designee has given due notice to the permittee. The United States shall also have the right thereafter to restore possession and control to the permittee. In the event that the United States exercises the rights described in this article, it shall pay to the permittee just and fair compensation for the use of such Border facilities, upon the basis of a reasonable profit in normal conditions, and shall bear the cost of restoring the Border facilities to their previous condition, less the reasonable value of any improvements that may have been made by the United States.

Article 5. Any transfer of ownership or control of the Border facilities, or any part thereof, or any changes to the name of the permittee, shall be immediately communicated in writing to the President or his designee, and shall include information identifying any transferee. Notwithstanding any such transfers or changes, this permit shall remain in force subject to all of its conditions, permissions, and requirements, and any amendments thereto, unless subsequently terminated, revoked, or amended by the President.

Article 6. (1) The permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as may become necessary or appropriate.

(2) The permittee shall hold harmless and indemnify the United States from any claimed or adjudged liability arising out of construction, connection, operation, or maintenance of the Border facilities, including environmental contamination from the release, threatened release, or discharge of hazardous substances or hazardous waste.

(3) To ensure the safe operation of the Border facilities, the permittee shall maintain them and every part of them in a condition of good repair and in compliance with applicable law.

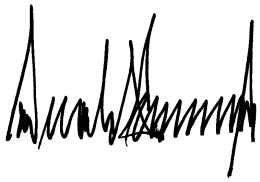
Article 7. The permittee shall file with the President or his designee, and with appropriate agencies, such sworn statements or reports with respect to the Border facilities, or the permittee's activities and operations in connection therewith, as are now, or may hereafter, be required under any law or regulation of the United States Government or its agencies. These reporting

obligations do not alter the intent that this permit be operative as a directive issued by the President alone.

Article 8. Upon request, the permittee shall provide appropriate information to the President or his designee with regard to the Border facilities. Such requests could include, for example, information concerning current conditions or anticipated changes in ownership or control, construction, connection, operation, or maintenance of the Border facilities.

Article 9. This permit is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I, DONALD J. TRUMP, President of the United States of America, have hereunto set my hand this third day of October, 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.



[FR Doc. 2020–22511
Filed 10–7–20; 11:15 am]
Billing code 3295–F1–P

Presidential Documents

Presidential Permit of October 3, 2020

Authorizing Front Range Pipeline, LLC, To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Canada

By virtue of the authority vested in me as President of the United States of America (the ''President''), I hereby grant this Presidential permit, subject to the conditions herein set forth, to Front Range Pipeline, LLC (the ''permittee''). The permittee is a wholly owned subsidiary of CHS Inc., an agricultural business cooperative incorporated in the State of Minnesota. Permission is hereby granted to the permittee to operate and maintain existing pipeline Border facilities, as described herein, at the international border of the United States and Canada at Toole County, Montana, for the transport between the United States and Canada of all hydrocarbons and petroleum products of every description, refined or unrefined (inclusive of, but not limited to, crude oil, naphtha, liquefied petroleum gas, natural gas liquids, jet fuel, gasoline, kerosene, and diesel), but not including natural gas subject to section 3 of the Natural Gas Act, as amended (15 U.S.C. 717b).

This permit does not affect the applicability of any otherwise-relevant laws and regulations. As confirmed in Article 2 of this permit, the Border facilities shall remain subject to all such laws and regulations.

The term ''Facilities,'' as used in this permit, means the portion in the United States of the international pipeline project associated with the permittee's April 30, 2019, application for a Presidential permit, and any land, structures, installations, or equipment appurtenant thereto.

The term ''Border facilities,'' as used in this permit, means those parts of the Facilities consisting of one 10-inch diameter pipeline and one 12-inch diameter pipeline in existence at the time of this permit's issuance extending from the international border between the United States and Canada at Toole County, Montana, to and including the first mainline shut-off valve in the United States, located in that county approximately one third of a mile from the international border, and any land, structures, installations, or equipment appurtenant thereto.

This permit is subject to the following conditions:

Article 1. The Border facilities herein described, and all aspects of their operation, shall be subject to all the conditions, provisions, and requirements of this permit and any subsequent Presidential amendment to it. This permit may be terminated, revoked, or amended at any time at the sole discretion of the President, with or without advice provided by any executive department or agency (agency). The permittee shall make no substantial change in the Border facilities, in the location of the Border facilities, or in the operation authorized by this permit unless the President has approved the change in an amendment to this permit or in a new permit. Such substantial changes do not include, and the permittee may make, changes to the average daily throughput capacity of the Border facilities to any volume of products that is achievable through the Border facilities, and to the directional flow of any such products.

Article 2. The standards for, and the manner of, operation and maintenance of the Border facilities shall be subject to inspection by the representatives

of appropriate Federal, State, and local agencies. Officers and employees of such agencies who are duly authorized and performing their official duties shall be granted free and unrestricted access to the Border facilities by the permittee. The Border facilities, including the operation and maintenance of the Border facilities, shall be subject to all applicable laws and regulations, including pipeline safety laws and regulations issued or administered by the Pipeline and Hazardous Materials Safety Administration of the U.S. Department of Transportation.

Article 3. Upon the termination, revocation, or surrender of this permit, unless otherwise decided by the President, the permittee, at its own expense, shall remove the Border facilities within such time as the President may specify. If the permittee fails to comply with an order to remove, or to take such other appropriate action with respect to, the Border facilities, the President may direct an appropriate official or agency to take possession of the Border facilities—or to remove the Border facilities or take other action—at the expense of the permittee. The permittee shall have no claim for damages caused by any such possession, removal, or other action.

Article 4. When, in the judgment of the President, ensuring the national security of the United States requires entering upon and taking possession of any of the Border facilities or parts thereof, and retaining possession, management, or control thereof for such a length of time as the President may deem necessary, the United States shall have the right to do so, provided that the President or his designee has given due notice to the permittee. The United States shall also have the right thereafter to restore possession and control to the permittee. In the event that the United States exercises the rights described in this article, it shall pay to the permittee just and fair compensation for the use of such Border facilities, upon the basis of a reasonable profit in normal conditions, and shall bear the cost of restoring the Border facilities to their previous condition, less the reasonable value of any improvements that may have been made by the United States.

Article 5. Any transfer of ownership or control of the Border facilities, or any part thereof, or any changes to the name of the permittee, shall be immediately communicated in writing to the President or his designee, and shall include information identifying any transferee. Notwithstanding any such transfers or changes, this permit shall remain in force subject to all of its conditions, permissions, and requirements, and any amendments thereto, unless subsequently terminated, revoked, or amended by the President.

Article 6. (1) The permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as may become necessary or appropriate.

(2) The permittee shall hold harmless and indemnify the United States from any claimed or adjudged liability arising out of construction, connection, operation, or maintenance of the Border facilities, including environmental contamination from the release, threatened release, or discharge of hazardous substances or hazardous waste.

(3) To ensure the safe operation of the Border facilities, the permittee shall maintain them and every part of them in a condition of good repair and in compliance with applicable law.

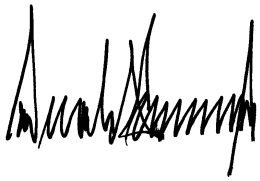
Article 7. The permittee shall file with the President or his designee, and with appropriate agencies, such sworn statements or reports with respect to the Border facilities, or the permittee's activities and operations in connection therewith, as are now, or may hereafter, be required under any law or regulation of the United States Government or its agencies. These reporting obligations do not alter the intent that this permit be operative as a directive issued by the President alone.

Article 8. Upon request, the permittee shall provide appropriate information to the President or his designee with regard to the Border facilities. Such

requests could include, for example, information concerning current conditions or anticipated changes in ownership or control, construction, connection, operation, or maintenance of the Border facilities.

Article 9. This permit is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I, DONALD J. TRUMP, President of the United States of America, have hereunto set my hand this third day of October, 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.



[FR Doc. 2020–22521
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Billing code 3295–F1–P

Presidential Documents

Presidential Permit of October 3, 2020

Authorizing NuStar Logistics, L.P., To Operate and Maintain Existing Pipeline Facilities at the International Boundary Between the United States and Mexico

By virtue of the authority vested in me as President of the United States of America (the ''President''), I hereby grant this Presidential permit, subject to the conditions herein set forth, to NuStar Logistics, L.P. (the ''permittee''). The permittee is a limited partnership formed under the laws of the State of Delaware and is a subsidiary of NuStar Energy L.P., a publicly traded master limited partnership based in San Antonio, Texas. Permission is hereby granted to the permittee to operate and maintain existing pipeline Border facilities, as described herein, at the international border of the United States and Mexico near Laredo, Texas, for the transport between the United States and Mexico of all hydrocarbons and petroleum products of every description, refined or unrefined (inclusive of, but not limited to, crude oil, naphtha, liquefied petroleum gas, natural gas liquids, jet fuel, gasoline, kerosene, and diesel), but not including natural gas subject to section 3 of the Natural Gas Act, as amended (15 U.S.C. 717b).

This permit supersedes and revokes the Presidential permit issued to the permittee, dated June 28, 2017, *see* 82 FR 32039 (July 11, 2017), and the Presidential permit issued to the permittee under its former name, Valero Logistics Operations L.P., dated December 19, 2003.

This permit does not affect the applicability of any otherwise-relevant laws and regulations. As confirmed in Article 2 of this permit, the Border facilities shall remain subject to all such laws and regulations.

The term ''Facilities,'' as used in this permit, means the portion in the United States of the international pipeline project associated with the permittee's January 15, 2020, application for an amendment to its existing permit, and any land, structures, installations, or equipment appurtenant thereto.

The term ''Border facilities,'' as used in this permit, means those parts of the Facilities consisting of an 8.625-inch diameter pipeline in existence at the time of this permit's issuance extending from the international border between the United States and Mexico underneath the Rio Grande at a location known as ''La Bota'' near Laredo, Texas, to and including the first mainline shut-off valve in the United States, located approximately 0.9 miles from the international border, and any land, structures, installations, or equipment appurtenant thereto.

This permit is subject to the following conditions:

Article 1. The Border facilities herein described, and all aspects of their operation, shall be subject to all the conditions, provisions, and requirements of this permit and any subsequent Presidential amendment to it. This permit may be terminated, revoked, or amended at any time at the sole discretion of the President, with or without advice provided by any executive department or agency (agency). The permittee shall make no substantial change in the Border facilities, in the location of the Border facilities, or in the operation authorized by this permit unless the President has approved the change in an amendment to this permit or in a new permit. Such substantial changes do not include, and the permittee may make, changes to the average

daily throughput capacity of the Border facilities to any volume of products that is achievable through the Border facilities, and to the directional flow of any such products.

Article 2. The standards for, and the manner of, operation and maintenance of the Border facilities shall be subject to inspection by the representatives of appropriate Federal, State, and local agencies. Officers and employees of such agencies who are duly authorized and performing their official duties shall be granted free and unrestricted access to the Border facilities by the permittee. The Border facilities, including the operation and maintenance of the Border facilities, shall be subject to all applicable laws and regulations, including pipeline safety laws and regulations issued or administered by the Pipeline and Hazardous Materials Safety Administration of the U.S. Department of Transportation.

Article 3. Upon the termination, revocation, or surrender of this permit, unless otherwise decided by the President, the permittee, at its own expense, shall remove the Border facilities within such time as the President may specify. If the permittee fails to comply with an order to remove, or to take such other appropriate action with respect to, the Border facilities, the President may direct an appropriate official or agency to take possession of the Border facilities—or to remove the Border facilities or take other action—at the expense of the permittee. The permittee shall have no claim for damages caused by any such possession, removal, or other action.

Article 4. When, in the judgment of the President, ensuring the national security of the United States requires entering upon and taking possession of any of the Border facilities or parts thereof, and retaining possession, management, or control thereof for such a length of time as the President may deem necessary, the United States shall have the right to do so, provided that the President or his designee has given due notice to the permittee. The United States shall also have the right thereafter to restore possession and control to the permittee. In the event that the United States exercises the rights described in this article, it shall pay to the permittee just and fair compensation for the use of such Border facilities, upon the basis of a reasonable profit in normal conditions, and shall bear the cost of restoring the Border facilities to their previous condition, less the reasonable value of any improvements that may have been made by the United States.

Article 5. Any transfer of ownership or control of the Border facilities, or any part thereof, or any changes to the name of the permittee, shall be immediately communicated in writing to the President or his designee, and shall include information identifying any transferee. Notwithstanding any such transfers or changes, this permit shall remain in force subject to all of its conditions, permissions, and requirements, and any amendments thereto, unless subsequently terminated, revoked, or amended by the President.

Article 6. (1) The permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as may become necessary or appropriate.

(2) The permittee shall hold harmless and indemnify the United States from any claimed or adjudged liability arising out of construction, connection, operation, or maintenance of the Border facilities, including environmental contamination from the release, threatened release, or discharge of hazardous substances or hazardous waste.

(3) To ensure the safe operation of the Border facilities, the permittee shall maintain them and every part of them in a condition of good repair and in compliance with applicable law.

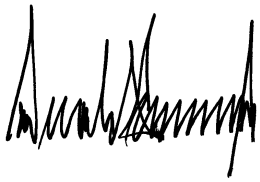
Article 7. The permittee shall file with the President or his designee, and with appropriate agencies, such sworn statements or reports with respect to the Border facilities, or the permittee's activities and operations in connection therewith, as are now, or may hereafter, be required under any law or regulation of the United States Government or its agencies. These reporting

obligations do not alter the intent that this permit be operative as a directive issued by the President alone.

Article 8. Upon request, the permittee shall provide appropriate information to the President or his designee with regard to the Border facilities. Such requests could include, for example, information concerning current conditions or anticipated changes in ownership or control, construction, connection, operation, or maintenance of the Border facilities.

Article 9. This permit is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I, DONALD J. TRUMP, President of the United States of America, have hereunto set my hand this third day of October, 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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